

THE SENTENCING REFORM MOVEMENT



What happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system.

—*United States v. Waters*
(457 F. 2d 722 [D.C. Cir. 1970])

Concerns about disparity, discrimination, and unfairness in sentencing led to a “remarkable burst of reform” (Walker 1993:112) that began in the mid-1970s and continues today. The initial focus of reform efforts was the indeterminate sentence, in which the judge imposed a minimum and maximum sentence and the parole board determined the date of release. The parole board’s determination of when the offender should be released rested on its judgment of whether the offender had been rehabilitated or had served enough time for the particular crime. Under indeterminate sentencing, sentences were tailored to the individual offender, and discretion was distributed not only to the criminal justice officials who determined the sentence but also to corrections officials and the parole board. The result of this process was “a system of sentencing in which there was little understanding or predictability as to who would be imprisoned and for how long” (U.S. Department of Justice, Bureau of Justice Statistics 1996:6).

Both liberal and conservative reformers challenged the principles underlying the indeterminate sentence and called for changes designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing. Liberals and civil rights activists argued that indeterminate sentencing was arbitrary and capricious and therefore violated defendants' rights to equal protection and due process of law (American Friends Service Committee 1971; Davis 1969; Frankel 1972a). They charged that indeterminate sentences were used to incapacitate those who could not be rehabilitated and that offenders' uncertainty about their dates of release contributed to prison unrest. Liberal critics were also apprehensive about the potential for racial bias under indeterminate sentencing schemes (see van den Haag 1975; Wilson 1975). They asserted that "racial discrimination in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials' discretion offered the only way to limit racial disparities" (Tonry 1995:164).

Political conservatives, on the other hand, argued that the emphasis on rehabilitation too often resulted in excessively lenient treatment of offenders who had committed serious crimes or had serious criminal histories (see van den Haag 1975; Wilson 1975). They also charged that sentences that were not linked to crime seriousness and offender culpability were unjust (von Hirsch 1976). These conservative critics championed sentencing reforms designed to establish and enforce more punitive sentencing standards. Their arguments were bolstered by the findings of research demonstrating that most correctional programs designed to rehabilitate offenders and reduce recidivism were ineffective (Martinson 1974).

After a few initial "missteps," in which jurisdictions attempted to eliminate discretion altogether through flat-time sentencing (Walker 1993:123), states and the federal government adopted structured sentencing proposals designed to control the discretion of sentencing judges. A number of states adopted determinate sentencing policies that offered judges a limited number of sentencing options and included enhancements for use of a weapon, presence of a prior criminal record, or infliction of serious injury. Other states and the federal government adopted sentence guidelines that incorporated crime seriousness and prior criminal record into a sentencing "grid" that judges were to use in determining the appropriate sentence. Other reforms enacted at both the federal and state level included mandatory minimum penalties for certain types of offenses (especially drug and weapons offenses), "three-strikes-and-you're-out" laws

that mandated long prison sentences for repeat offenders, and truth-in-sentencing statutes that required offenders to serve a larger portion of their sentences before being released.

This process of experimentation and reform revolutionized sentencing in the United States. Thirty years ago, every state and the federal government had an indeterminate sentencing system and “the word ‘sentencing’ generally signified a slightly mysterious process which . . . involved individualized decisions that judges were uniquely qualified to make” (Tonry 1996:3). The situation today is much more complex. Sentencing policies and practices vary enormously on a number of dimensions, and there is no longer anything that can be described as the American approach.

In this chapter, we discuss the sentencing reform movement. We begin by describing the changes in sentencing policies and practices that have occurred since the mid-1970s. We focus on determinate sentencing and sentencing guidelines, mandatory minimum sentencing statutes, three-strikes-and-you’re-out laws, and truth-in-sentencing laws. We also discuss recent Supreme Court rulings that have reshaped sentencing practices and procedures. In Chapter 7, we discuss the impact of these changes. We ask whether the reforms have resulted in more punitive sentences, less crime, or reductions in disparity and discrimination.

REFORMING SENTENCING POLICIES AND PRACTICES

The attack on indeterminate sentencing and the proposals for reform reflected conflicting views of the goals and purposes of punishment, as well as questions regarding the exercise of discretion at sentencing. As discussed in Chapter 1, proponents of retributive or just deserts theories of punishment argue that sentence severity should be closely linked to the seriousness of the crime and the culpability of the offender. Thus, those who commit comparable offenses should receive similar punishments, and those who commit more serious crimes should be punished more harshly than those who commit less serious crimes. In other words, like cases should be treated alike. Proponents of utilitarian rationales of punishment, including deterrence, incapacitation, and rehabilitation, argue that the ultimate goal of punishment is to prevent future crime and that the severity of the sanction imposed on an offender should serve this purpose. Thus, the amount of punishment need not be closely proportioned

to crime seriousness or offender culpability; it can instead be tailored to reflect individual circumstances related to rehabilitative needs or deterrence and incapacitation considerations.

These conflicting views of the goals of punishment incorporate differing notions of the amount of discretion that judges and juries should be afforded at sentencing. A sentencing scheme based on utilitarian rationales would allow the judge or jury discretion to shape sentences to fit individuals and their crimes. The judge or jury would be free to consider all relevant circumstances, including “the importance of the behavioral norms that were violated, the effects of the crime on the victim, and the amalgam of aggravating and mitigating circumstances that make a defendant more or less culpable and make one sentence more appropriate than another” (Tonry 1996:3). A retributive or just deserts sentencing scheme, on the other hand, would constrain discretion more severely. The judge or jury would determine the appropriate sentence using only legally relevant considerations (essentially crime seriousness and, to a lesser extent, prior criminal record) and would be precluded from considering individual characteristics or circumstances.

The reforms enacted during the sentencing reform movement reflect both retributive and utilitarian principles and are designed to achieve both retributive and utilitarian objectives. For example, sentencing guidelines are based explicitly on notions of just deserts. Punishments are scaled along a two-dimensional grid measuring the seriousness of the crime and the offender’s prior criminal record, and judges are expected to impose the sentence indicated by the intersection of these two factors. By curtailing the judge’s discretion, reformers hoped to eliminate disparity and discrimination. By tying sentence severity to crime seriousness and offender culpability, they hoped to achieve proportionality and fairness in sentencing and, at least in the minds of some, to produce more punitive sentences. But most sentencing guidelines also incorporate, implicitly if not explicitly, utilitarian principles and objectives. Most allow the judge to depart from the presumptive sentence if there are good reasons to do so. Although the circumstances under which departures are permitted may be narrowly defined, allowing the judge to depart opens the door to individualization of sentences based on the offender’s dangerousness, likelihood of recidivism, or amenability to rehabilitation. In other words, the ability to depart means that the judge can attempt to achieve utilitarian objectives of incapacitation, deterrence, and rehabilitation.

The other sentencing reforms discussed in this chapter—mandatory minimum sentencing statutes, three-strikes-and-you’re-out laws, and truth-in-sentencing

laws—are based explicitly on theories of deterrence and incapacitation. These “tough-on-crime” sentencing policies prescribe greater use of imprisonment and longer sentences. Mandatory minimum statutes and three-strikes laws target certain types of offenders: those who use firearms to commit a crime, those who engage in more serious drug offenses, and those who repeat their crimes. Truth-in-sentencing laws, on the other hand, are designed to ensure that all offenders who are imprisoned serve a greater portion of their sentence. Although each of these three reforms reflects a view that justice is served when those who commit very serious crimes receive harsh punishment, their primary purpose is to reduce crime by deterring would-be offenders or incapacitating dangerous offenders.

In the sections that follow, we discuss the changes in sentencing policies and practices that have occurred in the past 30 years. We begin with a discussion of three structured sentencing reforms: voluntary or advisory sentencing guidelines, determinate sentencing, and presumptive sentencing guidelines. We then examine mandatory minimum sentencing statutes, three-strikes-and-you’re-out laws, and truth-in-sentencing laws.

STRUCTURED SENTENCING REFORMS

In 1972, Marvin Frankel, U.S. district judge for the Southern District of New York, issued an influential call for reform of the sentencing process (Frankel 1972a, 1972b). Judge Frankel characterized the indeterminate sentencing system that existed at that time as “a bizarre ‘nonsystem’ of extravagant powers confided to variable and essentially unregulated judges, keepers, and parole officials” (1972b:1). Frankel decried the degree of discretion given to judges, which he maintained led to “lawlessness” in sentencing. As he pointed out,

The scope of what we call “discretion” permits imprisonment for anything from a day to 1, 5, 10, 20 or more years. All would presumably join in denouncing a statute that said “the judge may impose any sentence he pleases.” Given the morality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable. (1972b:4)

Judge Frankel, who claimed that judges “were not trained at all” for “the solemn work of sentencing” (1972b:6), called for legislative reforms designed to regulate “the unchecked powers of the untutored judge” (1972b:41). More to the point, he called for the creation of an administrative agency called a

sentencing commission that would create rules for sentencing that judges would be required to follow.

Judge Frankel's calls for reform did not go unheeded. Reformers from both sides of the political spectrum joined in the attack on indeterminate sentencing and pushed for reforms designed to curtail judicial discretion and eliminate arbitrariness and disparity in sentencing. In response, state legislatures and the Congress enacted a series of incremental structured sentencing reforms. A number of jurisdictions experimented with voluntary or advisory sentencing guidelines. Other states adopted determinate sentencing policies and abolished release on parole. Still other jurisdictions created sentencing commissions authorized to promulgate presumptive sentencing guidelines. Whereas every jurisdiction had indeterminate sentencing in 1970, by 2004, 4 states and the District of Columbia had determinate sentencing, 7 states had voluntary sentencing guidelines, and 11 states had presumptive sentencing guidelines. Indeterminate sentencing survived in the remaining states (U.S. Department of Justice, Bureau of Justice Statistics 2006d).

Voluntary or Advisory Sentencing Guidelines

The first stage in the movement toward structured sentencing was the development of voluntary or advisory sentencing guidelines. These early guidelines typically were *descriptive* rather than *prescriptive*; they were based on the past sentencing practices of judges in the jurisdiction and not on determinations of what the sentence ought to be. In other words, the idea was to document the sentences that judges in the jurisdiction typically imposed for different types of offenses and different categories of offenders. For example, if the normal penalty for a first-time offender convicted of armed robbery was 5 to 6 years in prison, the guidelines would establish this range as the recommended sentence, and judges would be encouraged to sentence within the range. If the sentences imposed by judges in the jurisdiction became more severe or less severe over time, the guidelines could be revised to reflect these changes.

The primary goal of these voluntary, descriptive guidelines was to reduce intrajurisdictional disparity in sentencing. Advocates of this reform hoped that identifying the normal penalty or going rate would encourage judges at the two ends of the sentencing continuum to move closer to the middle. The problem, of course, was that the guidelines were, as the name implies, *voluntary*. Judges were not obligated to comply with the guidelines. In fact, the judge could

simply ignore them, and the defendant could not appeal a sentence that was harsher than the guidelines prescribed.

The results of early studies of the impact of voluntary guidelines are not surprising. These studies found low rates of compliance and hence little impact on reducing disparity (Frase 1997b:12). Generally, the sentences imposed during the postreform period were not more consistent than those imposed during the prereform period. For example, Rich and his colleagues (1981) evaluated the impact of the guidelines in Denver and Philadelphia, two of the first jurisdictions to adopt this particular reform. They found that in each jurisdiction, about 70 percent of the decisions to incarcerate but only about 40 percent of the sentence length decisions were consistent with the guidelines during both time periods. Interviews with judges and lawyers confirmed that few of the judges in either jurisdiction felt obligated to comply with the guidelines.

Although voluntary sentencing guidelines did not produce the instrumental effects that reformers had predicted, they were an important first step in the sentencing reform process. The lessons learned during this early stage in the process helped to guide and structure the efforts of those who subsequently lobbied for determinate sentencing and presumptive sentencing guidelines.

Determinate Sentencing

In the mid- to late 1970s, several states abolished release on parole and replaced the indeterminate sentence with a fixed (i.e., determinate) sentence. Under this system, the state legislature established a presumptive range of confinement for various categories of offenses. The judge imposed a fixed number of years from within this range, and the offender would serve this term minus time off for good behavior. Determinate sentencing was first adopted in California, Illinois, Indiana, and Maine; it was later adopted in Arizona.

Determinate sentencing was seen as a way to restrain judicial discretion and thus to reduce disparity and (at least in the minds of conservative reformers) preclude judges from imposing overly lenient sentences. However, the degree to which the reforms constrain discretion varies. As shown in Exhibit 6.1, which compares the determinate sentencing provisions in California and Illinois, the presumptive range of confinement established by the legislature is narrow in California but wide in Illinois (the changes in the California law prompted by the Supreme Court's decision in *Cunningham v. California* [2007] are discussed later in this chapter). The California Uniform

Determinate Sentencing Law, which took effect on July 1, 1977, provides that judges are to choose one of three specified sentences for people convicted of particular offenses. The judge is to impose the middle term unless there are aggravating or mitigating circumstances that justify imposing the higher or lower term. Thus, the presumptive sentence for second-degree robbery is 4 years; if there are aggravating circumstances, the sentence could increase to 6 years, and mitigating circumstances could reduce the sentence to 3 years.

Judges have much more discretion under the Illinois Determinate Sentencing Statute. Felonies are divided into six classifications, and the range

| EXHIBIT 6.1 Determinate Sentencing in California and Illinois | | | |
|--|-------------------------------------|------------------------------------|--|
| <i>Felony Categories and Range of Penalties in California</i> | | | |
| <i>Presumptive Sentence (years)</i> | <i>Range in Aggravation (years)</i> | <i>Range in Mitigation (years)</i> | <i>Examples</i> |
| 8 | 11 | 6 | Kidnapping (under age 14) |
| 6 | 8 | 3 | Rape |
| 4 | 6 | 3 | 2nd-degree robbery |
| 4 | 6 | 2 | 1st-degree burglary |
| <i>Felony Categories and Range of Penalties in Illinois</i> | | | |
| <i>Felony Category</i> | <i>Regular Term (years)</i> | <i>Extended Term (years)</i> | <i>Examples</i> |
| 1st-degree murder | Life or 20–60 | 60–100 | Murder |
| Class X | 6–30 | 30–60 | Rape, armed robbery, aggravated kidnapping |
| Class 1 | 4–15 | 15–30 | Dealing in narcotics |
| Class 2 | 3–7 | 4–15 | Burglary, arson, unarmed robbery |
| Class 3 | 2–5 | 5–10 | Theft (more than \$150), aggravated battery |
| Class 4 | 1–3 | 3–6 | Possession of marijuana, theft (less than \$150) |

SOURCE: California Penal Code (available at <http://www.leginfo.ca.gov/calaw.html>); Illinois General Assembly, Legislative Research Unit (available at <http://www.ilga.gov/commission/lru/2005PFC.pdf>).

of penalties is wide, especially for the more serious offenses. Murder and Class X offenses are nonprobationable, but judges can impose prison terms of 20 to 60 years or life for murder and 6 to 30 years for Class X offenses. If there are aggravating circumstances, the sentence range for Class X felonies increases to 30 to 60 years. As noted earlier, whereas judges in California were expected to impose a sentence of 4 years for robbery, Illinois judges could impose anywhere from 3 to 7 years. If there were aggravating circumstances, the sentence range for robbery increased to 7 to 14 years in Illinois, compared with 6 years in California.

Although judges in jurisdictions with determinate sentencing retain control over the critical probation or prison decision, their overall discretion is reduced, particularly in states such as California. Evaluations of the impact of the California law showed that judges complied with the law and imposed the middle term in a majority of the cases (Cohen and Tonry 1983:363). Despite predictions that discretion would shift to the prosecutor and that plea bargaining would consequently increase, there were no changes in the rate or timing of guilty pleas that could be attributed to the determinate sentencing law. On the other hand, there was some evidence that prosecutors were increasingly likely to use provisions regarding sentence enhancements and probation ineligibility as bargaining chips. For example, one study found that the sentence enhancement for use of a weapon was dropped in 40 percent of robbery cases and that the enhancement for serious bodily injury was struck in 65 to 70 percent of these cases (Casper, Brereton, and Neal 1982). As Walker noted, "The net effect of the law seems to have been to narrow and focus the exercise of plea-bargaining discretion. Given the very restricted options on sentence length, the importance of the various enhancements and disqualifiers increased" (1993:129).

Partly as a result of research showing that determinate sentencing laws did not significantly constrain the discretion of judges, the determinate sentencing movement lost steam and eventually sputtered out. With the exception of the District of Columbia, no jurisdiction has adopted determinate sentencing since 1983.

Presumptive Sentencing Guidelines

Since the late 1970s, presumptive sentencing guidelines developed by an independent sentencing commission have been the dominant approach to sentencing reform in the United States. About half of the states have adopted or are considering sentencing guidelines, and sentencing at the federal level has been structured by guidelines since 1987. In 1994, the American Bar

Association endorsed sentencing guidelines; it recommended that all jurisdictions create permanent sentencing commissions charged with drafting presumptive sentencing provisions that apply to both prison and nonprison sanctions and are tied to prison capacities.

State Sentencing Guidelines

The guideline systems adopted by the states have a number of common features. Each of the guideline states established a permanent sentencing commission or committee composed of criminal justice officials and, sometimes, private citizens and legislators. The commission is charged with studying sentencing practices and formulating presumptive sentence recommendations. Some states require legislative approval of the guidelines. In other states, the guidelines either go into effect unless the state legislature rejects them or are issued by administrative order of the state supreme court (U.S. Department of Justice, Bureau of Justice Assistance 1996:45–46). The commission is also authorized to monitor the implementation and impact of the guidelines and to recommend amendments.

A second common feature of state guidelines is that the presumptive sentence is based primarily on two factors: the severity of the offense and the seriousness of the offender's prior criminal record. Typically, these two factors are arrayed on a two-dimensional grid; their intersection determines whether the offender should be sentenced to prison and, if so, for how long. The Minnesota Sentencing Guidelines Grid is shown in Exhibit 6.2. The dark line separates offense–criminal history combinations that are probationable (below the line) from those for which the presumptive sentence is a prison sentence (above the line). The guidelines require prison sentences for all offenders convicted of aggravated robbery. The length of the term depends on the offender's criminal history. The guideline range is 44 to 57 months if the offender's criminal history score is 0, 54 to 62 months if the criminal history score is 1, and 104 to 112 months if the criminal history score is 6 or more. Offenders convicted of less serious crimes may receive a nonincarceration sentence, again depending on the criminal history score. Offenders convicted of residential burglary or simple robbery could be either placed on probation or sentenced to jail if their criminal history scores are 2 or less; if their criminal history scores are greater than 2, the presumptive sentence would be a prison sentence.

| SEVERITY LEVEL OF CONVICTION OFFENSE | | CRIMINAL HISTORY SCORE | | | | | | |
|---|------|------------------------|-----------------|-----------------|----------------|----------------|----------------|----------------|
| | | 0 | 1 | 2 | 3 | 4 | 5 | 6 or more |
| Murder, 2nd Degree (unintentional murder, drive-by-shootings) | X | 306 299-313 | 326 319-333 | 346 339-353 | 366 359-373 | 386 379-393 | 406 399-413 | 426 419-433 |
| Murder, 3rd Degree Murder, 2nd Degree (unintentional murder) | IX | 150 144-156 | 165 159-171 | 180 174-186 | 195 189-201 | 210 204-216 | 225 219-231 | 240 234-246 |
| Criminal Sexual Conduct, 1st Degree Assault, 1st Degree | VIII | 86 81-91 | 98 93-103 | 110 105-115 | 122 117-127 | 134 129-139 | 146 141-151 | 158 153-163 |
| Aggravated Robbery 1st Degree | VII | 48 44-52 | 58 54-62 | 68 64-72 | 78 74-82 | 88 84-92 | 98 94-102 | 108 104-112 |
| Criminal Sexual Conduct, 2nd Degree (a) & (b) | VI | 21 | 26 | 30 | 34 33-35 | 44 42-46 | 54 50-58 | 65 60-70 |
| Residential Burglary Simple Robbery | V | 18 | 23 | 27 | 30 29-31 | 38 36-40 | 46 43-49 | 54 50-58 |
| Nonresidential Burglary | IV | 12 ¹ | 15 | 18 | 21 | 25 24-26 | 32 30-34 | 41 37-45 |
| Theft Crimes (Over \$2,500) | III | 12 ¹ | 13 | 15 | 17 | 19 18-20 | 22 21-23 | 25 24-26 |
| Theft Crimes (\$2,500 or less), Check Forgery (\$200-\$2,500) | II | 12 ¹ | 12 ¹ | 13 | 15 | 17 | 19 | 21 20-22 |
| Sale of Simulated Controlled Substance | I | 12 ¹ | 12 ¹ | 12 ¹ | 13 | 15 | 17 | 19 18-20 |

Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section II.E. Mandatory Sentences for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to a state prison. These offenses include Third Degree Controlled Substance Crimes when the offender has a prior felony drug conviction, Burglary of an Occupied Dwelling when the offender has a prior felony burglary conviction, second and subsequent Criminal Sexual Conduct offenses and offenses carrying a mandatory minimum prison term due to the use of a dangerous weapon (e.g., Second Degree Assault). See section II.C. Presumptive Sentence and II.E. Mandatory Sentences.

1 One year and one day

States with presumptive sentencing guidelines, as opposed to voluntary or advisory guidelines, require judges to follow them or provide reasons for failing to do so. Judges are allowed to depart from the guidelines and impose harsher or more lenient sentences if there are specified aggravating or mitigating circumstances (Box 6.1). Some states also list factors that should not be used to increase or decrease the presumptive sentence. For example, the Minnesota guidelines state that the offender's race, gender, and employment status are not legitimate grounds for departure. In North Carolina, on the other hand, judges are allowed to consider the fact that the offender "has a positive employment history or is gainfully employed" (U.S. Department of Justice, Bureau of Justice Assistance 1996:79–80). In most states, a departure from the guidelines can be appealed to state appellate courts by either party. For example, if the judge sentences the defendant to probation when the guidelines call for prison, the prosecuting attorney can appeal. If the judge imposes 60 months when the guidelines call for 36, the defendant can appeal.

The standards used by appellate courts to review sentences vary widely. In Minnesota, for example, the appellate court is authorized to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact" (Laws of Minnesota 1978 CA. 723 § 244.11). In contrast, in Oregon a departure will be upheld as long as it is warranted by "substantial and compelling reasons" (Oregon Criminal Justice Council 1989). If the appellate court rules that the sentence departure is unwarranted, the sentence will be overturned and the offender will be resentenced.

BOX 6.1

Reasons for Departures in Pennsylvania

John Kramer and Jeffrey Ulmer examined the official reasons given by judges in Pennsylvania for departing from the guidelines. The most common reasons for downward departures were as follows:

- Defendant is remorseful or good candidate for rehabilitation.
- Guilty plea or plea bargain.
- Defendant is caring for dependents, court is unwilling to disrupt family ties.

- Defendant is employed, court is unwilling to disrupt job ties.
- Offense or prior record is qualitatively less serious than the guideline scores indicate.

Kramer and Ulmer also interviewed a number of Pennsylvania judges about the factors that influence decisions to depart from the guidelines. Comments made by these judges included the following:

In a departure situation, you try and get a sense of whether the person really is likely to return, whether the person really can profit from probation, whether you think they have a sense of remorse. I mean, it's everything that you rely on in your experience and judgment and trying to size a person up.

You rely on your sense of whether or not, if you give them another chance, are they really not going to commit another crime? You can get a good picture of people in just a few minutes.

Every case is so different. . . . I always consider the nature of the offense, the defendant's prior record, their character and attitude in general. It is just everything put together.

This study found that the likelihood of a downward departure was affected by the offender's gender and race and by the type of disposition in the case: Judges were more likely to depart if the defendants were women, were not members of racial minorities, and pled guilty. The authors contend that both the official reasons given by judges and the comments made during interviews "suggest how race- and gender-linked stereotypes" may affect departure decisions. As they note, "Although these judges do not explicitly mention factors such as race or gender, it is plausible the process of "sizing up" a defendant's "character and attitude" in terms of whether he or she is a candidate for a departure below guidelines may involve the use of race and gender stereotypes and the behavioral expectations they mobilize."

SOURCE: Adapted from Kramer and Ulmer (1996).

These similarities notwithstanding, state guidelines differ on a number of dimensions. Arguably, the most important difference concerns the purpose or goals of the reform. As the Bureau of Justice Assistance stated,

States create sentencing commissions for many reasons. . . . The most frequently cited reasons are to increase sentencing fairness, to reduce unwarranted

disparity, to establish truth in sentencing, to reduce or control prison crowding, and to establish standards for appellate review of sentences. (U.S. Department of Justice, Bureau of Justice Assistance 1996:31)

Although all state guidelines attempt to make sentencing more uniform and to eliminate unwarranted disparities, the other goals are not universally accepted. Using the guidelines to gain control over rapidly growing prison populations, for example, is a recent development. Minnesota, the first state to incorporate this goal into the guidelines, stated that the prison population should never exceed 95 percent of available capacity. Pennsylvania initially did not link sentencing decisions to correctional resources; by the time they did, prisons and jails were operating at 150 percent of capacity (Frase 1997b:15–16).

State guidelines systems differ on other dimensions as well. Some guidelines are designed primarily to achieve just deserts, whereas others incorporate utilitarian and retributive rationales. Most guidelines cover felony crimes only, but a few, such as those adopted in Pennsylvania, also apply to misdemeanors. Some apply only to the decision to incarcerate and the length of incarceration, whereas others, such as those adopted in North Carolina, also regulate the length and conditions of nonprison sentences. Most guideline states abolished discretionary release on parole, but a few states have retained it. The procedures for determining offense seriousness and prior record vary widely, as do the presumptive sentences associated with various combinations of offense seriousness and prior record (for a comparison of sentencing policies and outcomes in Minnesota, Pennsylvania, and Washington, see Kramer, Lubitz, and Kempinen 1989). In other words, even among states with sentencing guidelines there is no typical “American approach.”

U.S. Sentencing Guidelines

In 1977, Senator Edward M. Kennedy responded to Judge Marvin Frankel’s call for reform of federal sentencing and introduced the Sentencing Guidelines Bill (S. 1437, 95th Cong. [1977]). The purpose of the bill was to establish a U.S. Commission on Sentencing, which would be authorized to develop sentence guidelines for U.S. district court judges. Senator Kennedy, who at various times described federal sentencing as “arbitrary,” “hopelessly inconsistent,” “a national scandal,” and “desperately” in need of reform (Stith

and Cabranes 1998:38), introduced versions of his sentencing reform bill in the next four congresses, until it was finally enacted as the Sentencing Reform Act of 1984 (SRA) (18 U.S.C. §§ 3551–3626 and 28 U.S.C. §§ 991–998; for a detailed discussion, see Stith and Cabranes 1998). The overriding objective of the SRA was to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system” (U.S. Sentencing Commission 1993, chap. 1, part A-3). The SRA created the U.S. Sentencing Commission (USSC), which was authorized to develop and implement presumptive sentencing guidelines designed to achieve “honesty,” “uniformity,” and “proportionality” in sentencing (USSC 1993, chap. 1, part A, p. 2). The SRA also abolished discretionary release on parole, stated that departures from the guidelines would be permitted with written justification, and provided for appellate review of sentences to determine whether the guidelines were correctly applied or whether a departure was reasonable.

The federal sentencing guidelines promulgated by the USSC went into effect in 1987. In 1989 the U.S. Supreme Court ruled in *Mistretta v. United States* (488 U.S. 361 [1989]) that the SRA, the USSC, and the guidelines were constitutional. The federal guidelines are extremely complex. The first guidelines manual consisted of more than 300 pages of directives; the manual is now more than 1,000 pages long and includes hundreds of amendments enacted since 1987 (Stith and Cabranes 1998:58). Like the guidelines adopted by the states, the federal guidelines are based on the seriousness of the offense and the offender’s prior criminal record. Unlike the state systems, most of which use 12 or fewer categories of offense seriousness, the federal guidelines use a 43-level sentencing grid (Exhibit 6.3). They also require the sentencing judge “to follow complex and abstract rules and to make minute arithmetic calculations in order to arrive at a sentence” (Stith and Cabranes 1998:83). Judges and other criminal justice officials calculate the sentence using a standardized worksheet that, at least in theory, guides everyone to the same sentence. However, critics charge that this process is overly rigid and mechanical. They contend that the “traditional judicial role of deliberation and moral judgment” has been replaced with “complex quantitative calculations that convey the impression of scientific precision and objectivity” (Stith and Cabranes 1998:82).

Although the federal sentencing guidelines are fairly rigid, they are not inflexible. The guidelines provide for a spread of about 25 percent between the minimum and the maximum sentence for each combination of offense seriousness and prior record; judges therefore have discretion to impose sentences

EXHIBIT 6.3 The Federal Sentencing Guidelines Grid

SENTENCING TABLE
(in months of imprisonment)

| Offense Level | Criminal History Category (Criminal History Points) | | | | | |
|---------------|---|-------------|---------------|--------------|----------------|-----------------|
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 |
| Zone A | | | | | | |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| Zone B | | | | | | |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| Zone C | | | | | | |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-106 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-106 | 92-115 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| Zone D | | | | | | |
| 25 | 57-71 | 63-78 | 70-87 | 84-106 | 100-125 | 110-137 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | life | life | life | life | life | life |

within that range. In addition, defendants who plead guilty may qualify for a two- or three-level reduction in the guideline range for “acceptance of responsibility.” This results in a sentence reduction of approximately 25 percent. Defendants who provide “substantial assistance”—that is, information that leads to the prosecution and conviction of another offender—can also be

sentenced outside the applicable guideline range. This type of departure is especially common in cases involving drug offenses, many of which carry mandatory minimum sentences. A substantial assistance motion made by the prosecutor and granted by the court removes the mandatory minimum sentence that otherwise would be binding at sentencing. If the case involves unusual circumstances, the judge can depart from the sentence range indicated by the guidelines, either upward or downward.

However, there are very limited grounds for these upward or downward departures. The statute states that judges may depart from the guidelines only on a finding that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines” (18 U.S.C. § 3553 [b]). Moreover, the guidelines expressly state that certain factors “are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range” (USSC 1993, chap. 5, part H, § 5H.1–13). Included among the “specific offender characteristics” that are “not ordinarily relevant” are the defendant’s age, education and vocational skills, mental and emotional conditions, physical conditions (including drug or alcohol dependence or abuse), employment record, family ties and responsibilities, and community ties. These provisions preclude judges from considering what many regard as the “commonsense bases for distinguishing among offenders” (Tonry 1996:77).

Another important—and highly criticized—feature of the federal guidelines is their severity. In developing the guidelines, the USSC apparently interpreted the SRA, which stated that “the guidelines were to correct the fact that current federal sentences often did not accurately reflect the seriousness of the offense” (28 U.S.C. § 994 [m]), to mean that sentences generally should be more severe than they had been in the past. Accordingly, under the guidelines, sentences for probation were greatly reduced, sentences for career offenders and for those convicted of violent crimes, drug crimes, and white-collar crimes were significantly increased, and sentences for crimes involving mandatory minimum sentences were set substantially above statutory minimums. Although the commissioners asserted that they developed the guidelines “by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice” (USSC 1993, chap. 1, part A, p. 4), Stith and Cabranes contend that they did no such thing. They state that the categories of offenses “for which the Commission conceded it purposely deviated from past practice—drug cases, fraud and other white collar cases, and cases involving

threatened or actual violence—actually far outnumber the remaining categories of cases” (1998:60–61).

These essential differences between state and federal guidelines help explain why the guidelines enacted by the states are generally supported by both citizens and criminal justice practitioners, whereas the federal guidelines are, in the words of one of their staunchest critics, “the most controversial and disliked sentencing reform initiative in U.S. history” (Tonry 1996:72). (See the “Focus on an Issue” for a discussion of the guidelines concerning crack and powder cocaine.) They are deeply unpopular with the judges and lawyers who are required to apply them, and they have been condemned by legal scholars, social scientists, and civil rights activists. According to Stith and Cabranes, “The greatest challenge facing policymakers today is the restoration of the legitimacy of sentencing in the eyes of victims, litigants, the bar, the bench, and the general public” (1998:143).

FOCUS ON AN ISSUE

U.S. Sentencing Guidelines for Crack and Powder Cocaine

Federal sentencing guidelines for drug offenses differentiate between crack and powder cocaine. In fact, the guidelines treat crack cocaine as being 100 times worse than powder cocaine. Possession of 500 grams of powder cocaine, but only 5 grams of crack, triggers a mandatory minimum sentence of 5 years. Critics charge that this policy, though racially neutral on its face, discriminates against African American drug users and sellers, who prefer crack cocaine to powder cocaine. More than 90 percent of the offenders sentenced for crack offenses in federal courts are African American. Those who defend the policy suggest that it is not racially motivated; rather, as Randall Kennedy, an African American professor at Harvard Law School, contends, the policy is a sensible response “to the desires of law-abiding people—including the great mass of black communities—for protection against criminals preying on them” (Kennedy 1994:1278; see also Kennedy 1997).

In 1993 Judge Lyle Strom, the chief judge of the U.S. District Court in Nebraska, sentenced four African American crack dealers to significantly shorter prison terms than called for under the guidelines. In explanation, Strom wrote, “Members of the African American race are being treated unfairly in receiving substantially longer sentences than Caucasian males who traditionally deal in powder cocaine” (1993:1).

Strom's decision was overturned by the Eighth Circuit Court of Appeals in 1994. The three-judge panel ruled that even if the guidelines are unfair to African Americans, that is not enough to justify a more lenient sentence than called for under the guidelines. Other federal appellate courts have upheld the hundred-to-one rule, holding that the rule does not violate the equal protection clause of the Fourteenth Amendment (see *U.S. v. Thomas*, 900 F.2d 37 [4th Cir. 1990]; *U.S. v. Frazier*, 981 F.2d 92 [3rd Cir. 1992]; and *U.S. v. Latimore*, 974 F.2d 971 [8th Cir. 1992]).

The USSC has long recommended that the penalties for crack and powder cocaine offenses be equalized. In 1995 the USSC recommended that the hundred-to-one ratio be changed to a one-to-one ratio. Both Congress and former President Clinton rejected this amendment. In May 2002 the USSC "unanimously and firmly" reiterated its earlier position that "the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio" (USSC 2002:viii). The USSC recommended increasing the quantity levels that trigger the mandatory minimum penalties for crack cocaine. They recommended that the 5-year mandatory minimum threshold be increased to at least 25 grams and that the 10-year mandatory minimum threshold be increased to at least 250 grams. The USSC also recommended that Congress repeal the mandatory minimum sentence for simple possession of crack cocaine.

Although its recommendations were not followed, in April 2007 the USSC voted to promulgate an amendment to the guidelines that reduced the penalties for crack cocaine offenses. Whereas the original guidelines provided that first-time offenders convicted of offenses involving 5 grams of crack cocaine were to receive a guideline sentence of 63 to 78 months, the amended guidelines provide for a sentence of 51 to 63 months. There was a similar reduction—from 121 to 151 months (original guidelines) to 97 to 121 months (amended guidelines)—for first-time offenders convicted of offenses involving 10 grams of crack cocaine. In December 2007, the USSC voted unanimously to apply the amendment retroactively. This meant that an offender sentenced under the old guidelines could apply for a sentence reduction; a federal judge would decide whether the offender was eligible for a reduced sentence and how much the sentence reduction should be. As of May 13, 2008, 5,796 crack cocaine offenders had applied for a sentence reduction; 80.5 percent of the applications were approved and 19.5 percent were denied. The average sentence reduction was 22 months (USSC 2008a).

In a press release announcing the decision on retroactivity, the USSC stated that the amended guidelines "are only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants." The USSC reiterated its belief that Congress should act "to address the issue of the 100-to-1 statutory ratio that drives Federal cocaine sentencing policy" (USSC 2007).

Sentencing Guidelines: Compliance or Circumvention?

Sentencing guidelines are intended to change sentencing practices. Their intent is to alter the procedures used by the judge to determine the appropriate sentence and, at least in some cases, increase the severity of the sentence imposed by the judge. In the preguidelines era, the trial judge had the ultimate discretion to fashion the sentence. He or she could determine which factors were relevant or irrelevant to criminal punishment, weigh all the relevant circumstances in the case, and tailor a sentence designed to meet one or more of the four general purposes of punishment. The sentencing process in the post-guidelines era is much less discretionary and, some would say, substantially more mechanical. Unless there are aggravating or mitigating circumstances that justify a departure, the judge is directed to impose the sentence indicated by the intersection of offense seriousness and prior criminal record.

Because the movement from indeterminate sentencing to sentencing guidelines represented a major change in sentencing policies and practices, some observers predicted that members of the courtroom workgroup would find ways to circumvent or sabotage the guidelines. For example, skeptics predicted that discretion simply would shift from the judge to the prosecutor, who would manipulate the charges so that the defendant's sentence would approximate the going rate for the offense in the preguidelines era (Miethe 1987). In other words, if the going rate for a first offender convicted of armed robbery in the preguideline period was 7 years but the guidelines called for 10 years, the prosecutor could reduce the defendant's sentence liability by downgrading the charge to unarmed robbery. Because the prosecutor's discretion is essentially unregulated, the courtroom workgroup could undermine the guidelines in this way.

Evidence about the "hydraulic displacement of discretion" (Miethe 1987:156) from the judge at sentencing to the prosecutor at charging can be found in studies of offenders sentenced before and after the guidelines were implemented in Minnesota and Washington State. The studies conducted in Minnesota reached contradictory conclusions. One study found that prosecutors manipulated charges for property offenders, who faced a lower likelihood of imprisonment under the guidelines than in the preguideline era, and for sex offenders, who faced substantially more serious penalties under the guidelines (Knapp 1987). Prosecutors required property offenders to plead guilty to multiple counts, which increased the odds of imprisonment. Conversely, prosecutors

would agree to a downward departure from the guidelines for offenders convicted of sex offenses. Miethe and Moore (1985), who examined charging and plea-bargaining practices before and after the Minnesota guidelines were implemented, reached a different conclusion. They found that charging and plea-bargaining practices did not change dramatically and that the changes that did occur were related to changes in case attributes. Miethe (1987) concluded there was little evidence that members of the workgroup were using charging and plea bargaining to undermine the guidelines.

Engen and Steen's (2000) analysis of sentencing in Washington State led them to the opposite conclusion. They examined charging and sentencing decisions in cases involving drug offenders before and after three amendments to the Washington Sentencing Guidelines. The first change, which went into effect in 1988, eliminated the first-time offender waiver for offenders convicted of delivery of heroin or cocaine. Enactment of this amendment meant that these offenders would no longer be eligible for a reduced sentence of up to 90 days confinement. The second change, effective in 1990, significantly increased the presumptive sentence for offenders convicted of delivery of heroin or cocaine. The third change resulted from a 1992 Washington Court of Appeals decision, *State v. Mendoza* (Engen and Steen 2000:1365). The court ruled that conspiracy to deliver was an unranked offense that carried with it a presumptive sentencing range of 0 to 12 months. As Engen and Steen note, this decision meant that "an offender—even a repeat offender—convicted of one or more counts of conspiracy to deliver heroin or cocaine could receive a shorter sentence than a first-time offender convicted of a single count of simple possession" (2000:1365).

Consistent with the hydraulic displacement argument, Engen and Steen found changes in charging practices that corresponded to these changes in the sentencing guidelines. From 1986 to 1990, the proportion of drug offenders convicted of simple possession increased, whereas the proportion convicted of delivery decreased. Moreover, the proportion of convictions for conspiracy, which did not change much from 1986 to 1992, increased fivefold from 1993 to 1995. Further analysis revealed that "the *changes over time* in the severity of charges are *entirely contingent upon the mode of conviction*" (Engen and Steen 2000:1382). In other words, prosecutors in Washington were using their charging and plea bargaining discretion to minimize the effect of the sentencing guideline amendments. As Engen and Steen conclude, "The severity of charges at conviction changed significantly following each change in the law,

which suggests the manipulation of charges (and subsequent sentences) rather than a strict application of charges to the crimes committed” (2000:1384).

There also is evidence of guideline manipulation at the federal level. As explained earlier, the USSC attempted to short-circuit circumvention of the guidelines through charging and plea-bargaining decisions by requiring federal judges to base the sentence on defendants’ relevant conduct. In addition, the *Prosecutor’s Handbook on Sentencing Guidelines* states that “readily provable” charges should not be bargained away and that a guilty plea should not be used as a basis for recommending a sentence that departs from the guidelines (U.S. Department of Justice 1987:50). These rules and policies clearly were designed to prevent circumvention of the guidelines through charging and plea bargaining.

Nagel and Schulhofer’s analysis of charging and bargaining practices in three federal districts revealed that the rules and practices implemented to preclude manipulation of the guidelines were “more impressive on paper than in practice” (1992:544). According to the authors, the procedures designed to regulate charging and bargaining practices were not rigorously enforced, and “fact bargaining, charge bargaining, and guideline-factor bargaining continue unabated” (Nagel and Schulhofer 1992:547). Nagel and Schulhofer found that prosecutors sometimes dropped charges, including use of a weapon, which were “readily provable.” They also used the substantial assistance motion to avoid severe sentences for sympathetic defendants who provided no genuine substantial assistance. Although the authors were careful to point out that guideline compliance, not guideline circumvention, was the norm, they nonetheless concluded that “unwarranted manipulation and evasion do occur in a substantial minority of guilty-plea cases” (Nagel and Schulhofer 1992:552).

The changes in charging and plea-bargaining practices documented by these studies obviously make it difficult to determine the extent of compliance with the guidelines. If compliance is defined simply as the percentage of sentences that conform to the guidelines, with no consideration of the degree to which the charges at conviction mirror the seriousness of the offender’s behavior, then a high rate of formal compliance may mask substantial informal or organizational noncompliance. As Tonry points out, “If judges are willing to give plea bargaining free rein, compliance may be more apparent than real” (1996:33). With these important caveats in mind, the research conducted to date does reveal substantial formal compliance with sentencing guidelines.

Consider, for example, the following findings:

- In Minnesota, compliance with the guidelines was very high in the first year of the postguideline period. Judges departed only 6.2 percent of the time on the disposition (prison vs. probation) and only 8.5 percent of the time on the duration of the prison sentence. By 1996, the departure rate had more than doubled, but compliance remained the norm (Dailey 1998:315).
- In the first 5 years after adoption of sentencing guidelines in Oregon, judges followed the guidelines and imposed the presumptive sentence in 87.5 percent of the cases (Bogan and Factor 1997:53).
- Judges in Washington State complied with a series of sentencing guideline amendments. When the first-time offender waiver was eliminated for defendants convicted of delivery of heroin or cocaine, judges responded by sentencing 94 percent of these offenders to prison in accordance with the increased presumptive ranges (Engen and Steen 2000:1384).
- Judges in Pennsylvania from 1985 to 1987 and 1989 to 1991 imposed the disposition called for by the guidelines in 86 percent of cases. Dispositional departures ranged from a low of 4 percent for rape and involuntary deviate sexual intercourse to a high of 33 percent for weapon offenses (Kramer and Ulmer 1996, tables 1 and 2). From 1984 to 1997, overall conformity to the guidelines ranged between 83 and 89 percent (Pennsylvania Commission on Sentencing N.d., figure M).
- The proportions of offenders sentenced in U.S. district courts in the early guideline years who received a sentence within the guideline range were as follows: 71.1 percent (1995), 69.6 percent (1996), 67.9 percent (1997), 66.3 percent (1998), and 64.9 percent (1999) (USSC 2000, figure G). In 2007, 60.8 percent of the offenders received a sentence within the guideline range. Most offenders whose sentences fell outside the guideline range received downward departures. Only 1.5 percent of the offenders in any year received upward departures (USSC 2008b, table N).

As these data indicate, “Judges much more often than not impose sentences that comply with applicable guidelines” (Tonry 1996:39). Although we do not know how often charging and plea-bargaining decisions distort the process and produce misleading estimates of the overall compliance rate, it

appears that judges do fashion sentences that conform to the guidelines in a majority of the cases.

Supreme Court Decisions on Guidelines and Determinate Sentences

In 1994, Charles Apprendi Jr. fired several shots into the home of an African American family. He also stated that he did not want the family living in his neighborhood because of their race. He was charged under New Jersey law with possession of a firearm for unlawful purposes, an offense that carried a prison term of 5 to 10 years. After Apprendi pled guilty, the prosecutor filed a motion to enhance the sentence under the state's hate crime statute. The judge hearing the case found by a preponderance of the evidence that the crime was racially motivated and sentenced Apprendi to 12 years in prison, which was 2 years more than the maximum sentence authorized by the statute under which Apprendi was convicted.

Apprendi appealed his sentence, arguing that the due process clause of the Fourteenth Amendment and the Sixth Amendment right to trial by jury require that the hate crime enhancement be either proved to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. The U.S. Supreme Court agreed. In a decision handed down in 2000, the Court rejected New Jersey's contention that the judge's finding that the crime was racially motivated was not "an 'element' of a distinct hate crime offense but a 'sentencing factor' of motive." The Court ruled that "any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt" (*Apprendi v. New Jersey*, 530 U.S. 466 [2000]).

Two years later, the Supreme Court handed down another decision clarifying the jury's role in sentencing. In *Ring v. Arizona* (536 U.S. 584 [2002]), the Court applied the rule articulated in *Apprendi* to the capital sentencing process. The Court reversed Timothy Ring's death sentence for first-degree murder, ruling that a sentencing judge, sitting without a jury, cannot find the aggravating circumstances necessary to impose a death sentence. According to the Court, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury."

Although neither *Apprendi* nor *Ring* involved the application of sentencing guidelines, commentators predicted that the Supreme Court would soon

turn its attention to sentencing under state and federal guidelines. This is because most sentencing guidelines allow judges to increase sentences for aggravating factors, such as whether the crime was committed with deliberate cruelty, whether the offender played a major role in the offense, whether the offender engaged in obstruction of justice, and other “specific offense characteristics” (to use the term used by the federal sentencing guidelines). Under sentencing guidelines, determining the sentence that will be imposed requires a series of postconviction findings of fact by the judge, using a preponderance of the evidence standard.

In 2004, the Supreme Court confronted the constitutionality of sentencing guidelines head on. The case involved a defendant, Ralph Howard Blakely Jr., who pled guilty in Washington State to kidnapping his estranged wife. In his guilty plea, Blakely admitted the elements of second-degree kidnapping involving domestic violence and use of a firearm. These facts, standing alone, made him eligible for a maximum sentence of 53 months. However, the sentencing judge imposed a sentence of 90 months after finding that Blakely had acted with deliberate cruelty (which, according to the statute, allowed the judge to depart from the standard guideline range). Blakely challenged the sentence, arguing that the offense of second-degree kidnapping with aggravated cruelty was essentially first-degree kidnapping, which was the charge he avoided by pleading guilty to second-degree kidnapping.

Consistent with its ruling in *Apprendi*, the Supreme Court ruled 5 to 4 that Blakely’s sentence violated his Sixth Amendment right to trial by jury (*Blakely v. Washington*, 542 U.S. 296 [2004]). The Court rejected Washington’s argument that there was no *Apprendi* violation because the maximum sentence for a class B felony (which was the type of felony for which Blakely was convicted) was not 53 months but 10 years. According to the Court’s decision,

Our precedents make clear, however, that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. (*Blakely v. Washington*, 542 U.S. 296 [2004])

In other words, Blakely’s sentence was invalid because the judge could not have imposed 90 months solely on the basis of facts admitted in the guilty plea.

The Court's ruling in *Blakely v. Washington* led many commentators to predict that the federal sentencing guidelines would soon come under the Court's scrutiny. According to Frase, "There is reason to believe that at least some justices in the *Blakely* majority were already thinking that *Apprendi* would be a good way to strike down or cut back the highly unpopular federal guidelines" (2007:418). The federal sentencing guidelines give judges even more discretion than do state guidelines to determine facts that increase the sentence the defendant is facing: "specific offense characteristics" that modify the base offense level of the crime seriousness score, "adjustments" related to the vulnerability of the victim or the offender's role in the offense, and the offender's "acceptance of responsibility" by pleading guilty.

One year after handing down the *Blakely* decision, the Supreme Court ruled in the case of *United States v. Booker* and the companion case, *United States v. Fanfan* (543 U.S. 220 [2005]), that the principles articulated in the *Apprendi* and *Blakely* decisions did apply to sentences imposed under the federal sentence guidelines. The Court invalidated Booker's 30-year sentence for drug trafficking, which exceeded by more than 8 years the maximum sentence the judge could have imposed based on the facts proved to the jury at trial. Essentially, the Court ruled that the enhancement provisions of the federal sentencing guidelines were unconstitutional. To avoid declaring the guidelines themselves unconstitutional, the Court also ruled that the federal guidelines were advisory rather than mandatory. Although judges must still compute and take into account the recommended guideline range for each offender, they are not bound to impose a sentence within that range.

The final decision handed down by the Supreme Court (at least as of mid-2008) was *Cunningham v. California* (No. 05-6551 [2007]), which addressed sentences imposed under California's determinate sentencing law. As explained earlier in this chapter, the California law provides that judges are to choose one of three specified sentences for people convicted of particular offenses. The judge is to impose the middle term unless there are aggravating or mitigating circumstances that justify imposing the higher or lower term. In this case, the judge sentenced John Cunningham to the higher term, based on six aggravating circumstances that the judge found by a preponderance of the evidence during a posttrial sentencing hearing. In striking down Cunningham's sentence, the Court stated that it had "repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

In the *Cunningham* case, the Supreme Court also explained how states with structured sentencing procedures could comply with the Court's rulings. One way is to require the prosecutor to include facts that increase the defendant's sentence exposure in the charging document and then require the jury—either at trial or in a postconviction sentencing hearing—to find these facts beyond a reasonable doubt. This is the approach taken by most jurisdictions with legally binding guidelines (Frase 2007:426). Another remedy is to permit judges to exercise broad discretion within a statutory sentencing range; in this situation, the judge does not need to show that there are aggravating factors that justify a sentence at the top of the range. This is the approach taken by California; under SB 40, which Governor Arnold Schwarzenegger signed into law in April 2007, the judge in each case can choose between the lower, middle, or upper term provided by the law for the particular crime (see http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0001-0050/sb_40_bill_20070125_amended_sen_v98.pdf).

The decisions handed down by the U.S. Supreme Court since 2000 clearly have reshaped sentencing procedures in the United States. These decisions have enhanced the role of both the prosecutor and the jury in sentencing and may motivate states with structured sentencing to return to indeterminate sentencing or to make guidelines advisory. Although it is still too early to tell whether the decisions will undo more than 20 years of sentencing reform, as Justice O'Connor predicted (dissenting in *Blakely*), it seems clear that they will have a lasting impact not only on sentencing practices but also on the design of sentencing laws and practices.

MANDATORY MINIMUM SENTENCING STATUTES

In 1985, Donald Clark, a Myakka City, Florida, farmer, was arrested by local police for growing marijuana on his farm. He was sentenced to probation and 2 years' house arrest. In 1990, federal agents descended on Myakka City, where many of the local residents grew marijuana, and arrested 28 people, including Donald Clark, for conspiracy to grow more than a million marijuana plants; the crime carried a mandatory life sentence. All of the others arrested in the conspiracy case entered into plea bargains for sentences of less than 12 years. Clark, who contended that he had not grown marijuana since his arrest in 1985, took his case to trial. He was convicted and sentenced to life in prison. He later appealed his sentence, which was reduced to 27 years. On

January 20, 2001, outgoing President Bill Clinton commuted his sentence and Donald Clark was freed. He had spent 9 years in prison for a nonviolent drug offense. (For other examples, see <http://www.famm.org/ExploreSentencing/TheIssue/ProfilesOfInjustice.aspx>.)

Donald Clark's story is not atypical. Each year, thousands of state and federal offenders are sentenced under mandatory minimum statutes that require the judge to impose specified sentences on offenders convicted of certain types of crimes, such as violent offenses, firearm offenses, drug offenses, or drunk driving, and on habitual or repeat offenders.¹ These "tough-on-crime" statutes are designed to prevent future crime by deterring potential offenders and incapacitating those who are not deterred. The implicit assumption is that *everyone* convicted of a targeted offense is dangerous and likely to recidivate. In imposing the sentence, therefore, the judge is supposed to consider *only* the fact that the defendant has been convicted of an offense carrying a mandatory sentence. He or she is not permitted to consider the defendant's role in the offense, the defendant's family situation or background characteristics, or other mitigating factors.

Mandatory penalty statutes proliferated during the "war on crime" and "war on drugs" that were waged in the 1970s, 1980s, and early 1990s. Candidates from both political parties campaigned on "tough-on-crime" platforms and decried "lenient sentences" imposed by "soft" judges; they championed "reforms" designed to ensure that offenders who do the crime will do the time (for a description of these reforms, see Beckett and Sasson 2000; Mauer 2006; Tonry 1996). State and federal legislators responded enthusiastically.

Consider these examples:

- In 1973, New York enacted the Rockefeller Drug Laws, which required long prison terms for a variety of drug offenses. For example, the law provided a mandatory penalty of 15 years to life for anyone convicted of selling 2 ounces or possessing 4 ounces of a narcotic substance.
- In 1975, the Massachusetts Bartley–Fox Amendment was enacted. This law required a 1-year prison term for unlawfully carrying (but not necessarily using) an unlicensed firearm.
- In 1977, Michigan's Felony Firearm Statute went into effect. Publicized with the catchy slogan "one with gun gets you two," the Michigan law required a 2-year sentence enhancement for use of a firearm in the course of committing a felony.

- In 1978, Michigan passed the “650 Lifer Law,” which requires a life sentence for offenders convicted of delivering or attempting to deliver 650 grams (about 1.4 pounds) of cocaine or heroin. In 1998, the law, which originally required a life sentence with no possibility of parole, was revised to make prisoners eligible for parole after 20 years.
- In 1984, Congress enacted the Comprehensive Crime Control Act of 1984, which required a 5-year sentence enhancement for using or carrying a gun during a crime of violence or a drug crime. The law also mandated a 15-year sentence for possession of a firearm by a person with three state or federal convictions for burglary or robbery.
- In 1986, Congress enacted the Anti-Drug Abuse Act, which established 5- and 10-year mandatory sentences for a variety of drug offenses. Passage of this law was spurred by the death of Len Bias, a University of Maryland basketball star who had just been signed by the Boston Celtics. Bias died of heart failure, apparently as a result of an accidental cocaine overdose.

Despite the fact that evaluations of these early statutes revealed that they had not achieved their objectives (see Chapter 7), the mandatory penalty movement continued unabated. By the mid-1990s, mandatory penalties had been enacted in every state, and Congress had passed more than 60 mandatory sentencing laws covering more than 100 federal offenses (Tonry 1996, chap. 5).

Criticisms of Mandatory Minimums

Although the primary objection to mandatory penalties, particularly those for drug offenses, is their excessive severity, opponents also criticize their inflexibility. They charge that mandatory statutes turn judges into sentencing machines: The type of drug plus the amount of drugs equals the sentence (Beckett and Sasson 2000:177–178). As noted earlier, in sentencing a defendant convicted of an offense carrying a mandatory minimum sentence, the judge is not supposed to consider anything other than the type and amount of drugs involved. Thus, “it matters not at all whether the offender is a 17-year-old transporting drugs from one location to another (a ‘mule’), the battered girlfriend of a small-time distributor, or a genuine ‘drug kingpin’” (Beckett and Sasson 2000:176–177). State and federal judges echo these criticisms (Box 6.2). Large majorities disapprove of mandatory minimums (*ABA Journal*

1994), want mandatory penalties for drug offenses eliminated (USSC 1991c), and support changes designed to increase the discretion of the judge (Federal Judicial Center 1994).

BOX 6.2

Mandatory Minimum Sentences: Judicial Exasperation and Despair

In 1993, Billy Langston, who was on probation for driving while intoxicated, and a friend were stopped by the police as they were transporting chemicals used to manufacture phencyclidine (PCP). He was convicted of conspiracy to manufacture 70 kilograms of PCP after a Drug Enforcement Agency agent testified that Billy had admitted he was going to use the chemicals to make PCP.

Billy Langston's codefendant, who provided information to the government to help convict the man who was to receive the chemicals, received a 60-month sentence. The alleged recipient received probation. Billy Langston, who contended that he had played only a minimal role in the crime and maintained that his codefendant bought the chemicals, was sentenced to 30 years in prison.

At the sentencing hearing, U.S. District Court Judge David V. Kenyon stated that "there is no question that this is an unjust, unfair sentence"; he lamented the fact that his hands were tied by the mandatory minimum sentencing statute. As he stated from the bench, "It is clear that what's going on here is a far greater sentence than what this man deserves. But there's nothing I can do about it, at least that I can figure out."

Judge Kenyon's comments were echoed by the prosecuting attorney, who stated that "the 30-year sentence in this case, which is mandated, is extraordinarily heavy. I don't think that it's anything that anyone feels good about. I certainly don't."

SOURCE: Families Against Mandatory Minimums, "Victims of MMS" (<http://www.famm.org>).

Critics also charge that mandatory minimum sentencing statutes, like presumptive sentencing guidelines, shift discretion from the sentencing judge to the prosecutor. Because sentencing for offenses carrying mandatory penalties is, by definition, nondiscretionary and because the application of a mandatory minimum sentence depends on conviction for a charge carrying a mandatory

penalty, prosecutors, not judges, determine what the ultimate sentence will be. In other words, if a defendant is convicted of a drug offense carrying a mandatory minimum sentence of 5 years in prison, the judge's hands are tied: He or she must impose the mandatory 5-year term. The prosecutor, on the other hand, is not required to charge the defendant with the drug offense carrying the mandatory term. If the prosecutor does file the charge, he or she can reduce it to an offense without a mandatory penalty if the defendant agrees to plead guilty. By manipulating the charges that defendants face, prosecutors can circumvent the mandatory penalty statutes.

An early study conducted by the USSC (1991c:57) confirmed that prosecutors often did not file charges carrying mandatory minimum penalties when the evidence indicated that such charges were warranted. In fact, prosecutors did not file the expected charges in about a fourth of the cases. To avoid the mandatory minimum penalty, prosecutors filed drug charges that did not specify the amount of drugs or that specified a lower amount than appeared supportable, failed to file charges for mandatory weapon enhancements, and did not request increased minimums in cases involving offenders with prior convictions. Plea-bargaining decisions also had an impact. A substantial proportion of the defendants who were charged with mandatory minimum offenses pled guilty to offenses that carried lower mandatory minimum sentences or no mandatory minimums at all (USSC 1991c:58). The USSC study also found that 40 percent of the defendants received shorter sentences than would have been warranted under the applicable mandatory minimum statute.

The commission acknowledged that prosecutors might have legitimate reasons for not filing charges that carried mandatory penalties or for allowing defendants to plead guilty to lesser offenses. Nonetheless, they concluded that the results of their study indicated that mandatory minimums were not working. As they noted, "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised" (USSC 1991c:ii). According to the USSC, "There are a number of ways in which Congress effectively can shape sentencing policy without resorting to mandatory minimum provisions" (1991c:124). (See Box 6.3 for a discussion of the "safety valve" provision.)

Evaluations of mandatory minimum sentences in New York, Massachusetts, and Michigan also revealed high levels of noncompliance and circumvention. An examination of the impact of New York's Rockefeller Drug Laws (Joint Committee on New York Drug Law Evaluation 1978), touted as

the “nation’s toughest drug laws,” found that the proportion of felony arrests that resulted in indictment declined, as did the percentage of indictments that led to conviction. Although the likelihood of incarceration and the average sentence imposed on offenders convicted of drug felonies did increase, the lower rates of indictment and conviction meant that the overall likelihood that someone arrested for a drug felony would be sentenced to prison remained about the same. A similar pattern was observed in Massachusetts (Beha 1977; Rossman et al. 1979) and Michigan (Loftin, Heumann, and McDowall 1983), which adopted mandatory sentencing provisions for carrying or using a firearm, and in Oregon (Merrit, Fain, and Turner 2006), which imposed long mandatory prison terms for 16 violent and sex-related offenses. For offenses targeted by the gun laws in Massachusetts and Michigan, the rate at which charges were dismissed increased and the conviction rate decreased. In Oregon, the law resulted in harsher sentences for offenders convicted of offenses targeted by the measure but conviction and sentencing of fewer offenders for the targeted offenses. In all four states, as in the federal system, prosecutors and judges devised ways to avoid applying mandatory penalties.

BOX 6.3

Mandatory Minimums and the “Safety Valve”

In 1994, the Department of Justice issued a report revealing that one in five federal prisoners were low-level drug offenders with no records of violence, no involvement in sophisticated criminal enterprises, and no prior sentences to prison. Among federal prisoners locked up for drug offenses, more than a third were low-level offenders.

Publication of these findings led Congress to search for ways to revise, but not repeal, mandatory minimum penalties for drug offenses. Senator Strom Thurmond (R-SC) and Senator Alan Simpson (R-WY) cosponsored legislation establishing a safety valve for nonviolent drug offenders. Under this provision, first-time, nonviolent offenders would be exempt from mandatory penalties if they met specified criteria.

Although the safety valve provision was attacked by conservative legislators, the National Rifle Association (which claimed, incorrectly, that the provision would eliminate mandatory minimums for gun crimes), and the National Association of U.S. Attorneys, it was included in the final version of the Omnibus Crime Control Act of 1994.

SOURCE: From Mauer (1999).

21st-Century Backlash?

In 1996, Michael Tonry, a staunch critic of mandatory penalties, predicted that “sooner or later, the combination of chronic prison overcrowding, budgetary crises, and a changed professional climate will make more public officials willing to pay attention to what we have long known about mandatory penalties” (1996:135). By the late 1990s, it appeared that Tonry was correct. Prison populations continued to grow even as the crime rate declined, and mandatory minimum sentencing statutes came under increasing criticism. In July 1998, Michigan governor John Engler signed a law reforming Michigan’s “650 Lifer Law” (Michigan Compiled Laws, chap. 333 § 7401[2]). Under the old law, anyone convicted of possessing, delivering, or intending to deliver more than 650 grams of cocaine or heroin received a mandatory life sentence without the possibility of parole. The new law requires a sentence of “life or any term of years, not less than 20” (Public Act 314 of 1998) for future offenders. A companion bill made the change applicable to offenders sentenced under the old law. In February 1999, DeJonna Young became the first person released from prison as a result of the legal changes. She had been sentenced to life in prison without parole in 1979 after she and her boyfriend were stopped by the police, who found 3 pounds of heroin in her car. Young, who was 24 years old at the time of her arrest, maintained that she didn’t know the drugs were in her car.

New York’s draconian Rockefeller Drug Laws also came under attack (“Who’s Defending Rockefeller Drug Laws?” 2001). In early 2001, New York governor George Pataki proposed changing the laws. He recommended shorter mandatory terms, treatment instead of incarceration in some cases, and greater sentencing discretion for judges. Although state legislators were generally supportive of the governor’s recommendations, the New York State District Attorneys Association came out against the changes. The president of the association stated, “We can’t live with a system that takes out of prosecutors’ hands the right to send predatory drug dealers to prison” (“Who’s Defending Rockefeller Drug Laws?” 2001). The opposition of prosecutors notwithstanding, in 2004 Governor Pataki signed into law the Drug Law Reform Act, which replaced the indeterminate sentences required by the Rockefeller Drug Laws with determinate sentences, reduced mandatory minimum sentences for nonviolent drug offenders and for first-time offenders convicted of the most serious drug charges, and allowed offenders serving life sentences to apply for resentencing.

These direct attacks on mandatory minimums, coupled with the drug court movement and the increasing emphasis on drug treatment rather than incarceration (see “Focus on an Issue: Sentencing Drug Offenders”), suggest that state and federal officials are willing to rethink mandatory minimum sentencing statutes, particularly for nonviolent, low-level drug offenders. Although it is unlikely that mandatory penalties will be repealed, there appears to be growing consensus that reform is needed.

FOCUS ON AN ISSUE

Sentencing Drug Offenders

Incarceration or Treatment?

The past three decades have witnessed dramatic growth in the U.S. prison population. Nearly 1.6 million people were incarcerated in state and federal prisons at the end of 2006 (U.S. Department of Justice, Bureau of Justice Statistics 2007e), compared with fewer than a quarter of a million in 1975 (U.S. Department of Justice, Bureau of Justice Statistics 1999f). Many commentators attribute this dramatic increase in the number of people locked up in our nation’s prisons to increasingly severe sentencing practices for drug offenses (Mauer 1999; Skolnick 1997; Tonry 1995).

Statistics concerning the offenses for which state and federal prisoners are incarcerated support this conclusion. The percentage of state prisoners incarcerated for a drug offense nearly quadrupled from 1980 (6%) to 1996 (23%). Similarly, the percentage of federal prisoners serving time for drug offenses increased from 25 percent in 1980 to 60 percent in 1996. In fact, the increase in drug offenders accounted for nearly three quarters of the total increase in federal inmates and one third of the total increase in state inmates during this 16-year period (U.S. Department of Justice, Bureau of Justice Statistics 1998a). Although the percentages of inmates incarcerated for drug offenses declined somewhat in the next decade, drug offenders still made up 20 percent of all state inmates in 2004 and 53 percent of all federal inmates in 2006 (U.S. Department of Justice, Bureau of Justice Statistics 2007e).

These statistics reflect a crime control policy premised on a theory of deterrence that Skolnick characterizes as “superficially persuasive” (1997:411). The assumption is that sentencing drug offenders to prison for long periods of time will deter current and prospective offenders, leading eventually to a reduction in drug abuse and drug-related crime. As numerous commentators have observed, however, this assumption rests on the false premise that altering criminal penalties will alter behavior (Austin and Irwin 2001; Paternoster 1987; Tonry 1996). In fact, scholarly research generally

concludes that increasing the severity of penalties will have little or no effect on crime (for research on the deterrent effects of punishment for drug offenders, see Caulkins et al. 1997; Speckart, Anglin, and Deschenes 1989). As Cohen and her colleagues recently noted,

Observers of the criminal justice system who in general agree on little else have joined in arguing that increased penalties for drug use and distribution at best have had a modest impact on the operation of illicit drug markets, on the price and availability of illicit drugs, and on consumption of illicit drugs. (Cohen et al. 1998:1260)

Critics of the crime control approach, who maintain that the war on drugs has failed and that “public safety has not improved as a result of the imprisonment binge” (Irwin and Austin 1997:140), have called for a new approach that balances public safety and public health interests. While acknowledging that imprisonment may be an appropriate penalty for some offenders, those who advocate a public health approach argue for expansion in the use of a variety of alternatives to incarceration. For example, Skolnick (1997) suggests that two thirds of the \$13 billion the United States spends annually to wage the war on drugs be allocated to treatment and prevention.

These calls for expansion of drug treatment programs are premised on the notion that in contrast to incarceration, treatment works. In fact, there is substantial evidence in support of the efficacy of treatment. There is now a sizable literature that documents the ability of drug abuse treatment programs to reduce drug use and drug-related crime (see Anglin and Hser 1990 for a summary of this research). Positive results have been noted both for community-based treatment (Benedict, Huff-Corzine, and Corzine 1998; Smith and Akers 1993) and for treatment in a correctional institution (Field 1984; Inciardi, Lockwood, and Hooper 1994; Mullen 1996; Tunis et al. 1996; Wexler, Falkin, and Lipton 1990).

Demands for expanding drug treatment programs also are fueled by research documenting a strong relationship between drug use and crime. Evidence of this comes from the National Institute of Justice’s Arrestee Drug Abuse Monitoring program, which tested arrestees for a variety of drugs in the 1980s and 1990s. Results from the program indicate that the percentage of arrestees testing positive for any drug has rarely fallen below 50 percent in any of the 23 sites and has been as high as 85 percent in some (National Institute of Justice 1997). In 1996, for example, more than 60 percent of men and at least 50 percent of women tested positive for any drug in all but three sites; the median rate for all sites was 68 percent.

These figures are consistent with the results of self-report studies of substance-abusing offenders. For example, state prison inmates report high rates of drug use: 80 percent of those surveyed in 1991 said that they had used illegal drugs at least once, about half stated that they had been using drugs in the month before the offense for which they were incarcerated, and 31 percent

indicated that they were under the influence of drugs at the time of the crime (U.S. Department of Justice, Bureau of Justice Statistics 1991). Self-report studies also indicate that substance-abusing offenders are responsible for a disproportionate amount of crime. One study found that violent offenders who used heroin committed 15 times more robberies, 20 times more burglaries, and 10 times more thefts than offenders who did not use drugs (Chaiken 1986).

The Drug Court Movement

Increases in the number of drug offenders appearing in state and federal courts—coupled with mounting evidence of both the links between drug use and crime and the efficacy of drug treatment programs—led a number of jurisdictions “to rethink their approach to handling defendants charged with drug and drug-related offenses” (Drug Court Clearinghouse and Technical Assistance Project 1991:3). Some jurisdictions, such as Cook County (Chicago), Illinois, established specialized dockets designed to manage the drug caseload more efficiently and to alleviate stress on the felony court system (Inciardi, McBride, and Rivers 1996). Other jurisdictions, such as Dade County (Miami), Florida, created “drug treatment courts,” which incorporated intensive judicial supervision of drug offenders, mandatory drug treatment, and rehabilitation programs providing vocational, education, family, and medical services.

The drug treatment court concept spread rapidly in the 1990s. As of June 1999, 377 drug courts were operating, and an additional 217 drug courts were in the planning stages in 49 of the 50 states, the District of Columbia, Puerto Rico, Guam, several Native American tribal courts, and two federal district courts (Drug Court Clearinghouse and Technical Assistance Project 1991:1). By December 2007, there were 1,786 adult and juvenile drug courts operating in jurisdictions throughout the United States; another 284 courts were in the planning stages (U.S. Department of Justice Bureau of Justice Assistance Drug Court Clearinghouse Project at American University 2007).

Although the nature and characteristics of drug courts throughout the United States vary widely, they share several key elements (National Association of Drug Court Professionals 1997):

- Integration of substance abuse treatment with justice system case processing
- Use of a nonadversarial approach
- Early identification and prompt placement of eligible participants
- Access to a continuum of treatment, rehabilitation, and related services
- Frequent testing for alcohol and illicit drugs
- A coordinated strategy by judge, prosecutor, defense, and treatment providers to govern offender compliance
- Ongoing judicial interaction with each participant

In the typical pre-adjudication drug court (Drug Court Clearinghouse and Technical Assistance Project 1991:3), drug offenders who meet the eligibility criteria for the program are given a choice between participation in the drug court and traditional adjudication. Although the eligibility criteria vary, most programs exclude offenders who have prior convictions for violent offenses or whose current offense involved violence or use of a weapon. They target offenders whose involvement with the criminal justice system is due primarily to their substance abuse. The program may last 12 months, 18 months, or longer. Offenders who are accepted and agree to abide by the requirements of the program are immediately referred to a substance abuse treatment program for counseling, therapy, and education. They also are subject to random urinalysis and are required to appear frequently before the drug court judge. Offenders who do not show up for treatment sessions or drug court or who fail drug tests are subject to sanctions. Repeated violations may result in termination from the program and in adjudication and sentencing on the original charges. The charges against the offender are dismissed upon completion of the program.

The Effectiveness of Drug Court

There is mounting evidence that drug courts reduce offender recidivism and prevent drug relapse. A report by the U.S. General Accounting Office (GAO) summarized the results of 20 evaluations of 16 drug courts that had been completed by early 1997 (U.S. General Accounting Office 1997). The GAO report indicated that these early evaluations generally concluded that drug courts were effective in reducing drug use and criminal behavior. A later review by Belenko (1998) summarized the results of 30 evaluations of 24 drug courts that had been completed by May 1998. Belenko observed that most of these evaluations concluded "that criminal behavior was substantially reduced during participation in the program" (1998:29). For example, an evaluation of a Ventura County, California, drug court that tracked recidivism over an 8-month period found that only 12 percent of the drug court participants were rearrested, compared with 32 percent of those in a comparison group. A Jackson County, Missouri, evaluation similarly revealed 6-month rearrest rates of 4 percent for program participants and 13 percent for nonparticipants.

Belenko's review also included studies that assessed the impact of drug court participation on postprogram recidivism. Eight of the nine evaluations reported lower recidivism rates for the drug court group, compared with a group of similarly situated offenders who did not participate in the drug court program (Belenko 1998:29–30). For example, an evaluation of the Multnomah County, Oregon, drug court found statistically significant differences between drug court participants (0.59 new arrests) and drug

court-eligible nonparticipants (1.53 new arrests) over a 24-month tracking period. Belenko concluded,

Although the evaluations vary considerably in scope, methodology and quality, the results are consistent in finding that . . . drug courts provide more comprehensive and closer supervision of the drug-using offender than other forms of community supervision, drug use and criminal behavior are substantially reduced while clients are participating in drug court, [and] criminal behavior is lower after program participation. (1998:17–18)

More recent and methodologically sophisticated studies also provide evidence that drug courts are effective in preventing recidivism. For example, an evaluation of the Baltimore City Drug Treatment Court used an experimental design in which participants were randomly assigned either to the drug court or to traditional adjudication. The results of the evaluation revealed that offenders assigned to the drug court were less likely than offenders who were placed in the traditional adjudication group to be rearrested during the 12-month follow-up period (Gottfredson and Exum 2002). A follow-up study using 3 years of recidivism data found similar results; this study also found that the positive effects of participation in the drug treatment court extended past the offenders' involvement in the drug court (Gottfredson et al. 2006).

New Approaches: More Effective Solutions?

Recent developments in New York and California suggest that criminal justice officials and the general public are becoming increasingly concerned about the costs of incarcerating nonviolent drug offenders and increasingly skeptical about the benefits of doing so. In June 2000, the chief judge of New York, who has wide latitude to restructure state courts, issued an order requiring that nearly all nonviolent, drug-addicted offenders be offered treatment instead of jail time ("New York" 2000:8). To be eligible for the program, offenders must test positive for drugs, agree to plead guilty, and be willing to enter a rigorous substance abuse treatment program. Chief Judge Judith Kaye said that about 10,000 offenders per year would be diverted from jail or prison to treatment. Court officials predicted that the program would lead to a 10 percent reduction in the state prison population and would save \$500 million a year in prison, foster care, and mental health costs.

In November 2000, California voters voted overwhelmingly to approve Proposition 36 (Box 6.4), providing drug treatment instead of prison for first- and second-time drug offenders who are not charged with other crimes ("Drug Policy" 2000:3). The law, which was described as "the most sweeping change" in the California criminal justice system in decades, was

expected to divert 36,000 offenders each year from prison and into treatment programs (Butterfield 2001). A similar law, the Drug Medicalization, Prevention and Control Act (Proposition 200), was approved by Arizona voters in 1996. The Arizona law requires that nonviolent offenders convicted for the first or second time of use or possession of illegal drugs be sentenced to mandatory drug treatment, education, or community service instead of prison. (In 2006, Arizona voters approved Proposition 301, which excluded methamphetamine offenders from the program; as a result, offenders convicted for the first or second time of use or possession of methamphetamine are eligible for a jail or prison sentence.) Laws mandating drug treatment for low-level drug offenders also were enacted in Maryland, Hawaii, Washington State, and Kansas.

BOX 6.4

California's Substance Abuse and Crime Prevention Act, Proposition 36

The People of the State of California hereby declare their purpose and intent in enacting this Act to be as follows: To divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses.

Although the laws enacted in these states were widely praised, there were concerns that they were not adequately funded, that there were not enough treatment slots available, and that the laws would dissuade drug offenders from pleading guilty. A recent review and assessment of evaluation research focusing on California's Proposition 36 concluded that the measure had met its goals of reducing imprisonment and increasing treatment of drug offenders (Ehlers and Ziedenberg 2006). The authors of the report noted that from 2000 to 2005 the number of drug possession offenders in California's prisons fell by 27.4 percent; among adult felony drug offenders, prison sentences declined by 20 percent and sentences to probation increased by 370 percent. The authors also reported that the capacity of the state to provide drug treatment increased and that the drug treatment completion rates for Proposition 36 offenders were comparable to those of drug court participants. Finally, the report concluded that implementation of the measure had saved the state "hundreds of millions of dollars." As the authors noted, "While the true extent of cost savings cannot be fully known, prisons that were expected to be built did not break ground, and a reasonable method for calculating the savings

from reduced prisons and jail admissions for drug possession suggest the state saved hundreds of millions of dollars” (Ehlers and Ziedenberg 2006:27).

A study of the Arizona law addressed the law’s impact on plea bargaining practices (Webb and Rodriguez 2006). More specifically, the authors assessed whether charging and plea bargaining decisions in cases involving low-level drug offenders changed after the passage of Proposition 200. The authors concluded that plea bargaining was widely used in the prosecution of these types of cases and that it was used “in a manner consistent with prosecutorial practices aimed at incarcerating those drug offenders who are perceived to present a greater threat to the community.” However, the authors also found that plea outcomes in the post-Proposition 200 era were less favorable for Hispanic offenders than for white offenders.

It is too early to tell whether these calls for expanded drug treatment signal a major change in the philosophy of punishment for drug offenders. However, it does appear that both voters and lawmakers are disillusioned with current crime control efforts, which have resulted in the imprisonment of increasingly large numbers of drug offenders but have not produced the expected reduction in crime.

THREE-STRIKES-AND-YOU’RE-OUT LAWS

Laws bearing the catchy “three-strikes-and-you’re-out” slogan were enacted in the early 1990s in Washington State and California. These laws, which impose extremely long prison terms on repeat offenders—sometimes life without parole—proved immensely popular. As one commentator noted, “The laws appeal to a certain intuitive notion of justice” (Caulkins 2001:227). Like the baseball player in the batter’s box, an offender is allowed to strike out once, even twice, but the three-time loser is out of the game, at least temporarily and sometimes for good. As of 2004, 23 states and the federal government had adopted some variation of three-strikes-and-you’re-out laws (Schiraldi, Colburn, and Lotke 2004).

Although touted as a major innovation, in reality three-strikes laws are simply more punitive versions of habitual offender statutes that date back to the late 18th century. Like their predecessors, three-strikes laws target repeat offenders. They are designed to prevent future crime by locking up offenders who repeatedly commit serious crimes for long periods of time, in many cases for life. In other words, they are designed to incapacitate dangerous career criminals. The main difference between the three-strikes laws and the earlier habitual criminal statutes is the size of the sentence enhancement. Whereas the

typical habitual criminal statute might have added 5 or 10 years to the sentence, three-strikes laws provide for sentence enhancements of 25 years, 40 years, or longer; some laws mandate life in prison with no possibility of parole. The three-strikes laws also are less flexible and apply to a longer list of felonies than the habitual offender statutes (Wright 2002:442).

Not all laws that carry the “three-strikes-and-you’re-out” moniker are alike. They differ in three important ways: how the “strike zone” is defined, how many strikes are required to be “out,” and what it means to be “out” (Clark, Austin, and Henry 1997:7). The “strike zone” refers to the offenses that constitute a strike. All states include violent felonies, but some state laws also include drug offenses and property crimes. In Maryland and Tennessee, only prior offenses that resulted in incarceration qualify as strikes. And in California, the first two strikes must be from the list of “strikeable” felonies, but the third strike can be *any* felony offense, no matter how minor. Under California’s law, people have been sentenced to 25 years to life for stealing a slice of pizza, stealing cookies from a restaurant, and stealing meat from a grocery store (Beckett and Sasson 2000:180). In 2003 the U.S. Supreme Court upheld California’s three-strikes law, ruling that a sentence of 25 years to life for stealing golf clubs from a country club did not violate the cruel and unusual punishment clause of the Constitution. According to the Court’s decision in *Ewing v. California* (538 U.S. 11 [2003]), the Eighth Amendment “does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”

In most states, offenders are not “out” until they have three strikes, but many of these states also have enhanced sentences for a second strike. In Montana and South Carolina, a person convicted a second time for a serious violent crime is sentenced to life in prison without parole. In California, a conviction for any felony doubles the sentence that otherwise would be imposed if the offender has one prior conviction for a strikeable offense. Typically, a three-time loser receives a mandatory sentence of life without parole. In a few states, offenders who strike out can be released but only after serving 25, 30, or 40 years in prison.

Critics of three-strikes laws predicted that they would have a substantial impact on local courts and jails. They predicted that offenders facing mandatory life sentences would demand jury trials and that the additional time needed to process cases through trial—coupled with local officials’ reluctance

to release three-strikes defendants before trial—would cause jail populations to explode. For example, an early report on the projected impact of the law in Santa Clara County, California, stated that “the ‘three-strikes, you’re out’ law is expected to create a crisis in the administration of justice in Santa Clara County and elsewhere in the State” (Cushman 1996:93).

Although early evaluations of the implementation of three-strikes laws in California revealed substantial increases in trials and jail populations, more recent data showed that these trends were beginning to moderate (Clark et al. 1997:3). One study noted that although trials in six California counties had increased in third-strike cases, the trial rate in nonstrike cases had decreased dramatically (Harris and Jesilow 2000). This study also found that criminal justice officials had devised a number of ways to circumvent the law. Judges have attempted to encourage guilty pleas by offering two-strike defendants the lowest possible sentences, and the prosecuting attorney in one county announced that third-strike cases would be filed only when the current offense was serious or violent (Harris and Jesilow 2000).

The results of these studies suggest that the dire predictions of clogged courts and skyrocketing jail populations as a result of three-strikes laws were overly pessimistic (see Chapter 7 for discussion of the impact of the laws on sentence severity and prison populations). Although the laws may have produced an “initial period of hyper-concern and confusion,” over time the members of the courtroom workgroup used “a host of discretionary devices to adapt to the laws in ways that reinstitute long-standing operating procedures” (Feeley and Kamin 1996:136). In other words, over time the criminal justice system may adapt to and eventually nullify the law.

TRUTH-IN-SENTENCING LAWS

In July 2000, the *Birmingham News*, in Alabama, ran a story headlined “Lies in Sentencing.” The article cited two recent cases in which offenders served only a portion of their sentences. The first involved two brothers who were sentenced to prison for 40 years for kidnapping and rape. They were released on parole after serving less than half of their sentences. The second involved a woman who was sentenced to 25 years in prison for murdering another woman but was up for parole after spending only 8 years behind bars. Noting that most offenders in Alabama served only one third of their prison sentences, the

author of the article asked, "So where is 'truth in sentencing,' where 40 years means 40 years and 25 years means 25 years?"

Widespread concerns about "lies in sentencing" led to a number of interrelated reforms. About half of the states abolished early release from prison at the discretion of the parole board, either for all offenders or for certain categories of offenders. Many states also tightened policies regarding good-time reductions for satisfactory behavior in prison and earned-time reductions for participation in prison-based educational and vocational programs. At the same time, most states enacted truth-in-sentencing laws that require offenders to serve a substantial portion of the prison sentence imposed before being eligible for release. These laws were enacted in the wake of the passage of the 1994 Crime Act, which authorized grants to states to build or expand correctional facilities. To qualify for the federal money, states must require people convicted of violent crimes to serve at least 85 percent of the prison sentence imposed by the judge.

By 1999, 27 states and the District of Columbia had adopted truth-in-sentencing laws that met the 85 percent federal standard (U.S. Department of Justice, Bureau of Justice Statistics 1999g, table 1). The laws enacted by 13 other states require offenders to serve 50 to 75 percent of the sentence. Maryland and Texas have a 50 percent requirement for violent offenders, Nebraska and Indiana require all offenders to serve 50 percent, and Arkansas requires certain offenders to serve 70 percent. In Colorado, violent offenders with two previous violent felony convictions serve 75 percent of the sentence, and those with one prior violent conviction serve 56 percent. Several states with indeterminate sentencing require offenders to serve 100 percent of the minimum sentence imposed by the judge. Federal offenders serve a uniform 85 percent of the sentence.

Truth-in-sentencing laws are designed to ensure that offenders, particularly violent offenders, serve a substantial portion of their sentences. Assuming that the judge does not discount the sentence he or she imposes, anticipating that the offender will serve a larger percentage of the sentence, these laws should result in longer prison terms. Early data from states that qualified for federal funding by enacting an 85 percent requirement showed that the average time served by violent offenders did, in fact, increase between 1993 and 1997. For the United States as a whole, the mean time served by offenders who were released from prison increased by only 6 months, from 43 months in 1993 to 49 months in 1997. Among states with the 85 percent rule, the increase was much more dramatic. Vermont reported the largest increase (32 months to 82 months), followed by Florida (28 months to 50 months) and North Dakota (31 months to 47 months).

The percentage of time served by offenders who were released in 1997 varied widely between states; it ranged from 25 percent in Arkansas to 87 percent in Vermont (U.S. Department of Justice, Bureau of Justice Statistics 1999g, table 8).

Like three-strikes laws and mandatory minimum sentencing statutes, truth-in-sentencing laws are premised on assertions that offenders who commit violent crimes or repeat their crimes are responsible for a disproportionate amount of crime and that locking them up for long periods of time will reduce the crime rate. As Princeton University professor John Dilulio wrote, “Letting violent and repeat criminals out of prison or jail and putting them on probation, parole, or pretrial release results in countless murders, rapes, assaults, weapons offenses, robberies, and burglaries each year” (1995:2). Although it may be too early to tell whether truth-in-sentencing laws will prevent “countless” crimes by violent and repeat offenders, one study concluded that the laws did not have a significant effect on crime rates (Turner et al. 1999).

THREE DECADES OF REFORM

Three decades of experimentation and reform have transformed sentencing policies and practices in the United States. Thirty years ago, indeterminate sentencing based on the philosophy of rehabilitation was the norm. Judges had substantial though not unlimited discretion to determine the sentence range, and parole boards decided how long offenders would actually serve. Judges considered the facts and circumstances of the case and the characteristics of the offender and attempted to tailor sentences that fit individuals and their crimes. With few exceptions, judges were not required to impose specific sentences on particular types of offenders.

Concerns about disparity and discrimination in sentencing—coupled with widespread disillusionment with rehabilitation and a belief that more punitive sentences were both necessary and just—led to a series of incremental sentencing reforms that revolutionized the sentencing process. Sentencing policies and practices today are much more complex and substantially more fragmented than they were in the past. Some jurisdictions retained indeterminate sentencing; others replaced it with more tightly structured determinate sentencing or sentencing guidelines. Mandatory minimum sentencing statutes that eliminated judicial discretion and targeted violent offenders, drug offenders, and career criminals proliferated at both the state and federal levels. Other

tough-on-crime reforms also proved popular. More than half of the states adopted “three-strikes-and-you’re-out” laws, and most jurisdictions enacted truth-in-sentencing laws designed to ensure that offenders served a larger portion of the sentence imposed by the judge.

Although there is evidence that the members of the courtroom workgroup have been able to circumvent some of the requirements of these laws and that state and federal lawmakers are beginning to have doubts about the wisdom of imprisoning drug-addicted offenders, the reforms adopted in the past 30 years have significantly altered the sentencing process in the United States. As a result of these changes, sentencing today is less discretionary, less individualized, and more mechanical.

However, the situation is complicated by the Supreme Court decisions handed down since 2000, which have enhanced the role of the prosecutor and the jury in sentencing in jurisdictions with determinate sentencing or mandatory sentencing guidelines. Although it is too early to tell whether these decisions will undo the structured sentencing reforms enacted in the past three decades, it is clear that we have entered a new era in sentencing policies and practices.

DISCUSSION QUESTIONS

1. Calls for sentencing reform came from both ends of the political spectrum. How did the arguments put forth by liberal reformers differ from those put forth by conservative reformers?
2. Assume that your state legislature is considering sentencing guidelines. You have been asked to testify before the committee on the judiciary. Would you recommend voluntary, advisory guidelines or presumptive guidelines? Why?
3. What are the common features of state sentencing guidelines? How do the guidelines adopted by the states differ?
4. Why are the federal sentencing guidelines “the most controversial and disliked sentencing reform initiative in U.S. history”?
5. Explain how the *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* decisions have reshaped sentencing in the United States. Do you agree with the principles articulated in these decisions? Why or why not?

6. Critics charge that sentencing guidelines and mandatory minimum sentencing statutes result in “hydraulic displacement of discretion.” Explain what this means.
7. How do the sentences imposed by drug courts differ from those imposed in traditional courts?
8. Your state is considering enacting a “three-strikes-and-you’re-out” law. You send an e-mail to your state senator explaining why you are opposed to this. What will you say?
9. How has the sentencing process changed as a result of the reforms enacted in the past 30 years?

NOTE

1. In 2007, 6,299 offenders were convicted of marijuana offenses in U.S. district courts; of these, 1,879 (29.8%) received 5-year mandatory minimum sentences and 594 (9.4%) received 10-year sentences. Considering all federal offenders convicted of drug offenses in 2007, 7,141 (28%) received mandatory minimum sentences of 5 years and 9,879 (38.8%) received 10 years (U.S. Sentencing Commission 2008a, table 43).