

Sentencing Guidelines, Sentencing Practices, Truth-in-Sentencing

Remarks by PROF. CHARLES OSTRUM

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I'm here to talk a little bit about sentencing guidelines. I've been studying sentencing in Michigan since 1978, when I was part of the study headed by Marv Zalman to look into the possibility of racial disparity. We published a report called "Sentencing in Michigan" in 1979. I then worked with the Supreme Court for 10 years developing the advisory guidelines and then, after a few years off, I came back and served as a consultant for the Michigan Sentencing Commission.

Michigan has studied its sentencing practices for as long as any state in the union but, on the other hand, there is a disconnect. A lot of the stuff that we've learned about sentencing never finds its way into the public policy arena. The original impetus for guidelines was to reduce disparity in sentencing. Research has shown that where you are in the State of Michigan has a huge impact upon the likelihood of going to prison and the length of time that you spend there. Another issue that was surfaced in impetus was to reduce discrimination. And, we now have data in place and we can look more closely at the causes and the extent to which declines in discrimination and sentencing are occurring. Although, I'm engaged right now in a three-state study in California, Minnesota and Michigan and in order to really get a handle on discrimination, we also need to go back to the arrest, the charging, prosecutorial decisions and so forth to get that whole thing into the mix. The sentencing part is simply something that takes place at the very end.

The other idea that the commission had was they would be able to project prison population. If we had this wonderful guideline system in place, every judge, probation officer would fill out a sentencing guideline form, enter this into the computer. We would have a wonderful database and we'd be able to anticipate how many people would walk in the door.

Before I talk about that, let me briefly mention a few things about the Michigan Sentencing Guidelines. There are about 22 states in the United States that have sentencing guidelines. Michigan is the only state that has a three-dimensional guideline. That is, we have crime classifications that are pretty roughly based on the statutory maximum from the life crimes on down to the two-year felonies. We take into account prior record. Those two dimensions are part of every guideline system in the country. The thing that makes Michigan unique is that we also include an assessment of how severe the instant offense

was. So all armed robberies, for example, are not the same. What kind of a weapon did you use? Was there injury, psychological injury, and so forth? We have 20 offense variables that get scored so that we are able to separate out the run-of-the-mill armed robberies, for example, from those that are truly horrible. With this three-dimensional system we are able to then develop, ten six by six grids, so we have 360 categories into which we can sort all offenders and then we can think about sentencing those offenders.

The other good thing about the Sentencing Commission Guidelines is that unlike the Supreme Court Guidelines, which apply only to the 15 or 20 most frequently occurring offenses, these guidelines apply across the board with one exception. And that exception was, at the last minute, the commission couldn't decide what to do with probation violations. It decided to bring it up at its next meeting; and it never met again. What we have out there is a guideline system that ignores a potentially huge amount of potential input. It's very hard to get a handle on probation violations because sometimes the violators have a new offense. Sometimes they bargain away the new offense and are sentenced on the probation violation, so it's a very difficult thing. But it's huge; potentially a third of offenders could be coming in and being sentenced on probation violations.

The third major feature of the guidelines was that the recommended sentences, and I'll show you those in a second, were based on a study we did of 1995. Michigan is the only state that has based its recommended sentences on the current practice. Our goal is to try to capture about 75 percent of the variation in judges' sentencing and to encapsulate that so that in a sense when judges look at these guidelines, they would have some face validity. Again, the expectation was we would get some experience, at future commission meetings recommendations would be made, and these sentences could be modified. They haven't been. But, it did start with an empirical base.

The other thing that is interesting about the Michigan guidelines is that, you've all got a picture of this (to see the PowerPoint Presentation or the PDF version of this presentation, **click here**), is that most states have two kinds of grid cells. They have a line that they draw. To the left of the line are lock-out cells, where the presumption is prison. To the right of the line is a prison cell where the presumption is prison. Michigan, rather than having a line, has included what I have here in yellow, a set of things that are called straddle cells where the judge has the prerogative to give a sentence of alternative sanctions, including jail, something within the community, or to send the person to prison. So rather than have what is called an in/out line in the trade, we now have a band of grid cells whereby judges have that discretion. One of the issues that Michigan confronted with the commission was to try to leave some discretion with the judges. Not surprisingly, there were lots of judges on the sentencing commission and they were interested in some discretion. On the whole, at the time, it appeared to be a pretty good idea. I'll talk a little bit more about some problems with that.

Now, the guidelines came on board in 1999, but it's important to remember that right now in the State of Michigan there are essentially three sentencing regimes in place. Everybody that committed an offense, except a probation violation, after January 1, 1999, falls under the auspices of the commission guidelines. Offenses that were committed before that, some of those are going to have the Michigan Supreme Court advisory guidelines applied to them, and some cases have no guidelines at all. And so, we've got three sorts of pools of inmates coming in. One of the things that's happened is that intake into the prisons, as well as the number of convictions, have continued to grow. The intake, I understand, for 2002 is about 11,000 new offenders, which I believe is the highest one-year intake in the history of the department. In addition to the fact that the trend is going up, we are finding a huge

number, over 50 percent, of the people being sent to prison are being sent for sentences of two years or less. I'll say something about that in a moment. The last thing is the commission, at the end of its activity, purchased some prison projections software. The commission paid for it, and we never got it. And so, the model that was supposed to be in place just isn't there.

Now, I don't know if you can see this but as part of this other study that I have been working on comparing Michigan, Minnesota and California patterns, and you can see Michigan, as well as the national trend, but Michigan from the late '80s to the late '90s, had a higher rate for 100,000 convictions, felonies, than other states. And it's tremendously higher than the state of Minnesota. Minnesota is right at the bottom. Certainly, as that one slide showed, with the exception of Texas, we are the only large state with such high conviction rates. Now coupled with that, what we see is, and this is 2002 data, but it's the data for people sentenced under the commission guidelines. Right now, I believe that's about 75 percent of all the people being sentenced are sentenced under the new guidelines. And so the distribution we see is a small number of sentences in the one - six range, but then we see some very substantial numbers in the one year, 18 month and 24 month ranges. So there are a lot of people that are coming into the system for a very, very short amount of time. I'm not an expert on the efficiency aspects of this, but I can't believe that it is very efficient to bring somebody in and keep them there for six or seven months and go through all the intake procedures and so forth. So, the fact is that we do have a bunch of people who are being sent to prison for not a very long time. The majority of these short sentences are coming from the straddle cells. I'll say some more about that in a minute.

What we have here in Michigan is a wonderful policy tool. We have a comprehensive guidelines system, that eventually will apply to all offenses with the exception, I guess, of probation violations. We have a wealth of data. I don't think there is another state in the union that has as much data, high quality data, as the State of Michigan does. We have just a whole raft of things. Plus the other thing that truly sets Michigan apart is we have comprehensive information on how the offense was committed: some of your key factors, such as the type of weapon, the extent of injuries, and so forth. We've got extensive information on prior record plus all of the demographic, socioeconomic data that the department collects as part of their basic information report.

Now, when the commission set the guidelines up, the discussion was around the conventional rules of sentencing, specific and general deterrence, rehabilitation and so forth, trying to make the punishment fit the crime. In the background, though, was the idea that a set of guidelines, a comprehensive across-the-board set of guidelines, would provide a way to be able to exercise some fiscal control. So, what I'd like to do is go through a couple of projections that the commission made in the fall of 1998 just to get an idea on the fact that we can do this. But before I do it, basically, if I were teaching a class on policy analysis, I'd always start with a little input/output diagram like this. Lynn Jondahl talked about this pool of potential convicted offenders. There are lots of things we could do; with education, with mental health and a variety of things, but as corrections policy makers, people don't have the option to go out there 20 years before, 15 years before and change. What we have to do is be able to deal with what comes to the door. What comes in terms of the number of offenders convicted of felonies.

Right now, we have three sets of data, three different kinds of offenders for who there are no guidelines; the commission guidelines and the old Supreme Court guidelines. And then we can do some projections on both the type sentence the individual gets as well as the anticipated length. In the fall of 1998, these were the projections. M2 is second degree

murder. There is no guideline for first-degree murder. And then the crimes A-H. As you can see, the expectation was that judges would embrace these new guidelines. They would sentence right down the middle. You know, they'd depart once in a while, but on the whole, that they would follow these things. In terms of actual practice, however, two things jump out. Number one is for the truly serious crimes, those who are in murder 2nd A, B and C, you can see that the departure rates below are extensive. This, as well as, the percentages in the lower half. Now, there still are double-digit percentages above the grid cell mean but predominantly, judges are telling us it seems to me, that they are telling us that the recommended sentences for these severe crimes are too long. They are not going along with them.

I should add one other consequence of there being no commission in place is that, to my knowledge, no one is collecting information on departures. If judges do not sentence within the guideline range, they are required to state on the record why is it they are doing so, fill out a form that has this departure reason. I'm sure that they are putting it on the record, and that the various appeals and so forth are being argued around certain departures, but as a rule, we are not collecting that information, so we don't really know the reasons judges are giving for their high departure rates in these very serious crimes.

The other thing that is very noticeable is that in the lower severity crimes, grids E, F, G H, the dominant sentence is in the bottom part of the recommended range. The ranges could be adjusted a bit downward and still capture what it is that the individuals are doing. What I am advocating is not for any particular philosophical reason. What I am arguing is that we have a tool that if we had particular fiscal goals such as we had to save \$100 million, we could adjust this grid in the input/output format so that we were getting less people coming in the door, and we could target who those people are.

The other thing is that in the fall of 1998, we generated a predicted average sentence and a predicted percentage to prison. Again – the current data, what I have here for 2002 -- reflects only those cases sentenced under the new guidelines. The incarceration rate for cases sentenced for which there are no guidelines or under the Supreme Court Guidelines, is closer to 28 percent. So the overall rate is higher than 20 percent today. Once all the people fall under the guidelines, if that were the case, then we would expect to see somewhat lower incarceration rates, or prison rates.

Now, what's the culprit; what explains this? And this is a table that you don't have. It's what I added late last night, but let me just describe what's in it. As I noted before, there are three kinds of grid cells. There is a prison only, a lock-out and a straddle cell. We anticipated, when we did the projections that about 22 percent of all people falling in the straddle cell would receive a prison sentence. What's happened is it's closer to 50 percent; it's now 41 percent. One way to understand that is when we created a straddle cell and put it in the guidelines, the message judges were getting, perhaps, is that's a 50/50 decision – you could go either way -- as opposed to communicating that it's a 25/75 or what have you.

So what we are finding is incarceration rates for these straddle cell offenders are substantially higher than we anticipated. That is the reason why we are seeing a very big increase in the number of short sentences. The straddle cell is one that has as its cell minimum 12 months or less, and generally, the highest that a straddle cell goes, I think, is 24 months. So, somewhere in the 12 to 24 range, we are generating a whole host of short sentences.

So, we've got the data, potentially, we can target who stays and who goes, who we want, which of the people we are most afraid of as opposed to people that we're just annoyed with. We identify who we're afraid of and target those people for prison sentences.

It seems to me there are three things that we can do in this regard. Number one is we can make some changes in guideline grids to accommodate how much we're able to spend, control intake that way. Another thing that happened, I need to mention, is that the sentences that are ensconced in the guidelines, as I said, are based on 1995 data. Tie barred to the sentencing guidelines was the truth-in-sentencing package whereby disciplinary credits were taken away. While the feds mandate truth-in-sentencing in which you serve 85 percent of your minimum, in Michigan we like people to serve at least 100 percent of their minimum. So, truth-in-sentencing was never factored in in the sense of taking the ranges down rather than under the old regime where an offender would typically serve 83 or so percent of the sentence, they are now serving 100 percent. That's another change we could make. Third change would be to include probation violations.

I want to illustrate the first one just quickly. How can we reduce the number of offenders coming through the door? We don't have a commission currently and it would require legislation to do this, but this would be hypothetical to what a commission could do. Focus on Class E. One third of all the offenders sentenced under the guidelines fall under Class E. Class E includes, primarily, offenders convicted of crimes with a statutory maximum of five years or less, plus anyone convicted of an A, B, C or D crime at the attempt level. So if it's an attempted armed robbery, it falls to E. So E has a lot of things going on, and out of 30,000 cases in 2002 that were sentenced under the new guidelines, 10,300 fall into Class E.

I've drawn a little box around four grid cells. These grid cells contain 25 percent of all the cases in the E grid. So, what I wanted to explore is the possibility of taking and turning this, this, this and these from straddle cells into lock-out cells -- just changing the policies, adjusting the sentences so they are no longer straddle cells and leaving a nice band of straddle cells there to accommodate some other offenders. So, what are we able to do then with that change? The ones in green, we could move from a straddle cell status to a lock-out cell status. Whereas before we had 3,700 offenders in straddle cells, this change would make it 777. We would just simply say, target those offenders on the periphery there, and we would say that they are now lock-out cells. They are going to be coming into prison at a much lower rate than are straddle cell offenders, and so I've adjusted the rates to prison. You have, at the bottom, what the rates are right now, and as you can see, the cells that I have left as straddle cells, most of them have some fairly significant percentages of those folks going to prison. But, again this would just be policy-driven, and it would be fiscal policy that we were trying to affect. And doing this would lead to, so those cells that are green there, we would apply the lock-out rates to prison rather than the straddle cell rates to prison and anticipate a drop of 745 offenders.

I went on the National Institute of Justice website and they calculate that Michigan's prison costs on average are \$77 per day, which works out to \$28,000, approximately, per year. Making these small changes in one grid in the guidelines over the space of two or three years would save \$33.5 million. So, we could tie money to people, we could make changes, and we could begin to get estimates; get a handle on explicit ways to reduce the amount of money or the cost of operating the system. This could work the other way as well.

Let me just conclude by offering five suggestions of things to consider.

First of all, it seems to me to be imperative that the sentencing commission be reconstituted in fashion. The guidelines were never intended to be carved in stone and stay the same. They were intended to be changed as we learned more about practice.

Secondly, if you reconstitute the commission, it needs to be reconstituted with a staff. The state of Virginia has 12 full-time staff members. At it's height, Michigan had two.

Third, we need to enforce departure provisions as well as collect data on what's going on.

The reverse aspect then of what I was talking about, trying to figure out how to cut money, is the fourth bullet. North Carolina has instituted a procedure whereby every bill that creates a new crime or changes the penalties has to do a sentencing impact statement. The guidelines would provide the grounds to see how many more offenders a proposal would bring into the system, average sentences and using current figures we could attach a cost to that. So, we would again try to anticipate -- the crime of the month club -- what it's going to cost to add a new offense.

Finally, and most controversially, it seems to me that if the commission is reconstituted, that its recommendations should go into effect unless a majority of the Legislature says "no". This has all kinds of constitutional issues associated with it, but it's only the way that other states around the country have been able to get away from that ratchet effect. No public official is going to get re-elected arguing that we need to decrease penalties or take penalties off the books. An independent commission can make some recommendations, the Legislature can get some coverage, and sentencing policy could be a bit more rational. But again, I'll just close in saying that the sentencing guidelines currently in place in Michigan along, with the data collection that's already in place, gives Michigan a huge step up on almost any other state in the union in terms of being able to take fiscal goals and change policy in line with actual resources.

Thank you.