

Evaluating Systemic Sentencing Guidelines

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ABSTRACT

Cet article décrit la raison d'être et la logique des directives selon lesquelles une sentence est prononcée, leur fonctionnement, les questions soulevées lors de l'évaluation ainsi que les résultats émanants de l'implantation de ces directives dans l'état du Minnesota.

The issue of sentencing reform has occupied a significant place on the public agenda for over a decade. Sentencing commissions and task forces have abounded and sentencing proposals have proliferated. While the desire for sentencing reform is variously motivated depending on the particular actor, two primary concerns fuel the sentencing reform effort. First, concern with disparity in sentencing has spurred efforts to structure discretion, whether the discretion is exercised by judges, paroling authorities, or corrections officials. Second, concern with prison crowding and other correctional resource issues have resulted in efforts to coordinate sentencing policy with correctional resources to achieve a more implementable system.

Legislatively mandated sentencing guidelines are an interesting response to the problems of sentencing disparity and lack of coordination between sentencing and correctional resources (Blumstein et al, 1983). Sentencing guidelines have been implemented in several jurisdictions in the United States, most notably in Minnesota in 1980 and Washington in 1984. In both of those jurisdictions, the legislature delegated the authority to develop specific sentencing policy to a sentencing commission, with the policy subject to the disapproval of the legislature. Generally, sentencing guidelines incorporate two key factors, seriousness of the offense and criminal history of the offender, the combination of which determines the presumptive sentence for each case (Gottfredson, 1984: 293). The presumptive sentences are generally displayed in a grid or matrix format, with seriousness of the offense designating the vertical axis and criminal history portrayed on the horizontal axis.

The coordination of sentencing policy with correctional resources is achieved in the guideline development process by means of impact analysis. The impact of proposed sentencing policies on correctional resources can be simulated, given a distribution of the jurisdiction's offenders on the offense and offender characteristics contained in the guidelines. The sentencing policy can be tailored to fit within existing correctional resources if the legislature is reluctant to appropriate additional funds. If additional correctional resources are an option and expanding the overall level of sanctions is seen as desirable, explicit policy in conjunction with impact analysis can determine the level of resources required.

The appropriate sentence included in the guidelines is imposed by the judge unless there are substantial and compelling circumstances that differentiate the particular case from others of that type. The judge must make

a record of the substantial and compelling circumstances for review by the appellate court should either defence or prosecution appeal the sentence. In addition, the reasons must be forwarded to the sentencing commission for monitoring purposes. In both Minnesota and Washington, parole is abolished and the judge imposes the real time sentence, minus statutorily defined good time.

The guidelines are not static, but rather are periodically modified by the commission. Modifications could occur as a result of changed perceptions of offense seriousness, the creation of new crimes by the legislature, or changed circumstances regarding correctional resources. A thorough monitoring system is essential to the modification function of the commission.

The systemic nature of the sentencing guidelines structure creates a very rich evaluation situation. Systemic guidelines coordinate the three functions of government – judicial, legislative, and executive – and incorporate goals that relate to both judicial and executive functions. The remainder of this article outlines evaluation issues, evaluation design and implementation considerations, and evaluation findings in Minnesota.

Issues for Evaluation

The most common goal of guideline systems is reduction of unwarranted sentencing disparity. As is so often the case, that simply stated goal is fraught with conceptual and operational problems. Disparity merely means differences, and there is general agreement that sentences should be highly differentiated. The label “unwarranted sentencing disparity” requires the identification of factors by which sentences should not vary, i.e., the development of sentencing policy. The situation prior to the adoption of guidelines can generally be characterized as one in which explicit sentencing policy is lacking. Lack of explicit policy coupled with multiple sentencing goals including rehabilitation, incapacitation, deterrence, and retribution, create a situation in which almost any sentence can be justified. Only after the development of explicit policy can unwarranted disparity be defined. Generally, the conceptual problem for evaluation with unwarranted disparity has been resolved by applying guideline criteria retrospectively and measuring the differences in disparity before and after guideline implementation.

A second evaluation issue is changes in prosecutorial charging and negotiating practices. This is of particular importance when the presumptive sentence is based on the offense of conviction rather than on alleged behavior (sometimes labeled “total” or “real” offense behavior). Sentencing guidelines generally replace an indeterminate sentencing system in which there is considerable latitude in considering unadjudicated behavior for purposes of sentencing. Charging and negotiating patterns under an indeterminate system often include charge reductions which can best be characterized as bogus in the sense that the reduction does not affect the disposition of the case. Reducing an armed robbery charge to an unarmed robbery charge matters little if the sentencing judge can and will consider the allegation of gun use in setting sentence. When conviction offense determines the

presumptive sentence and unadjudicated elements cannot be used at sentencing, charge reductions result in reduced sentences. This both gives the prosecutor more power to determine the sentence, at least in terms of reducing a sentence, and makes charge reductions more visible and accountable. The different results that occur under the two sentencing systems suggest that prosecutorial practices will likely change under guidelines, if only to achieve the same results under the new system as under the old. It is important to note that a changed distribution of cases can significantly affect impact estimates, and therefore changes in charging and negotiating practices are also important in evaluating other aspects of the guideline system.

The impact the sentencing policy has on correctional resources is a key evaluation issue for two reasons. First, correctional resources require substantial expenditures of public funds and any significant funding decision tends to generate considerable interest. Second, the issue is key because if adequate correctional resources are lacking, the guidelines cannot be implemented and sentences become symbolic pronouncements which will be adjusted at some point to conform to resource constraints.

A final area for evaluation is case processing. Case processing issues emerge at several points in the system. The proportion of cases that go to trial is probably the most significant processing issue. There is general concern that significant substantive or procedural changes might result in more trials.

In particular, concern is often expressed that certainty of sentence under a presumptive system will reduce the incentive to plead guilty in hope of obtaining a more lenient sentence. A second processing issue is the length of time it takes following conviction to compile the information needed for sentencing. Guidelines generally do not require more information for sentencing than is required under an indeterminate system, but more verification of information is generally required. A third processing issue is the number and proportion of sentences appealed and the length of time between filing and judgement.

This brief listing of evaluation topics is not exhaustive. It does, however, include the major issues addressed by systemic guidelines.

Evaluation Design and Implementation Considerations

The evaluation issues listed above are subject to an outcome evaluation design. Periodic and discreet assessments can be made to determine whether unwarranted disparity exists, whether impact assessments of correctional resource use were accurate, and whether significant changes in case processing occurred.

Systemic guidelines, however, also require on going monitoring which is an element of the evaluation design. In addition to including a series of goals which are subject to periodic outcome evaluation, systemic guidelines provide a structure which enables policy makers to monitor sentencing and correctional practices and intervene in either policy area when the need arises. For example, in order to coordinate sentencing policy with correctional resources, it is necessary to be able to anticipate shortages of correctional resources. Ideally, resource problem would be anticipated far enough

in advance to enable the commission and legislature to either modify sentences or develop additional correctional resources. A major evaluation issue, then, is whether the structure is effectively used to regulate the system through modification and intervention (Weiss, 1984).

The need for monitoring as a part of the evaluation effort strongly suggests that the evaluation be located within the commission rather than outside the commission. It would be possible to provide data to an external evaluator for periodic outcome evaluation analysis. It would be much more difficult to conduct the monitoring function externally. A high level of knowledge is required to recognize possible problem areas before extensive data are available. That knowledge more likely reside within the commission. The higher level of knowledge inside the commission is also an advantage for outcome evaluation. The more leisurely pace of periodic outcome evaluation, however, allows time for review and consultation during the evaluation which can compensate for less knowledge. The luxury of time for extensive review and consultation is usually not afforded in monitoring. It is also more difficult to anticipate the extent of analytical needs in monitoring than in outcome evaluation, and that uncertainty as well as uncertainty regarding the timing of analysis make external monitoring harder to manage than external outcome evaluations.

An evaluation of sentencing guidelines requires extensive data. Information is needed on charging and negotiating practices, guideline presumption (guideline sentence, seriousness level, criminal history score, and information on any other guideline criteria that apply), actual sentence imposed, reasons for departure from the guidelines, and prison population information. Existing information systems are undoubtedly inadequate to meet the needs of the evaluation, regardless of the jurisdiction. Guideline criteria will not have been anticipated in existing information systems and measures of other factors, such as initial charges, generally need modification in order to conform with guideline criteria.

The specific design of the information system for monitoring and evaluating the guidelines must be tailored to the situation in a particular jurisdiction. An essential ingredient, however, is to tie the information system into the actual operation of the guidelines. For example, the presumptive sentence is determined prior to sentencing (generally by a probation officer) and distributed to the judge, prosecution, and defence. To the extent feasible, the monitoring system should use the same forms relied upon in the sentencing process. The close connection between guideline implementation and the monitoring system again suggests significant involvement of the commission in designing the monitoring and evaluation design rather than turning it over to an external evaluator.

The cost of information systems varies greatly. The most significant factor related to cost is the timeliness of the data. An on-line system in which data are sent to a centralized location as they are entered provides up to date information. This type of system provides the best feedback information for process evaluation, but it is also the most expensive type of information system to install. An information system in which the data are submitted on paper forms or periodically in batch introduces a lag in the data which can become substantial. A system such as this does tend to be rela-

tively inexpensive. The question is whether the lag that is introduced is too costly in terms of timely feedback to decision makers.

Evaluation Findings and Implications in Minnesota

Sentencing guidelines were implemented in Minnesota for crimes committed on or after May 1, 1980. Minnesota has the longest period of experience with sentencing guidelines and has engaged in more extensive monitoring and evaluation than other jurisdictions. The primary goals of the Minnesota guidelines were to send more serious person offenders to prison and fewer property offenders to prison, and to reduce unwarranted disparity in sentencing. The coordination of sentencing policy with correctional resources was also a goal of the Minnesota sentencing guidelines.

Data were collected on a fifty percent sample of sentences to support the guideline development effort. Approximately one hundred items of information on offense and offender characteristics and case processing were collected. Those data were used to show the changes the guideline policies would have on sentencing practices and to project the impact of policy proposals on correctional resources. Those data also serve as a baseline for evaluating the impact of the guidelines on sentencing practices.

The monitoring system developed for the guidelines was designed and implemented by the sentencing commission. The monitoring system combines an existing information system in modified form with a new system designed specifically to capture information regarding the guidelines. The monitoring system is a combination paper and batch system and is very inexpensive to operate. There is, however, a significant time lag (anywhere from six to twelve months) between the imposition of a sentence and the inclusion of the sentence in an analytically useful data set. In spite of the lag inherent in this kind of monitoring system, the data are more current than had previously been available and are more relevant than those provided by previous information systems. The monitoring system provides most of the data needed for evaluating the impact of the guidelines. In addition to those data, in depth data on a sample of cases were collected in each of the first two years of guideline operation (1981 and 1982). A third in depth data collection effort is underway on a sample of 1984 cases.

Two major outcome evaluation reports have been prepared by the sentencing commission. A preliminary evaluation report on the impact of the guidelines during the first year after implementation was published (MSGC, 1982) and an evaluation report on the impact of the guidelines after three years was published (MSGC, 1984).

One of the goals of the sentencing guidelines was to reserve scarce prison resources for the more serious person offenders and use community sanctions for most property offenses. This was achieved to a considerable extent in 1981, but sentencing practices reverted to pre-guidelines patterns to some extent in subsequent years. In 1981, 37% of offenders committed to prison were property offenders compared to 47% prior to the guidelines. In subsequent years the proportion increased to the pre-guideline rate. The percentage of commitments that were for person offenses similarly changed. In the year following guideline implementation, 57% of commitments were for

person offenses compared with 39% prior to the guidelines. Fifty percent and 43% of prison commitments were person offenders in subsequent years.

One factor that contributed to the increased commitments of property offenders in recent years is changes in prosecutorial practices. Prosecutors began bringing more charges against property offenders and dismissing fewer of them. This resulted in higher criminal history scores and consequently more presumptive prison commitments for property offenses. The percentage of offenders with criminal history scores of four or more, which separates imprisonment from nonimprisonment for many property offenders, increased from approximately 8% in 1981 to 12% in 1982 (a 50% increase), and 14% in 1983 (a 75% increase from 1981), remaining at approximately 14% in 1984. Another factor that contributed to the rise in property offenders committed to prison after the initial low level is an increase in departures, that is commitments to prison when the guidelines presume a nonimprisonment sanction. Many of those departures were at the request of defendants who preferred to go to prison rather than receive relatively onerous community sanctions.

Sentences were more uniform in 1981 than they had been prior to the guidelines. They were particularly more uniform with respect to disposition — that is who goes to prison — with a 6.2% departure rate from the presumptive disposition. The baseline imprisonment practices would have yielded a dispositional departure rate of 19.4% under guideline policy. Dispositions in subsequent years were still more uniform than dispositions prior to the guidelines, but the level of dispositional uniformity decreased somewhat from that found in 1981. The dispositional departure rate was 7.0% in 1982, 8.9% in 1983 and 9.7% in 1984.

Durational uniformity is more difficult to assess because no stable durational practice existed prior to the guidelines. The durational departure rate of approximately 20% after implementation of the guidelines probably represents a significant increase in uniformity. Durational uniformity further increased in 1983 over 1981 and 1982 levels in one important respect. The average increase for aggravated durational departures went from 56 months in 1981 and 46 months in 1982 to 28 months in 1983. The increase in durational uniformity reflects judicial adaptation to real time sentences and reflects appellate standards established in 1981 that limited the extent of durational aggravation (Knapp, 1985: 42).

Case processing was not greatly affected by the guidelines. The rate of trials remained at the baseline level of approximately 5%. The average time between conviction and sentencing also remained at the baseline level of approximately 40 days. Less than 1% of the sentences are appealed, which translated into approximately 320 sentencing opinions by the end of 1985.

Prison population dropped from almost 100% of the capacity of 2,072 beds when the guidelines were implemented to approximately 93% of capacity the first year after implementation. Commitments during 1982 were higher than in 1980 and 1981, and prison populations increased to capacity. Projections based on 1982 sentencing practices indicated that if those sentencing practices continued, prison populations would continue to grow and would result in a serious crowding problem. Several factors

contributed to the rise in prison population including increased imprisonment rates for property offenders, increased mandatory sentences for weapon offenses, and an increase in the number of offenders moving through the system.

The legislature and the commission worked together in 1983 to avert the projected crisis in prison populations. The legislature modified good time for mandatory sentences, which effectively reduced the mandatory sentences. The commission modified the guidelines in several ways which also reduced sentences. Subsequent sentencing practices reflected these changes, and other changes in sentencing practices emerged to further mitigate the problem. A new 400 bed facility was completed which increased prison capacity. Excess prison capacity is currently used to house Wisconsin and Federal prisoners on a per diem basis.

Overall, the guidelines process is successful in Minnesota. Cases are being processed without undue delay, real time sentences are being imposed, and there is prison space for offenders who are sentenced. The substantive goals of the guidelines — that is, increased proportionality and uniformity in sentencing — are being realized to a lesser extent than was initially the case. The structure that has been established is available to decision makers should they wish to intervene and encourage practices more in keeping with the original goals.

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