

Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota

Richard S. Frase

Follow this and additional works at: <http://scholarship.law.cornell.edu/cjlp>

 Part of the [Law Commons](#)

Recommended Citation

Frase, Richard S. (1993) "Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota," *Cornell Journal of Law and Public Policy*: Vol. 2: Iss. 2, Article 2.
Available at: <http://scholarship.law.cornell.edu/cjlp/vol2/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Journal of Law and Public Policy by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

IMPLEMENTING COMMISSION-BASED SENTENCING GUIDELINES: THE LESSONS OF THE FIRST TEN YEARS IN MINNESOTA

Richard S. Frase[†]

INTRODUCTION

The Minnesota Sentencing Guidelines, in effect since 1980,¹ represent a pioneering effort to reduce judicial and parole-release discretion, provide more uniform and proportional punishment, and prevent prison over-crowding. Minnesota was the first state to use an independent state sentencing commission to draft and implement presumptive guidelines, and it was also the first jurisdiction to enact state-wide controls over both prison duration and prison commitment decisions. Congress and several other states subsequently adopted similar commission-based, presumptive sentencing reforms. Nevertheless, Minnesota's experience remains important because its Guidelines have been in effect the longest and have been extensively studied and evaluated. The Minnesota Sentencing Guidelines Commission has routinely collected a large amount of data on all felony sentences, as well as additional, even more detailed data for selected samples.² This rich source of data and com-

[†] Benjamin N. Berger Professor of Criminal Law, University of Minnesota. A preliminary version of this paper was presented at the annual meeting of the American Society of Criminology, San Francisco, November 1991.

¹ The current version of the Minnesota Sentencing Guidelines can be found in MINN. R. OF CT. §§ I-V (West 1992) and in MINN. STAT. ANN. § 244 (West 1992 & Supp. 1993).

² The Commission compiled two pre-Guidelines datasets based on 1978 cases, one examining the use of executed prison terms, the other dealing with the duration of such terms (i.e., time served prior to first release on parole). MINNESOTA SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 20 (1984) [hereinafter THREE YEAR EVALUATION]. Starting in 1981, the Commission compiled post-Guidelines "evaluation" datasets for all felons sentenced in each year. Prior to 1988, these datasets covered a "year" running from November through October (and designated by the later of the two years); starting in 1988, these datasets cover a calendar year. The Commission has also compiled more detailed data on the use of jail, fines, and other conditions of non-prison sentences, and on the sentencing of weapons and drug offenders. *See, e.g.*, MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON CONTROLLED SUBSTANCE OFFENSES (1992); MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON INTERMEDIATE SANCTIONS

mentary, the extensive appellate case law interpreting the Guidelines, and a decade of legislative and Commission-initiated amendments contain essential lessons for reformers in other jurisdictions. These lessons concern not only the process of drafting and implementing a system of commission-based presumptive sentences, but also the evolution of such a system over an extended period of time.

The Commission and outside researchers published several reports analyzing implementation efforts through 1984.³ The

(1991); MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON THE MANDATORY MINIMUM LAW FOR WEAPONS OFFENSES (1991). Finally, the Commission compiled four "in depth" datasets for the years 1978, 1981, 1982, and 1984, containing detailed information on the "real" (versus charged) offense, charging and plea bargaining, and offender demographics. These datasets included only those defendants who were sentenced in eight counties, containing about 60% of the state's population. THREE YEAR EVALUATION, *supra*, at 19-20.

In addition to the reports cited above, the Commission has published findings from the evaluation datasets in annual "data summaries." In the remainder of this article, when statistical results are cited by year or dataset only, rather than by publication, such findings are based on the author's own analysis of the Commission's data, using the Statistical Package for the Social Sciences (SPSS PC+ version 4.01).

³ *E.g.*, THREE YEAR EVALUATION, *supra* note 2; DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988), reviewed and partially updated by Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727 (1991); Debra L. Dailey, *The Sentencing of Sex Offenders Under the Minnesota Sentencing Guidelines: Is There a Need for Change?* 10 HAMLINE J. PUB. L. & POL'Y 193 (1990); Kay A. Knapp, *Proactive Policy Analysis of Minnesota's Prison Populations*, 1 CRIM. JUST. POL'Y REV. 37 (1986); Kay A. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181 (1984); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987); Terance D. Miethe & Charles A. Moore, *Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 CRIMINOLOGY 337 (1985) [hereinafter Miethe & Moore, *Socioeconomic Disparities*]; Charles A. Moore & Terance D. Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines*, 20 LAW & SOC'Y REV. 253 (1986); Symposium, *Determinant Sentencing*, 5 HAMLINE L. REV. 161 (1982) (articles and casenotes on Minnesota Guidelines); Terance D. Miethe & Charles A. Moore, *Can Sentencing Reform Work? A Four-Year Evaluation of Determinate Sentencing in Minnesota* (1987) (unpublished paper presented at the 1987 Annual Meeting of the American Society of Criminology) [hereinafter Miethe & Moore, Four-

purpose of this article is to present the most important data through 1989, compare these findings to those of earlier studies, and assess the long-term successes and failures of this important reform effort. The most recent year for which complete sentencing data were available as of this writing is 1989, and it was also a "watershed" year which saw major changes in the Guidelines, the enabling statute, and the state's criminal code.⁴ Further significant statutory changes were enacted in 1990, 1991, and 1992. Since the 1989 changes applied to crimes committed on or after August 1st of that year, they only governed about 5% of the cases included in the calendar-year 1989 dataset, but they will dramatically affect data for subsequent years and may cause serious problems of comparability with earlier years.⁵ Thus, 1989 provides a natural stopping point at which to take stock of the evolution and accomplishments of the Minnesota Guidelines.

Part I of the article briefly summarizes the 1978 enabling statute, the initial 1980 Guidelines and subsequent amendments, important statutory changes since 1978, and the most significant appellate case law. Parts II through IV assess the extent to which the Guidelines appear to have achieved each of their major goals,⁶ namely: (1) *greater uniformity* in the use of state prison sentences, with particular emphasis on preventing racial, gender, and social class disparities; (2) *increased proportionality* of prison commitment rates and durations, relative to the Guidelines Commission's offense severity rankings and other normative choices; and (3) *avoidance of prison and jail overcrowding*. Several other declared or apparent goals of the Minnesota Guidelines will also be addressed from time to time, namely: (4) *honesty* ("truth in sentencing"), particularly with respect to the relationship between the sentence pronounced and the sentence actually served;⁷ (5) *simplicity* in the Guide-

Year Evaluation].

⁴ See *infra* part I.

⁵ For example, the criminal history weighting scheme, described *infra* text accompanying note 42, can shift a given case several cells to the right or left in the Guidelines matrix.

⁶ See MINN. R. OF CT. § I (Statement of Purpose and Principles); THREE YEAR EVALUATION, *supra* note 2, at v, 1, 3; MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 2-3, 13-14 (1980).

⁷ See, e.g., U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1(A)(3) (1991); MINNESOTA LEGISLATIVE AUDITOR, SENTENCING AND CORRECTIONAL POLICIES 75 (1991).

lines' definitions and application;⁸ (6) "*parsimony*" (insuring that sentences are the least restrictive necessary to achieve the purposes of the sentence);⁹ and (7) *Commission control over state-wide sentencing policy* (to make such policy more coordinated and less subject to short-term political pressures).¹⁰

This study concludes that the Minnesota Guidelines have achieved, and continue to achieve, most of the goals summarized above. They have been modestly successful in achieving greater honesty and uniformity in sentencing, and very successful in promoting parsimonious use of prison sentences and in preventing prison and jail overcrowding. They give judges and other officials substantial but not unlimited discretion, and still remain fairly simple to apply. Despite some legislative encroachments, the Guidelines Commission retains primary control over the setting of statewide sentencing policy. However, the Commission's efforts to effect certain prescriptive changes in the choice of who goes to prison were relatively unsuccessful, even in the early years.

I. EVOLUTION OF MINNESOTA SENTENCING LAW SINCE 1980

A. THE ENABLING STATUTE AND INITIAL GUIDELINES

The broad outlines of the Minnesota Sentencing Guidelines were laid down in the 1978 statute creating the Guidelines Commission.¹¹ Parole release was abolished, and was replaced with a specified reduction (up to one-third off) for good behavior in prison.¹² The new commission was directed to promulgate guidelines regulating both the decision to impose state imprisonment and the duration of such imprisonment, based on "reasonable offense and offender characteristics," while taking into "substantial consideration" two factors: "current sentencing and releasing practices" and "correctional resources, including

⁸ See MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 7; PARENT, *supra* note 3, at 53 n.3, 58 n.8, 71.

⁹ MINN. R. OF CT. § I(3); see NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 59-62 (1974).

¹⁰ See Frase, *supra* note 3, at 729-30.

¹¹ Act of Apr. 5, 1978, ch. 723, 1978 Minn. Laws 761 (codified as amended at MINN. STAT. ANN. § 244 (West 1992 & Supp. 1993)).

¹² *Id.* § 4 (codified at MINN. STAT. ANN. § 244.04(1) (West Supp. 1993)).

but not limited to the capacities of local and state correctional facilities."¹³ The Commission was also permitted (but not required) to develop guidelines regulating the conditions of non-prison sentences. The 1978 statute further provided that earned good time reductions would constitute a period of parole-type post-release supervision known as the Supervised Release Term;¹⁴ the statute also implied that denial of good time reductions could only be based on disciplinary violations, not failure to participate in or cooperate with in-prison treatment programs (since all such programs were to become voluntary).¹⁵ Finally, sentencing judges were directed to provide written reasons when they departed from the new guidelines,¹⁶ and both defendants and the prosecution were given the right to appeal any sentence (whether or not it was a departure).¹⁷

Pursuant to this statutory mandate, the Sentencing Guidelines Commission promulgated a set of guidelines represented by the matrix shown in Figure 1, with offense severity on the vertical axis and the defendant's criminal history score on the horizontal axis.¹⁸ Offenders with low to medium criminal history scores, convicted of lower severity offenses were to receive a stayed (suspended) prison term of a specified number of months; for more serious offenses or criminal history scores, the presumptive sentence was an executed prison term within a narrow specified range (e.g., 30 to 34 months). The boundary between presumptive stayed and presumptive executed prison terms was shown on the matrix by a heavy black line known as the "disposition line." Cases above the line had presumptive stayed sentences, except for a few cases involving a dangerous weapon or repeat sex offender, which were subject to mandatory minimum prison terms under existing state statutes. Additional rules specified when consecutive prison sentences could be imposed, listed permissible and impermissible bases for departure from presumptive disposition and durational rules, and suggested (but did *not* regulate) a wide variety of possible

¹³ *Id.* § 9 (codified at MINN. STAT. ANN. § 244.09(5) (2) (West 1992)).

¹⁴ *Id.* § 9 (codified at MINN. STAT. ANN. § 244.09(1) (West Supp. 1993)).

¹⁵ *Id.* §§ 2-3 (codified at MINN. STAT. ANN. §§ 244.02-.03 (West 1992 & Supp. 1993)).

¹⁶ *Id.* § 10 (codified at MINN. STAT. ANN. § 244.10(2) (West 1992)).

¹⁷ *Id.* § 11 (codified at MINN. STAT. ANN. § 244.11 (West 1992)).

¹⁸ MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 38.

FIGURE 1
Original Minnesota Sentencing Guidelines Grid
Effective May 1, 1980

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE	0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana I	12*	12*	12*	15	18	21	24
Theft Related Crimes (\$150-\$2500) Sale of Marijuana II	12*	12*	14	17	20	23	27 25-29
Theft Crimes (\$150-\$2500) III	12*	13	16	19	22 21-23	27 25-29	32 30-34
Burglary - Felony Intent Receiving Stolen Goods (\$150-\$2500) IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, 2nd Degree VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
Murder, 3rd Degree IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

Under state statutes, 1st Degree Murder has a mandatory life sentence.

* one year and one day

conditions of stayed prison sentences. Such conditions can include up to one year of confinement in a local jail or workhouse, supervised or unsupervised probation, fines, restitution, treatment, and community service.¹⁹

The Commission announced that its new rules were not merely descriptive of prior practice, but were rather "prescriptive":²⁰ norm-changing, not merely norm-reinforcing. For example, the severity ranking of offenses was based on the Commission's own consensus as to the seriousness of individual crimes,²¹ and the Guidelines criminal history scale included a point for prior misdemeanor convictions, which had not figured heavily in previous judicial and correctional practices.²² Overall, the Commission stated that it was adopting "just deserts" as the primary sentencing goal, and that its new Guidelines were intended to reserve scarce prison space for violent offenders (even first offenders) rather than repeat property offenders.²³

B. MAJOR GUIDELINES AND STATUTORY CHANGES FROM 1980 TO 1988

The most important changes made by the Guidelines Commission itself from 1980 to 1988 involved the durations of presumptive prison terms:²⁴ durations at severity levels one to

¹⁹ MINN. STAT. ANN. § 609.135(1) (West Supp. 1993). In felony cases the duration of a stayed sentence (and thus, the length of probation) may be any period up to the maximum prison term that could have been imposed, or three years, whichever is longer. MINN. STAT. ANN. § 609.135(2) (a) (West Supp. 1993).

²⁰ THREE YEAR EVALUATION, *supra* note 2, at v, 8-10; MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 3.

²¹ MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 6-7.

²² *Id.* at 7. The principal component of criminal history under the Guidelines — as under pre-Guidelines practice — is the number of prior felony convictions. From 1980 until 1989, each felony counted one point; as of August 1, 1989, prior felonies are weighted according to their seriousness. See *infra* text accompanying note 42.

²³ THREE YEAR EVALUATION, *supra* note 2, at 10-14; MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 9, 15.

²⁴ In addition, the disposition line was changed so that the upper righthand cell (severity level one, criminal history six or more) is now a presumptive executed prison sentence, not a stayed sentence (compare figures 1 and 2); also, aggravating factors were added for drug crimes, violent crimes for hire, and gang-related offenses. See KAY A. KNAPP, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY ANNOTATED 61-61A (1985 & Supp. 1992).

FIGURE 2
 Minnesota Sentencing Guidelines Grid
 Effective August 1, 1987 through July 31, 1989

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE	0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana I	12*	12*	12*	13	15	17	19 18-20
Theft Related Crimes (\$2500 or less) Check Forgery (\$200-\$2500) II	12*	12*	13	15	17	19	21 20-22
Theft Crimes (\$2500 or less) III	12*	13	15	17	19 18-20	22 21-23	25 24-26
Nonresidential Burglary Theft Crimes (over \$2500) IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Residential Burglary Simple Robbery V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Criminal Sexual Conduct, 2nd Degree (a) & (b) VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Criminal Sexual Conduct 1st Degree Assault, 1st Degree VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
Murder, 3rd Degree Murder, 2nd Degree (felony murder) IX	105 102-108	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree (with intent) X	216 212-220	236 231-241	256 250-262	276 269-283	296 288-304	316 307-325	336 326-346

Under state statutes, 1st Degree Murder has a mandatory life sentence.

* one year and one day

three, with medium to high criminal history, were lowered by from one to seven months, in order to stay within prison capacity limits;²⁵ durations in certain cells at severity levels nine and ten were increased by from eight to 100 months. Figure 2 shows the Guidelines grid immediately prior to August 1, 1989. These are the rules which governed almost all sentences in the 1989 dataset, which is the most recent sentencing period discussed in detail in this article.

Major legislative changes from 1980 through 1988 included the following: (1) in 1981 the statute requiring a mandatory minimum prison term for use of a dangerous weapon was amended to increase terms for use of a firearm, increase the number of offenses to which the statute applies, and authorize courts to depart from the mandatory minimum prison term on the prosecutor's motion.²⁶ (2) Also in 1981, the separate offense of Intrafamilial Sexual Abuse (IFSA) was created, paralleling the existing Criminal Sexual Conduct statutes but with a provision that the court may impose a stayed prison sentence if it finds that this is "in the best interest of the complainant or the family unit."²⁷ In 1985, further requirements for such stayed sentences were added: a "professional assessment" must indicate that the offender "has been accepted by and can respond to a treatment program," and the court must order defendant to complete the program and spend some period of time in jail. (3) In 1987, the legislature added a similar "amenable to treatment" provision to the statute imposing a mandatory minimum prison term on repeat sex offenders.²⁸

²⁵ THREE YEAR EVALUATION, *supra* note 2, at 91-92.

²⁶ In 1982 the Supreme Court ruled that the trial court may also depart on its own motion. *State v. Olson*, 325 N.W.2d 13 (Minn. 1982).

²⁷ Law of May 28, 1981, ch. 273, §§ 7-11, 1981 Minn. Laws 1236, 1239-43 (repealed 1985). This statute was replaced by similarly-worded provisions in the regular Criminal Sexual Conduct statutes. *See, e.g.*, MINN. STAT. ANN. § 609.342(1) (g) (3) (West Supp. 1993) (stay authorized for certain first degree offenders with a "significant relationship" to the complainant).

²⁸ MINN. STAT. ANN. § 609.346(2) (West Supp. 1993); *see also* *State v. Feinstein*, 338 N.W.2d 244 (Minn. 1983) (holding that trial courts still have authority to grant probation in cases covered by this mandatory minimum statute, provided they comply with Guidelines requirements for a mitigated dispositional departure).

C. CASE LAW

Most of the major appellate case law interpreting the Guidelines was decided in the first two years after they became effective, and thus was controlled entirely by the Minnesota Supreme Court. (The intermediate-level Minnesota Court of Appeals did not begin issuing opinions until February, 1984). The Supreme Court almost immediately established the principle that sentencing should be based on the conviction offense, and should not be based on the details of offenses dismissed or never filed (so-called "real offense" sentencing).²⁹ The court also established that departures could not be based on assessments of the individual defendant's dangerousness,³⁰ nor on special needs for deterrence,³¹ nor on factors such as the absence of criminal history, which had already been taken into account in drafting the guidelines (criminal history "redundancy").³² The court also ruled, in *State v. Evans*,³³ that upward durational departures should normally not exceed twice the presumptive duration (although, in very exceptional cases, the court may depart all the way up to the statutory maximum).

²⁹ THREE YEAR EVALUATION, *supra* note 2, at 111-13; *cf.* United States v. Galloway, 976 F.2d 414 (8th Cir. 1992) (en banc), *cert. denied*, No. 92-6911, 1993 U.S. LEXIS 2015 (Mar. 8, 1993) (upholding trial court's power to impose a sentence three times longer than the Federal Sentencing Guidelines presumptive term, based on uncharged "relevant conduct"). However, real-offense sentencing is still permitted in limited situations, under the Minnesota Sentencing Guidelines: (1) Defendants are subject to mandatory minimum prison terms if they commit certain offenses with a dangerous weapon, even though most of the eligible offenses do not include use of such a weapon as an element of the crime. MINN. STAT. ANN. § 609.11(4) (West 1992); (2) Some offense severity rankings depend on dollar amounts of loss which are not elements of the conviction offense. *See* MINN. R. OF CT. § V (Theft and Theft Related Offenses); (3) Upward departures may be based on aggravating factors which are not elements of the conviction offense (e.g., particular vulnerability of victim), and which may not even be part of the same course of conduct charged (e.g., "major economic offense" by defendant involved in other, similar conduct as evidenced by findings of prior civil, administrative, or disciplinary proceedings). *Id.* § II(D) (2) (b) (1), 4(e); *see also* State v. Garcia, 302 N.W.2d 643 (Minn. 1981) (upholding upward departure based on unconvicted crimes which defendant had admitted on the record, and which were part of the same course of conduct as the offenses to which he pled guilty).

³⁰ State v. Hagen, 317 N.W.2d 701, 703 (Minn. 1982).

³¹ State v. Schmit, 329 N.W.2d 56, 58 n.1 (Minn. 1983).

³² THREE YEAR EVALUATION, *supra* note 2, at 121, 124.

³³ 311 N.W.2d 481 (Minn. 1981).

Trial court decisions *not* to depart were largely insulated from appellate scrutiny by the Court's statement in *State v. Kindem*³⁴ that "[although] we do not intend to entirely close the door . . . it would be a rare case which would warrant reversal of the refusal to depart."

In another very significant line of cases, the court held that dispositional departures (but *not* durational departures) may be based on individualized assessments of the offender's "amenability" to probation or prison.³⁵ *State v. Park*³⁶ upheld an upward dispositional departure (commitment to prison, rather than the presumptive stayed term) based on the defendant's unamenability to probation; *State v. Wright*³⁷ upheld a downward dispositional departure based on findings that the defendant was unusually vulnerable and was therefore unamenable to prison, and that he was particularly amenable to treatment in a probationary setting. *State v. Trog*³⁸ upheld a downward dispositional departure based solely on the defendant's particular amenability to probation, emphasizing the aberrational and uncharacteristic nature of the defendant's crime, rather than any particular treatment needs. Another important decision related to dispositional departures was *State v. Randolph*,³⁹ which held that courts must grant a defendant's request for execution of the presumptive stayed prison term when the trial court's proposed conditions of the stay are so onerous that they would be more severe than the prison term.

Finally, the court held in *State v. Hernandez*,⁴⁰ that criminal history points may accrue on a single day when defendants are sentenced concurrently for more than one offense. For example, a defendant with no previous convictions who was sentenced concurrently on four separate burglary counts would have a criminal history of three by the time he was sentenced

³⁴ 313 N.W.2d 6, 7 (Minn. 1981).

³⁵ These cases are discussed at length in Frase, *supra* note 3, at 740-48. A very similar line of cases, under the Federal Sentencing Guidelines, is discussed in Richard S. Frase, *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines*, 3 FED. SENTENCING REP. 328 (1991).

³⁶ 305 N.W.2d 775 (Minn. 1981).

³⁷ 310 N.W.2d 461 (Minn. 1981).

³⁸ 323 N.W.2d 28 (Minn. 1982).

³⁹ 316 N.W.2d 508 (Minn. 1982).

⁴⁰ 311 N.W.2d 478 (Minn. 1981).

on the fourth count. Prior to *Hernandez*, prosecutors could threaten to serialize prosecutions to achieve the same result, and all additional concurrent counts would increase the defendant's future criminal history if he committed further offenses, but *Hernandez* sentencing increases the immediate impact (and plea-bargaining leverage) of multiple counts. The *Hernandez* rule also helps prosecutors target "high-rate" offenders, and thus further emphasizes the utilitarian (incapacitative) rather than retributive purposes of the criminal history score under the Guidelines. However, utilitarian goals clearly were already present. Under the original Guidelines, "prior" felony and misdemeanor convictions were counted as of the date of *sentencing*, rather than as of the date of the current offense, which would be required under a purely retributive model.⁴¹

D. MAJOR GUIDELINES AND STATUTORY CHANGES SINCE 1989

As of August 1, 1989, the Guidelines Commission substantially increased the durations of sentences at severity levels seven through ten (compare Figures 2 and 3); changes at levels seven and eight were the Commission's idea; those at levels nine and ten were mandated by the Legislature (see below). In addition, the Commission adopted the following criminal history weighting scheme for prior felony convictions:

- (1) prior convictions at levels 1 and 2 = *one-half point* each;
- (2) convictions at levels 3, 4 and 5 = *one point* each;
- (3) convictions at levels 6 and 7 = *one and a half points* each;
- (4) convictions at levels 8, 9 and 10 = *two points* each.⁴²

⁴¹ See PARENT, *supra* note 3, at 163.

⁴² The Commission also for the first time added a new mitigating factor to its list, applicable to cases in which the defendant is found guilty at levels one through four and all of his or her prior felony sentences were imposed in one or two court appearances (which often occurs in the case of closely-related offenses or crime "sprees"). MINN. R. OF CT. § II(D) (2) (a) (4). At the same time, the Commission added another aggravating factor, applicable to certain sex offenses. *Id.* § II(D) (2) (b) (3).

FIGURE 3
Minnesota Sentencing Guidelines Grid
Effective August 1, 1989

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE	0	1	2	3	4	5	6 or more
Sale of a Simulated Controlled Substance I	12*	12*	12*	13	15	17	19 18-20
Theft Related Crimes (\$2500 or less) II	12*	12*	13	15	17	19	21 20-22
Check Forgery (\$200-\$2500)							
Theft Crimes (\$2500 or less) III	12*	13	15	17	19 18-20	22 21-23	25 24-26
Nonresidential Burglary IV							
Theft Crimes (over \$2500)	12*	15	18	21	25 24-26	32 30-34	41 37-45
Residential Burglary V							
Simple Robbery	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Criminal Sexual Conduct, 2nd Degree (a) & (b) VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
Criminal Sexual Conduct 1st Degree VIII							
Assault, 1st Degree	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
Murder, 3rd Degree IX	150	165	180	195	210	225	240
Murder, 2nd Degree (felony murder)	144-156	159-171	174-186	189-201	204-216	219-231	234-246
Murder, 2nd Degree (with intent) X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433

Under state statutes, 1st Degree Murder has a mandatory life sentence.

* one year and one day

Not satisfied with the Commission's proposed prison duration increases at severity levels 7 and 8, the 1989 Minnesota Legislature adopted a large number of "get tough" measures.⁴³ Certain first-degree murderers became eligible for life without parole; other recidivist murderers and sex offenders received mandatory statutory-maximum terms; minimum prison terms were specified for certain drug crimes; and other violent and sex crimes received increased statutory maxima. In addition, the Legislature amended the Guidelines' enabling statute to specify that the Commission's "primary" consideration in setting guidelines should be *public safety*; the availability of correctional resources remains a factor, but is no longer to be taken into "substantial" consideration. The Commission also was directed to increase the presumptive prison terms for Severity level 9 and 10 offenders by specified amounts, and to add a specified item to the Guidelines' list of aggravating factors justifying departure.⁴⁴

The 1989 Crime Bill also gave judges and correctional authorities greater discretion both to aggravate and to mitigate the Guidelines' terms: judges could impose the statutory maximum prison term in certain cases,⁴⁵ apparently without meeting the ordinary standards for departure and degree of departure, but were also given explicit authorization to depart from the new mandatory minimum prison terms for drug offenders, where "a professional assessment indicates that the offender has been accepted by and can respond to a treatment program."⁴⁶ Judges could also authorize early release of sex offenders if the Commissioner of Corrections found them "amenable" to treatment.⁴⁷

In 1990 and 1991 the Legislature seemed to give further endorsement to individualized assessments of dangerousness

⁴³ Act of June 1, 1989, ch. 290, 1989 Minn. Laws 1581 (codified as amended in scattered sections of the Minnesota Statutes). The provisions of this crime bill are discussed further in Frase, *supra* note 3, at 732-33, 749.

⁴⁴ Act of June 1, 1989, art. 2, § 17, 1989 Minn. Laws at 1594; *id.* art. 3, § 25, 1989 Minn. Laws at 1605 (repealed 1991).

⁴⁵ *Id.* art. 2, § 9 (codified at MINN. STAT. ANN. § 609.152 (West Supp. 1993)) (dangerous and career offenders); art. 4, § 10, codified at MINN. STAT. ANN. § 609.1352 (West Supp. 1993)) (dangerous sex offenders).

⁴⁶ *Id.* art. 3, § 20 (codified at MINN. STAT. ANN. § 152.152 (West Supp. 1993)).

⁴⁷ *Id.* art. 4, § 10(5) (codified at MINN. STAT. ANN. § 609.1352(5) (West Supp. 1993)).

and amenability to treatment. The 1990 Crime Bill⁴⁸ established a program of "intensive community supervision" (ICS) for three offender groups: those on supervised release, those committed to custody after revocation of their stayed prison term, and certain offenders with prison terms of 27 months or less. The trial court must approve such release in the second and third categories above, but the Commissioner of Corrections has discretion to decide which eligibles to release in all three categories, and when to revoke such release. Individualized assessments of danger to public safety are implicit or explicit in all of these decisions. The operation of ICS (e.g., caseloads, and stages and degree of supervision) was strictly regulated by the 1990 statute, but the 1991 Crime Bill eliminated these restrictions (thereby restoring Department of Corrections discretion and control), in the case of offenders on supervised release.⁴⁹

The 1992 crime legislation continued many of the trends described above. Although the principal crime bill did seek to expand treatment, education, and social service programs, it also contained "get tough" provisions for certain sex offenders: mandatory doubling of Guidelines presumptive sentences, lengthier supervised release terms, increased statutory maxima, and mandatory life and 30-year prison terms.⁵⁰ Another bill substantially increased sentences for certain cocaine offenses.⁵¹ Correctional discretion was increased by provisions allowing officials to require prisoners to participate in sex offender programs, discipline those who refuse, and remove "unamenable" prisoners from such programs.⁵² Discretion to grant early

⁴⁸ Act of May 3, 1990, ch. 568, art. 2, §§ 31-36, 1990 Minn. Laws 1792 (codified as amended at MINN. STAT. ANN. §§ 241.26(2), 244.05, 12-15 (West 1992)). The provisions of this bill are discussed further in Frase, *supra* note 3, at 749-51.

⁴⁹ Act of May 31, 1991, ch. 258, 1991 Minn. Laws 920 (codified as amended at MINN. STAT. ANN. § 244.12 (West 1992)).

⁵⁰ Act of Apr. 29, 1992, ch. 571, art. 1, §§ 11-12, 14-15, 22-25, 1992 Minn. Laws 1990 (codified as amended at MINN. STAT. ANN. §§ 609.1352, .342-43, .346 (West Supp. 1993)); *see also id.* § 13 (mandating life without parole for certain rape-murderers).

⁵¹ Act of Jan. 17, 1992, ch. 359, 1992 Minn. Laws 3 (codified as amended at MINN. STAT. ANN. §§ 152.01, .021-.023, .025 (West Supp. 1993) (raising penalties for powdered cocaine to equal those previously applicable to "crack," in response to a Minnesota Supreme Court decision, *see State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991), holding that the prior statutory distinction between these two forms of cocaine violated the state constitution).

⁵² Act of Apr. 29, 1992, ch. 571, art. 1, § 1, 1992 Minn. Laws 1984 (codified

release to certain amenable sex offenders was eliminated, but the Commissioner was given discretion to select other offenders for early release to a new boot-camp ("challenge incarceration") program⁵³ (a development which seemed to herald the return of the "P word" — parole). Finally, renewed interest in the goal of "truth in sentencing" led to enactment of a provision reversing the procedure for applying "good time" credits: instead of pronouncing a longer prison term which can later be reduced by one-third, judges will henceforth pronounce a sentence equal to two-thirds of the presumptive term, which can be lengthened for misconduct in prison.⁵⁴

E. SUMMARY

The case law, legislation, and Guidelines modifications summarized above show that the Minnesota Guidelines have changed substantially over time, giving increased emphasis to treatment and incapacitation goals, with more and more scope for individualized assessments of offender amenability and dangerousness (and thus, decreased emphasis on "Just Deserts" and uniformity goals). This evolutionary process has also made the Guidelines' rules and application more complex than they once were, a trend which may be inherent in any regulatory scheme. However, the Minnesota Guidelines are still fairly simple to apply. Perhaps the most troubling development is the recent tendency of the Legislature to take a more active role in setting sentencing policy: enacting increasingly punitive penalties, without regard to available prison capacity or less punitive alternatives; directing the Commission to make specific changes in the Guidelines; and encouraging the exercise of judicial and correctional discretion in some cases, while at the same time enacting "mandatory" sentencing laws applicable to other cases.

as amended at MINN. STAT. ANN. § 241.67 (West Supp. 1993); Act of Apr. 29, 1992, ch. 571, art. 2, § 6, 1992 Minn. Laws 2005 (codified as amended at MINN. STAT. ANN. § 244.01 (West Supp. 1993)).

⁵³ *Id.* art. 1, § 12 (codified at MINN. STAT. ANN. § 241.67 (West Supp. 1993)); *id.* art. 11, §§ 5-8 (codified at MINN. STAT. ANN. § 244.05(1)(B) (West Supp. 1993)).

⁵⁴ *Id.* art. 2, §§ 3-7 (codified at MINN. STAT. ANN. §§ 244.04-.05, .101 (West Supp. 1993)); *see also id.* § 8 (removing 40-year cap on consecutive sentences); *id.* § 12 (directing the Commission to adopt presumptive consecutive sentences for crimes committed by inmates); *id.* art. 4, § 3 (mandatory minimum fines equal to 20 percent of the statutory maximum fine).

The Guidelines Commission retains primary control over statewide sentencing policy, but no longer enjoys the relative monopoly (and insulation from public scrutiny and political pressures) which it had in the early 1980s.

II. SENTENCING UNIFORMITY

The primary goal of the Minnesota Guidelines is to reduce disparity in the imposition and duration of state prison sentences.⁵⁵ The Minnesota Commission viewed disparity as having two components: uniformity and proportionality.⁵⁶

Uniformity is achieved when similarly situated offenders receive the same sentence, whether or not that is the "best" (e.g., deserved or most "proportional") sentence. A particularly important subsidiary goal is sentencing "neutrality" with respect to the race, gender, and social or economic status of offenders.⁵⁷ Of course, there is inevitably a normative component in any definition of the factors that make two offenders "similarly situated."⁵⁸ The Commission and previous researchers have generally limited their analyses to comparisons of defendants sharing the same Guidelines severity level, criminal history score, and presumptive disposition. However, as shown below, some of these groups contain sub-categories of offenders who are consistently handled differently from each other.

Proportionality in sentencing requires that severity of sanctions increase in direct proportion to increases in offense severity and relevant offender criteria. A key issue of proportionality is whether courts and prosecutors accept, initially and over time, the "prescriptive" changes sought to be imposed by the Guidelines Commission. Again, the Commission and previous researchers have generally assumed that Guidelines severity level, criminal history score, and presumptive disposition are the only factors relevant to proportionality.⁵⁹

⁵⁵ Other forms of disparity, particularly in the conditions of stayed-prison sentences and in prosecutorial charging and plea bargaining, are not addressed under the Guidelines.

⁵⁶ THREE YEAR EVALUATION, *supra* note 2, at 33.

⁵⁷ *Id.* at 61-69.

⁵⁸ Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 917-18 (1991).

⁵⁹ The Commission recognized that the goal of proportionality sometimes requires *departure* from the presumptive sentence to reflect unusual aggra-

Uniformity is discussed in this part of the article, proportionality in the next. Although the principal focus is on Guidelines implementation in the years since 1984, which are not covered by earlier published evaluations, attention must also be given to some important limitations of those evaluations.

A. DEPARTURE RATES

The Guidelines Commission's principal measures of overall sentencing uniformity *and* proportionality⁶⁰ have been the rates of departure from presumptive prison commitment ("disposition") and prison duration rules. Dispositional departures can be either "aggravated" or "mitigated," depending upon whether the presumptive disposition was a stayed or an executed prison sentence. Durational departures can also be either aggravated or mitigated, and are usually reported separately for 1) executed prison terms and 2) all prison terms, including both executed and stayed sentences. Since most prison terms are stayed, and most stays are never revoked, the remainder of this article will focus only on the first of these two measures.

As shown in Figures 4 and 5, reported dispositional and executed-prison durational departure rates fell dramatically in 1981, the first year of the Guidelines.⁶¹ After 1981, the rates for both types of durational departure, as well as those for aggravated dispositional departures, remained fairly stable through 1989. Mitigated dispositional departure rates rose

vating or mitigating circumstances of the case. However, such circumstances have only been studied in two eight-county samples of 1981 and 1982 cases. THREE YEAR EVALUATION, *supra* note 2, at 53-56.

⁶⁰ Dispositional departure rates measure uniformity and proportionality somewhat differently. Any increase in the departure rate implies *reduced* proportionality, since it increases the likelihood that some of the departures are not justified by "substantial and compelling circumstances." As to uniformity, however, increases in the dispositional departure rate only make sentences less uniform within the range of 0% to 50%. Above 50%, further increases make sentences *more* uniform, but less proportionate. An additional measure of uniformity within cells, entitled "grid variance," was employed by the Commission until 1983. See THREE YEAR EVALUATION, *supra* note 2, at 33-34.

⁶¹ Of course, since there were no presumptive sentences to "depart" from in 1978, "departure rates" for that year are only meaningful as a means of comparing pre- and post-Guidelines sentences *relative to the offense groupings and other norms embodied in the Guidelines*. Alschuler, *supra* note 58, at 917-18.

FIGURE 4
 Reported Dispositional Departure Rates
 (% of all cases sentenced)
 1978 (estimated) and 1981-1989

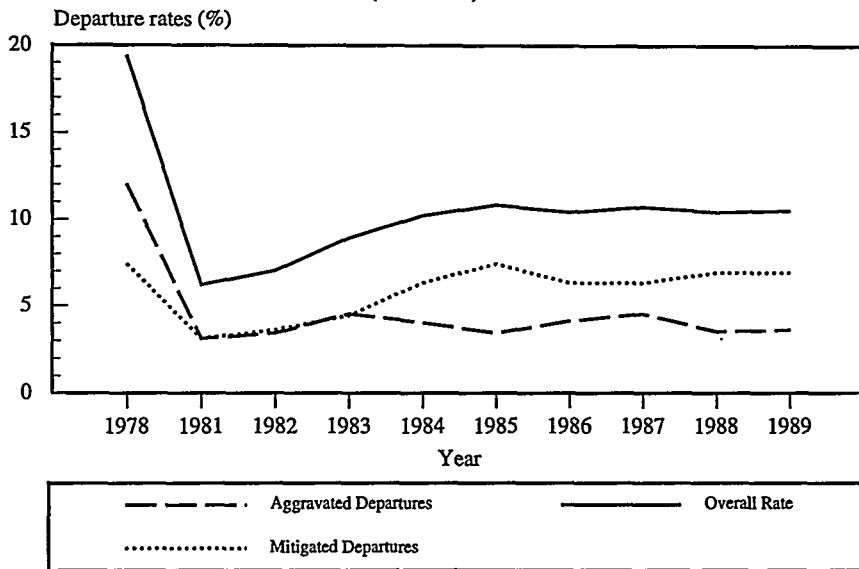
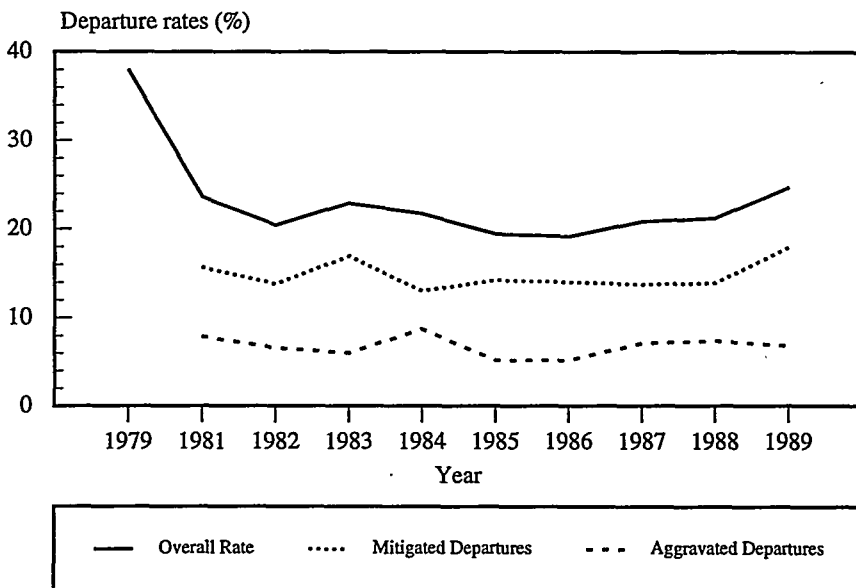
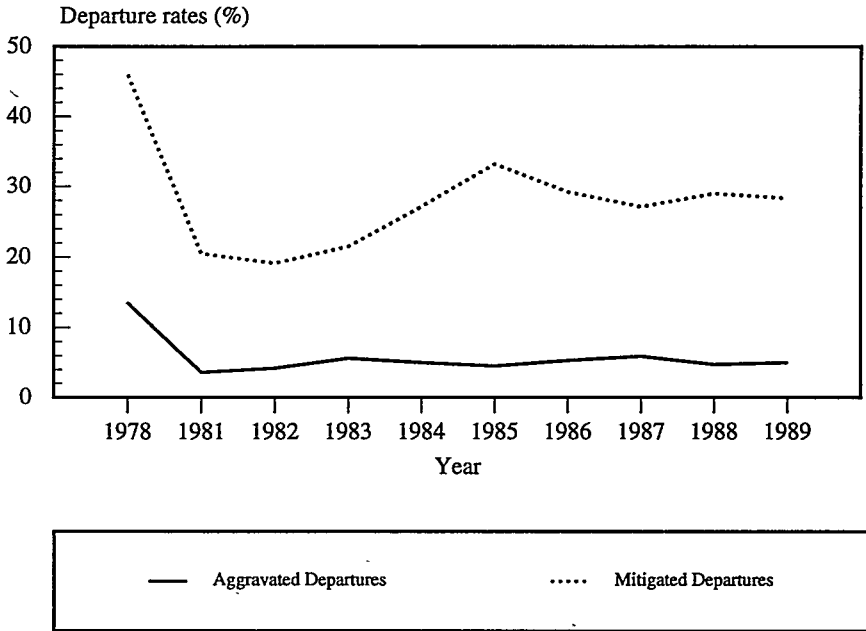


FIGURE 5
 Reported Durational Departure Rates
 (executed sentences only)
 1979 (estimated) and 1981-1989



substantially through 1985, then levelled off at about 6%.

FIGURE 6
Adjusted Dispositional Departure Rates
(% of defendants eligible for each type)
1978 (estimated) and 1981-1989



There are several problems with these official measures, however, particularly with the mitigated dispositional departure rates. The Guidelines Commission has generally computed dispositional departure rates for each year as a percentage of the total cases sentenced, but when aggravated and mitigated dispositional departure rates are analyzed separately, it is more meaningful to express the number of departures as a percentage of the number of cases *eligible* for each type of departure in that year — mitigated departures as a percentage of the number of cases with presumptive executed prison terms, and aggravated departures as a percentage of cases with presumptive stayed-prison terms. As shown in Figure 6,⁶² this

⁶² Throughout this Article, adjusted (percentage-of-eligibles) dispositional departure rates are computed using the PRISON variable (executed prison term) to determine the numerator, and the PRESUMPT variable (presumptive disposition) to determine the denominator. The results vary slightly from rates basing the numerator on the "departure" variable, DISPDEP.

method produces very different mitigated dispositional departure rates than those shown in Figure 4. The reason for the difference is that the number of cases with presumptive executed prison terms (the denominator of the adjusted mitigated rate) is small, but the number and proportion of such cases has increased substantially over time (from 15% of all cases sentenced in 1981, to 20% in 1983 and 25% in 1989). Thus, the adjusted (percentage-of-eligibles) rates are consistently much higher than the unadjusted (percentage-of-total-cases) rates, varying between 19% and 33% (versus 3% to 7%, for the unadjusted rates). Furthermore, adjusted mitigated departures outweigh adjusted aggravated departures by a factor of about 5 to 1 (versus about 2 to 1 for the unadjusted rates). Finally, the adjusted mitigated departure rates vary less over time, increasing by only 38% between 1981 and 1989 (versus 123% for the unadjusted rates). Moreover, the largest increases in adjusted mitigated departures (in 1984 and 1985) were not the continuation of a consistent upward trend since 1981, as the unadjusted rates would suggest. The adjusted rate went down in 1982, and was only slightly higher in 1983 than it was in 1981.

As noted in later sections of the article, this statistical adjustment has great implications for comparisons of departure rates between certain sub-groups with substantially different proportions of presumptive prison terms (e.g., race and gender groups, judicial districts, and possibly judges within a county or district). For present purposes, the point is more modest: how we "keep score" with respect to departures determines how we view compliance initially and over time. Adjusted (percentage-of-eligibles) measures reveal that mitigated dispositional departures were quite common *even in the first year of the Guidelines*, but did not increase as much over time as the Commission's published figures indicated. Both points have important implications for evaluation of certain "prescriptive" features of the Guidelines (see Part III). Using adjusted rates also more clearly reveals that mitigated departure rates (dispositional as well as durational) consistently have outweighed aggravated departure rates. As discussed below, this pattern corroborates other evidence suggesting that plea bargaining concessions remained widespread under the Guidelines.

An even more serious definitional problem affects all of the official durational and dispositional departure measures: these measures assume that defendants found guilty in a given Guidelines cell are comparable in different time periods, and that uniformity and proportionality need only be assessed

relative to conviction offense and criminal history categories. Of course, crime patterns and prosecution policies do change, over time — in some cases dramatically. For example, the Commission noted that the following significant changes had occurred between 1978 and 1983:

(1) Defendant requests that their presumptive stayed prison term be executed increased substantially, from 1981 to 1983.⁶³ Such requests must be granted, under *State v. Randolph*,⁶⁴ if the proposed stay conditions are very onerous.

(2) The number of child sex abuse cases also increased dramatically between 1981 and 1983.⁶⁵ As discussed in Part III, these cases have consistently shown high rates of mitigated dispositional departure, particularly when the offender and victim are related.

(3) Rates of charge reduction to lower severity levels for below-the-line cases with low criminal history scores were much higher in 1981 through 1983 than in 1978.⁶⁶

The first change explains *all* of the increase in aggravated dispositional departures, between 1981 and 1983.⁶⁷ The second trend explains some of the increase in mitigated departures. On the other hand, the third point, increases in "vertical" charge-bargaining between pre- and post-Guidelines periods, suggests that comparisons of mitigated departure rates based on conviction offense may substantially understate the mitigation rate relative to the "real" offense. This in turn tends to overstate the "success" of the Guidelines in 1981. Clearly, some vertical charge reductions are *de facto* mitigating dispositional and/or durational departures. The same is sometimes also true of "horizontal" reductions in the number of counts or concurrent charges.⁶⁸

⁶³ THREE YEAR EVALUATION, *supra* note 2, at 57.

⁶⁴ See *supra* text accompanying note 39.

⁶⁵ THREE YEAR EVALUATION, *supra* note 2, at 80.

⁶⁶ *Id.* at 78.

⁶⁷ Frase, *supra* note 3, at 738.

⁶⁸ Under the *Hernandez* concurrent sentencing rule, *supra* text accompanying note 40, fewer counts at conviction produce a lower criminal history score.

What is needed, then, is a measure of adjusted mitigated dispositional departure rates based on the defendant's "real offense" and "real" criminal history score — that is, the maximum provable severity and number of charges, whether or not such charges were filed or retained to conviction. As part of its initial evaluations of Guidelines implementation, the Commission constructed a real-offense variable (called the "alleged offense") based on its reading of corrections and court files (e.g., presentence investigation reports, the complaint or indictment, etc.).⁶⁹ Since evidentiary problems often do not appear in such files, this measure tends to overstate "real" offense severity. Another limitation is that alleged-offense data is only available through 1984, and only for eight of the larger counties in the state (representing about 60% of the state felony caseload). Finally, it must be noted that there is no corresponding measure of "real" (versus conviction-based) criminal history, so we cannot precisely compute the "real cell" into which each defendant falls. Using conviction-based criminal history tends to understate the extent of the defendant's "real" criminal history.

As shown in Part I of Table 1, mitigated dispositional departure rates based on the alleged offense⁷⁰ are higher in all years than the conviction-offense-based rates for the same eight counties, and the differences are especially great in the post-Guidelines years. While conviction-offense departure rates fell dramatically from 1978 to 1981 (from 48% to 20%), real-offense departure rates only fell from 53% to 47%. Thus, most of the apparent "improvement" in conviction-offense dispositional departure rates in 1981 (Figures 4 and 6) seems to have been due to changes in charging and/or plea bargaining. By 1981, many more of the cases eligible for presumptive prison-commit sentences (based on the "real" offense) were resulting in convic-

⁶⁹ THREE YEAR EVALUATION, *supra* note 2, at 19-20.

⁷⁰ Alleged-offense presumptive-prison cases (the denominator) fall into three categories: 1) the alleged offense severity and conviction-based criminal history place defendant below the disposition line (as amended in 1981); 2) although the alleged offense is above the disposition line, defendant is also alleged to have used a dangerous weapon, thus making him or her eligible for a presumptive prison sentence based on the mandatory minimum term imposed by MINN. STAT. ANN. § 609.11 (West 1992); or 3) although not falling into either of the above categories, defendant's presumptive sentence *at conviction* was an executed prison term. (There are very few of these cases. Most appear to be recidivist sex offenders covered by another mandatory minimum statute, MINN. STAT. ANN. § 609.346 (West 1992 & Supp. 1993), who are not otherwise identifiable from alleged offense data.)

TABLE 1
Mitigated Dispositional Departure Rates (percent non-prison sentence), by Year and Location on the Guidelines Grid, for Defendants with Presumptive Prison Sentences Based on Conviction Offense and on Alleged Offense
(Eight-County, In-depth Samples)

	Pre-Guidelines 1978	Post-Guidelines 1981 1984	
I. All presumptive-prison cases:			
— based on conviction offense	48	20	27
— based on alleged offense	53	47	45
II. Cases at Severity levels VII-X:			
— based on conviction offense	39	16	30
— based on alleged offense	51	45	50

Note: See text and notes accompanying this table [note 70] for definition of alleged offense presumptive prison cases.

tions on less serious charges, carrying no presumptive prison sentence.⁷¹

Between 1981 and 1984, conviction-offense mitigated dispositional departure rates went back up, to 27%, while alleged-offense rates fell a bit further, to 45%. However, there is one further potential problem with the latter figure: as noted above, overall alleged-offense departure rates are based on criminal history at conviction, not "real" criminal history. But criminal history at conviction was measured differently after 1981, due to the multi-count sentencing rule approved in *State v. Hernandez*.⁷² Part II of Table 1 avoids this problem, since criminal history does not affect the presumptive disposition at severity levels VII to X (where all cases are presumptive prison-

⁷¹ In 1978, 77% of presumptive-prison-commit cases based on alleged offense were also presumptive-commits based on the conviction offense. By 1981, this proportion had fallen to 63% (eight-county in-depth data). These results are consistent with the Commission's finding that charge reduction increased under the Guidelines. See *supra*, text accompanying note 39. In contrast, Miethe's 1987 article concluded that "charging and plea bargaining practices remained fairly stable across pre- and post-Guidelines periods." Miethe, *supra* note 3, at 165. Miethe's results are questioned in Tonry, *Structuring Sentencing*, 10 CRIME & JUST. 267, 312 n.7 (1988).

⁷² See *supra* text accompanying note 40.

commits). Once again, the real-offense data shows much less "improvement" (decrease in departure rates) between 1978 and 1981 than is reflected in the conviction-offense-based departure rates, and also much less "slippage" (increase in departure rates) between 1981 and 1984. Nevertheless, the real-offense mitigated departure rate in 1984 (50%) was almost as high as it was in 1978 (51%).

As noted earlier, these real-offense "departure" rates are undoubtedly exaggerated by the fact that many "alleged" offenses were not legally provable. Thus, the *real* "real offense" departure rates must lie somewhere in between the conviction-offense rates shown in Figure 6 and the real-offense rates shown in Table 1. It is also possible that the evidentiary strength of charges changed over time (although it seems unlikely to have changed dramatically). The most important point here is that future Guidelines reformers and researchers must seek to develop *and maintain, over time* better real-offense measures. Without such measures, we cannot assess the effects of *de facto* departures achieved through charging leniency. And without combined measures of *de jure* and *de facto* departures, we cannot accurately assess either the initial success of guidelines, or their evolution over time.

B. RACIAL AND GENDER DISPARITIES IN DISPOSITIONAL DEPARTURES

One of the most important goals of the Guidelines is to eliminate the impact of race, gender, and socio-economic variables on sentencing. Early evaluations of the Guidelines concluded that such biases had largely been eliminated as direct causes of sentencing disparity, although they continued to indirectly affect sentences (for example, minority offenders tend to have higher criminal history scores).⁷³ Since 1984, the Commission has only collected data on race and gender.⁷⁴ For

⁷³ See, e.g., Miethe & Moore, *Socioeconomic Disparities*, *supra* note 3, at 352-55 (table 2), 358.

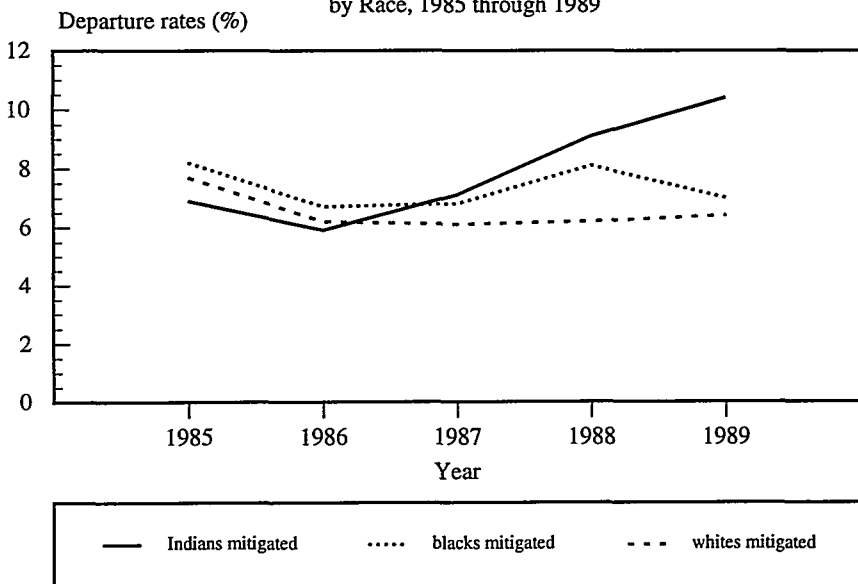
⁷⁴ Although the effect of social class variables on dispositional departures is not addressed directly in this study, the race variables studied probably include some indirect effects of social class.

This study also disregards durational departures, and the extent of such departures, because these decisions are more difficult to model with the available data. Appellate case law (discussed *supra* text accompanying notes 33-36) has held that durational departures must be based exclusively on case-

present purposes, we will analyze only the three principal racial groups in Minnesota, plus gender.

As indicated in Figures 7a, 7b, and 8, males had consistently higher reported dispositional departure rates (aggravated *and* mitigated) than females in all years since 1984. However, racial patterns were more complex: Blacks had higher mitigated departure rates than Whites in all years, with aggravated departure rates that were initially lower, then higher, than White rates; American Indian rates showed a very different pattern, with aggravated departure rates higher than White rates in all years, while mitigated departure rates were initially lower, then higher, than White rates.

FIGURE 7a
Reported Mitigated Dispositional
Departure Rates
(% of all cases sentenced)
by Race, 1985 through 1989



specific aggravating and mitigating culpability factors. These factors are not even indirectly measured by any variables in the post-1984 datasets. There also appear to be fewer consistent racial and gender disparities in sentence durations than are found in dispositional decisions.

FIGURE 7b
 Reported Aggravated Dispositional Departure Rates
 (% of all cases sentenced)
 by Race, 1985 through 1989

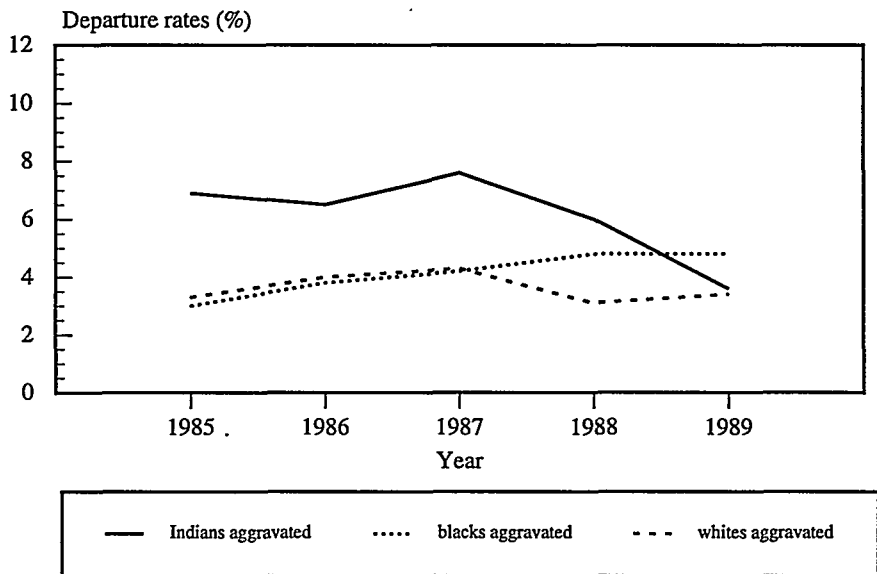
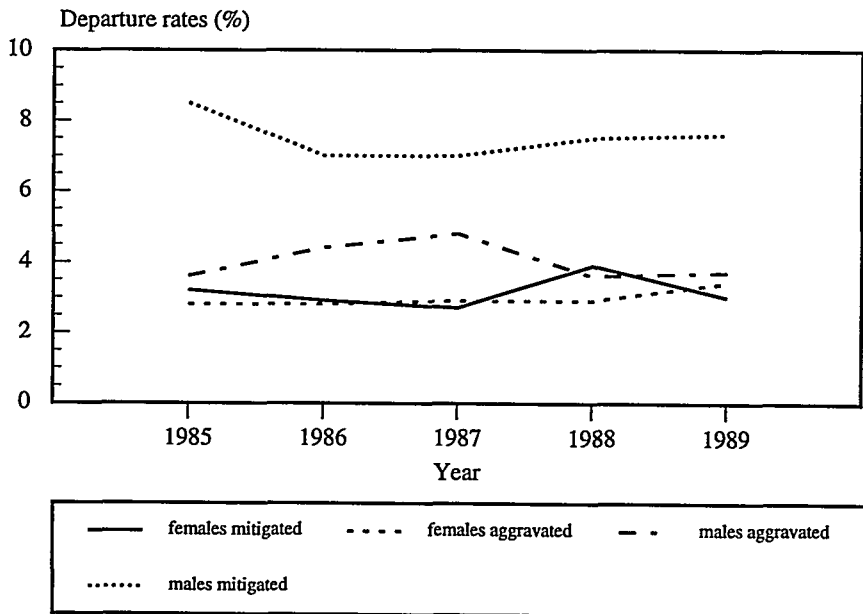


FIGURE 8
 Reported Dispositional Departure Rates
 (% of all cases sentenced)
 by Gender, 1985 through 1989



Once again, however, these officially-reported departure rates conceal the real patterns because the percentages are based on total cases, and fail to take into account major differences in the proportions of each group with presumptive prison terms — much higher proportions of Black, Indian, and male offenders have presumptive prison-commit sentences, so these offender groups would be expected to have higher numbers of mitigated departures and fewer aggravated departures even if all sub-groups were treated equally. Figures 9a, 9b, and 10 report the adjusted departure rates computed on a percentage-of-eligibles basis.⁷⁵ Figure 10 shows that the ratio of male to female aggravated departure rates is about two-to-one. This is even higher than the ratio of the unadjusted rates shown in Figure 8. Figure 10 also reveals that, contrary to Figure 8, males had consistently *lower* mitigated departure rates. As for racial groups, the conflicting trends of Figures 7a and 7b give way to a more consistent pattern (Figures 9a and 9b): Blacks and Indians had equal or higher aggravated departure rates than Whites in all years. Blacks had lower mitigated departure rates in all years, while Indian mitigation rates were equal to or lower than White rates in four of the five years.

In an effort to explain the consistently less favorable treatment of certain minorities with respect to dispositional departures, this article focuses on sentencing in two years when apparent racial disparity (as shown in Figures 9a and 9b) was high: 1987, when the adjusted mitigated departure rate for Whites was 40% higher than the Black rate (28.8% versus 20.5%, respectively); and 1988, when Black and Indian adjusted aggravated departure rates exceeded White rates by 78% and 120%, respectively (7.1% and 8.8% versus 4.0%).

⁷⁵ See *supra* text accompanying note 62.

FIGURE 9a
Adjusted Mitigated Dispositional
Departure Rates (% of eligibles)
by Race, 1985 through 1989

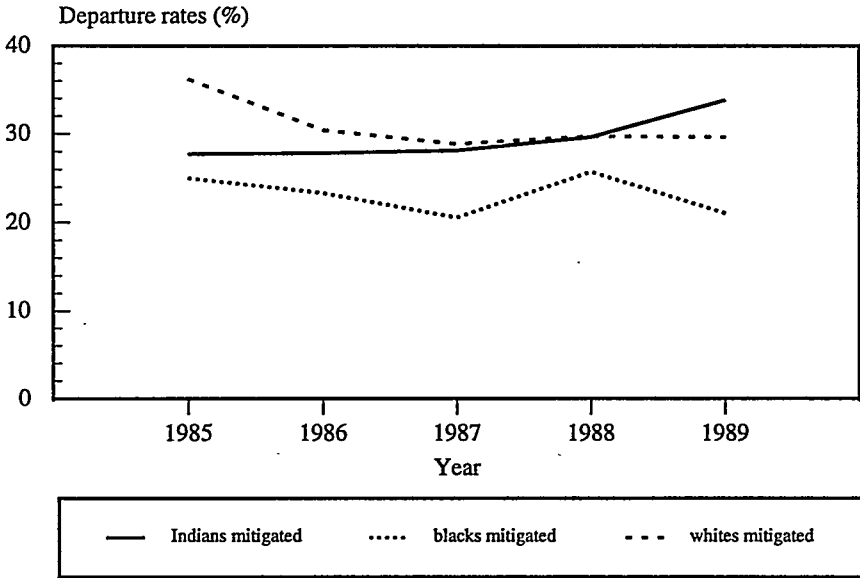


FIGURE 9b
Adjusted Aggravated Dispositional
Departure Rates (% of eligibles)
by Race, 1985 through 1989

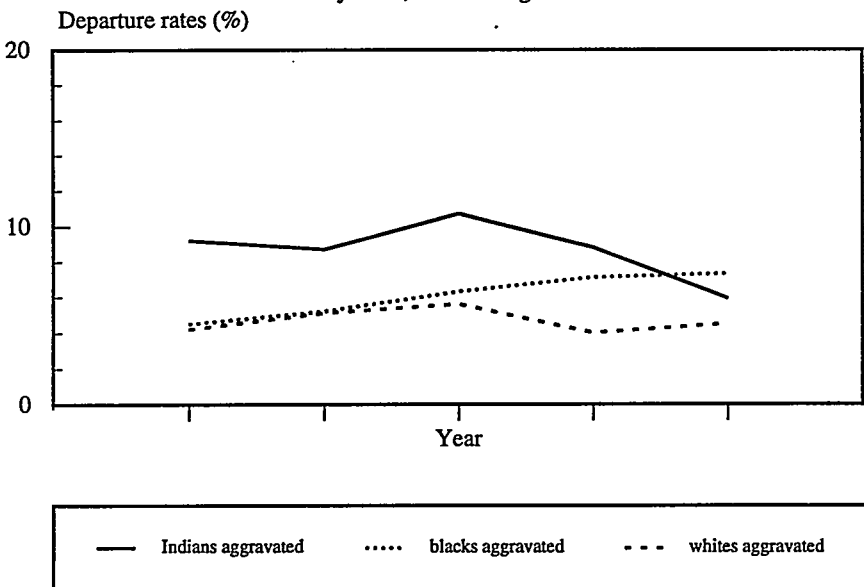
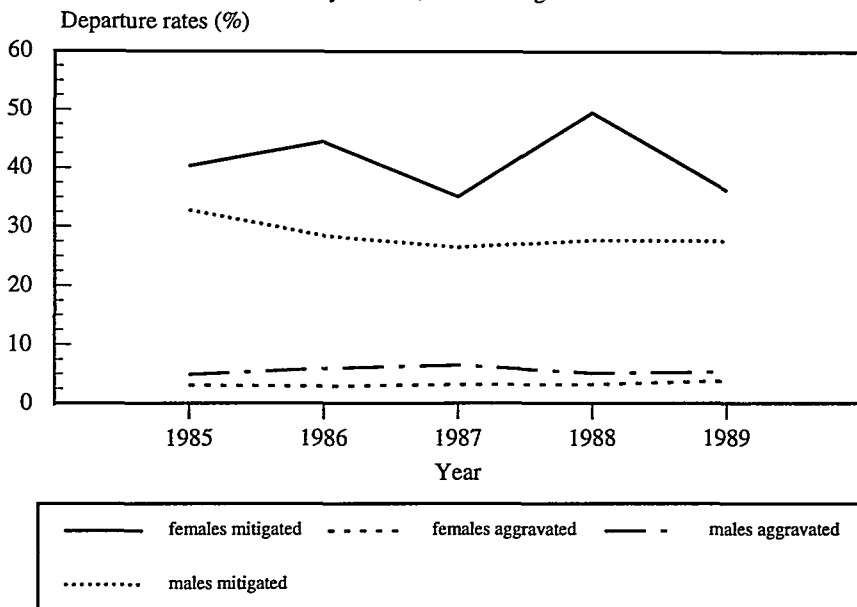


FIGURE 10
Adjusted Dispositional
Departure Rates (% of eligibles)
by Gender, 1985 through 1989



C. REGRESSION ANALYSIS OF MITIGATED DISPOSITIONAL DEPARTURES

Logistic regression was carried out for all Black and White defendants with presumptive prison sentences in 1987 (1429 defendants, including 356 Blacks). The dependent variable is NOPRISON, coded as 0 (committed to prison, the presumptive disposition) or 1 (no prison commitment, i.e., a mitigated dispositional departure). In this sample, 26.7% of defendants are mitigated departures. The independent variables are all variables in the database which are significantly related to the dependent variable, including the following:

1. *Offense-related variables*

- (1) Guidelines SEVERITY level (coded from 1 to 10) (higher severity crimes have lower mitigated dispositional departure rates);

- (2) The offense was an ATTEMPT (0 = no, 1 = yes) (attempts have *lower-than-average* mitigated departure rates (12%));
- (3) Below-the-line weapon-use case (mandatory-minimum statute) (WPNBELOW) (0 = no; 1 = yes, 12% departure rate);
- (4) Above-the-line weapons statute case (WPNABOVE) (0 = no, 1 = yes). Such cases have extremely high mitigated dispositional departure rates (80%);
- (5) Other (non-weapon) above-the-line presumptive prison cases (OTHRABOV) (0 = no; 1 = yes, 56% departure rate);
- (6) Intrafamilial Sex Abuse case (Severity level 7 or 8) (IFSACASE) (0 = no; 1 = yes, 62% departure rate. Almost all IFSA cases involve White offenders);
- (7) Other first degree statutory rape case (STATRAP1) (0 = no; 1 = yes, 40% departure rate);

2. *Offender-related variables*

- (8) Custody Status (INCSTODY) (0 = no, 1 = yes. Defendants who were on probation, parole, pre-sentence release, escaped or confined at the time they committed the current offense have low mitigated dispositional departure rates (11%));
- (9) Other criminal history points (excluding the Custody Status Point included in the previous variable) (OTHRHIST) (coded from 0 to 6) (defendants with more criminal history points have lower rates of mitigated departure);
- (10) Defendant's race (RACEAFRO) (0 = White, 29% mitigated departure rate; 1 = Black, 21% departure rate);
- (11) Defendant's Gender (SEXMALE) (0 = female, 34% departure rate; 1 = male, 26% departure rate);

3. *Other independent variables*

- (12) Plea (PLEANOTG) (0 = guilty plea, 29% departure rate; 1 = convicted at trial, 7% departure rate);
- (13) HENNEPIN County case (0 = no, 1 = yes). This is the state's largest county, with a slightly higher-than-average mitigated dispositional departure rate (29%) and the highest proportion of Black defendants;

(14) Ramsey County case (RAMSEYCO, 0 = no, 1 = yes). The state's second-largest county, with a much lower-than average mitigated departure rate (11%) and the second-highest proportion of Black defendants.

TABLE 2
Variables Explaining Mitigated Dispositional Departures (No executed prison sentence) Among Presumptive-Prison-Commit Black & White Defendants in 1987

Independent Variable	Correlation + / -	Wald Statistic	Significance level (p)
<i>Offense-related</i>			
SEVERITY	-	8.5884	.0034 **
ATTEMPT	-	3.0785	.0793
WPNBELOW	-	2.4573	.1170
WPNABOVE	+	59.7326	.0000 ***
OTHRABOV	+	9.8762	.0017 **
IFSACASE	+	20.1186	.0000 ***
STATRAP1	+	5.5127	.0189 *
<i>Offender-related</i>			
INCSTODY	-	37.7145	.0000 ***
OTHRHIST	-	15.9796	.0001 ***
RACEAFRO	-	1.5353	.2153
SEXMALE	-	2.8824	.0895
<i>Other variables</i>			
PLEANOTG	-	28.1364	.0000 ***
HENNEPIN	+	7.3536	.0067 **
RAMSEYCO	-	3.2566	.0711
***	Significant at p < .001		
**	Significant at p < .01		
*	Significant at p < .05		

Logistic Regression, SPSS PC+, version 4.01. See text for definitions of independent variables and table headings.

This model, which contains several variables not studied by previous researchers, predicts 84% of the observed case outcomes (55% of the 382 no-prison cases and 94% of the 1047 prison cases). As shown in Table 2,⁷⁶ "race" and "gender" are

⁷⁶ Logistic regression is used to determine whether two or more independent variables are significant predictors of a dependent variable which can have only two values — an event occurring or not occurring. M. NORUSIS, SPSS/PC+ ADVANCED STATISTICS FOR THE IBM PC/XT/AT AND PS/2, at B-39 (1990). In the regression results reported in Tables 2, 3, 4 and 8, the "corre-

not statistically significant variables, but another "illegitimate" factor, defendant's plea (PLEANOTG) is — indeed, it is one of the strongest of the independent variables. Other non-Guidelines factors which are significant at the .05 probability level or better are WPNABOVE, OTHRABOV, IFSACASE and STATRAP1 (all positively associated with mitigated departures) and INCSTODY and OTHR HIST (negatively associated). It is thus clear that system actors have rejected several of the Commission's prescriptive norms as to which offenses deserve imprisonment, and which offender and other factors are legitimate (see Part III). The strength of the two criminal history variables (INCSTODY and OTHR HIST) is particularly noteworthy, and suggests that judges are basing their departure decisions less on "just deserts" and more on offender-based utilitarian goals such as incapacitation, rehabilitation, and/or special deterrence. Finally, the opposing effects of the two judicial-district variables show that geographic variations have not been eliminated.

Given the significance of the two variables reflecting cell location above the disposition line (WPNABOVE and OTHRABOV), separate regression analyses were made of presumptive-prison cases above and below the line. The results for below-the-line cases (N=1,222) are very similar to those shown in Table 2, except that SEXMALE becomes significant at .05 (versus .09, in Table 2).⁷⁷ For above-the-line cases, however (N=207), the only significant independent variables are PLEANOTG ($p < .0001$) and OTHR HIST ($p < .0013$).⁷⁸ To further

lation +/-" column indicates which independent variables have a positive or negative correlation with the dependent variable (e.g., the "-" next to Severity means that offenses at higher severity levels have lower mitigated dispositional departure rates). The "Wald statistic" shown in these tables is a measure similar to Chi-square, and can be used to assess the strength and statistical significance of each independent variable. The "significance" heading in the tables shows the probability that the observed value of the Wald statistic is due to chance. *Id.* at B-41 to -42. The present study uses the 5% significance level (.0500) commonly used in social science research. An independent variable is deemed to be "significantly" related to the dependent variable if the odds of the observed relationship being due to chance are 5% or less. *Id.* at B-42, B-50.

⁷⁷ This regression uses only 12 independent variables, deleting WPNABOVE and OTHRABOV. The model once again predicts 84% of observed dependent variable outcomes: 98% of the 1000 prison commitments, but only 22% of the 222 stayed-prison cases (departures).

⁷⁸ For this regression there are only 10 relevant independent variables

test the basic model, the same three regressions were run for 1989, another year in which adjusted mitigated dispositional departure rates were much greater for Whites than for Blacks (29.6 versus 21.0%, respectively). In general, the same variables are significant in both years, but in a somewhat different rank order, with "official" Guidelines variables more significant in 1989 than they were in 1987.⁷⁹

It is possible, of course, that unmeasured variables,⁸⁰ or variations *within* categories of the measured variables, explain some of these patterns. Plea/trial variations are discussed more fully later in this part of the paper. Racial differences are taken up again in Part III.

D. REGRESSION ANALYSIS OF AGGRAVATED DISPOSITIONAL DEPARTURES

To analyze the apparent racial disparity in rates of aggravated dispositional departure (see Figure 9b), logistic regression was carried out on all 1988 presumptive stayed-prison cases involving Whites, Blacks, and American Indians (N=5,535, including 967 Blacks and 272 Indians). The dependent variable is PRISON (0 = no (presumptive stayed sentence imposed), 1 = yes (committed to prison, aggravated departure)). Of the defendants in this sample, 4.8% had aggravated departures. The regression model used above was modified to exclude independent variables specific to mitigated departures, and to include four new variables. In this sample, crimes against persons

(WPNBELOW, OTHRABOV, IFSACASE, and STATRAP1 are deleted). The model predicts 95% of the 160 stayed-prison cases (departures), 34% of the 47 prison-commitment cases, and 81% overall.

⁷⁹ For all 1989 presumptive-commit cases (N=1, 825), the following variables (in order of decreasing strength) were significant at .0016 or better: OTHRIST, SEVERITY, WPNABOVE, INCSTODY, PLEANOTG, OTHRABOV, and IFSACASE. HENNEPIN was only significant at .0840, and STATRAP1 only at .2069. RACEAFRO and SEXMALE were again not significant (p=.28 and .14 respectively).

⁸⁰ For example, perhaps White defendants receive more lenient initial charges or subsequent charge reductions, and thus have little need for mitigated dispositional departures relative to the conviction offense. However, an analysis of available "real offense" data does not support this hypothesis; among alleged-offense presumptive-prison-commit cases in 1984 (the last year for which alleged-offense data was collected, *see supra*, note 2 and text at note 69), the average drop in severity level, between alleged- and conviction-offense, was .86 for Whites, and 1.11 for Blacks.

(PERSNOFF; 0 = no, 1 = yes) and drug crimes (DRUGOFF; 0 = no, 1 = yes) are more likely to result in a prison sentence than are crimes against property or miscellaneous other offense types in the same cell. Two other new variables are RACEAIND (0 = other, 1 = American Indian) and DISTRCT9 (0 = other, 1 = Judicial District 9). In 1988, about 25% of all Indian defendants were sentenced in District 9, which had higher-than-average aggravated dispositional departure rates for *all* defendants that year.

TABLE 3
Variables Explaining Aggravated Dispositional Departures (Prison commitment) among Presumptive-stayed-Prison White, Black & American Indian Defendants in 1988

Independent Variable	Correlation + / -	Wald Statistic	Significance level (p)
<i>Offense-related</i>			
SEVERITY	+	13.6157	.0002 ***
PERSNOFF	+	2.3469	.1255
DRUGOFF	+	.1896	.6698
<i>Offender-related</i>			
HISTORY	+	324.7315	.0000 ***
RACEAFRO	+	3.9822	.0460 *
RACEAIND	+	3.6469	.0562
SEXMALE	+	.0582	.8094
<i>Other variables</i>			
PLEANOTG	+	.5873	.4435
HENNEPIN	+	.1854	.6668
RAMSEYCO	-	.0067	.9350
DISTRCT9	+	21.8248	.0000 ***
*** Significant at p < .001			
* Significant at p < .05			

Logistic Regression, SPSS PC+, version 4.01. See text and notes accompanying this table and Table 2, for definitions of independent variables and table headings.

The results are shown in Table 3. Although the model predicts 95% of the observed cases, it only predicts 4% of the aggravated departures. Thus the only variables significant at $p < .05$ are (in order of strength): HISTORY,⁸¹ DISTRCT9, SE-

⁸¹ Unlike the presumptive-prison-commit cases analyzed above, presumptive stayed-prison cases show no particular strength for the custody status component of criminal history. HISTORY (coded 0-6) is used here, instead of INCSTODY and OTHRIST.

VERITY, and RACEAFRO; RACEAIND is of borderline significance, at $p=.0562$. As to both race variables, however, it should be recalled that the Commission's "independent assessment" of cases in the 1981 and 1982 "in depth" samples found that Blacks and Indians had a higher proportion of cases in which an aggravated dispositional departure was deemed appropriate.⁸²

In any case, the 1988 aggravated dispositional departures are fairly easy to explain without regression analysis: over three-quarters of those departures involved either defendant requests for an executed prison term, pursuant to *State v. Randolph, supra*, or defendants who were already in, or going to, prison on other charges. The *Randolph* and other-charge cases are somewhat more likely to involve Blacks and Indians, but the major factor which distinguishes these departures is their much higher average criminal history scores (2.3, for *Randolph* cases and 3.0, for other-charge departures. The few remaining aggravated departures had an average criminal history score of 2.1, while the average for non-departure cases was .7). These results are consistent with the overwhelming strength of the HISTORY variable, as shown in Table 3, above.

Aggravated dispositional departures are difficult to model statistically because they are so rare (5% of presumptive stayed-prison cases), but jail sentences are much more common (about 70%). On the other hand, any model of jail sentences *alone* would be seriously distorted by the fact that about one-sixth of the no-jail outcomes are actually "worse" than jail (i.e., a prison sentence). Accordingly, logistic regression was used to model "custody sentencing," the imposition of *either* a prison or a jail sentence, in presumptive stayed-prison cases. This model predicts 77% of the outcomes (22% of the 1409 no-custody cases, and 95% of the 4126 custody sentences). As shown in Table 4, HISTORY and the three offense variables are very strong but so is SEXMALE and one of the two large urban county variables (RAMSEYCO); RACEAIND and HENNEPIN are also significant. Application of the same model (excluding the two offense-type variables, which were not available for that year), to 1989

⁸² THREE YEAR EVALUATION, *supra* note 2, at 66-67; *see also id.* (describing the in-depth samples). When the same model is applied to 1989 cases (excluding the offense-type variables, which were not available for that year), two of the variables remain significant at .0000: HISTORY and SEVERITY (Wald values = 376.1 and 36.3). However, the DISTRCT9, RACEAFRO, and RACEAIND variables are no longer even close to significant. PLEANOTG is significant at .0011.

TABLE 4
Variables Explaining Imposition of a Custody Sentence (Prison OR Jail) among Presumptive-Stayed-Prison White, Black & American Indian Defendants in 1988

Independent Variable	Correlation + / -	Wald Statistic	Significance level (p)
<i>Offense-related</i>			
SEVERITY	+	56.9060	.0000 ***
PERSNOFF	+	15.7565	.0001 ***
DRUGOFF	+	49.8609	.0000 ***
<i>Offender-related</i>			
HISTORY	+	153.5035	.0000 ***
RACEAFRO	+	.9716	.3243
RACEAIND	+	5.8313	.0157 *
SEXMALE	+	141.0204	.0000 ***
<i>Other variables</i>			
PLEANOTG	+	2.9651	.0851
HENNEPIN	-	10.2676	.0014 **
RAMSEYCO	-	81.0805	.0000 ***
DISTRCT9	+	2.9044	.0883
*** Significant at p < .001			
** Significant at p < .01			
* Significant at p < .05			

Logistic Regression, SPSS PC+, version 4.01. See text and notes accompanying this table and Table 2, for definitions of independent variables and table headings.

cases yielded similar results, with the following exceptions: SEXMALE is even stronger than HISTORY, in 1989 (Wald values = 211 and 124, respectively; p = .0000 for both); DISTRCT9 becomes significant (*more severe*) at p = .0000; and RACEAIND, PLEANOTG, and HENNEPIN increase in strength (p = .0007, .0016, and .0000, respectively).

The powerful influence of criminal history once again confirms the strong residual commitment to utilitarian sentencing goals in Minnesota,⁸³ and the significance of the county variables reveals continuing geographic diversity, but what explains the equally strong influence of gender? Further research, using variables not available in the existing data, will be needed to determine the extent to which these gender differences are attributable to unmeasured offense or offender factors. Are males more often instigators? More likely to repeat the

⁸³ See *infra* part III.

same or similar offense? Less likely to have custody of children who would be harmed if their primary parent received a custody sentence? Or are they simply more feared, especially if single and unemployed?

Similarly, the greater severity shown toward American Indians (but *not* Blacks) in the use of custody sentences requires further research to determine whether this is due to the presence of aggravating factors in their cases (as was found in the Commission's earlier in-depth studies),⁸⁴ or whether it reflects bias against Indians, higher unemployment,⁸⁵ or other factors. Judges are probably reluctant to imprison the rare defendant who has succeeded in finding and keeping a job, and unemployed defendants may be less likely to strongly resist imposition of a jail term. Indians may also be more likely to have been held in pretrial detention (e.g., because they are unemployed, homeless, or subject to bias); if so, that fact might substantially increase their likelihood of receiving at least a short jail sentence — as part of a "time-already-served" guilty plea,⁸⁶ and/or because pretrial detainees make a worse impression at sentencing.

E. PLEA BARGAINING DISPARITIES

The earlier regression analysis of mitigated dispositional departures revealed the continued existence of plea-trial disparities: controlling for offense severity, criminal history, and eleven other variables, defendants found guilty at trial were found to be significantly more likely to receive a prison sentence (see Table 2). Whether the method of disposition *causes* this difference is unclear; defendants who go to trial have higher offense severity and criminal history scores, so it is possible that trial cases are more aggravated even *within* categories of conviction offense, prior record, and the other measured variables.

Even if more variables and sub-categories were available, we could never be absolutely certain that all appropriate sen-

⁸⁴ THREE YEAR EVALUATION, *supra* note 2, at 66-67.

⁸⁵ The 1984 in-depth data (WORKSENT variable) shows that Indians had slightly higher unemployment rates at the time of sentencing than Blacks, and much higher rates than Whites.

⁸⁶ See Richard S. Frase, REVIEW ESSAY: DEFINING THE LIMITS OF CRIME CONTROL AND DUE PROCESS, 73 CAL. L. REV. 212, 230, 234-37 (1985) (book review).

tencing factors had been taken into account. As is often the case in social science research, we must rely on the corroboration provided by a variety of less-than-ideal measures — in Hans Zeisel's classic phrase, "triangulation of proof."⁸⁷ In the present case, these various measures reveal that the overwhelming majority of convictions involve not only guilty pleas, but *negotiated* guilty pleas⁸⁸ — presumably negotiated in return for some form of leniency. Moreover, there is a remarkably consistent overall pattern of leniency in the application of Guidelines imprisonment rules. It is possible, of course, that presumptive sentences are consistently too severe, or that mitigating circumstances are inherently much more common than aggravating factors. In light of the high rate of pleas and plea negotiation, however, it seems much more likely that this pattern of leniency reflects tacit or explicit sentence bargaining which causes reduced sentence severity for defendants who plead guilty. Consider the following:

(1) Mitigated durational departures have always been twice as common as aggravated departures (see Figure 5).

(2) Mitigated dispositional departures have generally been five or six times more frequent than aggravated departures, as a percentage of offenders *eligible* for each type of departure (see Figure 6). Moreover, aggravated dispositional departure rates would be even lower (1.1% versus 4.7% of presumptive non-prison cases, in 1988) if defendant requests for prison and prison terms concurrent with other charges were excluded.⁸⁹

⁸⁷ HANS ZEISEL, *SAY IT WITH FIGURES* 190-99 (5th ed. 1968).

⁸⁸ *THREE YEAR EVALUATION*, *supra* note 2, at 72 (Table 27).

⁸⁹ It must also be remembered that, as to both durational and dispositional departures, conviction-based statistics tend to *understate* the number and proportion of mitigated departures, while *overstating* aggravated departures. First, as noted earlier, mitigated departure rates do not include *de facto* departures achieved through non-filing, reduction or dismissal of provable charges. Second, charging leniency of this kind is sometimes coupled with an "aggravated" dispositional and durational departure on the lower charge of conviction. Such departures produce a prison term which is still shorter than the defendant would have received on the provable higher charge — an "aggravated" departure which is, in reality, a mitigated one! An example of such a case is *State v. Garcia*, 302 N.W.2d 643 (Minn. 1981), upholding aggravated dispositional and durational departures in a case involving a significant charge reduction (from a seemingly-provable first-degree rape (severity level

(3) The Commission's independent assessment of Guidelines departures in 1981 and 1982 consistently found that mitigated departures were less often justifiable than aggravated ones;⁹⁰

(4) The Commission's assessment of 1981 and 1982 cases receiving the presumptive sentence (*non*-departures) consistently found that most failures to make a justifiable departure were failures to aggravate, not failures to mitigate;⁹¹

(5) Despite these high rates of mitigating departures and failures to aggravate, prosecution appeal rates have remained low. Indeed, less than 1% of all sentences had been appealed by either side, as of July of 1984; in the same period, about 13.5% of sentences included a departure,⁹² and an unknown additional proportion represented unjustifiable failures to depart;

(6) Overall prison rates for cases tried are much higher than for cases pled guilty, and neither rate has changed much since 1978. Even when trial and plea cases are analyzed within "real offense" grid cells, to take account of charging variations as well as sentence-bargaining and formal departures, the results indicate that the disparity in prison rates between trial and guilty plea cases did not decline with the advent of the Guidelines.⁹³

VIII) to kidnapping (level VI).

⁹⁰ THREE YEAR EVALUATION, *supra* note 2, at 54, 56.

⁹¹ *Id.*

⁹² *Id.* at 110 (estimated 2,300 departures, out of 17,000 Guidelines sentences imposed).

⁹³ This comparison, which uses the Commission's "alleged offense" severity variable, *see supra* text accompanying note 69, might be called "real-offense plea-trial grid variance" (by analogy to the Commission's early "grid variance" measure, *see supra* note 60). For each conviction-criminal-history by alleged-offense-severity cell containing both guilty plea and trial cases, the prison rate for plea cases is subtracted from the rate for trials, then weighted (multiplied) by the number of *trial* cases in that cell (which is invariably smaller than the number of guilty pleas). The sum of these weighted cell differences is then divided by the sum of the trial cases in those same cells. In 1978, the average difference in the prison rate (percent), between trial and guilty plea cases in each alleged-offense cell, was 16.4%; in 1981, it was 18.0%.

Thus, it appears likely that whatever plea-trial disparities there were before the Guidelines went into effect continued to exist in the early post-Guidelines years, and still exist today. Plea bargaining, and its accompanying charge and sentence disparities, is "alive and well" in Minnesota. The continued existence of widespread plea bargaining concessions also suggests that *lower* limits on sanction severity are much less likely to be enforced than upper limits — a finding consistent with a theory of "limiting retributivism," but inconsistent with any more precise, "defining" retributive model (see below).

III. PROPORTIONALITY AND THE COMMISSION'S "PRESCRIPTIVE" CHANGES

The goal of proportionality requires that sanction severity increase in direct proportion to increases in offense severity and criminal history (as defined by the Guidelines). The previous discussion has already shown how overall proportionality changed under the Guidelines: as measured by conviction-offense departure rates, proportionality in prison commitments and durations increased in the first years of the Guidelines and (with the exception of mitigated dispositional departures) remained at much lower levels through 1989 (see Figures 5 and 6). However, "real offense" mitigated dispositional departure rates were much higher in all years, and were only modestly lower in the first post-Guidelines year (1981) than in 1978.⁹⁴ Moreover, regression analysis of prison use revealed that system actors have rejected the Commission's imprisonment norms for certain offenses (especially intrafamilial child sex abuse and above-the-line weapons statute cases),⁹⁵ and that method of disposition (guilty plea versus trial) is a very strong factor in the granting of mitigated departures. This analysis further shows that two of the strongest factors are the defendant's custody status at the time of the offense and other criminal history points — factors which are more closely linked to utilitarian than retributive sentencing goals.

⁹⁴ See Table 1 and accompanying text.

⁹⁵ The reluctance to imprison above-the-line presumptive-commit defendants (mostly weapons cases) appears even stronger when cases are analyzed using the "alleged offense" variable described *supra* text accompanying note 69. On a conviction-offense basis, the prison rate for such cases increased from 13% to 50%, between 1978 and 1981; on a real-offense basis, however, the prison rate actually fell, from 25% to 19%.

The purpose of the following discussion is to examine proportionality in the sentencing of particular cases where the Guidelines Commission expressly sought to change pre-existing norms. The focus once again is on the use of state prison sentences, since the Guidelines impose almost no limitations on the use of local jail or other conditions of non-prison sentences.

A. THE "PERSON" VERSUS "PROPERTY" DISTINCTION

One of the most significant normative changes sought by the Commission was to increase prison rates for offenders with low criminal histories convicted of high severity "person" offenses (e.g., rape, armed robbery), while decreasing prison rates for lower severity (mostly property) offenders with medium to high criminal histories.⁹⁶ The rationale for these changes was apparently twofold: first, "just deserts" sentencing requires that offense severity receive greater weight than criminal record; second, limited prison space should be reserved for physically dangerous persons.

TABLE 5
Imprisonment rates for high-severity offenses
(Severity levels VII through X), by year

1978	1981	1982	1983	1984	1985	1986	1987	1988	1989
61.1	85.9	87.8	76.5	72.5	72.5	74.8	77.4	73.5	72.5

We will first examine sentencing of high-severity ("person") offenses. As shown in Table 5, prison rates for all defendants convicted at severity levels VII through X increased in the early years of the Guidelines, then fell back substantially, but remained higher than before the Guidelines. However, as was shown previously, when cases are analyzed by real-offense severity levels, using the Commission's "alleged offense" variable, it appears that only modest change was achieved in 1981, and that, by 1984, prison rates for defendants at alleged-offense severity VII through X had almost returned to pre-Guidelines levels (see Part II of Table 1).

⁹⁶ MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 15; THREE YEAR EVALUATION, *supra* note 2, at 21.

TABLE 6
Prison rates for Severity Level VII and VIII defendants, by year,
based on conviction offense and criminal history

	1978	1981	1982	1983	1984	1985	1986	1987	1988	1989
Severity VII:										
History = 0	39.1	71.8	71.9	66.7	54.8	51.8	58.4	68.2	46.8	51.0
all defendants	60.1	84.5	86.5	83.3	74.8	74.4	74.8	83.0	72.1	70.2
Severity VIII:										
History = 0	41.9	85.4	80.3	39.8	52.0	47.3	57.5	55.3	50.0	53.3
all defendants	55.8	87.0	87.1	59.0	65.4	64.6	69.9	65.4	70.8	69.3

TABLE 7
Prison rates for Severity Level VII and VIII defendants,
by year, based on alleged offense and criminal history
at conviction

	Pre-Guidelines	Post-Guidelines	
	1978	1981	1984
Level VII, History = 0	24.3	40.5	26.7
all level VII defendants	45.9	55.1	55.1
Level VIII, History = 0	31.8	33.7	23.8
all level VIII defendants	44.8	46.9	39.7

Most of the non-prison sentences reflected in Table 5 are found at severity levels VII or VIII,⁹⁷ particularly for defendants with no prior record (see Table 6). But as shown in Table 7, prison rates for these defendants are even lower by "alleged offense." Table 7 also shows that, for defendants at level VIII, real-offense prison rates hardly increased at all even in the *first* year of the Guidelines, and by 1984 had fallen *below* 1978 levels.

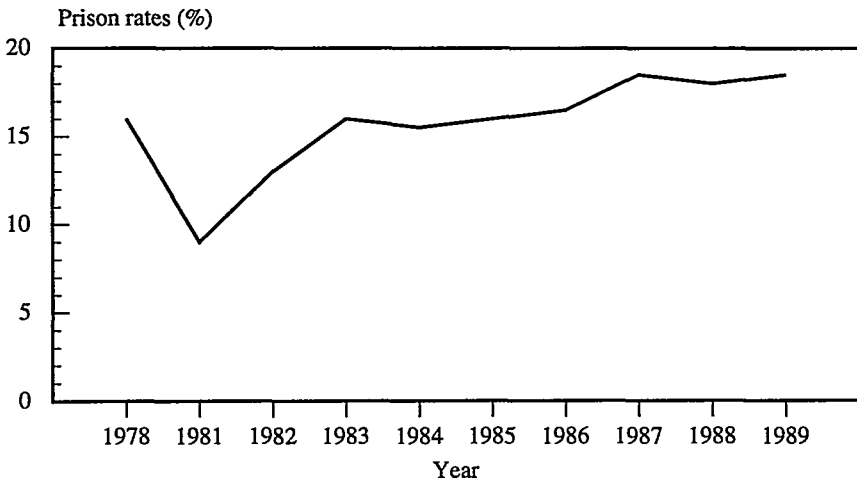
As suggested in Part II of this article,⁹⁸ much of the high departure rate at levels VII and VIII occurs in child sex abuse cases, and the number of these cases was increasing very

⁹⁷ Prison rates for defendants *convicted* at levels IX and X equalled 100% in all years except 1978 and 1989. At *alleged* levels IX and X prison rates were about 80-90% from 1978 through 1984.

⁹⁸ See *supra* text accompanying note 76.

rapidly in the early 1980s.⁹⁹ In 1987, the prison rate for defendants convicted of intrafamilial sex abuse (IFSA) at level VII or VIII was only 40%, and the rate for non-IFSA statutory rape cases at levels VII and VIII was 58%. If these cases are excluded, the 1987 prison rate for levels VII and VIII combined rises from 75 to 86% (equivalent to a departure rate of 14%). Nevertheless, the departure rate for the remaining defendants at level VII with zero criminal history remains fairly high — 30% — suggesting that criminal justice actors were resisting the Commission's prescriptive norms not only for child abuse sex cases, but also for other person offenders with no prior record.

FIGURE 11
Prison Rates for Property Offenders
1978, 1981 to 1989



⁹⁹ Such cases increased about ten-fold from 1981 to 1985, then declined but remained at fairly high levels through 1989. MINNESOTA SENTENCING GUIDELINES COMM'N, SUMMARY OF 1989 SENTENCING PRACTICES FOR CONVICTED FELONS 56 (1991).

FIGURE 12
Prison Rates (%) by cell, 1989

CRIMINAL HISTORY SCORE

CONVICTION OFFENSE SEVERITY	CRIMINAL HISTORY SCORE							Total
	0	1	2	3	4	5	6	
Sale Sim. Cont. Subst. I	0.0	1.9	8.4	11.9	25.0	50.0	81.3	13.1
	391	103	119	67	56	30	75	841
Theft Rel-Agg Forgery II	.3	1.9	4.6	13.5	18.8	43.5	87.5	8.9
	785	208	174	89	64	46	80	1446
Theft < 2500 III	.5	2.3	9.8	23.0	74.3	73.2	91.0	19.0
	830	213	183	139	105	71	145	1686
Non-Res Burglary IV	1.4	5.2	14.0	27.9	75.3	90.3	93.8	21.2
	781	231	178	154	93	72	130	1639
Resburg-Robbery V	3.0	6.6	11.1	81.8	83.3	91.7	90.7	24.4
	304	106	99	55	36	24	43	667
Assault 2-CSC 2 VI	5.3	16.3	21.0	62.9	97.4	82.8	83.8	20.7
	603	160	119	70	38	29	37	1056
AGG Robbery VII	51.0	70.0	75.5	90.6	92.3	100.0	90.9	70.2
	145	60	53	32	26	20	33	369
Assault 1-CSC 1 VIII	53.3	76.5	91.7	94.1	88.9	100.0	83.3	69.3
	107	34	24	17	9	8	6	205
Murder 2, Felony IX	92.0	100.0	100.0	100.0				94.3
	25	5	2	3	0	0	0	35
Murder 2, Intent X	94.4	100.0	100.0	100.0	100.0	100.0	100.0	96.7
	18	4	1	2	2	1	2	30
Total	5.7	11.8	17.0	37.3	64.1	75.4	89.3	22.0
	3989	1124	952	628	429	301	551	7974

Figure at bottom of each cell is the number of defendants.

As for the "property" side of the person-versus-property-offense distinction, the Commission's prescriptive norm was generally accepted by system actors in the early years. However, as shown in Figure 11, by 1983 the percentage of property offenders imprisoned had risen to the same level as before the Guidelines, and rose even further through 1989. Most of this increase was the result of property offenders acquiring higher and higher criminal history scores, which pushed more and more of these offenders across the disposition line. Thus, the percentage of property offenders with criminal history scores of four or more doubled from 1981 to 1989, and the percentage with presumptive prison sentences increased from 7% to almost 17%.¹⁰⁰ The higher scores were apparently the result of prosecutors charging and requiring defendants to plead to more counts, combined with the application of *Hernandez*¹⁰¹ concurrent-counts sentencing. Moreover, even if a low-severity defendant's criminal history is not quite high enough to move him across the disposition line, he is still fairly likely to get a prison sentence, as above-the-line defendants at severity levels I to IV with at least three criminal history points have always had fairly high prison commitment (upward departure) rates: 19% in 1981, increasing to 24% in 1989. Departure rates in some of these cells are as high as 50% (see Figure 12).

B. JUST DESERTS VERSUS UTILITARIAN SENTENCING GOALS

The fact that system actors (judges, attorneys, and probation officers) insist on imprisoning many property offenders with moderate to high criminal history scores, and refuse to imprison certain high-severity person offenders with very low criminal history scores, suggests that these decision makers did not accept the Commission's decision to shift away from sentencing based on offender characteristics and the utilitarian, offender-based sentencing goals of rehabilitation and incapacitation.

The latter goals were given explicit judicial approval in the amenable- and unamenable-to-probation departure cases described in Part I. As I have argued at greater length elsewhere,¹⁰² such departures are both justifiable and desir-

¹⁰⁰ *Id.* at 57.

¹⁰¹ See *supra* text accompanying note 40.

¹⁰² Frase, *supra* note 3, at 742-48; Frase, *supra* note 35 *passim*.

able, *provided* they are limited to exceptional cases and are not granted in a discriminatory manner. Amenable-to-probation departures avoid unnecessary incarceration (thus serving the overall goal of "parsimony"), minimize the *worsening* effects of prison on "salvageable" defendants, and conserve scarce prison space for more dangerous offenders. Both types of amenability departure encourage the system to deal more honestly with difficult cases, rather than achieving the same results *de facto* by various means (e.g., manipulation of the number or severity of charges; granting of probation with the expectation that it will promptly be revoked). Furthermore, such departures are consistent with Minnesota statutes, which continue to recognize utilitarian goals. Such departures also are consistent with the Guidelines themselves, which explicitly approve the pursuit of utilitarian goals in setting conditions of stayed sentences, and which have never limited departures to retributive grounds.

The amenability departures are *not* consistent with any precise, "defining" retribution theory, in which Just Deserts sets a specific penalty for each case,¹⁰³ but the Guidelines Commission never actually implemented such a theory. By declining to provide guidelines for conditions of stayed-prison sentences, and by failing to promulgate plea bargaining guidelines or even request a legislative mandate to do so, the Commission was, in effect, endorsing a "limiting" retributive theory in which presumptive disposition rules and prison durations set upper but rarely lower limits on sanction severity. The overwhelming majority of defendants have always had presumptive stayed-prison terms (85%, in 1981, declining to 75% in 1989). Although the conditions of stayed sentences are occasionally as onerous as the presumptive stayed prison duration,¹⁰⁴ and some stays are later revoked,¹⁰⁵ the great majority of defendants receive (and are clearly *expected* to receive) *less* than their full "just deserts" (as measured by the duration of their presumptive stayed prison term). Similarly, plea bargaining leniency acts (and must have been expected to act) to mitigate presumptive prison commitment and duration rules. Thus, if the amenability departures

¹⁰³ See generally NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 199 (1982); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73-76 (1974).

¹⁰⁴ See *State v. Randolph*, 316 N.W.2d 461 (Minn. 1981) (holding that defendants have the right to demand execution of the presumptive stayed term in such cases).

¹⁰⁵ See *infra* text accompanying note 123.

seem inconsistent with the Guidelines' Just Deserts theory, it is because the role and importance of that theory has been overstated in much of what has been written about the Guidelines.

However, amenability departures do have a potential to be over-used, or to be used in a discriminatory manner. How often do they occur, and in what kinds of cases? Are unamenable-to-probation departures likely to be imposed on minority, lower-class males with a "bad attitude"? Are amenable-to-probation defendants likely to be White and middle-class?

The unamenable-to-probation departures are actually fairly rare, and have become *less* frequent over time. In 1988, for example, they accounted for only 12% of aggravated dispositional departures, and only .6% of defendants with presumptive stayed sentences.¹⁰⁶ Black and Indian defendants are more likely to receive such departures (1.2% and 1.5% of presumptive stayed cases in each racial group), but these defendants also tend to have significantly higher criminal histories.

Amenable-to-probation departures are much more common, and their use increased substantially in the first half of the 1980s.¹⁰⁷ Since 1985, they have accounted for about half of all mitigated dispositional departures, and about 15% of defendants with presumptive prison sentences. Their location on the Guidelines grid has been fairly constant, however. Over three-quarters fall into one of three categories: 1) above the disposition line (weapons and other mandatory prison-commit cases; 2) just "over" (one cell below or to the right of) the disposition line; or 3) level VIII with zero criminal history (mostly Intrafamilial and other child sex abuse cases). Such departures are almost never granted at severity levels IX and X.

¹⁰⁶ Thirty two defendants in 1988 (out of 267 aggravated dispositional departures, and 5732 presumptive stayed-prison cases) had departures based on "unamenable to probation" (reason code 310) and/or "not amenable to rehabilitation" (reason code 539). These departure reason codes are described, and their use tabulated (without adjustment for multi-reason departures), in MINNESOTA SENTENCING GUIDELINES COMM'N, JUDGES' REASONS FOR DEPARTURE (1991).

¹⁰⁷ *Id.* at 6-7 (sum of reason codes 530 to 536).

TABLE 8
Variables Explaining Amenable-to-Probation Departures
Among Presumptive-Prison-Commit White and Black
Defendants in 1987

Independent Variable	Correlation + / -	Wald Statistic	Significance level (p)
<i>Offense-related</i>			
SEVERITY	-	2.6578	.1030
ATTEMPT	-	2.1063	.1467
WEAPON	-	5.8023	.0160 *
ABOVLINE	+	10.7302	.0011 **
IFSACASE	+	10.9503	.0009 ***
STATRAP1	+	5.5392	.0186 *
<i>Offender-related</i>			
INCSTODY	-	19.9885	.0000 ***
OTRHIST	-	9.6171	.0019 **
RACEAFRO	-	.7452	.3880
SEXMALE	+	.0038	.9511
<i>Other variables</i>			
PLEANOTG	-	10.7221	.0011 **
HENNEPIN	+	7.8668	.0050 **
RAMSEYCO	-	1.9248	.1653
***	Significant at $p < .001$		
**	Significant at $p < .01$		
*	Significant at $p < .05$		

Logistic Regression, SPSS PC+, version 4.01. See text and notes accompanying this table and Table 2, for definitions of independent variables and table headings.

C. REGRESSION ANALYSIS OF AMENABLE-TO-PROBATION DEPARTURES

In an effort to assess racial and gender bias in the use of amenable-to-probation departures, logistic regression was carried out using variables similar to those previously examined as predictors of *all* mitigated dispositional departures.¹⁰⁸ As shown in Table 8, RACEAFRO is *not* a statistically significant predictor, and neither is SEXMALE. The variables significant at $p < .05$ are (in order of strength): INCSTODY (-), IFSACASE

¹⁰⁸ See *supra* note 76. A single WEAPON variable is used (0 = NO, 1 = YES), since this factor here operates in the same direction above and below the disposition line. Location above the disposition line is measured by ABOVLINE (0 = no, 1 = yes). The model predicts 85% of observed cases and 99% of no-departure case, but only 5.71% of amenable-to-probation departure cases (which constitute 15% of the total).

(+), ABOVELINE (+), PLEANOTG (-), OTHR HIST (-), HENNEPIN (+), WEAPON (-), and STATRAP1 (+).¹⁰⁹ The IFSACASE, STATRAP1 and ABOVELINE variables once again show the strong field resistance to presuming imprisonment, even for first offenders, in these cases. Similarly, the two strong criminal history variables (INCSTODY and OTHR HIST) are traditionally much more closely associated with utilitarian goals than with the Just Deserts theory so often claimed to be the foundation of the Minnesota Guidelines. Once again, plea-trial disparity is strong, and so are inter-district differences. Comparison of all ten judicial districts reveals even wider variations (significant at .00001): one district only granted amenable-to-probation departures in 5% of its presumptive prison cases; another granted them in over 27% of such cases.¹¹⁰

The theory and application of amenability departures thus reveals the strong continuing influence of utilitarian sentencing goals in Minnesota. At the same time, the pattern of these departures reflects the retributive scaling built into the Guidelines' offense severity and criminal history scores: unamenable-to-probation departures cluster just above the disposition line, while amenable-to-probation departures cluster just below it (or above it, in the case of weapons and other above-the-line mandatory-prison cases), and these two types of departure are almost never found at the low and high extremes of offense severity and criminal history. A similar pattern appears in the overall departure rates, by cell (see Figure 12). Thus, in practice, the Minnesota Guidelines resemble the "four-band" theory proposed by Morris and Tonry: some cases are almost always kept out of prison, and some are almost always "in," with two intermediate bands (presumptive out and presumptive in, each with high departure rates).¹¹¹

¹⁰⁹ Application of the same model to 1989 data produced slightly different results. Only seven variables were significant at $p < .05$, in order: OTHR HIST (-), IFSACASE (+), PLEANOTG (-), SEVERITY (-), STATRAP1 (+), INCSTODY (-), AND ABOVELINE (+); WEAPON and HENNEPIN were no longer significant.

¹¹⁰ In 1989, the inter-district differences were less dramatic (significance = .02231), but the same two districts were again at the extremes (4% and 21%).

¹¹¹ N. MORRIS & M. TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 60 (1990).

IV. AVOIDING PRISON AND JAIL OVERCROWDING

Although the 1978 enabling statute only required the Commission to take existing correctional resources into "substantial consideration," the Commission chose to treat prison capacity as a controlling factor in drafting and implementing the Guidelines. To minimize the risk of overcrowding, the Commission set a goal of never exceeding 95% of prison capacity.¹¹² The Commission did not specifically address the issue of jail crowding, but its continued refusal to recommend presumptive jail terms for non-prison sentences has been motivated in part by concerns about the limited resources of many counties.¹¹³

As of 1989, Minnesota's prison and jail populations had risen substantially, and its prison system was nearing or exceeding capacity.¹¹⁴ However, as Table 9 shows, national prison and jail¹¹⁵ populations had risen even faster since 1978, overcrowding was more serious,¹¹⁶ the U.S. prison population rate per 100,000 residents was four times greater than Minne-

¹¹² MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 6, at 14; Frase, *supra* note 3, at 733-36.

¹¹³ See MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 19-20, 35 (1989).

¹¹⁴ The 1989 average daily population of six Minnesota jails exceeded the capacity of those jails, and many other jails must have been overcrowded at various times; in 1990, eight jails had average populations over their capacities. Interview with Mr. Dennis Falenschek, Inspection & Enforcement Unit, Minnesota Department of Corrections (Nov. 19, 1991). *But see* MINNESOTA LEGISLATIVE AUDITOR, *supra* note 7, at 16 (stating that in 1989, 60% of local detention facilities in Minnesota were operating over the Department's recommended capacity levels of 60% to 80%, depending on size of jail); *id.* at x (arguing that Minnesota avoided overcrowding because, unlike other states, it had "excess capacity" in its jails and prisons in the late 1970s).

¹¹⁵ The Minnesota and U.S. jail figures shown in the table include pretrial detainees. Statistics on sentenced jail prisoners alone are not available for Minnesota, and would be unreliable in any case, since many unconvicted detainees are serving what will later be deemed all or part of their jail or prison sentence. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 658 (1990).

¹¹⁶ All prison "capacity" data must be interpreted very cautiously, since states often simply re-define their capacity (e.g., cells are deemed to be "designed" for two prisoners, instead of one) to reduce their exposure to prisoner lawsuits. See Franklin E. Zimring, *Are State Prisons Undercrowded?*, 4 FED. SENTENCING REP. 347 (1992).

sota's, and the national jail rate was almost two times greater.¹¹⁷

TABLE 9
Prison and Jail Populations in Minnesota and the U.S., 1978-1989

	Minnesota	U.S. total
1989 prison populations:		
1. year-end count	3,103	703,687
2. per 100,000 residents	71	271
3. percent of capacity	100%	110%
4. % increase since 1978	+58%	+130%
1989-90 jail populations (including unsentenced inmates):		
5. average daily population	3,801	408,075
6. per 100,000 residents	87	157
7. percent of capacity	85%	104%
8. % increase since 1978	+139%	+158%

Sources: lines 1 & 2: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1989 at 2 table 2 (1990) (U.S. total includes both state and federal prisoners).

line 3: *Id.* at 6-7 tables 8 & 10.

line 4: 1989 figures are from line 1; 1978 figures are from: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1978 at 13 table 1 (1980) (U.S. = 306,602; Minn. = 1,965).

line 5: Minn: Interview with Mr. Dennis Falenschek, Inspection & Enforcement Unit, Minnesota Department of Corrections (November 19, 1991) (average of reported average daily population figures for calendar 1989 and 1990); U.S.: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES, 1990 at 1 table 1 (1991) (average daily population in year ending June 30, 1990).

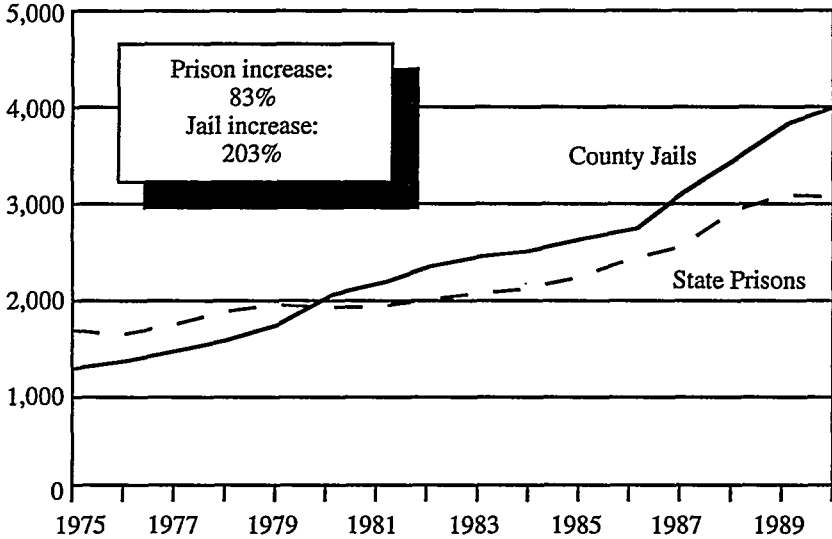
line 6: computed from other data in this table (line 5 divided by line 1, multiplied by line 2).

line 7: Minn.: Interview with Mr. Dennis Falenschek, *supra* (average of statewide occupancy figures for calendar 1989 and 1990); U.S.: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES, 1990 at 2 table 5 (1991).

line 8: 1989-90 figures are from line 5; 1978 figures are from Minn.: Mr. Dennis Falenschek, *supra* (1,592.32 inmates); U.S.: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES, 1990 at 4 appendix table (1991) (157,930 inmates).

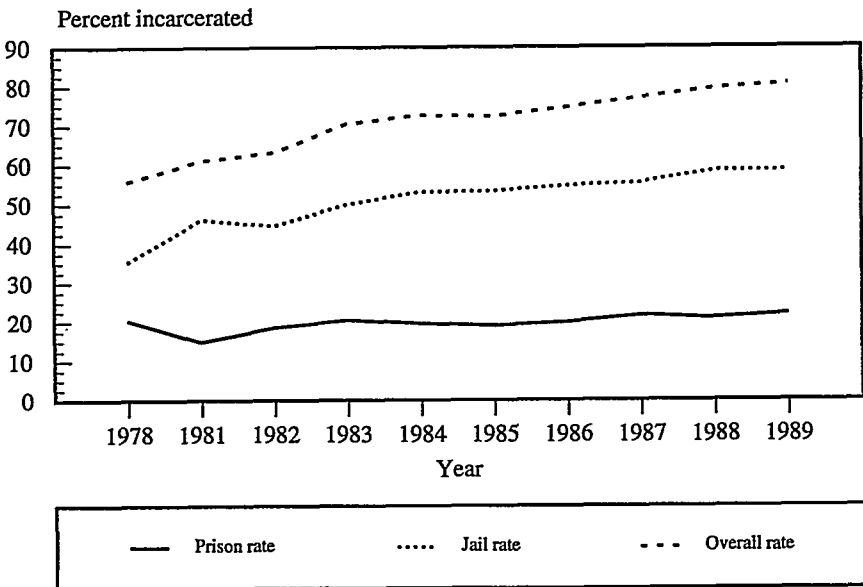
¹¹⁷ To some extent, these differences reflect the state's relatively low crime rates; Minnesota's incarceration rates *per arrested adult* are closer to national averages, particularly if arrests for violent crimes are weighted more heavily in computing the denominator (to reflect the disproportionate impact such arrests have on inmate populations). *Cf.* Frase, *supra* note 115, at 657 (comparing French and U.S. incarceration rates per weighted arrest). For example, if violent crime arrests are weighted (multiplied) by ten, the U.S. prison population per weighted adult arrest is only 2.28 times the Minnesota rate, and the U.S. jail population per weighted adult arrest is only 1.07 times greater than Minnesota's. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES — 1989, at 172 (U.S.G.P.O. 1990) (U.S. arrest statistics); Interview with Mr. Ray Lewis, Statistical Analysis Center, Minnesota Planning Office (May 11, 1993) (Minnesota arrest statistics).

FIGURE 13
 Number of Inmates in Minnesota Jails and Prisons
 1975-1990



Source: Minn. Legislative Auditor, SENTENCING AND CORRECTIONAL POLICIES 8 (1991) [based on Minn. Dept. of Corrections data]
 Note: County Jail data is the average daily population during that year; State Prisons data is the year-end (one-day) count.

FIGURE 14
 Prison, Jail, and Overall Incarceration
 Rates, 1978, 1981-1989



The fact that Minnesota's jail population increased so much faster than its prison population, from 1978 to 1989, might suggest that the state achieved its goal of avoiding prison overcrowding by simply substituting the use of jail terms. As shown in Figure 13, however, jail populations had started to rise even before 1978, and continued to increase fairly steadily throughout the 1980s. Moreover, the proportion of sentenced felons receiving a state prison sentence remained fairly constant at about 20%, from 1978 through 1989 (see Figure 14). Nevertheless, the percentage of felons receiving a jail sentence did increase — from 35% in 1978, to almost 59% in 1989. As a result, the total custody sentence rate (jail or prison) for felons increased from 56%, in 1978, to 81% in 1989. The latter figures suggest that overall sentencing severity was steadily increasing in Minnesota, but that Guidelines policy kept prison rates constant by *accelerating* the pre-Guidelines trend toward increased jail sentencing. At the same time, the number of persons on probation was also increasing dramatically (doubling, between 1983 and 1989¹¹⁸). As a result, the total correctional population (prison, jail, probation, and parole) as a percentage of index crime rates was the twelfth-highest in the nation in 1987,¹¹⁹ and Minnesota's custody rate for felons (jail OR prison sentence) is also higher than the national average.¹²⁰

Given the fairly constant prison sentence *rate* (about 20% of sentenced felons in all years except 1981), why did Minnesota prison *populations* increase by almost 60%, in the 1980's? As of 1989, this increase seemed to be almost entirely a function of increased case volume. The number of felony sentences imposed increased by 70%, between 1978 and 1989,¹²¹ while the average duration of prison "time served" hardly increased at all.¹²²

¹¹⁸ MINNESOTA LEGISLATIVE AUDITOR, *supra* note 7, at 8 (Figure 1.2).

¹¹⁹ *Id.* at 10.

¹²⁰ U.S. DEP'T OF JUSTICE, BULLETIN: FELONY SENTENCES IN STATE COURTS, 1988, at 2 (1990) (Table 2) (estimated national custody rate in 1988 was 69%: 44% prison plus 25% jail). In 1988, Minnesota's rate was 79% — 21% prison plus 58% jail. MINNESOTA SENTENCING GUIDELINES COMM'N, 1988 DATA SUMMARY 1, 6 (1990).

¹²¹ Seven thousand nine hundred seventy-four defendants were sentenced in 1989, THREE YEAR EVALUATION, *supra* note 2, at 20, compared to an estimated 4698 in 1978. MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 99, at 29.

¹²² The estimated average time served in prison prior to the Guidelines was

It also appears that the increased prison population was not due to increased rates of revocation of probation or supervised (post-prison) release. Prison admissions in each of the latter two categories actually constituted a lower percentage of initial prison commitments in 1989 (10% and 24%, respectively) than they did in 1978 (16% and 34%).¹²³ However, the legislative and Guidelines changes enacted in 1989¹²⁴ will substantially increase prison durations.¹²⁵ At the same time, prison rates may decline, as attorneys and judges use charge reductions and mitigated departures to shelter certain defendants from harsh prison terms.

CONCLUSION

Contrary to popular belief, the original Minnesota Sentencing Guidelines were only loosely based on a "just deserts" model, and they have become even less so over time. Moreover, some of the most important "prescriptive" changes sought to be imposed in the sentencing of certain offenders were resisted even in the first year of implementation. Sentencing under the Minnesota Guidelines has always been a multi-goal process, pursuing the purposes of rehabilitation, incapacitation, and prison population control within retributive upper (and occasionally lower) limits. Although some writers have viewed many of the changes since 1980 as avoidable mistakes which under-

25.1 months. THREE YEAR EVALUATION, *supra* note 2, at 27. For defendants sentenced in 1989, the average time served (assuming the maximum good-time allowance) was also 25.1 months (37.7 times two-thirds). MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 99, at 44.

¹²³ See Minnesota Dep't of Corrections, Adult Court Commitments (document provided by Mr. Kenneth E. Larimore, Information and Analysis Unit, Minnesota Department of Corrections) (includes both initial prison commitments and probation revocations); Minnesota Dep't of Corrections, Adults Returned Without New Sentences (document provided by Mr. Kenneth E. Larimore, Information and Analysis Unit, Minnesota Department of Corrections) (technical violations of supervised release); MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 99, at 35 (initial prison commitments).

¹²⁴ See *supra* part I.

¹²⁵ See MINNESOTA SENTENCING GUIDELINES COMM'N, SUMMARY OF 1990 SENTENCING PRACTICES FOR CONVICTED FELONS 29-30 (1992) (comparing "new law" cases sentenced in 1990 with comparable cases sentenced in 1988 and showing that 1990 prison durations were substantially longer at severity levels VIII through X).

mined basic Guidelines goals,¹²⁶ these changes can also be viewed as inevitable and even desirable accommodations between the purely retributive model favored by some members and advisors of the original Commission and the strong utilitarian traditions of judges and other system actors. Minnesota is a very treatment-oriented state, which also has very strong public and criminal justice system support for selective incapacitation goals.¹²⁷

Minnesota and its Guidelines have also not been immune from popular pressures to escalate prison rates and durations in response to short-term public hysteria. Although the use of an independent, nonpolitical sentencing commission did help the state to resist such pressures during most of the 1980s, the media-fanned "crime waves" of 1988 and 1991 eventually produced some of the same kinds of penalty increases as have often occurred in other states.¹²⁸ Despite these pressures and severity increases, however, Minnesota is still managing to avoid the serious problems of prison and jail overcrowding (and court intervention) which have become the norm in most states.¹²⁹ This achievement — which has nothing to do with the disparity—reduction theme normally associated with determinate sentencing reforms — is perhaps the Minnesota Guidelines' greatest "success story." Whether that success can be

¹²⁶ PARENT, *supra* note 2, at 161-66; Miethe & Moore, Four-Year Evaluation, *supra* note 3, at 5-6; K. Knapp, *Structured Sentencing: Building on Experience*, 72 JUDICATURE 46, 48 (1988).

¹²⁷ Recent public opinion surveys in Minnesota reveal a widespread preference for education, job training, community programs, and restitution, rather than more punishment. See KAY PRANIS & MARK UMBREIT, PUBLIC OPINION RESEARCH CHALLENGES PERCEPTION OF WIDESPREAD PUBLIC DEMAND FOR HARSHER PUNISHMENT 2 (1992). Opinion surveys in other states suggest that Americans support rehabilitative programs as much or more than punishment. Julian V. Roberts, *American Attitudes About Punishment: Myth and Reality*, 3 OVERCROWDED TIMES (No. 2) 1, 10 (1992); MINNESOTA LEGISLATIVE AUDITOR, *supra* note 7, at 80-81.

¹²⁸ See *supra*, text accompanying notes 42-54. The 1988 and 1991 "crime waves" which produced these penalty increases are described in Richard S. Frase, *Prison Population Growing Under Minnesota Guidelines*, 4 OVERCROWDED TIMES (no. 1) 1, 10-12 (1993).

¹²⁹ See U.S. GEN. ACCOUNTING OFFICE, PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYSTEMS 4-5 (1989) ("As of April 1989, 35 states and the District of Columbia faced court orders and/or consent decrees that related to prison crowding or the conditions caused by crowding."); see also Table 9 and *supra* text accompanying note 114.

maintained in the years ahead, as the severity increases of the late 1980s attain their full impact, remains to be seen.

Finally, it appears that the Guidelines have helped Minnesota to make its sentences more uniform and to avoid racial disparities in the use of prison and jail sentences. But the present study has shown that racial disparity *does* exist relative to the Guidelines Commission's own prescriptive norms: Black offenders have consistently lower rates of mitigated dispositional departure than Whites; Black and Indian defendants have generally higher rates of aggravated dispositional departure. Most of these discrepancies disappear when more variables are taken into account — but these are variables which the Guidelines themselves define as irrelevant (such as the specific offense within Guidelines cells, or criminal history score within presumptive stay or prison-commit groupings). The present study also reveals that the Guidelines have not eliminated gender, geographic, and plea-versus-trial disparities.

Many of the conclusions stated above were evident even in the early post-Guidelines years; they were not fully appreciated, however, because some of the principal measures of Guidelines compliance were defective, and critical data needed to compute proper measures was never collected. For example, mitigated dispositional departure percentages were dramatically understated (especially for female and white male offenders) because the percentages were computed on the wrong base; mitigated departure rates were further understated by the failure to include *de facto* departures achieved through charging leniency. Such departures cannot now be accurately estimated because the Commission's "real offense" measures were discontinued after 1984, and never included any estimate of the evidentiary strength ("provability") of real-offense charges.¹³⁰ In fairness, it must be pointed out that the Commission was given a massive policy-making and research mandate, and far too little time and money to carry it out.¹³¹ Nor can earlier researchers be blamed if they did not recognize problems which seem clearer in retrospect. The point is simply that future reformers and

¹³⁰ Similarly, success in reducing disparity among judges cannot be assessed because judge identification numbers are not included in most of the Commission's data sets. These data sets also contain almost no information on the defendant's pretrial detention status, which can have a major impact on defendant decisions to plead guilty, and on the imposition and duration of jail sentences. See Frase, *supra* note 115, at 660-61; Frase, *supra* note 86, at 237.

¹³¹ PARENT, *supra* note 3, at 32-33 n.5, 97 n.13, 209-10.

researchers must try to avoid these problems, and must insist that policy-making and research be fully funded and given enough time.

Minnesota's Guidelines have never been as philosophically pure or as dramatically effective as their supporters claimed. Ironically, this may be good news for reformers elsewhere. Minnesota is perhaps not so different from other states, after all — philosophically, politically, and even demographically. Thus, reformers in other states need not subscribe to a heavily retributive theory of punishment to adopt Minnesota-style Guidelines. Minnesota itself did not. Indeed, other states would do well to avoid attempts to radically shift existing sentencing purposes and practices, since this has been the least successful aspect of the Guidelines. Nor should it be assumed that Minnesota's experience with guidelines sentencing is irrelevant to states with less of a progressive political tradition, or with more racial diversity. Recent events in Minnesota suggest that political pressures on sentencing policy are much the same everywhere. It is true that Minnesota still has fewer racial minorities than many other states, but its racial diversity has increased significantly in recent years — the proportion of Black defendants among Minnesota felony convictions went from 11% in 1981 to 20% in 1990, and the total non-White proportion went from 18% to 29%.¹³²

Thus, when viewed in proper perspective, the Minnesota Guidelines remain an impressive and achievable model. By abolishing parole and instituting "real-time" sentencing, the Guidelines have promoted greater openness and honesty of punishment. They also appear to have been modestly successful in achieving and maintaining greater sentencing uniformity, despite major increases in the ethnic diversity of defendants. They have been very successful in promoting parsimonious use of prison sentences, and in preventing prison and jail overcrowding — notwithstanding a 70% increase in the state's felony caseload during the 1980s. The Minnesota Guidelines control discretion, but still give judges, prosecutors and attorneys substantial flexibility to pursue a variety of sentencing purposes and to tailor sentences to individual cases. They also remain fairly simple to apply (although not nearly as simple as they once were). The Legislature has taken back some of its delegat-

¹³² MINNESOTA SENTENCING GUIDELINES COMM'N, *supra* note 125, at 7 (Figure 3).

ed power, but the Guidelines Commission still retains primary control over the setting of statewide sentencing policy.

Indeed, it appears that all of the declared or apparent goals of the Minnesota Guidelines have been substantially achieved and maintained over time, with one exception: the Commission's efforts to effect certain prescriptive changes in the use of imprisonment were relatively unsuccessful even in the early years, and became even less successful over time. This finding contradicts the claims of some writers, who attributed the early success of the Minnesota Guidelines to their prescriptive (norm-changing) approach.¹³³ Instead, Minnesota's experience suggests that descriptive (norm-reinforcing) guidelines, although less ideologically pure, are more likely to succeed because they will be more readily accepted by system actors. Such acceptance is critically important; without it, judges, prosecutors, and correctional officials will use their remaining, unregulated discretionary powers (in charging, plea bargaining, setting of probation and supervised release conditions, and revocation of probation or release) to evade unpopular Guidelines requirements. Such covert evasion invites even greater disparity, and undercuts the goal of "truth in sentencing" — critical decisions about the nature and severity of the sentence should be made openly and honestly.¹³⁴

Minnesota's experience shows that presumptive sentencing guidelines can reinforce existing norms and encourage system actors to follow them more consistently. Such guidelines can even effect modest changes in existing norms. But any guidelines — whether voluntary, presumptive, or mandatory — are unlikely to permanently alter state and local traditions and the strongly-held beliefs of the officials who control sentencing and releasing decisions.¹³⁵

¹³³ See, e.g., PARENT, *supra* note 3, at 34-39 (just deserts perspective lent greater coherence of purpose to Guidelines drafting and implementation); A. VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 63 (1987) (expressing approval of the Minnesota Commission's decision to develop its own policy for sentencing).

¹³⁴ See *supra* text accompanying note 7; Frase, *supra* note 35, at 332.

¹³⁵ Cf. Tonry, *supra* note 71, at 330 (discussing research on the persistence of pre-existing norms and traditions, despite reform efforts).

