

Criminal Law

Michigan's Sentencing Guidelines

by Sheila Robertson Deming

*Judicial discretion may be the most inexact manner of sentencing—that is, until we examine the alternatives.*¹

Michigan has primarily an indeterminate felony sentence structure² in which all three branches of government play a role: The maximum term is set by the Legislature, the minimum is set by the sentencing judge, and the actual time served by a defendant sentenced to prison is determined by the parole board in the executive branch.

The determination of an appropriate minimum sentence was traditionally left to the broad discretion of the trial court bench. In some cases, that discretion allowed a minimum sentence as short as a few months or up to a life sentence. The judiciary implemented institutional self-restraints within that broad discretion over the years to temper the potential for abuse.

In 1983, the Michigan Supreme Court unanimously held in *People v Coles*³ that it had the power to review sentences imposed by trial courts for an abuse of sentencing discretion that "shocked the conscience" of the appellate courts. In 1990, having determined that the "shocks the conscience" standard had proved insufficient for meaningful appellate review of sentencing, the Court held in *People v Milbourn*⁴ that sentencing discretion would henceforth be reviewed to determine whether a sentence was proportionate to the offense and the offender.

In the meantime, the Michigan Supreme Court established a task force to consider the development and use of sentencing guidelines to determine the appropriate minimum term of a sentence.⁵ In 1984, the Court promulgated its first edition of sentencing guidelines, which it required the trial bench to use by administrative order.⁶ The judicial guidelines, which included less than 100 frequently-occurring felony offenses, were not policy directed, but were a statistical reflection of the actual sentences being imposed by the trial bench.

A second edition was promulgated in 1988, reflecting additional sentencing data collected in the interim.⁷ While use of the guidelines for included offenses was required, actual sentencing within the guidelines was not. A judge could "depart" from the guidelines' range by simply explaining the aspects of the case that warranted departure.⁸ A departure from the guidelines in the absence of factors not adequately reflected in the guidelines served to "alert" the appellate court to the possibility of a disproportionate sentence.⁹

Although the Supreme Court continued its data collection on the use of, and departure from, the guidelines after 1988,¹⁰ it never issued another edition of the guidelines and, over time, placed less reliance and emphasis on its guidelines in appellate review of sentencing.¹¹

The Supreme Court assumed responsibility for appellate review of sentencing and for developing sentencing guidelines in response to concerns of unwarranted disparity in sentencing. The purpose was to provide sentencing norms, to minimize disparity, and to promote consistency in sentencing without eliminating sentencing discretion.¹²

The response of the trial bench was to sentence within the recommended guidelines range in the vast majority of cases.¹³ The Court was later criticized in some quarters, however, for exceeding its constitutional role.¹⁴

The Legislature established a Sentencing Commission in 1994, with directions to develop sentencing guidelines. MCL 769.32; MSA 28.1097(3.2). The 19-member Commission included four senators and four representatives (two from each caucus), the directors of the Department of Corrections and the Department of Management and Budget, a circuit and a recorder's court judge, two representatives of the public, a prosecutor, a defense attorney, a sheriff, an individual advocating alternatives to incarceration, and an individual representing victims of crime. The Commission met from May 1995 through November 1997 and reported proposed sentencing guidelines to the Legislature in late 1997.¹⁵

The statutory sentencing guidelines were enacted by 1998 PA 317¹⁶ to be used for all felony offenses¹⁷ committed on or after January 1, 1999, for which there is sentencing discretion.¹⁸ The enactment of the guidelines was tie-barred to the adoption of another legislative sentencing policy requiring that offenders serve at least the entire minimum prison sentence imposed by the court and precluding any early release for good behavior or otherwise—a policy popularly called "truth-in-sentencing."¹⁹

In contrast to the judicial guidelines used from 1984 to 1998,²⁰ the statutory sentencing guidelines reflect policy decisions made by the Commission and adopted by the Legislature regarding the appropriate length of the minimum term of a sentence. The statutory direction to the Commission was to develop guidelines that would:

- 1) provide for the protection of the public
- 2) treat offenses against the person more severely than other offenses
- 3) include guidelines for habitual offenders
- 4) be "proportionate to the seriousness of the offense and the offender's prior criminal record"
- 5) "reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"
- 6) "specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper" MCL 769.33; MSA 28.1097(3.3).

The Commission first faced the task of identifying and cataloging all felony offenses. The more than 700 felony offenses contained in the statutory guidelines were culled from the Penal Code, as well as many diverse acts such as the Michigan Adoption Code, the Adult Foster Care Facility Licensing Act, the Michigan Election Law, the Motor Vehicle Code, the Public Health Code, the Tobacco Products Tax Act, and others too numerous to mention.

The Commission categorized all felony offenses into one of six crime groups reflecting the general nature of the social harm involved: crimes against the person, crimes against property, crimes involving controlled substances, crimes against public order, crimes against public safety, and crimes against the public trust. The crime group of the conviction offense determines which offense variables are to be considered and scored. MCL 777.22; MSA 28.1274 (32).

The Commission then ranked all felonies in nine levels of offense severity: the highest being second-degree murder, in a class by itself; then class A through class H, representing a descending order of offense severity. There is one

sentencing grid for each crime class that is consulted to determine the appropriate minimum sentence, which is reflected in months to be served and/or a life sentence. MCL 777.61-.69; MSA 28.1274(71)-(79). Enhanced habitual offender minimum sentence ranges were set by increasing the maximum end of cell length by 25, 50, and 100 percent for second, third, or fourth felony offenders respectively. MCL 777.21(3); MSA 28.1274(31)(3).

In determining the guidelines' sentence ranges, the Commission analyzed the actual sentencing practices of the trial court bench and considered the statutory maximum sentencing length, but were constrained by neither. The Commission weighed the impact of proposed guidelines on jail and prison population growth but, again, did not use that as a controlling factor. Dr. Charles Ostrom from Michigan State University managed data collection and analysis, and Dr. James Austin of the National Council on Crime and Delinquency (NCCD) created a computer-based simulation model. With all of the above as an information base, the Commission applied its collective wisdom to achieve prescriptive guidelines to meet the legislative policy goals.

The guidelines reflect the underlying sentencing policy in a number of ways. Offenses against the person are treated more severely by placement in higher crime classes. Proportionality in sentencing is achieved by providing longer minimum sentences to higher crime classes and within each grid based on increased offense severity and a more significant prior criminal record.

Designation of those offenses and offenders for which a prison sentence is appropriate, and those for which intermediate sanctions are appropriate, is accomplished by three dispositional "cell" types in the sentencing grids: cells that require imprisonment, "straddle" cells that allow the judge to sentence either to prison or to intermediate sanctions, and "intermediate sanction" cells that preclude state imprisonment.²¹

The guidelines retain sentencing that is individualized to the offender and the offense committed by taking into account the defendant's criminal record and the facts underlying the offense. At the same time, they attempt to reduce disparity in sentencing by assigning a measured weight to those factors.

In every case, the guidelines first measure seven categories of the defendant's criminal history (prior record variables), including prior "high" and "low" severity felony and misdemeanor convictions and adjudications; the offender's relationship, if any, with the criminal justice system at the time of the offense; and any contemporaneous felony convictions. MCL 777.50-.57; MSA 28.1274(60)-(67).

The guidelines then measure as many as 19 possible offense characteristics (offense variables), such as whether a weapon was used and its lethal potential; any physical and/or psychological harm to a victim; any aggravated physical abuse such as torture or excessive brutality; exploitation of a vulnerable victim; the number of victims; any contemporaneous felonious acts; a continuing pattern of felonious acts within five years; whether the offender was a leader in a multiple offender situation; the value of property taken or damaged; commercial trafficking in drugs; and, to some extent, the degree of intent to cause harm or degree of negligence involved, *etc.* MCL 777.31-.49; MSA 28.1274(41)-(59).

The prior record level (PRL) and offense severity level (OSL) constitute the two dimensions of the sentencing grids; the intersecting cell reflects the appropriate minimum sentence range for that offender and that particular offense.

The guidelines *structure* judicial sentencing discretion but do not eliminate it. Sentencing judges retain discretion both within the guidelines, which provide a sentence range and not a single fixed term, and outside the guidelines by virtue of the ability to "depart" from the guidelines' range for substantial and compelling reasons. MCL 769.34(3); MSA 28.1097(3.4)(3).

The legislation prohibits departures on the basis of gender, race, ethnicity, alienage, national origin, legal occupation,

lack of employment, religion, and representation in *pro per* or by appointed or retained counsel; and prohibits departure on an offense or offender characteristic already taken into account in the guidelines unless the sentencing judge finds that that characteristic has been given inadequate or disproportionate weight. *Id.*

Because both the Commission and the Legislature chose not to define what might constitute a "substantial and compelling" reason for departure, the judiciary retains the ability to develop the reasons justifying departures from the guidelines as well.²²

Fifteen months after implementation, a few difficulties in application have arisen, but the new lexicon has already become a habit. While the concept of crime class is new to Michigan criminal jurisprudence, the statutory guidelines were modeled after the judicial guidelines to minimize the learning curve and the natural resistance inherent with change. The State Court Administrative Office (SCAO) produced a user-friendly guidelines manual,²³ and 3,000 copies were distributed to the bench and bar, as well as to the Department of Corrections agents responsible for scoring the guidelines for the courts. Nearly 2,000 criminal justice professionals received in-person guidelines training.

Data is being collected, but the overall impact of the statutory sentencing guidelines on the actual sentencing practice has yet to be evaluated. An assessment of whether the guidelines have led to more principled, more proportionate, and less disparate sentencing has not yet been undertaken.

There are impediments to the effectiveness of the sentencing guidelines. One is compliance, which requires receptiveness to, and accurate use of, the guidelines by the collective group of professionals involved in the sentencing process: the presentence investigator who initially collects the case history and scores the guidelines, the prosecutor whose charging and bargaining power may be influenced by the guidelines, the defendant and defense attorney who may negotiate a plea or sentence bargain in reliance on guidelines, and the sentencing judge who makes the final determination of the correctness of the guidelines scoring and the actual sentence to be imposed. Compliance is maximized with confidence in a sound, policy-based system that is not exceptionally difficult to apply.

The use of a sentencing commission to develop, evaluate, and modify sentencing guidelines has the advantage of allowing sentencing policy to be expertly crafted and less subject to a natural political pressure to be tough on crime, period.²⁴ The legislation provides for a continuing sentencing commission that could recommend modifications based upon omissions, technical errors, changes in the law, or court decisions; that could recommend other modifications no earlier than two years after implementation; and that would continue to revise and resubmit such modifications to the Legislature for their consideration. MCL 769.33(4)-(5); MSA 28.1097(3.3)(4)-(5).

In spite of this statutory plan, the Legislature itself amended the guidelines in 10 different 1999 public acts with five different effective dates.²⁵ It corrected some recognized mistakes and oversights, but not all. It added a handful of new offenses, but failed to include the numerous offenses enacted in late 1998 after the initial guidelines. Within three months of the January 1, 1999 implementation date, a bill was already introduced to rewrite the guidelines structure. Both technical and substantive amendments were enacted in late December 1999, with immediate effect.

The Sentencing Commission has not met since reporting to the Legislature in late 1997, and the terms of 18 of the 19 members have since expired. The Legislature appears wont to relinquish any of its policy-making power. Yet, it seems ill-suited as an institution to consider and address the ambiguities, errors, and inequities that have already come to light in the application of the sentencing guidelines, and fails to appreciate the necessary lead time for education of the criminal justice professionals who are crucial to effective implementation. A lack of confidence in the guidelines as a sound sentencing policy—which can occur with guidelines subject to political maneuvering—as well as the difficulty in the practical use of an increasingly complex product subject to frequent change, may

eventually undermine this comprehensive effort to structure sentencing discretion in Michigan.

The other impediment arises from the nature of sentencing guidelines themselves—sentencing guidelines tend to eliminate disparity in sentencing, as well as to institutionalize some disparity in sentencing. Determining the appropriate sentence to meet sentencing goals is not a science, nor is it purely objective. Sentencing guidelines cannot be custom fit to all of the particular circumstances of an offense, nor to measure all aspects of the defendant's culpability. The aider and abettor may be held accountable for unintended acts of the perpetrator; the prescribed punishment may be the same whether the offender is age 12 or age 38; and a numerical score cannot capture the heart of the offender: whether it be misguided, abused, or malevolent.

Footnotes

¹ Aspen, Marvin, Sentencing: Judicial Function: in S. Kadish, ed, *Encyclopedia of Crime and Justice* (New York: The Free Press, 1983), p 465.

² There are exceptions where the Legislature has enacted mandatory determinate and/or minimum sentences for some offenses. For example, first-degree murder requires a nonparolable life sentence, MCL 750.316; MSA 28.548; felony firearm requires a mandatory two-year term, MCL 750.227b; MSA 28.424(2); and possession or delivery of certain controlled substances are punishable by various mandatory minimum terms from which sentencing judges have some discretion to deviate. MCL 333.7401(3); MSA 14.15(7401)(3), MCL 333.7403(3); MSA 14.15(7403)(3).

³ 417 Mich 523; 339 NW2d 440 (1983).

⁴ 435 Mich 630; 461 NW2d 1 (1990).

⁵ See Zalman, *Sentencing in Michigan*, Report of the Michigan Felony Sentencing Guidelines Project (SCAO, 1979).

⁶ Admin Order 1984-1, 418 Mich ixix (1984); Admin Order 1985-2, 420 Mich xii (1985).

⁷ Admin Order 1988-4, 430 Mich xxxi (1988).

⁸ Departure Policy, *Michigan Sentencing Guidelines*, 1988 Second Edition, p 7.

⁹ *People v Milbourn*, *supra* n 4, 435 Mich at 660.

¹⁰ See *People v Zinn*, 217 Mich App 340; 551 NW2d 704 (1996).

¹¹ The Court, rejecting a line of cases from the Court of Appeals, held that the guidelines were irrelevant to appellate review of habitual offender sentencing enhancement in *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995); and subsequently held that guidelines scoring errors were not cognizable on appeal unless the sentence itself was disproportionate. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

¹² See *People v Coles*, *supra* n 3, 417 Mich at 546.

¹³ McComb, *An Overview of the Second Edition of the Michigan Sentencing Guidelines*, 67 Mich Bar J 9 (September 1988), p 863.

¹⁴ See note, *Appellate Review of Judicial Sentencing Discretion in Michigan: A Principle of Proportionality*, 69 U Det Mercy L Rev 401 (1992).

¹⁵ See Report of the Michigan Sentencing Guidelines Commission, December 2, 1997.

¹⁶ The statutory basis and standards for departure and appellate review are found in MCL 769.31 *et seq.*; MSA 28.1097(3.1) *et seq.*; the actual guidelines, instructions, and definitions are primarily found in MCL 777.1 *et seq.*; MSA 28.1131 *et seq.*

¹⁷ A few offenses were inadvertently overlooked, and a large number of felonies created after 1998 PA 317 by amendment of statutes previously providing for felony sanctions in property offenses where the value of the property was over \$100 have yet to be added to the guidelines.

¹⁸ The statutory guidelines do not include offenses for which there is no judicial sentencing discretion such as first-degree murder; and some for which there is limited sentencing discretion, such as possession or delivery of schedule one or two controlled substances in amounts over 225 grams.

¹⁹ See MCL 791.233, .233b; MSA 28.2303, .2303(3). The truth-in-sentencing statutory amendments preclude a prisoner from earning disciplinary credits that allowed for parole eligibility prior to the service of a minimum sentence, and instead provide that a prisoner serve his or her entire minimum sentence. In addition, prisoners may accumulate disciplinary time for institutional misconduct that is submitted to the parole board as part of the parole decision-making process. Truth-in-sentencing (TIS) took effect for enumerated assaultive offenses committed on or after 12-15-98, and will take effect for all offenses committed on or after 12-15-00. MCL 800.34; MSA 28.1404 lists TIS offenses effective 12-15-98, and the SCAO Sentencing Guidelines Manual identifies those offenses subject to TIS in 1998 and in 2000.

²⁰ The judicial guidelines were rescinded by the Supreme Court for offenses committed on or after January 1, 1999. Admin Order 1998-2, 459 Mich xvi (1998).

²¹ Prison cells are defined by MCL 769.34(2); MSA 28.1097(3.4)(2). Straddle cells are defined by MCL 769.34(4)(d); MSA 28.1097(3.4)(4)(d). Intermediate sanction cells are defined by MCL 769.34(4)(a); MSA 28.1097(3.4)(4)(a).

²² An analogy may be drawn to the caselaw interpreting this same standard for departure previously used by the Legislature in the context of departures from the parole guidelines, MCL 791.233e(6); MSA 28.2303(6)(6), and in departures from the mandatory minimum terms in the Public Health Code for certain controlled substance offenses. See *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995).

²³ The Sentencing Guidelines Manual produced by the SCAO may be purchased from the State Bar of Michigan. A soft-bound version is also available from West Publishing.

²⁴ Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 Minn L Rev 727, 729-730 (1991).

²⁵ See 1999 PA 39, 45, 61, 67, 90, 165, 168, 192, and 227.



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