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Research in Action

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Highlights

The impact of sentencing guidelines has been generally favorable. By 1996 such sentencing guidelines had been implemented by nine States and the Federal Government and were under development in eight other States.

Sentencing guidelines are of two types: voluntary and presumptive. As the term suggests, voluntary guidelines (still in use in four States), a precursor of presumptive guidelines, have no enforcement mechanism. They are developed by committees of judges, while presumptive guidelines are developed by sentencing commissions created by State legislatures. Presumptive guidelines are prescriptive rather than descriptive and are also enforceable, although they have provisions to allow judges to depart from them. Sentencing commissions also collect and analyze data useful in policymaking.

Evaluations of voluntary guidelines indicate they did not make sentencing more uniform. By contrast, presumptive guidelines were found to be effective in a number of ways:

- Sentencing uniformity and proportionality increased.

- Racial, ethnic, and gender differences in sentencing generally declined, although one assessment found that in the use of noncon-

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Key Legislative Issues in Criminal Justice: The Impact of Sentencing Guidelines

by Dale Parent, Terence Dunworth, Douglas McDonald, and William Rhodes

The use of sentencing guidelines has been growing in the United States and is generating a debate with respect to their effects on the criminal justice system in jurisdictions where they have been enacted. By 1996 nine States and the Federal Government had presumptive guidelines and eight States were creating them, while four States continued to use voluntary sentencing guidelines. This Research in Action discusses the predominance of presumptive guidelines over voluntary guidelines, the goals of presumptive guidelines, and their impact on sentencing practices and criminal justice operations.

Dominance of presumptive guidelines

Voluntary sentencing guidelines were a precursor to today's presumptive guidelines. Of the four States that still have voluntary sentencing guidelines, only two implemented them after 1980, the year that the first State, Minnesota, initiated use of presumptive guidelines.

Voluntary guidelines sought to reduce sentencing disparity by making future sentencing decisions adhere more closely to past practice; they described past sentencing practices and used them as guidance. Usually, voluntary guidelines were created by committees of judges acting under the administrative authority of the courts. As the term suggests, voluntary sentencing guidelines have no enforcement mechanism. Rather, judges are encouraged to consider and apply the guidelines when sentencing offenders.

Presumptive sentencing guidelines differ from voluntary guidelines in important ways:

- They are developed by legislatively created sentencing commissions, whose members represent judges, prosecutors, defenders, law enforcement officials, correctional officials, the public, and (in some States) the legislature.

- Unlike voluntary guidelines, presumptive guidelines do not claim to *describe* past sentencing practices; rather, they *prescribe* policy that the officials ought to follow in the future.

- Presumptive guidelines contain enforcement mechanisms. If judges want to depart from the sentences recommended in the

Highlights

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finement options differences persisted. Although Federal sentencing was free of bias, congressionally imposed mandatory minimums for crack cocaine sentences disproportionately affected African Americans.

- State goals of reducing sentences for property offenders and increasing them for violent offenders were met, as was the Federal goal of increasing use of imprisonment generally and decreasing use of probation.

- Judges have adhered to presumptive guidelines at high rates.

The effects of sentencing guidelines on criminal justice operations have been generally positive:

- In contrast to what some observers expected from a presumed loss of prosecutors' flexibility, plea bargaining did not decline.

- The increase in court workload was modest, although reviews have added to the workload of appellate courts. At the Federal level, differences varied by district, although the time from filing to disposition increased slightly and the number of sentencing appeals rose substantially.

- By controlling decisions about the use and duration of imprisonment, guidelines give States a tool to control subsequent prison population levels, at least in the short term.

- The data used to develop and monitor guidelines enable sentencing commissions to make accurate projections of the effects and costs of proposed sentencing policies.

guidelines for a particular offender, they must hold a hearing to ascertain whether the facts warrant a departure, as well as issue a written finding stating why the departure is appropriate. In most States departures can be appealed (providing a foundation for the development of sentencing case law).

- Although legislatures typically play no role in voluntary guidelines, presumptive guidelines do not go into effect without the legislature's consent.

Goals of presumptive sentencing guidelines

The main goals of early presumptive sentencing guidelines systems were to inflict just punishment on convicted offenders. For punishment to be just, according to this view, it has to be proportional, uniform, and neutral. To be proportional, sanctions should vary with the seriousness of offenders' criminal conduct and their culpability—serious crimes should be punished more severely than minor crimes, and repeat offenders should be punished more severely than first-time offenders. To be uniform, punishment for similar offenders must be similar, and variations should be allowed only for demonstrably relevant reasons. To be neutral, sanctions should not vary by such factors as race, gender, and ethnicity, and preexisting differences in sentencing outcomes based on such factors should be diminished.

Role of the commissions. The first commissions were created to develop guidelines to meet these goals. Early sentencing commissions were also directed to make their guidelines work within the limits of available correctional resources. Some later sentencing commissions sought to make sentences tougher as well as more uniform.

The sentencing commissions that develop the guidelines maintain sentencing policy while ensuring that the legislatures retain ultimate control. Commissions routinely collect and analyze information on sentencing practices; the data they gather can be used to enhance policy decisionmaking. Commission members and staff also develop expertise that can help make policymaking more empirically based. For example, sentencing commissions can develop highly accurate forecasts of prison populations, allowing them to make precise estimates of the costs of implementing or amending the guidelines.

Impact of guidelines on sentencing practices

Evaluations of early voluntary sentencing guidelines found that they did not make sentencing more uniform.[1] In addition, some scholars challenged the alleged descriptive basis of voluntary guidelines,[2] noting that researchers were able to explain only a small proportion of the variation in sentencing decisions.[3]

Most evaluations of presumptive guidelines have focused on earlier implementations. Where they have been evaluated, these guidelines have had a mixed, but generally positive, record of:

- Achieving adherence to the guidelines by judges and other justice system officials.

- Increasing sentencing uniformity and proportionality.

- Improving sentencing neutrality.

- Altering sentencing patterns in intended ways.

Effects on the operations of the criminal justice system include changes in prosecutor and plea negotiation practices, court workloads, and prison populations.

Achieving conformance to presumptive guidelines. Studies show that judges, even those who publicly and stridently criticize the guidelines, adhere to them at a high rate.[4] Rates of conformity appear to be higher in systems that establish narrow grounds for departing from the guidelines and in States where case law strongly reinforces guideline policies.[5] Conformance also tends to be higher for guidelines that allow a wide range of presumptive practice; that is, place fewer restrictions on a practitioner's discretion.[6] Of course, precisely because they encompass a wider range of practice, these less restrictive guidelines are also less effective at increasing uniformity and proportionality.

Increasing sentencing uniformity and proportionality. Virtually all studies of presumptive guidelines report sentencing uniformity and proportionality. Two caveats about before-and-after evaluations are necessary, however. First, studies that compare sentencing patterns before and after imposition of guidelines for offenders who fall into particular guideline categories are suspect. This is because officials are likely to change their charging or bargaining practices over time, thereby changing the characteristics of offenders who fall into those categories. Second, general sentencing practices change over time (in recent years, usually becoming harsher) for reasons unrelated to the guidelines. Hence, before-and-after sentencing comparisons become less relevant as time passes.

Despite these caveats, there is strong evidence that presumptive sentencing guidelines increase uniformity and proportionality, at least in the years just following implementation.[7] Three evaluations of Minnesota's guidelines

About the Key Legislative Issues Series

In 1995 the National Institute of Justice (NIJ) contracted with Abt Associates Inc. to interview legislators and policymakers throughout the country to identify important criminal justice topics being considered by State legislatures and to determine the information they need to help them make more informed decisions. Altogether, 89 legislators, legislative staff members, and other criminal justice policymakers (e.g., sentencing commission members) were interviewed in 23 States. The interviews were conducted during the opening weeks of the 1995 State legislative sessions.

The sites and the respondents were chosen to reflect the diversity of the States. Some of the factors taken into consideration were geographic size and region, urban/rural mix, and existence (or nonexistence) of a sentencing commission in the State government. The respondents selected included the chairpersons of relevant legislative committees (such as the criminal justice, judiciary, and corrections committees), a representative from the governor's staff, and an official with the executive branch (such as the commissioner of corrections or the sentencing commission chairperson). Other people whom they suggested were also interviewed, and, as might be expected, legislators frequently referred the interviewers to their staff.

These policymakers identified four topics as important items on their legislative agendas:

- Sentencing commissions.
- Intermediate sanctions.
- Mandatory sentencing, including three-strikes laws.
- Transferring serious juvenile offenders to adult courts.

State policymakers expressed a strong desire for more timely and useful information about research findings on important criminal justice policy issues they were addressing. However, they voiced reservations about gleaning useful information from technical research reports.

Reviews and summaries of the research literature on the four key topics identified present the information in a way that is more accessible to policymakers. Of the four reports, this one summarizes what is known about the impact of presumptive sentencing guidelines on sentencing practices and on the operations of the criminal justice system.

Titles in the series

The Impact of Sentencing Guidelines (NCJ 161837)

Intermediate Sanctions (NCJ 161838)

Mandatory Sentencing (NCJ 161839)

Transferring Serious Juvenile Offenders to Adult Courts (NCJ 161840)

These summary reports have been published in NIJ's Research in Action series. Copies can be obtained from the National Criminal Justice Reference Service (NCJRS), Box 6000, Rockville, MD 20849–6000; telephone 800–851–3420 or e-mail askncjrs@ncjrs.org. The reports can also be viewed and downloaded from the NCJRS World Wide Web site, the Justice Information Center (http://www.ncjrs.org), or through the NCJRS Bulletin Board System (direct dial through computer modem: 301–738–8895; telnet to ncjrsbbs.ncjrs.org or gopher to ncjrs.org:71).

support this conclusion.[8] No independent evaluations of other early sentencing commissions were conducted, but studies by commissions in Oregon, Pennsylvania, Washington, and Delaware all found increases in uniformity.[9]

At the Federal level, the U.S. Sentencing Commission reported increased uniformity during the first 4 years of guideline operation.[10] However, three other studies offered more cautious interpretations, concluding that the question is open because the Commission's analysis was based on limited data.[11]

Improving sentencing neutrality. In Minnesota, the first State to implement presumptive guidelines, racial, ethnic, and gender differences in sentencing declined, even though minority defendants were more likely to be imprisoned via departures from the guidelines, and men were more likely to receive longer sentences than similarly situated women.[12] It is important to note that in jail sentences, which were *not* regulated by the guidelines, racial and ethnic differences did not change before and after the guidelines went into effect.[13] For women, movement toward neutrality meant movement toward the male norms; that is, toward a higher probability of confinement and longer confinement terms. A study of the Washington sentencing commission revealed that racial, ethnic, and gender differences in sentencing declined, but substantial differences by race, ethnicity, and gender persisted in the use of nonconfinement options.[14]

An analysis of U.S. Sentencing Commission guidelines found no compelling evidence of racial or ethnic bias in sentencing at the Federal level. Independent of these guidelines, however, congressionally imposed mandatory minimum sentences for crack cocaine have resulted in substantially longer sentences for African Americans. This is largely because those convicted of crack trafficking in the Federal courts are disproportionately African American, while those convicted of trafficking in powdered cocaine are mostly white or Hispanic.[15]

Altering sentencing patterns. Most presumptive guidelines sought to alter preexisting sentencing patterns and, hence, were prescriptive. Commissions in Minnesota, Oregon, and Washington intended to reduce imprisonment sentences for property offenders and increase them for violent offenders. In all three States, those outcomes were achieved.[16] At the Federal level, the U.S. Sentencing Commission sought to increase use of imprisonment and decrease the use of probation—and succeeded in meeting these goals.[17]

One researcher has observed that modest changes in past practice tend to revert over time, as criminal justice practitioners modify their discretionary choices in response to the guidelines, whereas more radical changes tend to persist.[18] Minnesota's experience also suggests that when case law gives a green light to judicial departures from the guidelines, reversions to previous practice will be more pronounced.[19] Studies also show that as commissions amend guidelines (particularly to make sentences more severe), the severity of sentences given to offenders in the affected categories increases rapidly.[20]

Impact of guidelines on criminal justice operations

Effects on plea negotiations. Some critics expected presumptive guidelines to reduce rates of plea bargaining because they believed prosecutors would have less flexibility to offer inducements in return for guilty pleas. However, evaluations of State sentencing guidelines[21] have found that:

- In general, the total proportion of cases concluded by guilty pleas remained fairly constant.
- The proportion of guilty pleas resulting from plea bargains remained fairly constant.
- Guidelines for prison and nonprison sentences had different effects: offenders for whom prison was recommended were somewhat less likely to plead guilty, while those for whom nonprison sentences were recommended were more likely to plead guilty.
- Charge bargaining increased and became more targeted (that is, it achieved a desired result, such as dropping an offender to a lower seriousness level of the guidelines), while sentence bargaining declined (although it continued at a significant level in most States).

To date, no empirical studies of plea bargaining under the Federal sentencing guidelines have been published.

Effects on court workload. Information on guidelines' impact on court workloads are limited to analyses of Minnesota and the U.S. sentencing guidelines. In general, increases in court workload were modest. In Minnesota the proportion of cases going to trial stayed about the same, and, although they increased for some types of cases, they were offset by reductions for others.[22] Guideline requirements for such tasks as holding sentencing hearings, completing sentencing worksheets, and collecting monitoring

data cause little delay or disruption. The lengths of time between charging and trial and between conviction and sentencing stayed about the same. However, review of sentences has added to the workload of the Supreme Court and triggered establishment of an intermediate court of appeals, a long-advocated reform. In general, appellate reviews were conducted expeditiously, but the additional cases may have delayed the disposition of other types of appellate cases.[23]

In the Federal system, the amount of time from filing to disposition has increased slightly. Beyond that, the impact seems to have varied considerably from district to district. Over time there has been a substantial growth in sentencing appeals.[24]

Predictions of effects on prison populations. The impact of guidelines on prison populations has tended to be predictable and relatively rapid. As expected, guidelines have made sentencing more certain and helped ensure that sentencing decisions are based on objective criteria. Therefore, simulation models that predict prison population levels with great accuracy can be developed. Such models were used in Minnesota, Oregon, and Washington to avert crowding in the short term and limit future maximum prison population levels (by modifying policy during initial development of the guidelines). The models were later used to assess the effects of proposed changes in the guidelines and in sentencing legislation on the prison population.

The U.S. Sentencing Commission accurately predicted that in the Federal system, prison populations would (by design) increase under the guidelines because of the independent effects of the guidelines and concurrently enacted mandatory minimum sentences. Indeed, the Commission's 1987 simulation model predicted the 1991 Federal prison population with almost perfect precision.[25] And the Commission used its simulation capacity to recommend a major Federal prison construction program.

Evaluations of State guidelines conducted to date reveal that dispositional policies (rules specifying which offenders should and should not be imprisoned) generally have had a greater impact on prison population levels than policies on amount of time to be served. The reason is that sentencing commissions have generally chosen to change the categories of offenders who are to be imprisoned instead of changing the current average duration of imprisonment. In the Federal system, guidelines on duration of confinement and congressionally mandated sentences for drug crimes have had a greater effect than have dispositional policies. Imprisonment rates have increased under the U.S. sentencing guidelines.[26] Across all guideline systems, effects on prison population resulting from changes in sentence duration take longer to emerge.

The potential of guidelines

State policymakers who were interviewed were deeply concerned about developing effective and affordable sentencing policies. While many felt compelled to respond to constituents' fear of crime and demands for tougher sanctions, they also recognized the need to limit spiraling correctional costs. In a time when voters want to cut costs of government, spending more on prisons means spending less on other important and worthwhile purposes.

Given these concerns, State legislators' interest in sentencing guidelines is understandable. Properly developed, presumptive sentencing guidelines can link the severity of punishment more rationally to the seriousness of crimes. They can modify the use of punishment so that available prison capacity is used for more serious and habitual offenders, and they can ensure that sanctions are applied more uniformly and more equitably.

Notes

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2. Because the early voluntary guidelines purported to analyze data on past sentencing to identify typical practices and to capture these practices as guideline policies, the argument went that if judges followed the guidelines, they would in effect be following their past practice more uniformly. Critics, however, noted that researchers typically could explain only about 35 percent of the sentencing variation observed to have occurred under the guidelines. With two-thirds of the variation unexplained by the guidelines, they contended it was misleading to claim that voluntary guidelines codified past practice.

3. Rich et al., *Sentencing Guidelines.*

4. Tonry, M., *Sentencing Matters,* Oxford, England: Oxford University Press, 1996.

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12. Knapp, *The Impact of the Minnesota Sentencing Guidelines;* Parent, D.G., *Structuring Criminal Sentences*, Stoneham, MA: Butterworth Legal Publishers, 1988; and Frase, "Implementing Commission-based Sentencing Guidelines."

13. Knapp, *The Impact of the Minnesota Sentencing Guidelines.*

14. Washington State Sentencing Guidelines Commission, *A Decade of Sentencing Reform: Washington and Its Guidelines, 1981–1991*, Olympia,WA: Washington State Sentencing Guidelines Commission, 1992.

15. McDonald and Carlson, *Sentencing in the Courts: Does Race Matter?*

16. Knapp, *The Impact of the Minnesota Sentencing Guidelines;* Parent, *Structuring Criminal Sentences;* Washington State Sentencing Guidelines Commission, *Preliminary Evaluation of Washington State's Sentencing Reform Act*, Olympia, WA: Washington State Sentencing Guidelines Commission, 1986; Ashford, K., and C. Mosbeck, *First Year Report on Implementation of Sentencing Guidelines: November 1989 to January 1991*, Portland, OR: Oregon Criminal Justice Council, 1991.

17. Tonry, M., "The Failure of the U.S. Sentencing Commission's Guidelines," *Crime and Delinquency*, 39 (April 1993).

18. Ibid.

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21. Tonry, *Sentencing Reform Impacts*; Tonry, *Sentencing Matters.*

22. Parent, *Structuring Criminal Sentences.*

23. Ibid.

24. Dunworth, T., and C.D. Weisselberg, "Felony Cases and the Federal Courts: The Guidelines Experience," *Southern California Law Review*, 66 (November 1992):99–153.

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26. McDonald and Carlson, *Sentencing in the Courts: Does Race Matter?*

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