Approved: January 23, 1992
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at

3:15 p.m. on January 16, 1992 in room 313-S of the Capitol.

All members were present except:
Senators Yost, Moran, Bond, Feleciano, Gaines, Martin, Oleen and Parrish, who were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Jill Wolters, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
David Gottlieb, University of Kansas School of Law
Representative Joan Hamilton
Representative Kathleen Sebelius
Matt Lynch, Kansas Judicial Council

The Committee met jointly with the House Judiciary Committee to continue taking testimony on SB 479.

SB 479 - enacting the Kansas Sentence Guidelines Act.

Professor David Gottlieb, University of Kansas School of Law, testified in support of SB 479 as a rational, effective change and as an improvement over the current system. (ATTACHMENT 1)

Representative Joan Hamilton testified in opposition to SB 479, supporting the current system with suggested changes. (ATTACHMENT 2)

Representative Kathleen Sebelius testified in support of SB 479. She outlined the operating assumptions of the Kansas Sentencing Commission and the policy questions to be answered. (ATTACHMENT 3)

Matt Lynch, Kansas Judicial Council, expressed their technical concerns with the relationship of the proposed criminal code recodifications, SB 358, and SB 479. They would prefer to have the recodifications in place prior to the guidelines going into effect. He added that some areas of both proposals need to be examined for possible substantive differences.

The meeting adjourned at 5:00 p.m.

ARTICLE

A Review and Analysis of the Kansas Sentencing Guidelines

*David J. Gottlieb**

I. INTRODUCTION

This spring, the Kansas Legislature will consider the most significant changes in criminal law in a generation.[1] The Kansas Sentencing Commission, created in 1989, will submit its proposed guidelines to the legislature. If enacted, the guidelines will fundamentally alter our state's sentencing philosophy, sentencing lengths, and sentencing procedures.

This Article examines the draft of the preliminary recommendations of the Sentencing Commission.[2] The first section of the Article describes the current sentencing system and the reasons why the Sentencing Commission was created. Next, the Article examines the guidelines themselves. Following this examination, the Article analyzes whether the guidelines will respond adequately to our current prison overcrowding crisis, whether they will help achieve just, consistent and humane punishment, and whether the procedures implemented by the Commission will be workable. The Article concludes that although a sentencing guideline bill should be enacted, the legislature should consider changes that will make the guidelines more effective at reducing prison overcrowding and provide a greater degree of flexibility in making guideline judgments. Specific suggestions are included in each section.

II. A HISTORY OF SENTENCING REFORM

Our State is a fairly late entrant into the sentencing reform movement. The past generation has witnessed a demand, across the political and academic spectrum, for replacement of the indeterminate system of

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1. The last major revision of the Kansas Criminal Code occurred in 1969. *See* Crimes and Punishments, ch. 180, 1969 Kan. Sess. Laws 440.

2. KAN. SENTENCING COMM'N, PRELIMINARY RECOMMENDATIONS OF THE KANSAS SENTENCING COMMISSION (Draft) (1990) [Hereinafter GUIDELINE DRAFT].

criminal sentencing.[3] That system, which began during the Progressive Era in the late 19th Century, is based in part on the belief that rehabilitation is an appropriate purpose of criminal punishment. Offenders, it was thought, are capable of rehabilitation and ought to be released once rehabilitation has occurred.[4] A necessary corollary of the theory was that, if incarceration were imposed, the optimum period of incarceration could only be determined during the course of the sentence. Since judges could not predict how soon an inmate would become rehabilitated in prison, parole boards were delegated the authority to determine the appropriate release date.[5]

Our system of punishment in Kansas reflects the influence of this model. Kansas criminal statutes give sentencing judges almost unreviewable power to decide whom to imprison and whom to place on probation.[6] If imprisonment is imposed, the terms are largely indeterminate, e.g., from 1 to 5 years.[7] Within that period, the Parole Board has broad discretion to decide whom to release and when that release should occur.[8]

In the past generation, systems such as ours have come under considerable criticism. Commentators have argued that the unregulated discretion given judges fosters excessive and unwanted disparity among offenders.[9] The rehabilitative ideal itself has been criticized as unsuccessful and unfair.[10] The "early" release on parole of offenders has been claimed to be both deceptive and soft on crime. More recently,

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3. *See, e.g.*, AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971); D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

4. *See, e.g.*, NAT'L PRISON ASSOC., TRANSACTIONS OF THE NATIONAL CONFERENCE ON PENITENTIARY AND REFORM DISCIPLINE 541-42 (Wines ed. 1870) (reprinted by American Correctional Association); Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 27 (1899); *see also* AMERICAN FRIENDS SERV. COMM., *supra* note 3, at 34-40; D. FOGEL, *supra* note 3, at 30-35; Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 31 (1978).

5. *See* AMERICAN FRIENDS SERV. COMM., *supra* note 3, at 37-38; NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS 389-90 (1973); Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 238 (1980); Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 95-96 (1978); Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. 281, 282-83 (1979).

6. KAN. STAT. ANN. § 21-4603(2) (Supp. 1990).

7. KAN. STAT. ANN. § 21-4501 (1988).

8. *See* KAN. STAT. ANN. § 22-3717 (Supp. 1990).

9. *See* AM. FRIENDS SERV. COMM., *supra* note 3, at 45-46; D. FOGEL, *supra* note 3, at 193-99; M. FRANKEL, *supra* note 3; J. MITFORD, KIND AND UNUSUAL PUNISHMENT (1973); P. O'DONNELL, M. CHRUGIN, & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 1-15 (1971).

10. *See* D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971); *see also supra* note 9 and accompanying text.

the system has been criticized as too diffuse in authority to control prison overcrowding.[11]

The remedy proposed by many sentence reformers for these maladies is a system of guidelines that specifies presumptive prison terms based upon the nature of the offense and the background of the offender.[12] The existence of definite sentencing standards eliminates unstructured judicial discretion which, it is argued, produces unwarranted disparity. Because the guidelines rely on preincarceration data (the crime and prior record), they permit imposition of a definite sentence.

By the early 1980s, these calls for reform had produced guideline systems in a number of states.[13] The federal system also joined this movement, and, in 1987, federal courts began imposing presumptive sentences written by the United States Sentencing Commission.[14] However, there was no similar movement toward guidelines within Kansas. Although proposals for sentencing guidelines were introduced during the 1980s, they received little initial support. On the two occasions bills were proposed, they failed to reach the floor of either House.[15]

Our State's prison overcrowding problem then worked an abrupt change in the politics of sentencing reform. From a population that numbered 2416 in 1979,[16] the prison population in Kansas almost tripled over the next decade. By 1989, there were 6172 inmates in the Department of Corrections' custody.[17] The average increase in population was approximately 400 inmates per year.

This rapid increase had its predictable result. By 1987, both the Kansas State Penitentiary and the Kansas State Industrial Reformatory in Hutchinson were operating at double their capacity. Other state institutions were similarly affected. Inevitably, a federal judge ordered

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11. *See* VON HIRSCH, THE SENTENCING COMMISSION'S FUNCTION, *in* A. VON HIRSCH, K. KNAPP & M. TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES at 4-5 (1987); *Hearings on S.B. 50 - Establishing the Kansas Sentencing Commission Before the Senate Comm. on Judiciary*, Leg. Sess. (1989) [hereinafter *1989 Senate Hearings*](statements of Attorney General Robert Stephen, Richard Ney, Sedgwick County Public Defender, Michael Barbara, Professor of Law, Washburn Law School).

12. *See, e.g.*, D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING (1978); *supra* note 11 and accompanying text.

13. The first states successful in implementing guidelines were Minnesota, Pennsylvania and Washington. TONRY, SENTENCING GUIDELINES AND THEIR EFFECTS, *in* A. VON HIRSCH, K. KNAPP, & M. TONRY, *supra* note 11, at 16-26.

14. The Comprehensive Crime Control Act of 1984, Pub. L. No. 93-473 § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (1988)), which established the United States Sentencing Commission, provided that the proposed guidelines would become effective six months after they were submitted by the Commission, unless Congress modified or disapproved them. *See also* Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of the Federal Guidelines).

15. *See 1989 Senate Hearings*, *supra* note 11 (statement of Attorney General Robert T. Stephan describing 1980 determinate sentencing proposal and statement of Hon. Richard B. Walker describing bill introduced in the 1984 legislative session).

16. KAN. DEPT. OF CORRECTIONS, FY 1989 OFFENDER POPULATION 6 (1989).

17. *Id.*

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population reductions at these institutions.[18] The State was forced to embark on a massive building program that has, in the decade, required new facilities in Norton, Stockton, Ellsworth, Hutchinson, Lansing, Topeka and ElDorado.[19] Even with this buildup, the state faces the spectre of continuing federal oversight of its prisons.

By 1989, a determination had been reached that something needed to be done. After spending considerable time on hearings concerning the prison overcrowding crisis,[20] the legislature passed SB 50, a Bill designed to form a Sentencing Commission to reform sentencing practice in the State.[21]

The Bill was an attempt to impart more rationality and control to our sentencing system. It authorizes the creation of a commission to develop sentencing guidelines based on "fairness and equity" which will provide a mechanism to "link justice and corrections policies."[22] The Commission is charged with designing a system that will specify the circumstances under which imprisonment is appropriate and assign a presumed sentence based upon a combination of "offense and offender characteristics," for those who should be imprisoned.[23] The legislature clearly manifested its intent that the guidelines deal with the overcrowding problem. The Bill states that in drawing the guidelines, the Commission shall take into account "correctional resources, including but not limited to the capacities of local and state correctional facilities."[24] The Commission, formed in 1989, released its preliminary draft in December 1990, in preparation for submission of its final draft to the legislature in the 1991 session.

III. THE STRUCTURE OF THE GUIDELINES

The guideline scheme proposed by the Commission alters fundamentally both the purposes of criminal punishment and the structure in which that punishment occurs. First, the Commission has stated, in effect, that it views the primary purpose of criminal punishment as retribution. Individuals should be sentenced based upon the seriousness of the offense and the injury to the victim.[25] Thus, the Commission believes that the crime of conviction, rather than the nature of the offender, should be the principal basis of the sentence.[26] In determining

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18. *See* Arney v. Hayden, No. 77-3045 (D. Kan.) (Memorandum and Order, Apr. 1, 1988; Memorandum and Order, Dec. 25, 1988; Order, Apr. 13, 1989).

19. *See* KAN. DEPT. OF CORRECTIONS, *supra* note 16, at 8 (reflecting opening of facilities at Ellsworth, Hutchinson and Stockton).

20. *See Hearings Before the Legislative Coordinating Council*, 1989 Leg. Sess. (Feb. 23, 1989).

21. S.B. 50, Ch. 225, 1989 Kan. Sess. Laws 1446.

22. *Id.* at sec. 1.

23. *Id.*

24. *Id.*

25. GUIDELINE DRAFT, *supra* note 2, at 1.

26. *See id.* at 1-2, 20-22.

the "seriousness" of the offense, the Commission has concluded that crimes involving personal injury produce the most harm, and therefore should be sanctioned most severely.[27] Finally, the Commission has decided to abandon rehabilitation either as a reason for sentencing to prison, as a reason to release an individual from prison, or as a reason to sentence an individual to probation rather than prison.[28]

The Commission's guideline scheme also emphasizes the goals of equity and "truth in sentencing."[29] The Commission has attempted to produce equity by requiring that defendants who are convicted of the same crimes and have similar prior criminal records serve the same amount of time.[30] The guidelines promote truth in sentencing by requiring that the actual term fixed by the judge in fact be, month for month, the term served by the inmate.[31]

The guidelines use two basic measures to determine the nature and length of a defendant's sentence: a Crime Severity Scale and a Criminal History Scale.[32] First, the Commission developed a Crime Seriousness Scale to rank virtually every felony in the State at one of ten Severity Levels, with Severity Level 1 crimes, such as aggravated kidnapping, the most severe, and Severity Level 10 crimes, such as piracy of sound recordings, the least.[33] In ranking the crimes, the Commission considered crimes causing physical and emotional harm as most severe, crimes involving private and public property rights as secondary, and crimes concerning the integrity of governmental institutions, public peace and public morals as least significant.[34] The Commission singled out 11 crimes which it subdivided into two separate levels, depending on the amount of harm caused by the act.[35] The Commission also produced a separate ranking for drug crimes.[36] For both sets of rankings, the levels chosen by the Commission did not necessarily correspond to the level of felony currently assigned by the legislature. Thus, the Commission ranked some Class E felonies as more severe and therefore at a higher level than some Class B felonies.[37]

The second measure used by the Commission to compute the sentence is the Criminal History Scale. According to the Commission, the purpose of this Scale is to serve as "an indicator of increased or decreased culpability."[38] The Criminal History Scale consists of 9

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27. *See id.* at 21.
28. *See id.* at 2.
29. *Id.*
30. *See id.* at 3-4, 64.
31. *See id.* at 2, 97.
32. *See id.* at 20-22, 40-43.
33. *See id.* at 30-39.
34. *See id.* at 21.
35. *See id.* at 27-29.
36. *See id.* at 4, 24-26.
37. *See id.* at 31 (listing Severity Level 5 Crimes).
38. *Id.* at 40.

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different categories, ranging from A to I.[39] A defendant's category is determined by the number and the kind of his prior convictions. Felonies are scored more severely than misdemeanors, and violent (person) crimes are treated more severely than non-violent (non-person) crimes.[40] For example, an individual with three prior person felonies receives an "A" rating; an individual with one person felony and one non-person receives a "C"; an individual with two non-person felonies receives an "F"; and an individual with no prior record receives an "I". The penalty imposed for an "A" criminal history score is double that which is presumed for an "I" offender.[41]

The only factors considered by the Commission in designing the Criminal History Scale are the number and nature of the defendant's prior convictions. Thus, an individual cannot change any score by a pattern of exemplary conduct, or by any other favorable behavior. Moreover, every conviction, no matter how removed in time, must be counted. Unlike a number of other guideline jurisdictions, the Commission has refused to permit a "tolling" period, which would exclude ancient convictions that were followed by substantial periods of good behavior in the community.[42]

These two measures form the axes of a graph plotted by the Commission.[43] At the intersection of each Crime Severity Level and Criminal History Scale rating, a presumptive sentence is established. For most boxes, the number represents a narrow range (plus or minus 5%) of imprisonment that must be served.[44] The Commission has also drawn an "in-out" line, separating those presumptive terms that require imprisonment from those that deserve probation. The shaded boxes below the line in the right-hand corner of the graph are presumed to require probation.[45]

The judge is permitted to depart from the presumptive sentence only for "substantial and compelling reasons."[46] The Commission has set out a list of five mitigating and three aggravating factors that may be considered.[47] The Commission has stated that its list is "non-exclusive" but it warns that departures should be limited to "exceptional" cases.[48] Departures must occur after a hearing, must be in writing and are reviewable on appeal.[49]

Once the presumptive sentence is set, that term becomes the actual range of months that the inmate is likely to serve. The Commission's

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39. *See id.* at 41-42.
40. *See id.*
41. *See id.* at Chart 15.
42. *See id.* at 42.
43. *Id.* at Chart 15. A copy of the matrix is reproduced on the facing page.
44. *Id.* at 65-66.
45. *Id.* at 65-66, Chart 15.
46. *Id.* at 73.
47. *See id.* at 75.
48. *Id.* at 73.
49. *See id.* at 50-52, 92.

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Sentencing Range - Non Drug Offenses

Legend

- Presumptive Incarceration
- Presumptive Probation

Severity Level	3+Person	2 Person	1 Person + 1 Non-person	1 Person	3 + Non-person	2 Non-Person	1 Non-Person	2 + Misdemeanor	No Record
I	216	203	189	176	162	149	135	122	108
II	162	152	142	132	121	111	101	91	81
III	108	100	94	87	81	73	67	61	54
IV	90	85	79	73	67	62	55	50	45
V	72	67	63	58	54	49	45	40	36
VI	43	39	36	34	30	27	24	20	18
VII	32	29	27	24	21	18	16	13	12
VIII	21	19	18	16	14	12	10	10	8
IX	16	14	12	12	10	9	8	7	6
X	12	11	10	9	8	7	6	6	6

[EXTENDED]

rules thus eliminate parole as we know it.[50] An inmate may no longer be released after serving a portion of his sentence to return to the community. The Commission has also eliminated the "120 day call-back," the provision in which a defendant can be sentenced for evaluation and then released on probation or returned to prison after the evaluation.[51] These decisions are consistent with the Commission's conception of "truth in sentencing"—now, every month of prison time uttered by the judge will be served in prison by the inmate. Moreover, they are consistent with its view of rehabilitation. There is no point in releasing an offender who has changed as a result of counseling or education programs if that change is irrelevant to the purpose of the sentence.

The Commission's concern with "truth in sentencing" has also led it to abolish the "good time" that an inmate can earn against his sentence. Current rules provide that an inmate can earn up to a 50% reduction.[52] Under the Commission's proposals, good time is completely eliminated. Instead, it is replaced by a very limited "bad time" provision. An inmate can have his stay extended by up to 20% if the institution awards "Behavior Attitude Adjustment Time."[53] The Department of Corrections has been designated the task of implementing hearing procedures for this extension of time.[54]

In sum, the Commission's rules require a nearly determinate sentence imposed by the sentencing judge, based almost exclusively on the crime of conviction and the individual's prior record. Unless an inmate violates institution rules, there will be no change in the initial judgment imposed at sentencing.

It is difficult to overstate the significance of the changes suggested by the Sentencing Commission. The guidelines do far more than respond to the prison overcrowding problem. With a single stroke, they eliminate one of the principal bases for criminal sentencing—the ability of the sentenced individual to be rehabilitated and to change his conduct. In place of rehabilitation, the guidelines create a rigid system to judge retribution. The Commission's ranking of crimes amounts to a recodification of all Kansas felonies, making some Class E felonies more severe than Class D or C felonies. The guidelines will also revolutionize sentencing procedure. They will eliminate parole and change the function of the Department of Corrections.

IV. ANALYSIS AND SUGGESTIONS

In the section that follows, I consider four questions raised by the guidelines. First, do they provide a resolution to the prison overcrowding

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50. *See id.* at 101-02.
51. *See id.* at 99-100.
52. *See* KAN. STAT. ANN. § 22-3725 (Supp. 1990).
53. *See* GUIDELINE DRAFT, *supra* note 2, at 97-98.
54. *Id.* at 98.

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problem? Second, do the guidelines in fact provide the promised regime of just and equitable sentencing? Third, is the Commission's complete abandonment of rehabilitation as a basis for punishment necessary and appropriate? Fourth, are the procedural changes proposed by the Commission adequate to resolve guideline issues?

A. The Guidelines and Prison Overcrowding

One of the principal justifications for creating guidelines is their ability to control prison population. The desire to stabilize our prison resources in fact was a principal justification for the Bill creating the Commission.[55] In order to be faithful to this mandate, the least the Commission's work should be able to promise is that it will stop the incarceration spiral.

While the task presented to the Commission may have political difficulties, it is not terribly complex. During the 1980s our prison population grew at an average of 400 inmates per year.[56] After a brief pause, we appear to be beginning substantial increases in population once again.[57] Unless the guidelines can end these increases, our cycle of overcrowding and building will continue.

Regrettably, the Commission's own research indicates that while the guidelines will slow the rise in prison population, they may not stop the increases. To be sure, the Commission has invested great effort to rearrange imprisonment. Under its guidelines, far fewer property offenders will be going to prison.[58] However, they will be replaced by larger numbers of violent offenders, drug users, and sex crime defendants.[59]

The Commission has produced different estimates of how its guidelines will effect the rate of incarceration. While it had once forecast a small increase, its current projection is that the guidelines will reduce the number of offenders by some 174 per year.[60] Unfortunately, since

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55. There are several means by which one could draw this conclusion. First, the text of the Bill states that the Commission should consider the capacities of local and state facilities when drawing up the guidelines. *See* S.B. 50, Ch. 225, 1989 Kan. Sess. Laws 1446, Sec. 1. The Bill became law during a time in which the legislature was vitally concerned with prison overcrowding. Moreover, many of the conferees who testified in support of guidelines did so because they believed that guidelines could be effective in bringing prison population increases under control. *See 1989 Senate Hearings*, *supra* note 11 (statements of Richard Ney, Sedgwick County Public Defender, Michael Barbara, Professor of Law, Washburn Law School, David Gottlieb, Professor of Law, University of Kansas).

56. *See* KAN. DEPT. OF CORRECTIONS, *supra* note 16, at 6.

57. Conversation with Charles Simmons, General Counsel, Kansas Department of Corrections, January 10, 1991 (reporting an increase of approximately 200 inmates in calendar year 1990).

58. *See* GUIDELINE DRAFT, *supra* note 2, at Chart 16.

59. *See id.*

60. *Id.* at 68. The Commission has also attempted to predict how the change in average length of imprisonment, as well as any changes in the numbers imprisoned, will affect prison population. It has devised a calculation called "person months" of imprisonment. The Commission estimates that the total will be a reduction of 9.3% in person months over current rates. According to the

our current rate of increase may be close to 200 inmates per year, this reduction of the rate of imprisonment, even if it proves to be accurate, will cut but not stop the increase in population.

Moreover, experience in other states has shown that estimates of incarceration rates under guideline systems usually understate the increases that occur.[61] There are at least two reasons for this pattern. First, it is likely that the Commission has underestimated the criminal history scores of the inmates sentenced to the Department of Corrections. At present, there is no great incentive to discover every last misdemeanor conviction for the inmates in the Department's custody. However, with the implementation of guideline scoring, each prior conviction becomes crucial, and prosecutors become better at building criminal history. Thus, states that have implemented guidelines have found criminal history scores raised and guideline terms increased above the estimates.[62]

Second, the Commission's estimates ignore the "bracket creep" that occurs as legislatures react to crises by creating mandatory penalties.[63] The federal system, with its mandatory minimum drug sentences, provides an example where minimum sentences have combined with guidelines to produce a tremendous increase in prison population. Despite a statement in the statute creating the federal sentencing commission that it should "take into account the nature and capacity" of available prison facilities in writing its guidelines,[64] the U.S. Sentencing Commission now estimates that federal prison population will more than double between 1987 and 1997.[65]

There is no justification to continue any increases in the rate of incarceration. We are not in the midst of an increase in crime. Our crime rate is remarkably stable.[66] The Commission has given no reason why it has set the "in-out" line so high. Moreover, the Commission's grid requires prison in considerably more cases than the two states,

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Executive Director of the Sentencing Commission, its data shows that even with this anticipated reduction, we can expect prison population to increase over the next several years. Statement of Ben Coates, Executive Director, Kansas Sentencing Commission, before Leavenworth County Bar, December 13, 1990.

61. *See* THE PENN. COMM'N ON SENTENCING, 1989-1990 ANNUAL REPORT, SENTENCING IN PENNSYLVANIA 7; Letter from David L. Fallen, Research Director, Washington State Sentencing Guidelines Commission, October 26, 1990 [hereinafter Fallen Letter] (on file with Kansas Law Review); MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES 88-92 (Sept. 1984).

62. *See* Fallen Letter, *supra* note 61.

63. *See supra* note 61.

64. *See* 28 U.S.C. § 994(g) (1988).

65. *See* U.S. SENTENCING COMM'N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 63-64, Tables 4 at 71 and 5 at 73 (June 18, 1987); *see also* Hoffman, *Statutory Challenges to the Guidelines* 261, 271, *in* 1 PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES (P. Bamberger & D. Gottlieb 2d ed. 1990).

66. *See* KAN. BUREAU OF INVESTIGATION, CRIME IN KANSAS 1989 at 2 (1990). The figures show total violent crimes of 9107 in 1980 and 9980 in 1989. The total index crime figures are 125,877 in 1980, and 125,439 in 1989.

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Minnesota[67] and Oregon,[68] upon which the Commission relied most heavily when setting up its grid.

The overuse of imprisonment will not only be wasteful, it will produce results in individual cases that will be terribly harsh. For example, the Commission has rated as Severity Level 5, and thus as requiring 32-40 months' imprisonment, even for first offenders, simple robbery, aggravated burglary and a host of other crimes.[69] Thus, the State will now require imprisonment in the following hypothetical Severity Level 5 cases:

Robbery:[70] The accused is an 18 year-old with no prior involvements with the law. One day at high school, he throws a fellow-student against his locker and takes that student's lunch money. Under the guidelines, the 18 year-old should receive a presumptive term of 32-40 months in a penitentiary.

Aggravated burglary (burglary of an occupied dwelling):[71] The accused is an 18 year-old with no prior involvements with the law. One night, after having just broken up with his girlfriend, he gets drunk and breaks into her house in an attempt to take a locket back. He breaks through a window but leaves after seeing someone in the house. Under the guidelines, the 18 year-old should receive a presumptive term of 32-40 months' imprisonment.

Aggravated sexual battery:[72] The accused, with no prior acts of violence or sexual abuse, returns a date to her home, does not immediately leave when asked to do so, touches the date once with the intent to arouse, and then leaves when asked a second time. Under the guidelines, the accused should receive a presumptive term of 32-40 months' imprisonment.

With but a few exceptions, the crimes listed in Severity Level 5 will produce harsh results if applied to immature first offenders. As noted, the Commission's rating of these offenses is notably more harsh than other states. It is also notably more harsh than current practice, for in each of the cases cited above, current practice sees a significant percentage of offenders sentenced to probation.

In addition, the Commission's Drug Offense Scale requires imprisonment in far more instances than is seen in current practice.[73] For example, a college student with no prior involvement with the law who sells a small quantity of marijuana to a friend will be required to be imprisoned for that offense.

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67. *See* MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 35 (Rev. Aug. 1, 1989).

68. *See* OR. CRIMINAL JUSTICE COUNCIL, 1989 FELONY SENTENCING GUIDELINES IN OREGON app. 1 (1989).

69. *See* GUIDELINE DRAFT, *supra* note 2, at app. C-6.

70. *See* KAN. STAT. ANN. § 21-3426 (1988).

71. *See Id.* at § 21-3716 (1988).

72. *See Id.* at § 21-3518 (1988).

73. *See* GUIDELINE DRAFT, *supra* note 2, at 68.

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The Commission's Criminal History Scale will also produce imprisonment where none ought to be required. Other jurisdictions have determined that prior convictions which are decades old and which have been followed by law-abiding behavior ought not be counted in the Criminal History Scale.[74] The Commission, however, has provided no such "tolling" time for prior adult or violent juvenile offenders. The absence of a tolling provision seems to contradict the Commission's stated view that punishment should be proportional to the seriousness of the crime and the harm caused. The Commission says that the purpose of the criminal history score is to "reflect increased culpability."[75] However, the Commission does not explain why an unrelated conviction occurring a generation in the past is relevant to the offender's culpability. It is difficult indeed to understand why, if X and Y commit violent crimes, X is more "culpable" because 30 years ago he was guilty of resisting arrest or bouncing a check.

Second, the guidelines require imprisonment, for committing even the most trivial Severity Level 10 offense, if the offender in the past has committed two or more person felonies.[76] This construction of the criminal history score also is more harsh than other guideline states, many of which provide that an offender who commits the most minor crimes should be probatable irrespective of the individual's prior record.[77] The Commission's determination runs counter to its goal of sanctioning an offender based on the harm caused. For example, an individual who at age 20 committed two unarmed robberies, who thereafter conducted himself in a law-abiding manner, and who at age 60 is found guilty of pirating a sound recording will be required to serve a term of imprisonment.

In sum, the Commission has not yet succeeded in its mission to reduce the prison overcrowding problem. It has constructed guidelines more severe than necessary to control crime and more severe than those in use in other similar states. Its product will create terribly harsh results in some cases. Before it passes the guidelines, the legislature should remedy these defects and insure that the guidelines expand the use of probation and reduce the use of imprisonment.

Recommendation

1. The Commission should restudy both its Crime Severity Scale and its use of imprisonment, with a view to promulgating a system of guidelines more in keeping with its legislative mandate. Any revision should include the following elements:

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74. *See, e.g.*, MINN. SENTENCING GUIDELINES COMM'N, *supra* note 67, at 5.
75. *See* GUIDELINE DRAFT, *supra* note 2, at 40, 48.
76. *Id.* at Chart 15.
77. *See* OR. CRIMINAL JUSTICE COUNCIL, *supra* note 68, at app. 1.

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a. The Commission's in-out line should be set to produce not only a substantial reduction in the rate of imprisonment, but a reduction in total prison population.

b. The Commission should make Severity Level 5 crimes, particularly robbery and aggravated burglary, presumptively probatable for first offenders.

c. Sales of small amounts of drugs should not require imprisonment for first offenders.

d. All Severity Level 10 crimes should be presumptively probatable for all offenders.

B. The Guidelines: Disparity and Effective Retribution

Perhaps the most important claims of the Commission are that its guidelines will reduce disparity and achieve fair punishment. By reducing disparity, the Commission means that individuals convicted of similar conduct will be treated similarly. By fair punishment, it means that individuals who commit more harm will be more severely sanctioned than those who commit less serious harm. Without question, the guideline scheme will reduce certain forms of disparity. However, unless greater consideration is given to judicial departures and prosecutorial discretion, the guidelines may create nearly as many disparities as they resolve.

1. The Need for Judicial Departures

One of the most important decisions of the Commission was to create a "charge offense" system. That system ties the punishment imposed directly to the offense of conviction.[78] The basic assumption of a charge offense scheme is that the severity of harm and the culpability of the offender are directly tied to the crime of conviction.[79]

The difficulty with this assumption is that it overlooks the fact that particular crimes can be committed in very different ways by very different people. These differences have traditionally been considered relevant to punishment.[80] Thus, an armed bank robber might use a toy knife or an uzi; the robber might take a little money or a great deal; he might only point a knife, or he might require all tellers to lie down and point the gun in a terrifying manner; the robber might be an impoverished or alcoholic individual acting impulsively, or he might be a calculating and seasoned professional. Although none of these factors is present in the armed robbery statute, each of the differences ought

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78. *See* GUIDELINE DRAFT, *supra* note 2, at 20.

79. *See id.* at 21.

80. *See* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988).

to be relevant to the punishment the individual receives. Unless the court is given the opportunity to consider these differences, a guideline system will create disparity by requiring that the system treat identically individuals with very different culpability.

The mechanism created by the guidelines to deal with these issues is the right given to the court to depart from the presumptive sentence. The Commission, however, has fairly rigidly cabined the discretion to depart. First, it has enunciated a short list of grounds for departures, with three aggravating and five mitigating factors.[81] Second, while it has specified that the grounds for departure are non-exclusive, it has emphasized that departures generally can be imposed only for "substantial and compelling reasons" in "exceptional" cases.[82]

Both the aggravating and mitigating factors omit significant considerations relevant to culpability. Thus, the aggravating factors include: 1) the victim's vulnerability; 2) excessive brutality in commission of the crime; and 3) that the crime was motivated by animus based on race, color, religion, ethnicity, nationality, or sexual orientation.[83] The aggravating factors do not include, for example, whether the defendant was an organizer of a criminal enterprise, whether the defendant recruited others in the crime, or whether the defendant's conduct evinced an unusual degree of planning or special skill.[84] These factors would appear to be relevant to culpability, since they indicate both that the defendant has been more coldly calculating than the typical offender, and that his conduct has caused more harm to society than that of the typical offender.

The omission of mitigating factors may be even more glaring. The Commission's factors include: 1) the victim was an aggressor or willing participant; 2) the defendant's passive role; 3) diminished capacity; 4) the defendant suffered a continuing pattern of abuse by the victim; and 5) the degree of harm was less than typical for such an offense.[85] This list omits factors such as youth, extreme age, duress or necessity, factors that have traditionally been consider relevant to culpability.

Courts have traditionally recognized youth as relevant to determining culpability.[86] Offenses may represent the exercise of youthful poor

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81. *See* GUIDELINE DRAFT, *supra* note 2, at 75.

82. *Id.* at 73.

83. *See id.* at 75 (the fourth aggravating factor listed by the Commission is:

> If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor *only if* the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime).

Id.

84. *Cf.* U.S. SENTENCING COMM'N, GUIDELINES MANUAL, §§ 3B1.1, 3B1.3 (1990).

85. *See* GUIDELINES DRAFT, *supra* note 2, at 75.

86. *See* United States v. Campbell, 704 F. Supp. 661, 665 (E.D. Va. 1989) (immaturity of defendant); United States v. Kopp, 1 Fed. Sent. Rep. (Vera Inst. of Justice) 123 (D.N.D. 1988) (downward departure because of youth and immaturity); Hillier, *Specific Offender Characteristics* 107, 112, *in* 1 PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES, *supra* note 65.

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judgment rather than calculated mature criminality. Youth is particularly relevant when there is evidence the defendant has been influenced or led astray by an older co-participant. Although the Commission recognizes that culpability may be reduced if judgment is affected by diminished capacity, it fails to recognize youthful immaturity as a basis for departure. The failure to consider youth has been severely criticized in the federal system;[87] this factor should not be omitted by the State.

Similarly, while the guidelines permit an upward departure if the victim is unusually vulnerable, they fail to permit a downward departure for any unusual vulnerability of the defendant such as extreme age. In cases involving older defendants, courts have considered the impact of prison on a defendant's life expectancy and health, as well as whether the older defendant is a significant threat to the community.[88]

The Commission has also omitted duress as a basis for a departure. Courts and other guideline systems have recognized that the existence of duress, blackmail or coercion not amounting to a complete defense may be relevant to culpability.[89] For example, in most states, including Kansas, if an individual commits an offense because someone has threatened to destroy that individual's livelihood, such circumstances will not constitute a complete justification for the criminal conduct.[90] However, economic duress should be admissible to show reduced culpability on the part of the defendant allowing a downward departure from the presumed sentence.

Finally, if the defendant committed the offense out of a desire to avoid greater harm, that fact is relevant to the determination of culpability. The father who steals a loaf of bread to feed his children may not be innocent of theft. On the other hand, that father's motivation should have an impact when it comes time to decide how severe the court's sanction should be.

In sum, absent revisions in the grounds for departure, we can safely predict, as one commentator has written about the federal system, that our guidelines will be "often too harsh, sometimes too lenient, and always too rigid."[91] The legislature should increase judicial authority to depart. If the result is the continuation of too great a degree of judicial disparity, the legislature is free to revisit the issue and tighten the guidelines.

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87. *See supra* note 86.

88. *See* United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990).

89. *See, e.g.*, U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K2.11 (1990); MINN. SENTENCING GUIDELINES COMM'N, *supra* note 67, at 19.

90. *See, e.g.*, State v. Dunn, 243 Kan. 414, 421 (1988); R. PERKINS & R. BOYCE, CRIMINAL LAW 1059-60 (3rd ed. 1982).

91. Letter of Michael G. Katz, Federal Public Defender, District of Colorado, to Commissioner Ilene H. Nagel (Feb. 21, 1990), *reprinted in* 2 Fed. Sent. Rep. (Vera Inst. of Justice) 229, 230 (1990).

Recommendation

1. The Commission should recognize the following aggravating factors as appropriate for departure:
   a. the defendant was an organizer or manager of an enterprise;
   b. the defendant recruited others; and
   c. the defendant's conduct evinced unusual planning or required special skill.
2. The Commission should recognize the following mitigating factors as appropriate for departure:
   a. youth;
   b. the defendant's age or health;
   c. duress not amounting to a complete defense; and
   d. necessity, or the desire to avoid a greater harm.
3. The Commission should require that a departure be granted only for "substantial" reasons. It should not require, however, that the reasons be "compelling" or "exceptional."

2. Prosecutorial Discretion

The most frequently repeated claim articulated by supporters of the guidelines is that they will reduce the disparity in treatment between similarly situated offenders. By drastically reducing the discretion of judges to determine the sentence, the guidelines in fact can be expected to reduce judicial disparities. However, the guidelines recommend virtually no change in the nearly unregulated prosecutorial discretion that now exists in the State. Unless attention is given to this issue as well, the guidelines will not reduce discretion and disparity, but merely transfer it from the judiciary to the prosecution.

For well over a decade, authorities have recognized that one of the dangers of a "charge-offense" system of presumptive sentencing is its potential to transfer discretion from the judge to the prosecutor.[92] When the precise sentence is pegged to the charge of conviction, a prosecutor may, by varying the charge, effectively set the final sentence. For example, while it may be advisable to treat all armed robbers the same, guidelines will not produce that result if some armed robbers are charged

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92. For example, during consideration of the FEDERAL SENTENCING GUIDELINES, there were frequent expressions of concern that the guidelines would increase disparity by limiting judicial discretion while at the same time leaving prosecutorial discretion intact. *See Hearings on H.R. 6869*, 95th Cong., 1st & 2nd Sess. 595-96 (Thomas Emerson, Yale Law School); *id* at 1934 (Judge James M. Burns); *id*. at 2224 (Cecil C. McCall, Chairman, United States Parole Commission); *id*. at 2324-29 (Daniel J. Freed, Yale Law School); *id*. at 2336-40 (Matthew T. Heartney, Yale Law School); *id*. at 2356-57 (G. LaMarr Howard, Nat'l Ass'n of Blacks in Criminal Justice); *see also* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 560-61 (1978); Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines*, 68 KY. L.J. 1, 11-12 (1979); Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 742-57 (1980).

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with armed robbery, some plea bargain to reduced charges of unarmed robbery, and some plead to larceny.

Of course, prosecutors have always had the power to engage in this charge bargaining. However, under the present system, the judge and parole authorities are in a position to mitigate any disparities produced by the prosecution. Thus, if the judge believes all three hypothetical offenders are equally culpable, she may sentence all three to probation or to prison. Moreover, if imprisonment is imposed, the Parole Board may attempt to impose similar release dates.

Under guideline sentencing, however, there is no control of prosecutorial discretion. The prosecutor controls the charge that is to be selected and, with that power, the sentence that will be imposed. In the hypothetical example, a decision to charge armed robbery will require a guideline sentence double that of the simple robber, with a sentence of probation for the individual convicted of larceny.[93]

For at least three reasons, this kind of power ought to be more troubling than judicial disparity. First, prosecutorial disparities occur off-the-record. While judicial judgments are pronounced in a recorded sentencing hearing, prosecutorial judgments are made in the County Attorney's office. Second, judges are elected or appointed to be neutral. The prosecutor, of course, is partisan for one side in the dispute. Finally, judges tend to be some of the most experienced practitioners in the state, while prosecutors may be barely out of law school.

This transfer of power, discretion, and disparity has been noted in many of the jurisdictions that have moved to more determinate sentencing systems. For example, the recent report of the Federal Courts Study Committee concludes:

> We have been told that the rigidity of the guidelines is causing a massive, though, unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system . . . . The result, it appears, is that some prosecutors (and some defense counsel) have manipulated the guidelines in order to induce the pleas necessary to keep the system afloat.[94]

Similar problems have been reported in Minnesota,[95] Washington,[96] and Pennsylvania,[97] states that have served as models for the Commission in implementing its guidelines.

The legislature need not consider itself helpless to deal with this transfer of discretion. One possible remedy is the implementation of guidelines to regulate the plea bargaining process. The Commission has proposed rules that recognize the prosecutor's power to move for

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93. *See* GUIDELINE DRAFT, *supra* note 2, at Chart 15, app. C-4, app. C-6, app. C-15.

94. REPORT OF THE FED. COURTS STUDY COMM. 138 (Apr. 2, 1990).

95. *See* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 61, at 71 ("[t]he power of prosecutors unquestionably increased with the implementation of the Sentencing guidelines"); M. TONRY, SENTENCING REFORM IMPACTS 60 (1987).

96. *See* M. TONRY, *supra* note 95, at 60.

97. *See id.*

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dismissal of counts, and to agree or not agree to file particular counts or charges.[98] Effective standards for prosecution conduct will require guidelines that specify the standards under which such bargains ought to be permitted. As well, they should require that the reasons for such bargains be given in writing. The State of Washington has led the way and has adopted recommended standards for charging and plea dispositions.[99]

Recommendation

The Commission should recommend that the legislature study and implement a series of guidelines to regulate prosecution charging practice.

C. The Guidelines and Rehabilitation.

In the preceding section, I analyzed whether the Commission has produced an efficient and equitable retributive system. This section considers a somewhat different issue—whether, in order to produce that system, it is necessary completely to abandon rehabilitation as a goal of sentencing.

To be sure, there appears to be a general consensus that uncritical and standardless reliance on rehabilitation can no longer be justified.[100] We have lost faith that we can determine when a person has been rehabilitated. Even if we could make that determination, most of us no longer believe that an individual should be released when rehabilitated. More fundamentally, it seems perverse to tell an inmate he has been sentenced to prison, with all its hardships, "to be rehabilitated." Finally, there seems to be some consensus that unconstrained discretion given judges under this system has produced unwarranted disparities based upon differing judicial attitudes.

On the other hand, our reaction against the excesses of the current system need not drive us inexorably to the conclusion that rehabilitation must be completely abandoned as a justification for a sentencing option. We need not blind ourselves to the reality that people commit crimes under very different stresses and circumstances. Just as we have recognized that there are "career criminals," so too there are individuals for whom a criminal act is an atypical response produced by stress, illness, addiction or setback. A sentence to probation that allows the defendant access to programs that will help him to deal with these underlying problems may literally save the defendant's life; it may also save the State the considerable financial costs of imprisonment.

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98. *See* GUIDELINE DRAFT, *supra* note 2, at 50-51.
99. *See* WASH. REV. CODE ANN. § 9.94A.440 (Supp. 1990).
100. *See supra* note 10 and accompanying text.

In the legislation creating the United States Sentencing Commission, Congress recognized that creation of a guideline system does not require the simultaneous abandonment of rehabilitation as a sentencing consideration. The enabling legislation retains rehabilitation as a permissible consideration in sentencing. Although Congress recognized that "imprisonment is not an appropriate means of promoting correction and rehabilitation,"[101] it did indicate that the need or amenability of probation could be relevant in deciding whether to impose a term of prison or probation.[102]

The Commission has advanced two justifications for completely abandoning rehabilitation. The first is that rehabilitation should never be a justification for sending someone to prison. As the Commission states, "[p]rison is not rehabilitation, it is punishment."[103] It is impossible to argue with this statement. However, it is irrelevant to the question of whether rehabilitative considerations might be relevant to determining whether an individual should be sentenced to probation in lieu of imprisonment. A limited ability to consider amenability to probation is consistent with the use of prison as punishment.

The Commission's second argument is that the consideration of factors relevant to rehabilitation, such as education, employment, and family ties has contributed to disparity, and particularly, to disparity on racial grounds.[104] One of the striking and persuasive features of the Commission's work is its finding of significant racial disparity in sentencing in the State. The Commission has hypothesized that the reason for this disparity is not so much overt racism as the fact that the variations reflect differences in socio-economic variables such as education, family ties, and employment.[105]

Without question, the Commission's data raises a serious question. Should factors concerning the background of an individual be considered if they may produce racially disparate sentences? A proper answer, I would submit, must be first, that if these factors are important, they should be considered,[106] and second, that the guideline incorporating the factors should be drafted in such a way as to minimize the possibility of disparate impact.

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101. 18 U.S.C. § 3582(a) (1988); *see* S. REP. No. 98-225, 98th Cong., 1st Sess., at 76 (1983).
102. *See* S. REP., *supra* note 101, at 75 n.162.
103. GUIDELINE DRAFT, *supra* note 2, at 2.
104. *See id.* at 4.
105. *See id.* at 4, 8-19.
106. It is possible that the Commission is itself willing to tolerate disparate impact for some aspects of the guidelines. The Criminal History Scale may have a disparate impact upon non-whites if they have, on the average, more substantial prior records. At least with respect to juvenile offenses, it is possible that the average non-white may begin with a longer prior record than the average white defendant. Non-whites convicted of the same crime may therefore serve longer sentences than whites, as a result of having longer prior records. The Commission, and other guideline states, are willing to tolerate this disparity because they consider an individual's prior record relevant to the sentencing determination, notwithstanding any disparate impact.

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An individual's need for, and ability to profit from, vocational or educational training, substance abuse counseling, or other factors has in the past been considered relevant to the sentencing determination. It should remain relevant for a carefully limited number of cases. In recognition of the need to avoid disparity, it is essential that the court document its justification for probation. The court should state both its reasons why retribution may adequately be served without prison, and the particular reasons why the individual may benefit from probation. Moreover, this departure should only be available when the defendant is in a grid category adjacent to the "in-out" line. This kind of compromise may help avoid some of the rigidity and harsh results observed in application of the federal guidelines without reintroducing severe disparities into the sentencing system.

Recommendation

The Commission should recognize amenability to probation as a ground of departure. The right to depart on this basis should be limited to an individual whose sentence is in a grid category adjacent to the "in-out" line.

D. Procedures Under the Guidelines

The guidelines will substantially alter sentencing procedure, from the charging stage through appeals and post-conviction practice. The Commission has recommended a number of changes to trial and sentencing procedure. For the most part, these changes appear adequate to resolve the issues likely to arise in guideline cases.

1. Procedures to Determine Crime Severity

The Commission's guideline scheme, which makes the crime severity dependent on the crime of conviction, virtually eliminates the need for the trial judge to make fact-findings concerning crime severity. If, for example, the defendant is convicted of armed robbery, he will be sentenced under the guideline applicable to that offense.

The only potential problem would occur in the 11 felonies that the Commission has decided to subdivide. Although the Preliminary Draft is not clear on this point, the Commission has apparently determined that the aggravating or mitigating elements it wishes to add should become elements of new crimes.[107] As a result, the jury will be required to determine the existence or non-existence of the element prior to sentencing. Thus, for these crimes as well, the trial court should have no additional fact-finding burden.

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107. Address by Ben Coates, Executive Director of the Kansas Sentencing Commission, before the Leavenworth County Bar (Dec. 13, 1990).

2. Procedures to Determine Criminal History Score

In contrast to the crime severity issue, it will be necessary for the court to make fact-findings at sentencing concerning a defendant's criminal history. Since the criminal history score will have a profound impact on a defendant's sentence, it is critical that the procedures proposed be adequate to permit an accurate determination of the defendant's prior record.

The Commission has suggested two principal changes relevant to criminal history. First, as a part of discovery, the prosecution will be required to provide all prior convictions that would affect the determination of the defendant's criminal history.[108] This proposal will assure that the defendant will have the opportunity, prior to sentencing, to examine and investigate his criminal history. This will eliminate surprises at the sentencing hearing that might require continuances.

The Commission has also proposed a procedure for determining the validity of a defendant's criminal history. The State will be responsible for preparing a summary of the defendant's criminal history and transmitting it to the defendant. Unless disputed, the summary shall be considered to satisfy the State's burden of proving criminal history. If the defendant gives written notice disputing any of the convictions, the State shall have the burden of producing further evidence to satisfy its burden of proof as to any disputed part of the criminal history.[109]

3. Procedures for Departures

The Commission adopted the procedures used in Minnesota for sentencing hearings in the case of departures. Upon notice of the court or either party, a hearing must be held to consider a departure from the guidelines. The parties may submit written arguments prior to hearing and oral argument at the hearing itself.[110]

The statute is silent about the right of the State and the defendant to present witnesses at the hearing. However, due process would seem to require that, at least in some cases, the defendant be granted the right to present testimonial evidence. In *United States v. Fatico*,[111] the court suggested that an evidentiary hearing at sentencing may be required "where there is reason to question the reliability of material facts having in the judge's view direct bearing on the sentence to be imposed, particularly where those facts are essentially hearsay."[112] In cases where the defense can contest government or presentence information by producing live testimony, counsel should request the oppor-

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108. *See* GUIDELINE DRAFT, *supra* note 2, at 50 (proposing amendment to KAN. STAT. ANN. § 22-3212 (1988)).

109. *See id.* at 51.

110. *See id.* at 51-52.

111. 603 F.2d 1053 (2d Cir. 1979).

112. *Id.* at 1057 n.9.

tunity to do so. Moreover, counsel should move, in cases where counsel believes it to be advantageous, to require the State to produce the sources of hearsay allegations.

4. The Appeals Process

The guidelines will change the appellate review process in the State. In order to insure compliance with the guidelines, the drafters have recommended an extensive appellate review mechanism. Appeals by both the State and the defense will be permitted in any case in which a departure is imposed.[113] The appellate court may also review a claim that the court "failed to comply with requirements of law in imposing or failing to impose a sentence [or the] court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes."[114] Appeal is precluded in those cases where the sentence is within the applicable guideline range or where it is the result of a plea agreement.[115]

There are at least two notable issues raised by this appellate review mechanism. First, while the rules permit an appeal of a judge's rating of a prior conviction for criminal history purposes, they do not appear to permit an appeal of a judge's determination of the validity of the conviction.[116] During the Commission's public hearings, it was noted that this omission would appear to preclude an appeal for an individual who contested the validity of a prior conviction on the ground it was obtained without counsel.[117] Apparently reacting to this testimony, the Commission had indicated it will permit appeal of the trial court's determination of the validity of a prior conviction.[118]

A second category of cases in which appeal is not permitted is from a judge's refusal to grant a departure.[119] Important management concerns support this limitation. If every failure to depart is appealable, every decision within the guidelines may be appealed. Even if reversal were permitted only for abuse of discretion, one could expect a high volume of such claims, with at most a handful possessing any merit. While it is certainly possible that in rare cases the lack of review may

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113. *See* GUIDELINE DRAFT, *supra* note 2, at 92.

114. *Id.*

115. *See id.* at 93.

116. *See id.* at 94 ("[i]t is important to emphasize that while a sentencing judge's classification of criminal history may be appealed pursuant to subsection (5), this provision does not apply to the court's decision on issues relating to the determination or proof of a defendant's criminal history.").

117. *See Hearings Before the Kansas Sentencing Commission*, Topeka, Kansas (Nov. 26, 1990) (testimony of David J. Gottlieb).

118. *See* Conversation with Ben Coates, Executive Director, Kansas Sentencing Commission (Dec. 10, 1990).

119. *See* GUIDELINE DRAFT, *supra* note 2, at 93.

seem unfair, the Commission's decision is an appropriate response to the need to conserve judicial resources.

Moreover, even under the Commission's scheme, refusals to depart may be reviewed when the refusal is based upon some error of law. For example, where the court refuses to depart on the basis of an incorrect belief that it is without power to do so, that decision should be reviewable on the ground that the court "failed to comply with the requirements of law."[120] Where, however, the refusal to depart is an informed exercise of discretion, appeal is apparently not permitted.

The Commission has adopted an expedited review process for the summary resolution of solitary sentencing issues and claims related to relatively short presumptive prison sentences.[121] These latter sentences could conceivably be served prior to appellate review without this process.

5. Correctional Administration — Good Time

The Commission proposal also makes profound changes in the State's system of "good time" (credits against the sentence for good behavior). The present system of good time permits reduction of a sentence of as much as 50% in both the maximum and minimum terms.[122] During its public hearings, the Commission heard considerable opposition to that system. Witnesses attacked a system that halved prison terms both as too lenient and as deceptive to the public.[123]

In an effort to promote "truth in sentencing," the Commission decided to adopt a system where the presumptive sentence cannot be shortened by good time. Instead, the Commission's proposal permits the Department of Corrections to award "bad time" (Behavior Attitude Adjustment Time) for misbehavior.[124] This "bad time" can extend a prison term up to 20%.[125] The Commission's proposal, unprecedented in the United States, presents some serious legal and administrative impediments, while offering no real advantages.

First, the system, if implemented in earnest, might well be unconstitutional. Due Process requires, in the criminal context, that no individual be punished and imprisoned without a trial and sentence.[126] The maximum sentence of imprisonment that an individual may be required to serve is the sentence imposed by the judge after trial. If an institution wishes to extend a defendant's stay beyond that mandated by the judgment, it must do so by way of criminal charge, trial, and convic-

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120. *See id.* at 94.
121. *See id.* at 93.
122. *See* KAN. STAT. ANN. § 22-3725 (Supp. 1989).
123. *See* GUIDELINE DRAFT, *supra* note 2, at 97.
124. *See id.* at 97-98.
125. *See id.* at 98.
126. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535 (1979); Specht v. Patterson, 386 U.S. 605, 609-10 (1968); Wong Wing v. United States, 163 U.S. 228, 237 (1896).

tion.[127] Thus, if the guidelines were to have a judge express the guideline sentence as the maximum, the Constitution would prohibit the addition of any "bad time."

The Commission has reacted to this problem by announcing that the maximum sentence imposed by the judge will be announced as the guideline "plus 20%."[128] If that is the case, it is difficult to see how the system differs, in terms of "truth in sentencing," from a traditional good-time system where the sentence would be expressed as the guideline "minus 20%" possible for good time. In either system, one group of inmates will serve the guideline term, one group will serve a different time. Indeed, if any system is deceptive, it is the "bad time" proposal, for it disguises from the defendant and the public the true maximum sentence imposed by the court.

While the "bad time" proposal will not further truth in sentencing, it will increase the administrative burden on the Department of Corrections. The Commission has announced that the Department of Corrections will be required to adopt procedures for imposing "bad time."[129] It is likely that these procedures will be more cumbersome than those that are presently required in the good time process. The Supreme Court, in a number of contexts, has required more elaborate procedures when one seeks to impose a penalty or withdraw liberty than may be required when granting a benefit. For example, in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,[130] the Court held that an institution need not follow the same procedure, in deciding whether to grant parole, that would be required to revoke a parole once granted.[131] Similarly, more elaborate procedures to litigate these "bad time" cases will be required than are now required to award good time.

Moreover, the proposal trivializes the concept of truth in sentencing. For years, commentators and the public have properly been concerned with sentences that have no relationship to the time being served. A 15 year sentence that really means release on parole after 5 years, or a 15 year term that really means a maximum of 7 years after good time, fails to provide either the public or the prisoner with a clear idea of the time served. Presumptive sentences, which assure that the sentence will approximate the time served, are a remedy to this problem. Small reductions in the sentence for good time do no violence to this principle. In fact, there is no evidence whatsoever of criticism of the good time reductions available in the federal guideline system or the state systems that have adopted guidelines.

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127. *See Specht*, 386 U.S. at 609-10; Baxtrom v. Herold, 383 U.S. 107, 115 (1966); *see also* Vitek v. Jones, 445 U.S. 480, 494 (1980) (transfer to a mental hospital from prison requires due process).

128. *See* GUIDELINE DRAFT, *supra* note 2, at 98.

129. *See id.*

130. 442 U.S. 1 (1979).

131. *Id.* at 10.

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Recommendation

The Commission should eliminate its "bad time" proposal and replace it with a system permitting awards of up to 20% off the inmate's sentence.

V. CONCLUSION

As this brief excursion has indicated, the process of creating Sentencing Guidelines is an enormous and difficult undertaking. While I have highlighted problems in the guidelines, many aspects of the Commission's proposals promise genuine advances in the State judicial system. To the extent this Article has been critical, it has been for the purpose of attempting to improve the guidelines, not to bury them. My final hope is that in reacting to these and other suggestions, the legislature keep two principles in mind.

The first is to remember why the Sentencing Commission was formed. The primary motivation behind the enactment of SB 50 was not philosophical disagreement on the purposes of sentencing or even concerns about disparity. The Bill was passed because of a severe prison overcrowding problem that needed to be brought under control. Any proposal passed by the legislature should produce, at the very least, stability in our prison population and an end to the spiral of incarceration.

Second, the legislature should approach its task with a sense of modesty. We have been living with the rehabilitative system of sentencing for generations. While it is clearly in need of reform, there is no single magic key to achieving just sentencing. The more radical the reform we pass, the more likely it is to replace old problems with new and unintended problems. It may be necessary to reduce judicial discretion and reduce our reliance upon rehabilitation. It will be a mistake, however, to eliminate judicial discretion, or to eliminate entirely rehabilitative considerations. Numbers can and should provide guidance, but if sentencing is to be humane, it will continue to require human judgment.

THE HAMILTON REPORT

SENTENCING GUIDELINES: RESTRUCTURING SUGGESTIONS

by Joan M. Hamilton, 51st Representative

Members of the Judiciary Committee:

I want to thank you for the opportunity to address you during the interim regarding the difficult subject of sentencing guidelines and restructuring sentences on October 30, 1991. I urge you to reread my testimony as to some of the concerns I had. These concerns are shared by a great number of key people in the system (over 150 calls received), as well as citizens, inmates' groups, Parole Board members, correctional personnel, and other legislators.

I also want to thank you for this opportunity to suggest to you some ideas for changing the present system, but not reinventing the wheel and throwing away the old system. I have NO argument that the present system is NOT working as well as it should. However, it's not because we have gotten "too tough" on crime and because our prisons are overcrowded. It's because we have NEVER taken the time to make the front end learn about the back end and to "cooperate with everything in-between". When one branch of the system has a goal and another has a complete opposite, there will be problems and conflicts. Though we focused on getting the offender punished and put in prison-----when the offender got into the system, we then focused on his behavior IN prison, rather than what he had done in society and how he would do in society--the offender learned to "trick the system"----then the focus went BACK to suitability in society and the offender didn't know what was expected and **neither did the citizens or the offenders' families.**

WE MUST ALL THRIVE FOR THE SAME GOAL (WITH PERHAPS A DIFFERENT FOCUS).

G O A L? ----------PUBLIC SAFETY & OFFENDER CHANGE OF BEHAVIOR

FOCUS?----1. Law enforcement - enforcement
2. Prosecutor - prosecution
3. Judicial - sentencing
4. Corrections - rehabilitation for the community
5. Parole - suitability for community

TRUTH IN SENTENCING

The positive aspect of the Sentencing Guidelines is the "Truth in Sentencing". However, the negative to that truth

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is that the discretion is taken away from the judges and all sentences are determinate. Though the statistics show disparity with indeterminate sentences, you will have the same problem with determinate sentences. All crimes, though the same on paper, should not be treated the same nor are they the same. **What would I propose? Both a truth in sentences and move for discretion, giving the inmate motive to change behavior and the judge leeway to have the sentence fit the crime.**

EXAMPLE: Presently Aggravated Robbery is a Class B felony with an indeterminate sentence of 5-15 minimum, 20-Life maximum. If the inmate gets the minimum of 5-20 years, he is parole **eligibility** in 2 1/2 years (1/2 of minimum) and MUST be released by 10 years (conditional release date which is 1/2 of the maximum time. This is sometimes very confusing to the public, much less the judicial system which is constantly aware of the legislature changing parole eligibility time. **SO LET'S GET SOME EASIER UNDERSTANDING AND TRUTH IN SENTENCING!**

Suggestion: Aggravated Robbery
Class B felony (don't change Classes)
Possible sentence - Minimum 2.5 years
- Maximum 15 years.

Discretion: Allow Judges to sentence offender to any time on this scale with the minimum NOT to exceed 1/2 of maximum and the maximum to NOT be less than 1/2 of maximum (i.e. 2.5 - 7.5 would be minimum; 7.5 - 15 would be maximum).

Requirement: Judge must state reasons why offender should NOT receive minimum and factors involved (as present law states).

Additional requirement: Judge should state program requirements to offender so offender, family, victim and public KNOW what will be expected in change of behavior before offender's release.

(Though DOC might say that the Judge's should not have the power to dictate the programs they should have available to the inmates, alot of time and money is lost by taxpayers and the system with repeated and unnecessary reevaluations. A PSI [pre-sentence investigation] is required before each sentence is imposed- very rarely are these waived. Often evaluations and

psychological reports are done during the PSI. Some judges will even send the inmate to the SRDC for an evaluation. This is ALL REPEATED if the offender is sent to prison, since all male offenders are sent through SRDC and female offenders are sent to Lansing to determine Program Agreements.)

Consolidate these efforts ---- it makes more sense and would save monies and time for everyone. Who better to know about the facts and evidence of the offenses besides the actual parties; behavior change needed would be more available to the Judge during sentencing than to have to reeducate DOC officials; history of offender is available and impact of crime is all known. The victim's impact statement is **required during this stage,** so they have had an important part of it.

THE TRUTH???? --- WITH ALL THE INFORMATION ABOVE KNOWN, THE JUDGE WOULD THEN SENTENCE THE OFFENDER.

Example: He imposes the sentence of 2.5 years with a maximum of 6 years.

Inmate is informed that he will <u>have to serve the minimum sentence of 2.5 years before he is parole eligible. IF HE FINISHES HIS PROGRAM AGREEMENT AND DOES NOT PICK UP ANY FURTHER TIME IN PRISON,</u>

<u>THE PRESUMPTION IS THAT HE WILL BE PAROLE SUITABLE AND HE WILL BE RELEASED.</u> This is a major change for Kansas, because all of our case law puts the entire burden on the inmate to become parole suitable....parole is considered a privilege and must be earned.

This method would still put some requirements on the inmate to do programs and work, and to behave while in the system, however, if programs are done and no further bad behavior is exhibited, the presumption is for his release. There would be no further judgment from a Board and he would not stand in suspense. It would also allow the flow of numbers that the Sentencing Commission feel is so important for DOC.

FOR THE VICTIM AND PUBLIC --- On the front end, it would assure them of input and the knowledge to know that strong sentences are still discretionary with the judge so their input is important and could make a difference. They would also know at the time of sentencing when the offender would be released back into society. The laws requiring DOC to notify victims of violent crime about offender coming into their community

would still be necessary and important. However the requirements of notification of public hearings would not. It would reduce alot of work yet still have the important input needed.

I BELIEVE THERE SHOULD BE MORE CONTROL IN THE PROSECUTION STAGE FOR THE PUBLIC AND VICTIMS AND I WILL ADDRESS THAT BRIEFLY LATER.

FOR THE INMATE AND FAMILY:

You are still delivering a message that the behavior of the offender is not acceptable, but he and his family know when his release will be IF he performs his obligations of the Program Agreement and does not act up. This allows for planning, but also forces some programming and motive to change. With the span of time allowed, the offender can still serve alot of time IF he is not motivated to do as expected.

This is where many will say that they like the idea of punishment and throwing **rehabilitation** away because there isn't any in prison. There is!!!!! I've seen it firsthand, even with repeat offenders. We can't expect to have 90, 80, 70, or even 60 or 50% success. We are dealing with complicated lives that have been influenced for years. Changing behavior in even 3-5 years is sometimes improbable, but it's not impossible.

National statistics show that for every offender, the average number of victims he will affect is 26. Even if Kansas only rehabilitated 1% (and I think we do better than that!), we could save 1,560 of our citizens from the horror of crime.

1% of 6,000 population = 60 X 26 = 1,560.

IF WE GIVE IT UP-----WE DON'T HAVE ANY HOPE FOR HELPING WITH PUBLIC SAFETY AND PREVENTION OF CRIME.

Also we throw away the key in worrying about recidivism--- surely we don't expect the offenders to change just because they have gotten out of prison. Yes, they will get more time assuming they are caught. But 90% of crime goes unsolved, and though the recidivism rate is high presently in Kansas, we couldn't expect it to do anything but increase.

Suggestion #2: Presently there is presumptive probation for Class E felonies. We should re-look at those statutes and restrict the discretion of the judges more on this level of felony. It is not being used as expected. We should also increase the presumption to increase property Class D felonies. With this increase of presumptive probation should

be given the ability of the judge to go away from that presumption of probation IF:

1. **The original** charges included a series of burglaries.....it's unfair to the offenders to treat multiple burglars the same as single burglars (even if they all occurred on a day or in one jurisdiction).

2. Any of the charges included offenses dealing with violence or harm.

3. The other statutory authority to go off the expected performance.

The **fallacy with the Sentencing Commission's statistics** showing the impact of numbers that precluding D and E felonies would have on the system, is that it doesn't give the long-range effect. **Unless we, as legislators, change the requirements of restitution and steady employment in the probation requirements and parole suitability requirements---all we are doing is DELAYING the numbers of offenders that will still go to prison on PVs (probation and parole violations).** The KBI and Wyandotte County Police department have both looked into these statistics and can relate to you their findings. It's not the racial disparity that is affecting the sentences as much as the **socio-economic situation. We need to be plugging in more monies to work release center, job opportunities and job training. If you disregard the racial element and look ONLY AT THE EMPLOYMENT RATE OF THOSE SENTENCED-----YOU WILL FIND THAT THERE IS <u>VERY LITTLE DISPARITY.</u>** These guidelines will NOT change this disparity.....they will only delay the effect.

We must make the necessary changes in the appropriate statutes, and also see the need for adding additional monies to community corrections and job opportunities.

That brings me to Suggestion #3:

Suggestion #3: We haven't given the mandatory requirement of <u>community corrections in all counties</u> enough time to see if they are effective. While on the parole board, you could determine which counties utilized their communities well for rehabilitation and change, and you knew immediately those that "abused" the corrective system. With the **mandatory** requirement, we need to allow each county to establish their corrections (which our state help), and give it a chance. These Sentencing Guidelines **force the communities to do so with the presumptive probation for nonviolent offenses. Why re-invent the wheel....the mechanism is already there, let's enforce it and help them.**

Suggestion #4:

WE MUST GET OUR ATTENTION OFF THE ADULT SYSTEM AND BEGAN TO WORK WHERE IT WILL MAKE A DIFFERENCE ------ THE JUVENILE SYSTEM. WE HAVE TOO LONG IGNORED THE FACT THAT THE REASON CRIME AND PRISON BEDS ARE INCREASING IS BECAUSE WE HAVE GIVEN UP ON THE YOUTH.

Behavior is sometimes molded into an individual by the age of 8 OR YOUNGER. We are trying to change it at 18 years and older and it has been set for almost 10 years. We can't give up....we must try to help the young and first-time offender during their youth.

ACTUAL TRUE STORY:

In my third year on the parole board (1986), I saw an inmate who was only 16 years old. Chad was there as a certified adult because of three burglaries as a juvenile. He had been a D & N (dependent and neglected child) in juvenile court at the age of 3. We had taken him out of his abused home and put him into the "system". We failed....he needed much more. At the hearing he knew me. I knew him. He still wanted to change but the attitude was very bad. However, we required him to get a trade, be put into a work release program before release and also to have mental health counseling to deal with his "years within the system" and also to see he would have to depend on himself if he was to make it. It worked.....at least he's not back into the system YET.

My questions and puzzlement: Why didn't we give this to him earlier? He should have been schooled and trained by age 16....we ignored it.

Where were his models? Presently the Boot Camp for Young Offenders has big "hopes". The Judge will even tell you that jurisdictions are finding loopholes in the statutes by certifying juveniles earlier than they would....to let them be eligible for the Camp.

Why aren't we setting up these Camps for our young offenders? Why wait until they are adults? We are working back-assward.

FACT: Our model prisoners are the repeat offenders and violent offenders. Though there are exceptions to this, the high percentage are these offenders. We then focus on giving these offenders the privileges within the system because they are our "model prisoners". Conversely, our first-time offenders and young prisoners often have a bad attitude and do not like the authority and can't "play the game".

They, therefore, are kept behind the maximum walls and programming is not as available to them. Is this not back-assward? **Yes, it is.**

I've heard numerous times from mainly legislators that too many first-time offenders and C,D,and E property offenders are in prison. Why?

1. Many legislators feel it's because DOC was too strict, or the Parole Board was too strict....not so. These offenders are harder to deal with and instead of the system giving them a chance for change, we punish them and reward the offender who knows the "game".

2. DOC officials are told to treat offenders the same once they get into the system....don't ask about the crime (s). Though I believe an offender should not be judged totally by their past, it's truly unrealistic to expect uneducated personnel to know a "con" from an offender who wants to make change **and that's what we are doing.**

   EDUCATION SHOULD BE A REQUIREMENT FOR THE OFFENDER-NOT JUST A PRIVILEGE.

   THE OFFENDER SHOULD BE PLACED IN PROGRAMS ACCORDING TO THIS CRIME AND HISTORY, NOT HIS PRISON BEHAVIOR.

   Certain offenses, i.e. Aggravated Juvenile Delinquency, should not preclude offenders from programs. The custody format of DOC needs to be completely revamped....this is not a task of the Legislature, but could be a focus for the Department. The crime history of the juvenile and his risk to society should be the factors considered for privileged programs....each case should be individually examined.

AGAIN, AS YOU SEE, THE FOCUS NEEDS TO BE WITH THE JUVENILE OFFENDER AND THE JUVENILE SYSTEM----IF WE ARE TO MAKE AN IMPACT ON THE POPULATION OF OUR PRISONS, WE MUST START WHERE WE HAVE SOME HOPE----THE FIRST END.

Suggestion #5:

Limit the power of the prosecutor!

(I speak of this again with firsthand experience. Before serving on the Kansas Parole Board for 5½ years, I was a Prosecutor in Shawnee County for 9 years [leaving in Nov., 1983, as the First Assistant District Attorney]).

If we had a statewide District Attorney's plan with experienced D.A.s and persons dedicating their careers to

public service you would see different results in alot of jurisdictions. However, we don't, and in many of your counties----because of lack of experience and salary, time and court personnel, you have ridiculous plea negotiations. This happens a lot in our large counties also.

I'm not advocating doing away with plea bargains---they must be there, and often the public and victim want a reasonable negotiation. The courts must also have the tool of plea bargains or they would be more crowded and backed up then they already are! **However, under these Sentencing guidelines, you have given the prosecution the ultimate power tool and control. They could take a violent offenses, i.e. Aggravated Robbery, Class B felony and reduce it to Theft, a nonviolent crime under the grid, Class D felony, and the judge's hands would be tied -----presumptive probation.**

You might say----that doesn't happen very often!!!??? Yes it does. Often murders are reduced to manslaughters, robberies to theft, rapes to battery, and indecent liberties with a child to child abuse. Though some of these reductions are still within the "violent" crime category - the sentences are substantially lower.

In the 1990-91 legislature, we passed a law requiring prosecutors to INFORM victims of "crimes against person" of any negotiations PRIOR to the finality of the negotiation. Though this is a step in the right direction, there still is no control over the negotiations and reductions of the prosecutor. The victim or victim's family need not consent to this negotiation. They just have to be informed.

We must make our prosecutors more accountable to the public, the victims, victims' families and the offenders. Often multiple charges are filed with the idea of dismissal of charges. <u>Their powers and discretion are abused far more often than any judge's discretion.</u>

<u>CONCLUSION:</u>

Though SB50 directed the Commission to formulate a grid, it did NOT direct the Commission to make it a **determinate** grid.

I hope you will give my "formula" of truth in sentencing coupled with discretion and flexibility of the judges a serious look.

****

We must make the **goal** of the judicial system the same -- rather than piecemeal each branch to do only their job. The

right hand must be educated to know what the left hand is doing.

****

The judges should take over the requirements of the Program Agreement **with the cooperation and coordination of DOC** to eliminate dual testings and costly time.

****

Class D and E felonies should be added to presumptive probation with multiple offenses to be an exception for the judges.

****

The custody format of DOC should be revamped to focus on the history of the offender and their crimes, rather than their performance in prison. We must shift our focus to the first-time offender and youth offender if we are going to change the makeup of our prisons.

****

Give community corrections a chance to work!! More monies needs to be given to them to allow the nonviolent offender and first-time offender to work out their time within the community.

****

Education and job training should be a requirement of release of an offender.....work releases need to be set up in jurisdictions where offenders most frequently return, i.e. Wyandotte County and more in Sedgwick.

****

<u>WE CANNOT IGNORE THE JUVENILE SYSTEM ANYMORE---NOR SHOULD WE BE FOCUSING ON GETTING "TOUGHER" WITH OUR JUVENILE OFFENDERS. IT DIDN'T WORK WITH THE "ADULTS"---WHY ARE WE TRYING TO RE-INVENT THE WHEEL WITH THE JUVENILES?</u> They are the ones we should be trying to give a "second chance" to.

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****

I would be most willing and even eager to work with the Legislative Research staff to vamp the necessary statutes and change the present operating statutes.

2-9/10

Thank you for this opportunity again. If further questions and suggestions are needed, I welcome the privilege to speak before you again.

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KANSAS SENTENCING COMMISSION

HOUSE OF
REPRESENTATIVES

OFFICE OF THE MAJORITY CAUCUS CHAIR

TESTIMONY TO THE JOINT JUDICIARY COMMITTEE
January 16, 1992

SENTENCING GUIDELINES IN KANSAS

Overview
Prior to the passage of SB 50 in 1989, legislators were extremely frustrated with a criminal justice system which they felt to be out of control.

-steep increases in prison population (almost triple in a decade), with no impact on crime or public safety;
-changes in sentencing practices which were overly-political and influenced by isolated events;
-growing budget demands, including a settlement of a class-action suit with a mandate for constitutional conditions by Judge Rogers;
-public frustration with a system which they don't understand, inability to access information about sentencing, arbitrary and disparate decisions about who goes to prison and how long the sentence will be;
-erratic pattern of parole release;
-allegations of racial bias, with a growing disproportionate number of non-whites in prison;
-use of expensive resources for non-violent offenders, and in spite of presumptive probation for both D and E felons. growing numbers sent into the system
-NO ABILITY FOR POLICY MAKERS TO CONTROL COSTS OR CONTROL POPULATION INFLUX. GOODTIME USED AS POPULATION CONTROL.

Operating Assumptions of Commission

-Commission felt that any recommendation which required further building of prisons was DOA;
-Attempt to follow legislative philosophy in many areas, (incarcerate violent criminals, public protection, intolerance for drug offenses). Commission members felt if Legislature wanted to alter positions, it was their role.
-Use of prison resources must be dedicated to most dangerous offenders. Line drawn between crimes involving persons and crimes involving property.

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Commission constituted of diverse group, representing all facets of criminal justice system. The group worked hard, had a series of public hearings, and constant input from community groups.

Debate on rehabilitation versus punishment is red herring. No one on Commission disputes advantages of rehabilitation. Bottom line decision was that ONLY TWO FACTORS should determine the length of a sentence: severity of the crime and past criminal history. The Commission strongly endorsed eliminating societal factors at sentencing and at the parole stage to foster truth in sentencing and eradicate racial and geographic bias from the system. Rehabilitation should be encouraged, but not determine release.

Policy Decisions

Is the current system in need of total overhaul, or will some tampering achieve the goals outlined by the Legislature in SB 50?

Does the political climate lend itself to rational decisions about sentencing, or should a neutral body with some expertise make recommendations to the Legislature?

Do we intend to make every effort to promote "truth in sentencing" and eradicate the racial and regional bias in the current system?

Do we, as legslators, want the tools to make fundamental decisions about the use of correctional resources, and have the management tools to control the population influx?

Decisions about the appropriate punishment for individual crimes, the drug grid, and the number of months in each category, can be seperately debated. The first issue is whether we want to finally be in a position to make policy decisions about this system, eliminate the arbitrary results at the trial and parole level, and manage our resources.

Currently we have no control over who is sent to prison and who is released from prison. The alternative is to continue to be controlled by election-year sentencing changes, sporadic bursts of community corrections fervor, and a budget which is driven by population influx beyond our control.

I urge the Committees to carefully consider these proposals. It is among the most significant policy issues to be made in the 1992 Session, and has enormous implications for the future of this state.

FORMATION OF THE COMMISSION

The Criminal Justice Coordinating Council recommended the development of a Kansas Sentencing Commission. These recommendations were presented during the 1989 Legislative session in the form of Senate Bill 50. The Bill passed, was signed by the Governor and became law in the spring of 1989. Prison overcrowding was a major concern that prompted the Coordinating Council to recommend the Commission, and the Legislature to enact Senate Bill 50. The bill directs the Commission to:

- Establish appropriate sentencing dispositions for all felony crimes (ranges, placements, probation or incarceration);
- Minimize sentencing disparity, especially in the areas of race and geography;
- Make recommendations concerning the future role of the Parole Board and good time credits;
- Consider current practices and resources.