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A Diversionary Approach for the 1980's.—Various changes in social thought and policy of the past several years carry important implications for the treatment of young offenders. These changes include a marked decrease in public willingness to spend tax money for social programs, a shift in focus from offender-rights to victim-rights, and an increase in the desire for harsher treatment of serious offenders. The general social ethos reflected in those positions has prompted a reassessment and new direction for the delivery of juvenile diversion services in Orange County, California. Authors Arnold Binder, Michael Schumacher, Gwen Kurz, and Linda Moulson discuss a new Juvenile Diversion/Noncustody Intake Model, which has successfully combined the collaborative efforts of law enforcement, probation, and community-based organizations in providing the least costly and most immediate level of intervention with juvenile offenders necessary to protect the public welfare and to alter delinquent behavioral patterns.

Home as Prison: The Use of House Arrest.—Prison overcrowding has been a major crisis in the correctional field for at least the last few years. Alternatives to incarceration—beyond the usual probation, fines, and suspended sentences—have been tried or proposed. Some—such as restitution, community service, intensive probation supervision—are being implemented; others have simply been proposed. In this article, authors Ronald P. Corbett, Jr. and Ellsworth A.L. Fersch advocate house arrest as a solution to prison overcrowding and as a suitable punishment for many nonviolent, middle-range offenders. The authors contend that with careful and random monitoring of offenders by special probation officers, house arrest can be both a humane and cost-effective punishment for the offender and a protection to the public.

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explains that exclusionary rules developed to keep illegally obtained evidence from being used in court and that both arrests and searches can occur without a warrant in specific circumstances.

Assessing Correctional Officers:—Authors Cindy Wahler and Paul Gendreau review the research on correctional officer selection practices. Traditionally, selection of correctional officers was based upon physical requirements, with height and size being a primary consideration. A number of studies have

employed the use of personality tests to aid in the identification of the qualities of "good" correctional officers. These assessment tools, however, have provided qualities that are global and not unique to the role of a correctional officer. Noting a recent trend towards a behavioral analysis within the field personnel selection, the authors argue that a similar type of analysis may provide a more fruitful avenue for assessment of correctional officers.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought but their publication is not to be taken as an endorsement by the editors or the Federal probation office of the views set forth. The editors may or may not agree with the articles appearing in the magazine, but believe them in any case to be deserving of consideration.

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Florida's Sentencing Guidelines: Progression or Regression?

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SENTENCING GUIDELINES went into effect in October 1983 in Florida, following the national trend toward determinate sentencing.¹ However, unlike previous discussions of Florida's guidelines which have been primarily descriptive,² this article is intended to provide a critical analysis of the sentencing guidelines. Given the tremendous impact that the guidelines may have on convicted offenders and correctional resources, the creation of sentencing guidelines represents one of the most noteworthy recent changes in Florida criminal law.

An early impetus for the development of sentencing guidelines was the Chief Justice's 1977 appointment of a committee "to examine the extent and causes of sentence disparity and to explore the variety of sentence alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation."³ (Sentence disparity refers to unequal sentences imposed on "similarly situated offenders"—offenders convicted of comparable crimes who have equivalent backgrounds such as criminal histories.)⁴ Based upon an analysis of sentencing practices throughout the state as well as a review of existing sentencing proposals, the committee approved

in principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consistency and fairness in the sentencing process throughout the state, the Committee recommend(ed) the

development and implementation of structured sentencing guidelines in combination with a sentence review panel that would operate within the sentence parameters of the Legislature.⁵

Thus, while the need for some judicial discretion was recognized, concomitantly the primary reason for developing guidelines was the reduction of sentence disparity, similar to positions taken elsewhere.⁶

There is little indication that there were other forces underlying the development of the guidelines, although other influences have been noted in more general discussions of determinate sentencing.⁷ Likewise, court decisions played an insignificant role, for, except in the most extreme cases, the appellate courts have been reluctant to intervene in sentencing matters.⁸

The recommendations of the sentencing committee culminated in the state court administrator's office obtaining a Federal grant to study "the feasibility of developing and implementing sentencing guidelines in a multijurisdictional setting" and to examine the impact of sentencing guidelines as a means of increasing sentencing consistency between several jurisdictions in a state.⁹ (Although the development of the experimental sentencing guidelines has been discussed extensively previously,¹⁰ it is necessary to briefly outline their development here because they provided the basis for the present guidelines.) Four circuits were selected for the development of the experimental guidelines; an advisory board consisting of the chief judge or designee from the four circuits, as well as eight ex-officio members, were responsible for overseeing the development and implementation of the experimental sentencing guidelines.

As noted, the primary goal of the experimental guidelines was to curtail case-by-case decisions by providing judges guidance for meting out sentences. To attain this objective, the sentencing study was designed to determine what factors were most predictive of past sentencing patterns. In contrast, the development of other guidelines has sometimes been nonpredictive or involved the prediction of recidivism.¹² Although it has been suggested that Florida's experimental sentencing guidelines met

¹ D. Griswold and M. Wiatrowski, "The Emergence of Determinate Sentencing," *Federal Probation*, 1983, 46, p. 28. (hereinafter "Emergence"); A. von Hirsch & K. Hanrahan, "Determinate Penalty Systems in America: An Overview," *Crime & Delinquency*, 1981, 27, p. 289. (hereinafter "Determinate").

² A. Sundberg, *A Report to The Legislature: Statewide Sentencing Guidelines Implementation and Review*, (1982) (hereinafter "Statewide Sentencing"); A. Sundberg, K. Plante & D. Braziel, "Florida's Initial Experience with Sentencing Guidelines," *Florida State University Law Review*, 1983, II.

³ A. Sundberg, K. Plante & K. Palmer, "A Proposal for Sentence Reform in Florida," *Florida's State University Law Review*, 1980, I, pp. 1-2.

⁴ "Emergence."

⁵ "Statewide Sentencing," p. 4.

⁶ "Emergence," "Determinate."

⁷ *Id.*

⁸ S. Schulhofer, "Due Process of Sentencing," *University of Pennsylvania Law Review*, 1980, 128, p. 733; D. Crump, "Determinate Sentencing: The Promises and Perils of Sentence Guidelines," *Kent Law Journal*, 1979, 68, p. 3.

⁹ "Statewide Sentencing," p. 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² "Emergence," "Determinate."

with some success,¹³ there is ample reason for skepticism about this assertion.¹⁴

The Development of the Guidelines

The statewide guidelines which were completed in July 1983 were developed on a similar basis as the experimental ones by a sentencing commission consisting of 15 members. Since they are based on past sentencing decisions in the state, they are reflective of factors influencing past sentencing patterns. Rather than grouping offenses according to their seriousness, nine categories were created which are based upon the similarity of offenses in each category. The offenses include:

- Category 1: Murder and manslaughter¹⁵
- Category 2: Sexual offenses¹⁶
- Category 3: Robbery¹⁷
- Category 4: Violent personal crimes¹⁸
- Category 5: Burglary¹⁹
- Category 6: Thefts, forgery, and fraud²⁰
- Category 7: Drugs²¹
- Category 8: Weapons²²
- Category 9: All other felony offenses.

There was no underlying rationale—rehabilitation, deterrence (specific or general), incapacitation, or retribution (just deserts)²³—for developing the guidelines. The consequences of sentencing for future criminal behavior, for example, were left unexamined. Factors which judges have weighted in the past do not necessarily offer the most just basis for developing sentencing guidelines, even if sentences are less disparate than in the past, a point which will be illuminated later.

Through statistical analysis as well as the recommendations of the sentencing commission, the number of factors was eventually reduced to five (see Figure 1 for the weightings and penalties for category 6 offenses). Although the five factors—primary conviction offense, additional conviction offenses, prior convictions, legal status at time of offense, and victim injury—are considered for all offense categories, their assigned weights vary according to the offense category.

Like sentencing guidelines elsewhere,²⁴ judges are permitted to deviate from the standard range of

FIGURE 1-CATEGORY 6: THEFTS, FORGERY, FRAUD

I. Primary offense at conviction

		Number of Counts			
		1	2	3	4+
Degree	1st	70	84	91	98
	2nd	35	42	46	49
	3rd	13	16	17	18

II. Additional offenses at conviction

		Number of Counts			
		1	2	3	4+
Degree	1st	14	17	18	19
	2nd	7	8	9	10
	3rd	3	4	5	6
	MM	1	2	3	4

III. A. Prior Record

		Number of prior convictions			
		1	2	3	4+
Degree	Life	50	110	180	270
	1st	30	66	96	162
	2nd	15	33	48	81
	3rd	5	11	18	27
	MM	1	2	4	6

B. Prior conviction for Category 6 offenses

Number prior convictions _____ x 5 = _____

IV. Legal status at time of offense

No restrictions	0
Pretrial diversion program	3
Legal constraint	6

V. Victim Injury

None	0
Slight	3
Moderate	6
Death or severe	9

SENTENCES

Points	Recommended Range
13 - 36	Probation - 12 months
37 - 56	18 months (12 - 30)
57 - 74	3 years (30 - 3½)
75 - 90	4 (3½ - 4½)
91 - 104	5 (4½ - 5½)
105 - 122	6 (5½ - 7)
123 - 146	8 (7 - 9)
147 - 180	10 (9 - 12)
181 - 240	15 (12 - 17)
241 - 300	20 (17 - 22)
301 - 360	25 (22 - 27)
361+	30 (27 - 40)

¹³ "Statewide Sentencing," *Op. cit. supra*, note 3.

¹⁴ D. Griswold, "A Critical Comparison of Florida's Sentencing and Parole Guidelines," presented at the American Society of Criminology, Toronto, Canada, 1982.

¹⁵ Florida Statute 782 (except subsection 782.041(1)(a) and subsection 860.01(2)).

¹⁶ Florida Statute 794, 800, and section 843.01.

¹⁷ Florida Statute section 812.13.

¹⁸ Florida Statute 784, 836, and section 843.01.

¹⁹ Florida Statute 810 and subsection 806.13(3).

²⁰ Florida Statute 322, 409, 443, 509, 812 (except section 812.13), 817, 831, and 832.

²¹ Florida Statute 893.

²² Florida Statute 790.

²³ "Emergence."

²⁴ *Id.*; "Determinate."

sentences if there are aggravating or mitigating circumstances, although these circumstances as well as the amount of deviation (as long as statutory limits are not exceeded) are unspecified. These reasons must be specified in writing. According to the guidelines:²⁵

Departures from the guideline sentences: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

However, even though there are no limits placed on the amount of deviation from the standard range of sentences, either the state attorney or defense attorney may appeal such cases.

Criticisms of the Guidelines

The previous discussion represents only a cursory examination of the development of the guidelines, but other details will be illuminated in the criticisms. The analysis will be largely limited to the general method of developing the guidelines, sentencing factors and their weightings, and potential implementation problems. Principally, we are interested in examining alternative strategies which could lead to more just sentencing. (However, it should be noted that Florida has essentially followed a prescription for developing guidelines outlined by the Federal government.²⁶)

General Methodology

A prominent issue is whether past sentencing patterns provide an adequate basis for developing sentencing guidelines. This was the primary basis for developing the guidelines, although the sentencing commission could make whatever modifications it deemed necessary. Such an approach has the effect of maintaining the status quo, even though the guidelines may be neither fair nor just. An advantage might be that judges would be more willing to adhere to the guidelines than if another

methodology had been adopted, since the guidelines are reflective of past sentencing patterns. However, because it is likely that the factors weighted previously vary from judge to judge,²⁷ there is no assurance of this outcome.

Rationale

Obviously other strategies for developing guidelines could have been used.²⁸ For one, an attempt could have been made to predict the future criminal behavior of sentenced offenders, the method used to develop the Florida parole guidelines.²⁹ Alternatively, a "just deserts" model could have been used in which the consequences of sentences for the future criminal behavior of offenders is ignored.³⁰ This points to a basic problem with the proposed guidelines—the lack of an underlying rationale; to the extent that there is a rational (or rationales), it is probably simply that reflected in past sentencing decisions.³¹ Nevertheless, several principles are expressed in the guidelines.³²

1. Sentencing should be neutral with respect to race, gender, and social and economic status.
2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.
3. The penalty imposed should be commensurate with the convicted offense and the circumstances surrounding the offense.
4. The severity of the sanction should increase with the length and nature of the offender's criminal history.
5. The sentence imposed by the sentencing judge should reflect the amount of time to be served, shortened only by the application of gain time.
6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.
7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

Clearly, no rationale is made explicit, although the principles do follow the national trend away from rehabilitation and the return to classical conceptions of punishment.³³

Nevertheless, it is possible to determine what rationale is represented by the guidelines. At first glance, the guidelines seemingly follow a modified just deserts perspective because all of the factors are intended to measure either harm or culpability.³⁴ However, if the guidelines are scrutinized it becomes apparent that they are not congruent with just deserts. (see Figure 1 for the weightings and

²⁵ Rule 3.701. "Sentencing Guidelines," p. 4.

²⁶ *Law Enforcement Assistance Administration, Sentencing Guidelines: Structuring Judicial Discretion*, 1978.

²⁷ "Emergence," "Determinate."

²⁸ *Id.*

²⁹ M. Lyons, G. Steele, and R. Digiacomo, *Objective Parole Guidelines for the Florida Probation and Parole Commission*, 1978.

³⁰ A. von Hirsch, *Doing Justice*, 1976 (hereinafter "Doing Justice").

³¹ K. Clancy, J. Bartolomeo, D. Richardson, and C. Wellford, "Sentence Decision-making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity," *Journal of Criminal Law and Criminology*, 1981, 72, p. 524.

³² *Op. cit. supra*, note 25 at 1.

³³ "Emergence."

³⁴ "Doing Justice."

sentences for Category 6 offenses which are probably the most common ones.) First, there is the option of sentences of up to 12 months in jail for offenders falling in the first cell for each offense category; this would include primarily 2nd degree and 3rd degree felons without extensive criminal histories, as well as those who are under no legal restrictions and have not injured their victims. Under just deserts, incarceration is reserved only for the most serious offenses involving the threat of or actual bodily harm; therefore, a lengthy jail sentence for minor offenses is deemed excessively harsh and undeserved.³⁵

More importantly, just deserts precludes a more serious offender from receiving a less severe sanction than a less serious one.³⁶ However, minor offenders can receive lengthier sentences than more serious ones in all offense categories because of the enhancement for criminal history under Florida's guidelines. On this basis, it can be argued that Florida's guidelines are most consistent with incapacitation which calls for isolating criminals from other members of society until their risk of future criminal behavior is diminished.³⁷ Those offenders with exceedingly lengthy criminal records would also receive increasingly harsh sentences under an incapacitation approach. Research on incapacitation, however, has indicated that it is difficult to predict future criminal behavior³⁸ and that the effects of incapacitation on the crime rate may be limited.³⁹ According to a just deserts approach an offender with a prior criminal record would receive no more punishment than in a system where priors were ignored.

The role of prior record I am proposing is one that reduces the severities of punishment. The first offender is to get less punishment than he would were the presence or absence of a criminal record disregarded in assessing deserts and the previously convicted offender is not to get any more punishment than he would in a hypothetical desert-based system that ignored prior criminality.⁴⁰

³⁵ *Id.*

³⁶ *Id.*

³⁷ E. Van den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question*, 1975; J. Wilson, *Thinking About Crime*, 1975.

³⁸ J. Monahan, "The Prediction of Violent Criminal Behavior: A Methodological Critique and prospectus," in A. Blumstein, J. Cohen, and D. Nagin (eds.), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, 1978 (hereinafter "Deterrence and Incapacitation").

³⁹ "Deterrence and Incapacitation."

⁴⁰ A. von Hirsch, "Desert and Previous Convictions in Sentencing," *Minnesota Law Review*, 1981, 65, p. 613.

⁴¹ D. Griswold, "A Comparison of Recidivism Measures," *Journal of Criminal Justice*, 1978, 6, p. 247.

⁴² The measurement of victim injury poses lesser problems but should be mentioned. Victim injury is categorized as follows: none, slight, moderate, and severe or death. However, since no definitions are provided for these categories, there will be some variation in interpretations, a further source of sentencing disparity.

Uniformity of Application

Issues in uniformity of application present major problems for the guidelines. By uniformity of application we are referring to the extent to which factors can be consistently and reliably measured for offenders, a point which is generally ignored in discussions of sentencing guidelines. Since a principal goal of sentencing guidelines is to reduce sentencing disparity, it seems critical that the individual factors be uniformly measured.

Prior juvenile and adult convictions probably present the greatest problems. Although Florida is presently centralizing juvenile records, juveniles convicted outside the state are problematic because access to their records is necessary. The measurement of juvenile priors is exacerbated in Florida because of its dramatic growth. Currently, Florida is growing at a rate of nearly 5,000 people a week and most of this increase is the result of individuals taking up residence in the state. Inclusion of juvenile criminal history has the effect of adversely penalizing offenders who have resided in the state for a lengthy period of time as compared to those who have acquired juvenile criminal histories elsewhere. This problem is not readily resolvable because to measure juvenile priors consistently would require obtaining juvenile records from every jurisdiction where the offender resided as a youth.

Compared to prior juvenile convictions, adult ones can probably be measured more reliably because "rap sheets" are available from the F.B.I., and the Florida Department of Law Enforcement (F.D.L.E.) maintains records on offenders convicted in the state. However, like juvenile convictions, criminal histories may not be uniform for adults.⁴¹ The author has compared dispositional information from the F.B.I. and F.D.L.E. for homicide victims in Miami and found that the former are often not as complete as the latter. For example, a particular offense may be missing or a disposition unrecorded by the F.B.I. Absent dispositional information, the guidelines preclude counting such offenses (in cases where the offender has been arrested but there is no record of a conviction, for example). Again, this can lead to disparity because offenders previously convicted within the state may receive more harsh penalties than those previously convicted elsewhere. The problem of counting priors uniformly cannot be easily remedied, short of the F.B.I. improving its procedure for recording dispositional information.⁴²

Another issue concerns recency of priors; prior juvenile convictions are considered for 3 years and adult ones for 10 years. In the case of adult convictions, it is perplexing why such remote behavior is

even considered. For example, it is possible for an offender who spent 20 years in prison to have that offense counted some 30 years later. One alternative would be to weigh priors according to their recency.⁴³ In addition, it has been recommended that recidivism be measured for a period of 3 years.⁴⁴

Further difficulties of uniformly applying the guidelines are likely to occur because of the manner in which the sentences are structured. Most critically, offenders falling in the first cell for each offense category may be sentenced to a year in jail or any combination of lesser penalties permitted under current law. Not only does this give the judge unlimited discretion, but previous evidence has indicated that the majority of offenders fall in the first cells.⁴⁵ Although the sentencing commission debated this issue, it was decided to always permit judges the option of sentencing offenders to jail. Not only does this give judges tremendous discretion in most cases, but even the most minor offenders may be sentenced to jail, a sanction which can be considered excessively harsh for such offenders because it is undeserved.⁴⁶ Precisely why the sentencing commission was reluctant to specify the penalties for offenders falling in the first cells is uncertain, but there will probably be unnecessary disparity as a result.

The large proportion of cases falling in the first cells would also make it difficult to predict what the impact of the guidelines will be on the state's jail population, an issue which was ignored in the development of the guidelines. Simulations of the projected impact of sentencing guidelines have been undertaken in Minnesota⁴⁷ and Washington,⁴⁸ for example, for the purpose of preventing the adoption of guidelines which would increase the institutional population. Since Florida's prison population has grown dramatically in recent years⁴⁹ and has a present level of about 27,500 inmates, it seems critical

that Florida consider the potential impact of the proposed guidelines on state prisons because huge expenditures for prison construction are the alternative.

Implementation

All of the issues related to uniformity of application are relevant to implementation. Previously, it has been noted that there was a high degree of compliance with the experimental guidelines which were implemented for a year in four circuits in Florida.⁵⁰ However, there is reason for skepticism about this finding, especially since the in/out decision was optional for offenders falling in the first cell of each offense category.⁵¹ All that was considered in the previous evaluation was the extent to which judges followed the experimental guidelines or aggravated or mitigated a sentence and not whether the guidelines were applied consistently.⁵²

Research conducted in Washington where probation officers who would score the cases and had extensive training has bearing on this issue.⁵³ In Washington, the guidelines consider instant offense, recency and seriousness of priors, and age (since they are for juveniles). The guidelines are comprised on a single matrix, unlike Florida's which has nine offense categories. In spite of their relative simplicity, hypothetical scenarios scored by probation officers produced widely divergent sentences. Given the complexity of Florida's proposed guidelines, it would be surprising if they were consistently applied. Clearly, more parsimonious guidelines could have been developed (a single matrix, for example), but separate offense categories were created to allow different weightings. Nevertheless, a single matrix would probably produce greater consistency of application, thereby reducing unnecessary sentencing disparity.

Implementation, then, is fundamental to any policy, although it has only recently been considered in criminal justice.⁵⁴ Soon a study which attempts to measure the degree of implementation of Florida's guidelines will be undertaken, similar to evaluations of sentencing guidelines conducted elsewhere.⁵⁵ Recognizing that discussion of the implementation of the guidelines in Florida is largely speculative, it is paramount that implementation issues be considered in the future if the guidelines are to attain their stated objectives.

In spite of the potential problems with the existing guidelines, they do represent some advances over the experimental ones.⁵⁶ Although the number of offense categories has been expanded from six to

⁴³ *Op. cit. supra*, note 40.

⁴⁴ National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 1973; L. Sechrest, S. White, and E. Brown (eds.), *The Rehabilitation of Criminal Offenders: Problems and Prospects*, 1979.

⁴⁵ "Statewide Sentencing."

⁴⁶ "Doing Justice."

⁴⁷ "Determinate."

⁴⁸ E. Loft, V. von der Hyde, and W. Netherland, *A Discrete Simulation of the Washington State Juvenile Justice Act of 1977*, paper presented at the Academy of Criminal Justice Sciences Meeting in Cincinnati, Ohio, 1979.

⁴⁹ Bureau of Prison Statistics (1979-81; 1981-83).

⁵⁰ "Statewide Sentencing."

⁵¹ *Op. cit. supra*, note 14.

⁵² "Statewide Sentencing."

⁵³ B. Hewitt, *Washington State's Juvenile Justice Act Presumptive Sentencing System*, 1980.

⁵⁴ D. Van Meeter and C. Van Horn, "The Policy Implementation Process: A Conceptual Framework," 6 ADM. & SOC. 445 (1975).

⁵⁵ S. Messinger, R. Sparks, and A. von Hirsch, *Project on Determinate Sentencing* (forthcoming).

⁵⁶ *Op. cit. supra*, note 2.

nine (largely because the experimental guidelines were applicable to only the most common offenses), the present guidelines contain fewer factors and they are limited to legal factors. The experimental guidelines weighed employment and alcohol/drug use, for example.

An Alternative Perspective

Although a variety of perspectives have been utilized to develop sentencing guidelines,⁵⁷ we are advocating a modified just deserts approach⁵⁸ (in contrast to a pure just deserts model)⁵⁹ in which the consequences of punishment for future criminal behavior are irrelevant. However, beyond philosophical considerations, pragmatic concerns, especially as they relate to uniformity of application, are also taken into account. From the outset it should be emphasized that Florida's guidelines represent a major advance over the previous system where judges had unbridled discretion in sentencing offenders. Still, the guidelines could be improved if they are to promote justice and fairness.

Figures 2 and 3 illustrate the differences between sentencing under a pure and modified just deserts model and Florida guidelines which are incapacitative. Given the tremendous impact of prison sentences for offenders as well as criminal justice resources,⁶⁰ the in/out line should be defined for all cases. Another noteworthy difference between Figures 2 and 3 is that minor offenders could not be sentenced to prison under the former. Instead, prison would be reserved for more serious offenders and /or those with extensive criminal histories.

Projecting the Impact on the Prison Population

There are ample reasons for projecting the impact of the guidelines on the state's prison population. The number of inmates in Florida prisons has grown dramatically in recent years from about 19,000 in 1979 to over 27,500 in 1983.⁶¹ As a consequence, Florida has been under Federal court order to reduce prison overcrowding; several hundred inmates have

FIGURE 2-IN/OUT LINE UNDER PURE AND MODIFIED JUST DESERTS MODEL

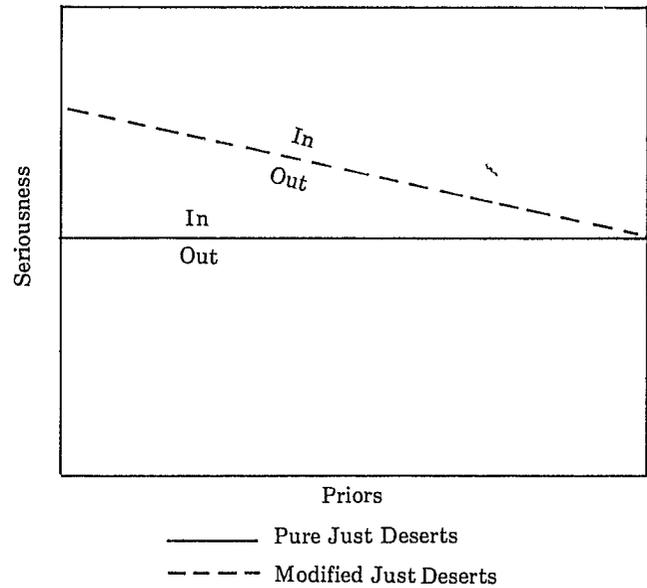
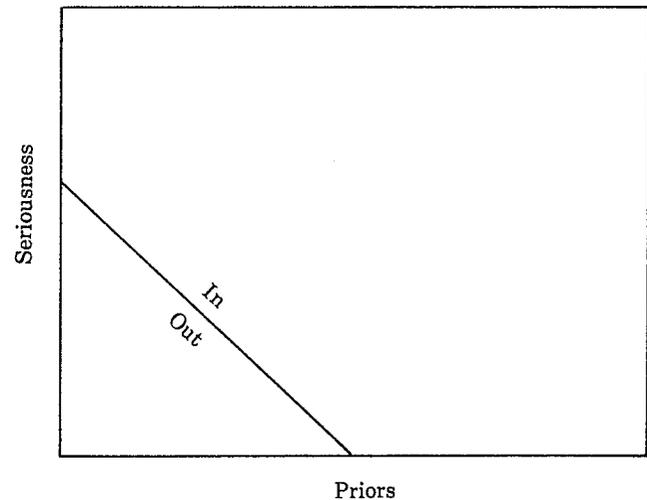


FIGURE 3-IN/OUT LINE UNDER FLORIDA'S SENTENCING GUIDELINES



been released early in the past year. Not only does this lead to sentencing disparity because the premature release of some inmates is the result of chance, but there are ethical and other considerations as well.

The strongest reason is ethical: it is simply wrong to sentence people to overcrowded prisons. As studies and recent court cases suggest, overcrowding renders prison conditions intolerable: the daily discomforts of prison life become much worse; frictions among inmates that can lead to violence are exacerbated; the institution's ability to ensure prisoners' safety diminishes. The sentencing policy of a civilized society cannot be one which involves committing offenders to institutions which lack room for them.⁶²

⁵⁷ "Emergence," "Determinate."

⁵⁸ *Op. cit. supra*, note 40; "Doing Justice"; A. von Hirsch, "Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Guidelines Commission," *Hamline Law Review*, 1982, 5, p. 164 (hereinafter "Constructing"); A. von Hirsch, "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale," *Journal of Crime and Criminology*, 1983, 7:1, p. 209 (hereinafter "Commensurability").

⁵⁹ G. Fletcher, *Rethinking Criminal Law*, 1978; R. Singer, *Just Deserts: Sentencing Based upon Equality and Desert*, 1979.

⁶⁰ M. Gottfredson and D. Gottfredson, *Criminal Justice Decisionmaking*, 1980.

⁶¹ *Op. cit. supra*, note 49. However there were projections after the guidelines were nearly complete; it was estimated that Florida's prison population will increase by 5,000 in fiscal year 1983-1984. Bureau of Planning, Research, and Statistics, *Preliminary Analysis of the Potential Impact of Sentencing Guidelines on the State Corrections and Probation System*, 1983.

⁶² "Constructing," p. 176-177.

In the effect of guidelines on the prison population is ignored, leading to overcrowding, the guidelines are not likely to be implemented completely. In Florida's case, the guidelines could have been developed on the basis of reducing the prison population. (The alternative to guidelines which will result in further overcrowding and subsequent action to reduce overcrowding is the construction of additional prisons, something which Florida seems disinclined to undertake at present.)⁶³

The Magnitude and Range of the Penalties

It is difficult to evaluate the magnitude of penalties from a desert perspective without first mentioning the issue of seriousness of offenses. According to a modified just deserts' perspective,⁶⁴ sanctions should be commensurate with the seriousness of the act; penalties which are excessively lenient or harsh are undeserved. In Florida, the guidelines simply rely on existing statutory penalties to determine seriousness, although other methods for determining seriousness have been established.⁶⁵

The guidelines group the offenses into offense behaviors which are deemed similar rather than into categories according to their seriousness. As a consequence, there are no more than five degrees of seriousness for any offense category (Category 9) and as few as two for certain offense categories (Categories 4 and 8). A basic problem with seriousness as measured by the guidelines is their breadth, leading to the situation where offenses of varying seriousness are treated similarly.⁶⁷ The broader the seriousness categories, the greater is the likelihood that dissimilar crimes will be considered in the same manner. For example, thefts, forgery, and fraud which are defined as Category 6 offenses are all treated in a similar manner. In other states, points have been assigned to offenses to establish their seriousness.⁶⁸ Florida could adopt a similar system for grading seriousness instead of one relying on statutory seriousness. This could lead to the development of a single matrix, a point which will be pursued later.

It is more difficult to judge the magnitude of the penalties. We have already suggested that the guidelines may be too punitive for offenders falling in the first cells because even relatively minor offenders may be sentenced to a year in jail. Part of the problem in determining whether the penalties prescribed are consistent with deserts is that an agreed upon method for relating seriousness to sanctions has not been devised.⁶⁹ Nevertheless, it can be suggested that the guidelines do not prescribe proportionate sanctions. At the upper extreme virtually all offenders (as long as statutory limits are not exceeded) can receive sentences of at least 30 years (if they have sufficient prior convictions) for all offense categories. At the other extreme, in many cases minor offenders with few prior criminal convictions can still receive a short prison sentence. Part of the problem is the disproportionate weight placed upon prior convictions which will be discussed in the next section.

The range of sanctions for similarly situated offenders varies according to offense category. Guidelines have differed in the range of sanctions permitted.⁷⁰ Although narrow sentencing ranges can have the effect of reducing disparity, ranges which are too narrow could lead judges to deviate from the guidelines. The ranges prescribed by the guidelines are inconsistent. For example, offenders in the second cell of Category 1 (homicide) can receive a sentence of from 1 to 3 years in prison, while offenders falling in the upper cells of all offense categories can receive sentences with ranges of 6 years up to the highest cell where it is as much as 14 years. Although the recommended sentence is also set forth in the guidelines, it is questionable that such large ranges are warranted. Undoubtedly, the magnitude of these ranges will create sentencing disparity. While it is recognized that some variation may be necessary, it is dubious whether the existing ones are reasonable. One alternative would be to simply expand the number of cells, providing greater assurance that similarly situated offenders will receive comparable sentences.

The Issue of Prior Convictions

Perhaps the most deficient component of the guidelines is the manner in which prior convictions are treated. Not only is it possible for priors to be weighed more heavily than the instant offense but less serious offenders can receive more severe sanctions than more serious ones. Both of these situations could be precluded by a just deserts rationale. Potentially, priors can be weighed more than four times as much as the instant offense; in many cases,

⁶³ Florida already has the distinction of being one of the states with the highest inmates/capita.

⁶⁴ "Statewide Sentencing."

⁶⁵ "Doing Justice."

⁶⁶ T. Sellin and M. Wolfgang. *The Measurement of Delinquency*, 1964; A. Blumstein. "Seriousness Weights in an Index of Crime," 39 AM. SOC. REV. 85 (1974); P. Rossi, C. Bose, and R. Berk. "The Seriousness of Crimes: Normative and Individual Differences," 39 AM. SOC. REV. 224 (1974).

⁶⁷ "Commensurate."

⁶⁸ "Constructing."

⁶⁹ "Commensurate."

⁷⁰ "Emergence," "Determinate."

the weight placed on priors will be at least as great as that placed on the instant offense.

Perhaps more than any other aspect of the guidelines prior convictions are problematic. In contrast to Florida's guidelines, ones based upon a just deserts' perspective would emphasize the instant offense. Furthermore, recency of priors would be considered, and, after a relatively short period of time, priors would no longer be counted.⁷¹ It has been suggested that recidivism should be considered only for 3 years instead of the 10-year period allowed under the guidelines. Furthermore, it can be argued that if prior convictions (especially juvenile ones) cannot be reliably measure for the vast majority of offenders, then they should be excluded from the guidelines.

Aggravating and Mitigating Circumstances

There is variation in the manner in which aggravating circumstances are treated, but the Florida guidelines place virtually no restrictions on these circumstances or the amount of deviation permitted. A just deserts' rationale would be restricted to circumstances related to either harm or culpability;⁷² the Florida guidelines could either attempt to enumerate aggravating or mitigating circumstances or circumstances which are disallowed.

Furthermore, it is doubtful that unlimited deviation (with the exception of statutory bounds) from the guidelines should be permitted. An alternative would be to establish a maximum amount of deviation from the standard range of sentences. Although the amount of deviation permitted would ultimately be arbitrary, it would further structure judicial discretion in exceptional cases.

A Single Matrix

Finally, there is the issue of whether separate offense categories are necessary. They were designed to allow varying weight to be placed on the factors according to offense categories. Guidelines developed in other states sometimes involve a single

matrix,⁷⁴ and there may be both philosophical and pragmatic reasons for preferring this approach. First, differential weightings by offense category introduce disparity because similarly situated offenders are not treated the same. One matrix would have the advantage of weighting all of the factors in a like manner for all offenders.

Error in applying the guidelines would probably also be reduced, given their present complexity. Again, the reason for developing separate offense categories points to the problem with relying on past sentencing patterns for developing guidelines. Simply because judges have weighed factors differently for various offenses in the past offers an insufficient basis for adopting this practice because of the disparity which it necessarily introduces.

Conclusions

While the proposed sentencing guidelines outlined here do not offer the only plausible alternative, they do illustrate some of the fundamental problems inherent in the existing ones. Among the more prominent problems are the absence of an explicit rationale, the lack of constraints or limiting principles placed on their development, and failure to consider the potential impact on the prison population in developing the sentencing standards. The guidelines are still in their infancy and evolution may lead to future improvement.

Nonetheless, even though Florida's guidelines may reduce sentencing disparity, they may promote neither justice nor fairness. There is little indication that Florida will address some of the basic issues raised by guidelines. Although Florida intends to conduct an implementation evaluation, other questions remain. Are similarly situated offenders receiving similar sanctions? What impact have guidelines had on criminal justice resources?

These questions await future consideration, but it is critical that they be addressed if Florida is to develop a criminal justice system which promotes justice.

⁷¹ *Op. cit. supra*, note 44.

⁷² "Determinate."

⁷³ *Op. cit. supra*, note 40.

⁷⁴ "Determinate."