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ISSUES FOR THE 21ST CENTURY

JUNE 2001

PAPERS FROM THE EXECUTIVE SESSIONS ON SENTENCING AND CORRECTIONS

No. 10

Sentencing Guidelines: Reflections on the Future

by Robin L. Lubitz and Thomas W. Ross

America's experiment with sentencing guidelines has now lasted more than a quarter of a century. Guidelines started locally and expanded to the State and Federal levels; evolved in numerous ways; adapted to changing philosophical currents and political realities; and have been both praised and vilified by politicians, criminal justice practitioners, and academics. One theme has persisted: Guidelines have proven to be more than a fad; they have left a lasting imprint on sentencing policy, practice, and thought in the United States.

As their name suggests, guidelines were conceived as a way to guide judicial discretion in accomplishing particular sentencing and correctional objectives. Generally, two criteria—seriousness of the crime and criminal history of the defendant—are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, guidelines also make it easier to predict sentencing outcomes and correctional costs.

Beyond the elements they hold in common, guidelines vary widely. They reflect no single

philosophy of sentencing—whether “just deserts” or any other. They are simply a tool for carrying out sentencing policies, however varied those policies may be. The bipartisan support that guidelines have attracted attests to their “neutrality.” In some States, the impetus to adopt them was spearheaded primarily by Republicans; elsewhere it was initiated primarily by Democrats. In most States, guidelines eventually won the support of both political parties. The ideological neutrality of guidelines constitutes their strength and staying power.

The record of accomplishment of guidelines is mixed. Most observers feel sentencing disparity has been reduced but certainly not eliminated. In some States, guidelines have successfully established truth in sentencing, and in some States they have been somewhat successful in controlling prison population growth. Success or failure can be judged, however, only in light of the goals a jurisdiction has set for its guidelines, and these too vary considerably.

Now the question is whether the sentencing guidelines “movement” will grow stronger or

ABOUT THIS SERIES



It is by now a commonplace that the number of people under criminal justice supervision in this country has reached a record high. As a result, the sentencing policies driving that number, and the field of corrections, where the consequences are felt, have acquired an unprecedented salience. It is a salience defined more by issues of magnitude, complexity, and expense than by any consensus about future directions.

Are sentencing policies, as implemented through correctional programs and practices, achieving their intended purposes? As expressed in the movement to eliminate indeterminate sentencing and limit judicial discretion, on the one hand, and to radically restructure our retributive system of justice, on the other, the purposes seem contradictory, rooted in conflicting values. The lack of consensus on where sentencing and corrections should be headed is thus no surprise.

Because sentencing and corrections policies have such major consequences—for the allocation of government resources and, more fundamentally and profoundly, for the quality of justice in this country and the safety of its citizens—the National Institute of Justice and the Corrections Program Office (CPO) of the Office of Justice Programs felt it opportune to explore them in depth. Through a series of Executive Sessions on Sentencing and Corrections, begun

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R E S E A R C H I N B R I E F

ABOUT THIS SERIES

CONTINUED . . .

In 1998 and continuing through the year 2000, practitioners and scholars foremost in their field, representing a broad cross-section of points of view, were brought together to find out if there is a better way to think about the purposes, functions, and interdependence of sentencing and corrections policies.

We are fortunate in having secured the assistance of Michael Tonry, Sonosky Professor of Law and Public Policy at the University of Minnesota Law School, and Director, Institute of Criminology, University of Cambridge, as project director.

One product of the sessions is this series of papers, commissioned by NIJ and the CPO as the basis for the discussions. Drawing on the research and experience of the session participants, the papers are intended to distill their judgments about the strengths and weaknesses of current practices and about the most promising ideas for future developments.

The sessions were modeled on the executive sessions on policing held in the 1980s and 1990s under the sponsorship of NIJ and Harvard's Kennedy School of Government. Those sessions played a role in conceptualizing community policing and spreading it. Whether the current sessions and the papers based on them will be instrumental in developing a new paradigm for sentencing and corrections, or even whether they will generate broad-based support for a particular model or strategy for change, remains to be seen. It is our hope that in the current environment of openness to new ideas, the session papers will provoke comment, promote further discussion and, taken together, will constitute a basic resource document on sentencing and corrections policy issues that will prove useful to State and local policymakers.

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weaker as the millennium begins and inevitably brings further changes in criminal

ALL THEIR PERMUTATIONS, VARIED GOALS, AND VARIED PHILOSOPHIES NOTWITHSTANDING, ALMOST ALL GUIDELINE SYSTEMS ARE BASED ON THE SAME SET OF CORE

justice policy. Several new issues have already arisen, among them whether the core principles on which guidelines are based are compatible with such recent concepts as restorative justice. Another of these issues is the get-tough crime policies adopted by many States and incorporated into sentencing guidelines. In the long term, these policies, which include the release of large numbers of serious, violent offenders, will need to be addressed. These issues are a challenge to the adaptability that has been a hallmark of guidelines over the years.

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Guidelines vary with sentencing policy

Initially, guidelines were established as a way to address concerns about unfettered judicial discretion and lack of uniform and equal treatment of similarly situated defendants. Later, they were championed as a way to help ensure predictability in sentencing and thus to project the amount of correctional resources needed. (Accordingly, in many States a major benefit has been the development of computer-based population simulation models that project the amount of dollars needed to achieve the State's sentencing policy goals.) In some States, this use of guidelines led in turn to the realization that they could be used to shape sentencing policy to fit resource levels that had already been set.

Use of the predictive power of guidelines also dovetailed neatly with efforts to achieve greater certainty in sentencing through truth in sen-

tencing. Prison overcrowding caused guidelines to evolve, in some jurisdictions, into a tool for allocating and prioritizing scarce resources. Thus, guidelines were recognized as a way to channel non-prison-bound offenders into an

array of intermediate and community-based sanctions.

Goals range widely

By the end of 1999, 18 States had developed and implemented some form of sentencing guidelines.¹ Their goals included the following or various combinations of the following:

- Reduce judicial disparity in sentencing.
- Promote more uniform and consistent sentencing.
- Project the amount of correctional resources needed.
- Prioritize and allocate correctional resources.
- Increase punishments for certain categories of offenders and offenses.
- Decrease punishment for certain categories of offenders and offenses.
- Establish truth in sentencing.
- Make the sentencing process more open and understandable.
- Encourage the use of particular sanctions for particular categories of offenders.
- Encourage increased use of nonincarceration sanctions (intermediate and community based).
- Reduce prison crowding.
- Provide a rational basis for sentencing.
- Increase judicial accountability.

guideline systems incorporate all these goals. On the other hand, the list is by no means exhaustive. Moreover, each State usually has even more specific goals for its guidelines.

Multiple features

Such features of guideline systems as the types of offenses and categories of offenders to which they apply are as varied as their goals. In some States, use of guidelines is voluntary and merely advisory for judges; in others, their use is presumptive, with consideration mandatory. There are States that provide for a wide range of sentences and others that prescribe a very narrow range. Some States mandate that offenders serve the full sentence imposed by the judge, and some allow parole boards to determine the length of time served. Some States link use of guidelines to availability of correctional resources, while others do not take resources into account. In some States, guidelines deal only with felonies; others deal with both felonies and misdemeanors. There are States that address only "in" and "out" decisions (confinement or not) and those that incorporate a range of intermediate sentencing options. Finally, there are States whose guidelines incorporate an appellate review process for all sentences and those with no appellate review (when the guidelines were followed).



Guidelines reflect varied sentencing philosophies

Ideally, sentencing policy flows from sentencing philosophy. That philosophy might define retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration as the goal of sentencing.²

Since guidelines have been an effective means of establishing sentencing policies, they accordingly reflect not just one but an array of sentencing philosophies.

The earliest guideline systems were based on "just deserts," a retributive sentencing philosophy dictating that the punishment for crime correspond with the harm done to the victim and society. Among States that have adopted desert-premised systems are Minnesota, Washington, and Oregon. Other States, such as Virginia, premised their guidelines on a philosophy of incapacitation or selective incapacitation, whose primary objective is to remove from society offenders who are likely to commit further crimes.

Several different and even conflicting philosophies of sentencing can coexist in a single guideline system. North Carolina is an example. One component of its "structured sentencing" system, adopted in 1993, is a guidelines grid that features three "bands" or types of sentence dispositions: incarceration for violent and career offenders, community-based punishments for nonviolent offenders who have little or no previous criminal involvement, and intermediate punishments for those in between. The guideline framers saw incapacitation as the major rationale or philosophy for incarceration, rehabilitation and restoration as the rationales for community punishment, and rehabilitation and deterrence for intermediate punishment. In all three bands, retribution and just deserts are additional, shared rationales/philosophies.³

The incorporation of different sentencing rationales/philosophies in one system demonstrates the desire to distinguish among categories of offenders, particularly nonviolent and violent offenders. These distinctions in the system facilitate the formulation of specific penal strategies for handling specific categories of offenders and offenses.



Restorative justice—a challenge to adaptability

All their permutations, varied goals, and varied philosophies notwithstanding, almost all guideline systems are based on the same set of core principles: proportionality, consistency/uniformity, and rationality/transparency in sentencing. These principles,

THE "TOP-DOWN" APPROACH OF SENTENCING GUIDELINES IS SEEMINGLY AT ODDS WITH THE COMMUNITY INVOLVEMENT FEATURED PROMINENTLY

which essentially define guidelines, seem to be at variance with certain new concepts of sentencing and corrections, restorative justice paramount among them.

Restorative justice promotes reparation over retribution. It vests sentencing authority in the community rather than the state. It substitutes consensus and joint resolution for conflict and adversarial proceedings. It emphasizes accountability of the offender to the victim and the victimized community rather than to the state.⁴ In these and other respects, restorative justice strikes at the heart of current sentencing policies and practices.

Incompatibility: Perception or reality?

The principle of proportionality prescribes that the sanction reflect gravity of offense and criminal background.⁵ The graver the offense and the longer the criminal record, the more severe the sanction. Consistency and uniformity prescribe that offenders who have similar records and were convicted of similar crimes receive similar sanctions. Implicit is the belief that sentences should not be subject to judicial caprice or to differences in local norms. Rationality and transparency hold that sentences be based on clearly articulated rules and policies that apply equally to all

offenders. The sentencing process is open and observable: Anyone who wants to understand the basis of a particular sentence can simply consult the guidelines.

Restorative justice is in many respects at variance with these principles. It may recognize that the punishment should be commensurate with the crime, but it does not use a standardized, objective measure of the crime's severity. Rather, it relies on a more subjective understanding of the harm done and the specific circumstances of the offend-

THERE IS SOME PROMISE OF INCORPORATING ELEMENTS OF RESTORATIVE JUSTICE INTO SENTENCING GUIDELINES SO THAT POLICYMAKERS NEED NOT CHOOSE ONE OVER ANOTHER.

er. By emphasizing individualized justice and shaping the response to the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. In the restorative justice framework, rationality and transparency either are not a priority or are viewed differently because sentences are tailored to the particulars of each case. Nor is there a body of rules open to inspection. Different or disproportionate sentences are not viewed as a problem.

The rules and order called for in sentencing guidelines imply the need to create a structure or body authorized to develop and implement them. Because in most jurisdictions this authority is vested in a board or commission, guidelines are generally developed by a relatively small number of people. Such a "top down" approach is seemingly at odds with the community involvement that is featured prominently in restorative justice.

Bridging the gap: A proposed hybrid

All this suggests that at its philosophical core, restorative justice appears to be incompatible with sentencing guidelines. However, when it

comes to practical application, there is some promise of incorporating elements of restorative justice into sentencing guidelines so that policymakers need not choose one over another.

The way guidelines are conventionally developed does not rule out either community input or individualized justice. Many guideline States permit and even encourage the development of local sentencing options (such as intermediate and community-based sanctions) for some categories of offenders. North Carolina's guidelines, for example, establish sentencing boards in each county and assign them responsibility for developing and recommending local, community sentencing options for prescribed categories of offenders.

Although these opportunities for local input offer some promise of resolving the impasse, there remains the guideline grid system. In the grid system conventionally used to impose sentences, the judge uses two discrete factors—severity of current offense and past criminal record—to determine the length and severity of the sentence. Dispositional "bands" prescribe various types of sanctions, such as incarceration and community punishment. Generally, the judge has limited power to deviate from the careful, precise calibration required by the grid. The much more qualitative and subjective restorative justice approach, which may also take into account the judgment of nonprofessionals, cannot be accommodated easily within the confines of the grid system.

The key to overcoming incompatibility may lie in the fact that restorative justice is currently used largely to adjudicate offenders who commit only minor crimes. To deal with these people—nonviolent offenders who do not have long criminal records—a hybrid,

called "restorative sentencing guidelines," could be created.

In the hybrid system, a new dispositional band would be added for restorative sanctions. For this new band, the grid structure that prescribes specific sanctions and sentence lengths would be removed. The core principles of guidelines would be preserved for adjudicating violent and career offenders, but the more unstructured approach to sentencing embodied in restorative justice would be accommodated for offenders convicted of minor crimes. (See the exhibit.)

■ ■ ■

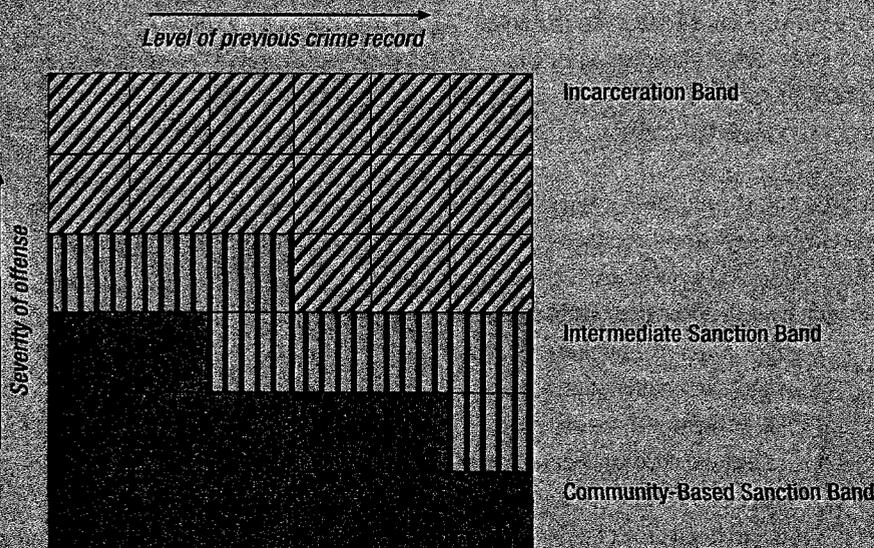
Handling the tough-on-crime legacy

The get-tough approach that infuses current crime policy was incorporated in many sentencing guidelines, and the implications will need to be faced. Truth in sentencing became the goal of many guideline systems adopted in the 1990s. It went hand in hand with elimination of discretionary parole and reduction in the amount of time offenders are supervised in the community following release. At the same time, most States yielded to public and political pressure to increase punishment, especially for violent offenders, and often integrated this approach into their guidelines as well.

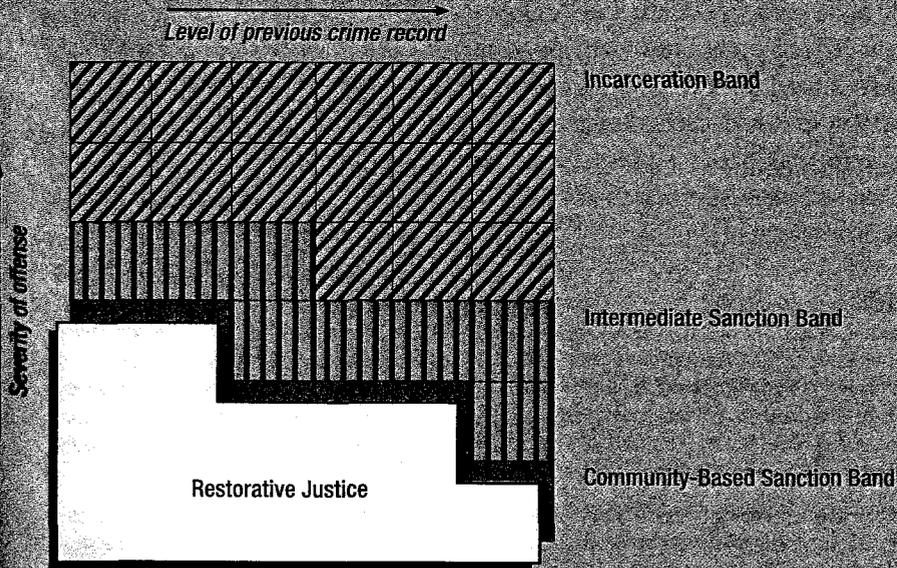
The implications of these policies can be challenging. Tough penalties for violent offenders will mean that their proportion in the prison population will increase, as will the number of people in prison and the proportion of older offenders. As a result of truth-in-sentencing laws, most inmates will serve more time in prison than they would have served without such laws. They also will be supervised on release for a much shorter period than they would have been without these laws. Those who behave badly in prison and consequently serve their entire term will be unsupervised on release. Most released

WHAT A RESTORATIVE JUSTICE GUIDELINES MODEL WOULD LOOK LIKE

Conventional guidelines model



Restorative justice guidelines model



The proposed model is a modification of the conventional guideline "grid," which bases sentences on two factors or dimensions: severity of offense and prior record. For sentences in a restorative justice context, the dispositional "band" of community-based sanctions would be replaced with a new band for sanctions based on restorative justice principles. For the new band, the two dimensions would not apply.

Like all other guideline grids, increasing length of criminal record is indicated by the direction of the horizontal arrow; increasing severity of offense is indicated by the direction of the vertical

inmates will have few of the employment or social skills they need to survive. The challenge is to develop systems that help reintegrate them and effectively monitor those who continue to pose a substantial risk. One promising new approach being piloted is "reentry courts" that help guide reintegration.⁶

These outcomes will create new challenges for management, requiring at minimum a reassessment of security levels and staffing needs. Complicating matters in many guideline States is the abolition of parole and/or reduction of "good time," which eliminates valuable tools for managing inmates and supervising them on release. Correctional authorities will need to find new ways to sanction behavior. Among the implications of an aging prison population are higher health care costs; loss of work productivity; and the need to segregate older, vulnerable inmates from younger, aggressive ones. In response, some States are considering early release of offenders who reach a certain age (65, for example), although adopting such a policy would require some backtracking on the pledge of truth in sentencing and the get-tough approach.



Long- and short-term futures

Few, if any, 19th-century experts in sentencing policy and law would have predicted the innovations and other changes that the 20th century wrought. At the close of the 19th century, the concept of judicial discretion was nearly inviolable. Concerns about proportionality, consistency, and rationality were hardly at the forefront of public policy debate. In fact, at the time, the major progressive movement in corrections premised its espousal of shifting from corporal punishment to penitentiaries on faith in rehabilitation and the indeterminate, medical model. Little thought was given to the monetary costs of corrections.

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In the same way, as a new century and new millennium begin it is impossible to predict the societal currents that will drive sentencing policies in the 21st century. Much will depend on trends in crime rates, the pace of technological change, the boom and bust cycles of the economy, the direction of political leadership, and the influence of the popular media. It is likely that technological advances will force a rethinking of how to control offenders and regulate their behavior. Trends in crime rates, either up or down, will help shift public opinion toward retribution, restoration, or rehabilitation. Economic cycles will compel

SENTENCING GUIDELINES HAVE BEEN A VALUABLE TOOL FOR ALLOCATING STATE RESOURCES RATIONALLY AND THOUGHTFULLY.

us to place either more or less emphasis on the need to predict and ration correctional resources. Changing political leadership will guide us along different pathways. Finally, the media, with its pervasive influence on perception and culture, may prove to have the greatest and most lasting influence on sentencing and corrections policy.

The long-term future of sentencing guidelines and sentencing policy is uncertain, but the near term is much clearer. If the utility of guidelines in operationalizing sentencing policy is any indication, they will continue to be employed. They have been a valuable tool for allocating State resources rationally and thoughtfully. The public and political demand for using guidelines this way is likely to continue to strengthen their appeal. The two-dimensional structure of most guideline systems has an appealing simplicity: The clear prescription of sentence dispositions and lengths constitutes a series of "windows" through which to visualize policy and to grasp the interactions and interrelations of crime severity, criminal record, and punishment prescribed. Moreover, the concepts of consis-

tency and proportionality basic to guidelines still resonate with the public.

It also appears likely that interest in restorative justice will continue to grow as understanding of the need for reconciliation and individual healing grows. As this happens, efforts to reconcile this approach with sentencing guidelines are also likely to accelerate.

Perhaps the most compelling reasons to expect that guidelines will continue to be widely accepted and applied are their adaptability and their ideological neutrality. This expectation is premised, however, on the assumption that sentencing policies will continue to reflect the core guideline principles. One concern is that the internal integrity of guidelines

remain intact. When legislation is enacted to deal with the "crime of the day," the rationality of the guideline system often takes a direct hit, and legislative action may over time erode guidelines and the courts' confidence in them. How to prevent micromanagement by legislatures while preserving the policymaking function of the legislative branch will be a constant challenge.

Notes

1. Kevin R. Reitz, "The Status of Sentencing Guideline Reforms in the U.S.," *Overcrowded Times* 10 (6) (December 1999): 9-10. In addition to the 18 States that have guidelines, in 4 others guideline proposals were pending at the end of 1999, and in 3 States plus the District of Columbia they were under study.
2. In practice, sentencing policy might be based on purely utilitarian considerations rather than on any philosophy of sentencing. An example is the policy goal of fostering predictability in sentencing as a way to project the amount of correctional resources needed.
3. For an indepth description of North Carolina's structured sentencing system, see *Managing Prison Growth in North Carolina Through Structured Sentencing*, by Ronald F. Wright, Program Focus series, Washington, DC: U.S. Department of Justice, National Institute of Justice, February 1998, NCJ 168944. The system was named a winner in the Innovations in American Government Program in 1997. The

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NCJ 186480

findings of an NIJ-sponsored evaluation of structured sentencing are being prepared for publication.

4. An elaboration of the concept of restorative justice was published in the Sentencing & Corrections: Issues for the 21st Century series. See *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, by Leena Kurki, Research in Brief, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175723.
5. Whether these two "dimensions" are the most appropriate ones on which to build a system of sentencing is, of course, a matter of debate.
6. The U.S. Department of Justice recently launched a two-pronged project designed to promote reentry initiatives at the local level. One is the Reentry Partnerships Initiative, which is sponsoring pilot projects whose goal is better risk management of released prisoners by means of enhanced surveillance, risk and needs assessment, and prerelease planning. There are eight pilot sites. The other initiative is the reentry courts, with nine sites participating. Based on the drug court model, the projects use sanctions and incentives to help released offenders remain crime free.

THE EXECUTIVE SESSIONS ON SENTENCING AND CORRECTIONS

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