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Intermediate Sanctions in Sentencing Guidelines

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ABSTRACT

Every American state has created new intermediate sanctions in recent years and nearly half have, have had, or are considering having sentencing guidelines. Guidelines can reduce sentencing disparities, including race, gender, and geographical disparities; effect changes in statewide sentencing patterns; and coordinate sentencing policies and corrections resources. Well-managed intermediate sanctions can scale punishment severity to crime seriousness and save money. Some research suggests positive effects on offenders' treatment participation. These aims, however, are often frustrated by judges' decisions to use intermediate sanctions for offenders different from those for whom programs are designed. As a result, some states are now incorporating intermediate sanctions into guidelines. A number of concepts—including "purposes at sentencing" and "parsimony"—and a number of mechanisms—zones of discretion, categorical exceptions, and dispositional presumptions—show promise as means to that end.

New intermediate sanctions, punishments less burdensome and intrusive than imprisonment but more so than standard probation, have been developed in every state since 1980, and nearly half the states have, have had, or are developing sentencing guidelines. In comparison with a quarter century ago, both developments are striking; few states then had programs that would today be considered intermediate sanctions, and not one had sentencing guidelines. From a late-1990s perspective, neither intermediate sanctions nor guidelines are novel. What is novel, however, is that policy makers in many American jurisdictions

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have begun to recognize that intermediate sanctions and guidelines may be necessary complements if either is to achieve its primary purposes. I stress "American" because no other Western country has adopted sentencing guidelines[1] and few have experienced an equivalent proliferation of new sanctions. This essay is as a result parochially American in its focus.

Both guidelines and intermediate sanctions are thriving. Guidelines were in effect in more states early in 1998 than ever before, and both the number of intermediate sanctions programs and the number of people supervised in them grow every year. A principal reason both are thriving is that they can accomplish many of the goals policy makers set for them. A second is that policy makers in many states are worried about the fiscal consequences for state budgets of recently enacted mandatory minimum sentencing laws, "three-strikes" laws, and general increases in the severity of sentences for violent offenders. Legislators in a number of states, notably including North Carolina (Wright 1997), Ohio (Rauschenberg 1997), and Pennsylvania (Kempinen 1997), have enacted laws that will increase use of prison sentences and lengthen terms for violent offenders while reducing use of prison sentences for nonviolent offenders and diverting them into sanctions programs. In each of these states, funds have been appropriated both to build more prisons and to pay for more community-based programs. Coordinating sentencing policies expressed in guidelines with the operation of intermediate sanctions may be the way to make ambitious new punishment policies workable and affordable.

Consider guidelines first (M. Tonry 1996, chaps. 1–3). State guidelines received considerable national attention in the 1980s and much less since. Yet there are many more guidelines systems in operation in the 1990s than in the 1980s, and they are typically more effective. Guidelines come in two broad forms: presumptive and voluntary. Presumptive guidelines, as the words suggest, establish rebuttable pre-

[1] Although new sentencing laws adopted in the 1970s in Finland (Törnudd 1997) and in the 1980s in Sweden (von Hirsch 1993) are sometimes referred to as "guidelines," they consist of a series of statutory presumptions that bear little resemblance to numerical American guidelines expressed, usually, in grid format. Dutch prosecutorial guidelines setting standards for prosecutors' sentence recommendations to judges are closer but do not give rise to appeal rights and, of course, do not create presumptions for judges. English case law includes "guideline judgments" that in some sense constitute guidelines for trial judges, but they are broad in scope, and there is little evidence that they significantly constrain trial judges' decisions (Ashworth 1995).

sumptions about appropriate sentences in individual cases. Judges can impose some other sentence by "departing" but must then give reasons for the departure that are subject to appellate review if a party objects. Voluntary guidelines create no presumptions. They are in effect suggestions that the judge may accept if he or she wishes to do so.

Although as many as ten states adopted voluntary guidelines in the late 1970s and the 1980s, the few that were evaluated were shown to have few or no effects on sentencing patterns, and most were abandoned or fell into desuetude. Delaware adopted voluntary guidelines in 1987 that remain in effect. Florida established voluntary guidelines in 1983 and later made them presumptive. More recently, Arkansas, Missouri, and Virginia adopted voluntary guidelines. Sentencing commissions in Massachusetts, Michigan, and Maryland were at work in 1997 on efforts to replace voluntary guidelines adopted in the early 1980s with presumptive guidelines.

Only a few states initially adopted presumptive guidelines—Minnesota in 1980, Pennsylvania in 1981, and Washington in 1984—but they were adjudged reasonably effective at reducing disparities, diminishing scope for gender and racial bias, and improving coordination between sentencing policy and corrections resources. Newer presumptive schemes have since taken effect in Oregon, Tennessee, Kansas, North Carolina, and Ohio.

A principal criticism of early guidelines systems was that they were too limited in scope (Blumstein et al. 1983, chap. 3). The successful Minnesota and Washington guidelines in the 1980s governed decisions of who was sent to prison, and for how long, but set no standards for imposition of jail sentences, intermediate sanctions, or standard probation. Since fewer than 25 percent of convicted felons in many states are sentenced to state prison, those early guidelines systems were far from comprehensive. More recent systems in other states, exemplified by North Carolina's new and Pennsylvania's revised guidelines, however, now cover felonies, misdemeanors, and all types of sanctions.

The story concerning intermediate sanctions is similar—more attention and excitement in the 1980s but more, and more sophisticated, activity today (M. Tonry 1996, chap. 4). New "intermediate sanctions" appeared in the 1980s and quickly spread. They included various forms of intensive probation, house arrest, electronic monitoring, boot camps, day-reporting centers, and day fines. Except for day fines, all can be operated as "front-end" or "back-end" programs. Entry into

front-end programs is controlled by judges; corrections officials control entry into back-end programs, often in connection with early release systems.

Intermediate sanctions were typically conceptualized as punishments located on a continuum between prison and probation and were supposed to be more intrusive and burdensome than standard probation (Morris and Tonry 1990, chaps. 1, 3). Proponents promised that the new punishments would cost less than jail or prison, reduce prison crowding, and cut recidivism rates. Although major evaluations of day-reporting centers and day fines had not been published by the end of 1997, evaluations of intensive probation, house arrest, electronic monitoring, and boot camps were available, and they did not confirm over-enthusiastic proponents' predictions (Clear and Braga 1995; M. Tonry 1996, chap. 4). Evaluated front-end programs typically experienced recidivism rates for new crimes neither higher nor lower than those of other sanctions for comparable offenders (but often much higher rates of technical violations and revocations), but because of extensive net-widening and high rates of technical violations and revocations, front-end programs often cost more than confinement and worsened prison crowding. Back-end programs had similar recidivism-rate experiences but because corrections officials' control of entry prevented net-widening were more effective at achieving cost savings and reducing prison population pressures.

Because intermediate sanctions have multiple purposes, the evaluation findings have not deprived them of credibility and support, as earlier mention of recent developments in North Carolina (Lubitz 1996), Pennsylvania (Kempinen 1997), and Ohio (Rauschenberg 1997) demonstrates: all these states have greatly increased state funding for county-level intermediate sanctions at the same time as guidelines were drafted to encourage and systematize their use. There are several reasons for this. First, from a retributive perspective, intermediate sanctions can be much more punitive than probation and can be scaled in severity to the seriousness of crimes. Evaluations show that intermediate sanctions can deliver much more intrusive and burdensome punishments than standard probation; that is why technical violation and revocation rates are high (M. Tonry 1996, chap. 4). Second, national evaluations of intensive probation (Petersilia and Turner 1993) and boot camps (MacKenzie and Souryal 1994; MacKenzie 1995) suggest, but do not prove, that intermediate sanctions with strong treatment components can improve treatment effectiveness and thereby reduce

recidivism rates (Gendreau, Cullen, and Bonta 1994). Third, experience with back-end programs shows that intermediate sanctions can save money and prison resources if ways can be found to eliminate or greatly diminish net-widening (Parent 1995).

Thus, intermediate sanctions can be used to save money and prison use, without significant sacrifices in public safety. The trick is to reduce net-widening in front-end programs. In the American legal system, judges decide who is not sentenced to prison. Since that power is unlikely to be taken away, ways need to be devised to set enforceable standards for sentences other than imprisonment. Sentencing guidelines may be the answer.

North Carolina (Wright 1997) and Ohio (Rauschenberg 1997) have adopted new guidelines systems incorporating standards for use of intermediate sanctions. Pennsylvania in 1994 overhauled its thirteen-year-old guidelines to do the same thing (Kempinen 1997; Kramer and Kempinen 1997). The Massachusetts sentencing commission in 1996 presented a proposal for similar guidelines to the Massachusetts legislature (H. Tonry 1996). Commissions are at work on such plans in several other states and the pressures of rising prison populations and corrections budgets are likely to encourage more states to consider such initiatives.

The early evidence from North Carolina suggests that guidelines incorporating intermediate sanctions can work (Lubitz 1996). The North Carolina guidelines cover all felonies and misdemeanors and attempt to increase use of prison sentences for violent crimes. They also attempt to reduce prison use for nonviolent crimes by directing judges to sentence more offenders to intermediate sanctions. Both things happened in 1995, the guidelines' first full year of operation. Eighty-one percent of violent felons received prison sentences, up from 67 percent in 1993. Twenty-three percent of nonviolent felons were sent to prison, down from 42 percent in 1993. For all imprisoned felons, the mean predicted time to be served increased from sixteen to thirty-seven months. Those trends continued in 1996 (North Carolina Sentencing and Policy Advisory Commission 1997).

Notwithstanding North Carolina's apparent success, it is small wonder that earlier guidelines dealt only with prison (and occasionally jail) sentences. A number of serious impediments prevented development of more comprehensive guidelines. First, judges in many states fiercely resisted the very idea of guidelines and overcoming that resistance for prison guidelines was challenge enough (M. Tonry 1996, chap. 6). In

some states, including New York, Maine, Connecticut, and South Carolina, judicial resistance could not be overcome, and no guidelines were adopted (von Hirsch, Knapp, and Tonry 1987, chap. 2).

Second, guidelines cannot realistically set standards for nonconfinement sentences, nor can judges be expected to follow them, unless credible programs exist to which offenders can be sentenced. Until recently, few states had extensive community corrections programs, especially outside the big cities. A number of states have now begun to provide community corrections funding to counties that makes the operation of well-managed intermediate sanctions feasible; many states as yet have not.

Third, nonconfinement guidelines present more complex issues than do prison guidelines. For serious violent crimes, and for chronic offenders, the current crime and the past criminal record are in many cases the primary considerations relevant to sentencing. Guidelines grids that array crime categories along one axis and criminal history along the other can efficiently encapsulate the major criteria for those cases. Sentencing for less serious crimes and offenders entails other considerations for many judges: might drug or sex offender treatment be more effective than confinement, what are the likely collateral effects of imprisonment on the offender and his family, are there special circumstances of the offense or the offender's or the victim's characteristics that make one kind of sentence more appropriate than another? The two-axis grid by itself is not a very efficient way to address these and other offender-specific considerations. Offense severity and criminal history are in effect linear variables and can easily be scaled on one axis of a grid. Other ethically relevant characteristics of offenses and offenders may or may not apply in particular cases and accordingly cannot easily be expressed along a single axis (M. Tonry 1996, chap. 1).

Incorporation of intermediate sanctions into sentencing guidelines is in its earliest days. There are, nonetheless, a number of techniques that have been developed and ideas that have been examined. They are sketched in this introduction and are discussed at length in the body of this essay. Jurisprudential ideas like the principle of parsimony (Tonry 1994) and the contrast between purposes of and at sentencing (Morris and Tonry 1990, chap. 3) when combined with techniques already in use, such as zones of discretion and categorical exceptions, offer tools for meaningful incorporation of intermediate sanctions into sentencing guidelines.

Fundamental normative questions must be faced, and resolved, if meaningful policies are to be set governing use of intermediate sanctions. Debate has long been waged over the principles that should govern sentencing. On one side have been proponents of deontological moral theories variously called retribution, reprobation, or just deserts that attach high importance to proportionality in punishment and apportionment of the severity of punishment to the seriousness of crime (e.g., von Hirsch 1992; Duff 1996). Although it is impossible for adherents of such views to specify the absolute punishments uniquely appropriate for any particular crimes, it is possible—on the basis of widely held views about the relative seriousness of various crimes—to devise proportionate schemes in which punishment is commensurate to offense severity. Once, in the specialized vocabulary of these analyses, "anchoring points" have been set that establish the most and least severe punishments to be used, a system of "ordinal proportionality" can be created in which punishments are arrayed between those extremes; if offenses, for example, are graded into ten levels of relative severity, punishments can be specified that assure that all persons convicted of level 6 crimes are punished more severely than those convicted of level 5 crimes and less severely than those convicted of level 7 crimes (von Hirsch 1993). Since the severity of crimes is integral to determination of just punishments, just deserts and similar theories require that offense severity and (sometimes) some measure of past criminality be the only allowable considerations in setting punishments.

On the other side are teleological theories in which punishment is a means to an end but not an end in itself (Walker 1991). For most of the past century, until the mid-1970s, utilitarian theories encompassing rehabilitative, deterrent, and incapacitative considerations were predominant. More recently, hybrid theories incorporating both retributive and utilitarian elements have been influential. Norval Morris's "limiting retributivism," for example, looks to retributive considerations to set upper and lower limits of deserved punishments that justly may be imposed but allows consideration of utilitarian purposes within those limits (Morris 1974; Frase 1997). The Finnish scholar Patrik Törnudd (like many other European scholars) has argued that just punishment requires "asymmetrical proportionality": punishments may not exceed the maximum that can be justified by reference to offense severity but may be less (Törnudd 1997). Both utilitarian and hybrid theories allow consideration at sentencing of matters other than current and past criminality. In utilitarian theories, any information

that is ethically relevant to achieving valid goals may be taken into account. For hybrid theories also, since proportionality notions set only outer or upper limits, any ethically relevant information may be considered.

Bluntly put, retributive and just deserts theories allow little room for use of intermediate sanctions. Proportionality concerns require that punishment severity be scaled to the seriousness of crimes, which means that the metric is some measure of painfulness or intrusiveness, and offenders convicted of comparably serious crimes must receive comparably severe punishments (Morris and Tonry 1990, chap. 3; von Hirsch 1993, afterword). Few punishments are as intrusive or burdensome as imprisonment, which means that there can be little substitution of nonincarcerative for incarcerative penalties. As a result, proponents of just deserts theories argue that there can be relatively little overlap in a just punishment system between generically different kinds of punishments (von Hirsch, Wasik, and Greene 1989).

Hybrid theories, by contrast, can easily countenance substitutions between punishments of different types for crimes of comparable seriousness or even for the same crimes so long as the outer bounds of deserved and undeserved punishment are not exceeded. Utilitarians are not subject even to those bounds.

Parsimony. Two concepts—"the principle of parsimony" and the distinction between "purposes of and at sentencing"—can provide guidance for incorporating intermediate sanctions into comprehensive sentencing systems (Morris and Tonry 1990, chap. 3; Tonry 1994). The parsimony concept derives from the writings of Jeremy Bentham who argued that the goal of the state should be to maximize happiness or satisfaction and, accordingly, that whatever policy would do that should be adopted. However, no unhappiness could be justified that was not outweighed by other gains. If punishing people severely, thereby imposing unhappiness, deterred others from committing crimes that would have caused even greater aggregate unhappiness, the punishment could be justified. However, if no or lesser unhappiness would be avoided by imposition of the punishment, then it could not be justified. Inflicting pain or unhappiness on anyone, including offenders, is a bad thing and can only be justified when some larger good is achieved. The offender's happiness is no more or less important than anyone else's and must be taken into account.

The "principle of parsimony," a concept revived in the writing of Norval Morris (1974), prescribes that the least painful or burdensome

punishment that will achieve valid social purposes be imposed. This is not an unfamiliar concept. Modern lawyers, and the American Bar Association's (1994) standards for sentencing, call for use of the "least restrictive alternative." In the jargon of modern computer software, parsimony or the least restrictive alternative is the default position. Applied to policies governing intermediate sanctions, the principle of parsimony would require imposition of the least painful, burdensome, or intrusive punishment that achieves the purposes being sought.

Purposes at Sentencing. The distinction between purposes of and at sentencing complements the parsimony idea. Purposes of sentencing are those general purposes to be sought from the general practice of sentencing—deterrence, incapacitation, retribution, rehabilitation, moral education, validation of important behavioral norms. Not all of these are equally pertinent in every case. Purposes at sentencing are those that apply to a particular case, and they will generally be narrower and more specific than the broader set of purposes that guide the sentencing system generally. Different purposes at sentencing will often call for different sanctions for people who committed similar or identical crimes.

Together, as is discussed in Section II in conjunction with many examples, the principle of parsimony and the notion of purposes at sentencing provide a framework for the development of rules governing use of intermediate sanctions.

Zones of Discretion. Most guidelines commissions that have tried to expand their guidelines' coverage to include nonconfinement sentences have altered the traditional guidelines format to include more zones of discretion. The first guidelines in Minnesota, Pennsylvania, and Washington divided their grids into two zones. One contained confinement cells setting presumptive ranges for incarcerative sentences, and the other contained nonconfinement cells that gave the judge unfettered discretion to impose any other sentence, often including an option of jail sentences up to one year.

New North Carolina, revised Pennsylvania, and proposed Massachusetts guidelines, by contrast, have four or more zones. The details vary, but they follow a common pattern. Sentences other than those authorized by the applicable zone are departures for which reasons must be given that are subject to review on appeal. One zone contains cells in which only prison sentences are presumed appropriate. A second might contain cells in which judges may choose between restrictive intermediate sanctions, such as residential drug treatment, house

arrest with electronic monitoring, and a day-reporting center, and a prison sentence up to a designated length. A third might contain cells in which judges may choose among restrictive intermediate punishments. A fourth might authorize judges to choose between restrictive intermediate sanctions and a less restrictive penalty like community service or standard probation. A fifth might authorize sentencing choices only among less restrictive community penalties.

Punishment Units. A second approach that Oregon adopted and several other states considered is to express punishment in generic "punishment units" into which all sanctions can be converted. A hypothetical system might provide, for example, for the following conversion values:

* One year's confinement	100 units
* One year's partial confinement	50 units
* One year's house arrest	50 units
* One year's standard probation	20 units
* 25 days' community service	50 units
* 30 days' intensive supervision	5 units
* 90 days' income (day fines)	100 units
* 30 days' electronic monitoring	5 units

If guidelines, for example, set 120 punishment units as the presumptive sentence for a particular offender, a judge could impose any combination of sanctions that represented 120 units.

In practice, the punishment unit approach has proven too complicated to be feasible. Oregon made tentative efforts to incorporate punishment units in its guidelines but did not follow through. Pennsylvania considered including the punishment unit concept in its revised 1994 guidelines but abandoned the idea as unworkable.

Exchange Rates. Another approach is simply to specify equivalent custodial and noncustodial penalties and to authorize judges to impose them in the alternative. Washington's commission did this in a modest way and later proposed a more extensive system, which the legislature did not adopt. Partial confinement and community service were initially authorized as substitutes for presumptive prison terms on the bases of one day's partial confinement or three day's community service for one day of confinement.

The difficulty is that community service programs to be credible must be enforced, and experience in this country and elsewhere in-

structs that they must be short. That is why the best-known American program, designed to be used for offenders who otherwise would receive jail sentences up to six months, set seventy hours as the standard work obligation. Under a three-days'-community-service-equals-one-day's-confinement policy, seventy hours of community service would substitute for only three days' confinement. No jurisdiction has as yet figured out how to operate an exchange-rate system.

Categorical Exceptions. Categorical exception policies, focusing not on the sanction but on the offender, are permissive. They authorize, but do not direct, judges to disregard otherwise applicable sentencing ranges if offenders meet specified criteria. One example is Rule 5.K.1 in the federal guidelines that empowers judges to depart from guidelines if the prosecution files a motion proposing such a departure because the defendant has provided "substantial assistance [to the government] in the investigation or prosecution of another person."

Washington State has developed extensive categorical exception policies. Under the First-Time Offender Waiver, judges may disregard otherwise applicable guidelines in sentencing qualifying offenders, and guidelines commentary indicates that "the court is given broad discretion in setting the sentence." Washington has also established categorical exception policies for dealing with a "special sex offender sentencing alternative" that authorizes judges to suspend prison sentences for most first-time sex offenders and for a "work ethic [boot] camp" program that permits substitution of four to six months' boot camp for twenty-two to thirty-six months in prison.

Likely Future Developments. Future sentencing commissions no doubt will develop current ideas in new ways. None of the commissions that have adopted a zones-of-discretion approach, for example, have attempted to provide guidance to judges on how to choose among authorized intermediate sanctions or community penalties or between intermediate sanctions and authorized confinement or community sanctions. This could easily be done by setting presumptions that particular kinds of sanctions are appropriate for particular kinds of offenders: an obvious example would be a policy that residential drug treatment be presumed appropriate for a drug-dependent chronic property offender.

Use of categorical exceptions likewise could be fine-tuned. The federal and Washington State examples given above, for example, are permissive, entirely within the judge's discretion. A state might, however, want to make some categorical exceptions permissive and others presumptive. A first offender exception, like Washington's, might be per-

missive, while a "substantial assistance" sentence reduction might be made presumptive.

More states will face the issues discussed in this essay. Most states have in recent years enacted laws mandating greatly lengthened sentences for violent offenders and for some drug and repeat offenders. Under the incentive of federal funds for prison construction, many states now require that violent offenders serve at least 85 percent of those longer sentences. Forecasts of enormous resulting increases in prison operating costs led the North Carolina legislature to adopt guidelines intended to carry out those policies for violent offenders but also to divert many nonviolent offenders from prison to less expensive intermediate sanctions. Many states will face the same financial choices, and some, at least, are likely to try to follow the paths that North Carolina, Pennsylvania, Ohio, and Massachusetts have charted.

Besides the preceding introductory discussion, this essay has three sections. Section I discusses efforts to date to incorporate intermediate sanctions into sentencing guidelines. Four or five different approaches have been tried. None has yet been demonstrated to be successful, but several are promising. Section II is more speculative and suggests ways that current developments might be extended better to achieve their goals. Section III is a brief conclusion.

I. Efforts to Date

The trick will be to establish both a graduated array of punishments between prison and probation and a system for appropriately distributing offenders among them. Knowledge exists on how to create and operate cost-effective intermediate sanctions. Knowledge also exists on how to create and operate systems of presumptive sentencing guidelines that effectively structure judicial decisions about confinement. Little experience exists, however, on tying the two developments together.

A. Obstacles

Intermediate sanctions have not been overlooked by sentencing commissions or by draftsmen of guidelines enabling legislation. Section 9(5)(2) of the statute creating Minnesota's commission authorized the establishment of nonincarceration guidelines: "The sentencing guidelines promulgated by the commission may also establish appropriate sentences for prisoners for whom imprisonment is not proper. Any [such] guidelines . . . shall make specific reference to noninstitu-

tional sanctions including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community-based residential and nonresidential programs, incarceration in a local correctional facility, and probation and the conditions thereof."

The Minnesota commission's guidelines created presumptions as to who among convicted felons should be sent to state prison (roughly 20 percent) and for how long but set no presumptions for sentences for nonimprisonment sanctions for felons or for sentences of any kind for misdemeanants.

For a variety of reasons, guidelines for use of nonincarcerative punishments run into special problems. These include a shortage (in some places, the absence) of credible, well-managed intermediate sanctions and an instinctive resistance by many judges to proposals for nonincarcerative guidelines. These are soluble problems. The challenge is to do both things simultaneously, and that has proven difficult.

This need for simultaneity has not gone unnoticed by policy makers. North Carolina, as noted below, has moved further than any other state toward structured use of intermediate sanctions. In the statutory background were both enabling legislation to create the Sentencing Policy and Advisory Commission and to adopt guidelines and the State-County Criminal Justice Partnership Act, which encourages and provides financial incentives for creation of new county-level programs (see, e.g., Roark and Price 1997). Pennsylvania also has moved both to include intermediate sanctions in its guidelines and to foster and fund new community-based programs (Kempinen 1997).

The widespread perception that community sentencing is too complicated and inherently too individualized to be subjected to general rules is likely to prove a formidable obstacle. Many judges believe that guidelines are in principle incompatible with the mildly-to-moderately serious crimes for which intermediate sanctions are most appropriate. While fairly simple systems for proportioning prison time to crime severity may work for the most serious crimes, more considerations—appropriate treatment conditions, effects on the offender's family and employment, the judge's reasons for imposing a particular sentence, the aggregate burden of multiple work, restriction-on-liberty, treatment, and monetary conditions—are often seen as relevant for less serious crimes and cannot easily be encapsulated in a guidelines grid. However, many judges have been persuaded that presumptive imprisonment guidelines improve the quality of sentencing generally. There

is no reason why they cannot likewise be persuaded of the merits of nonincarcerative guidelines, assuming the guidelines make substantive sense.

B. Efforts

Commissions are at work in many states on proposals to integrate intermediate and noncustodial penalties into guidelines and to devise systems of interchangeability between prison and nonprison sanctions. Three sets of interrelated issues must be faced. First, should guidelines permit judges to choose between incarcerative and nonincarcerative sanctions and, if so, to what extent? Second, how are choices among different kinds of nonincarcerative sanctions to be made? Third, how authoritative ought guidelines to be about intermediate sanctions? These questions are discussed below. Because little writing or policy discussion has focused on the second and third, most of the discussion concerns the first. This subsection B discusses the first question. Subsections C and D discuss the others.

Three devices have been used to authorize judges to choose between prison and nonprison sentences for cases that fall within a single guidelines cell. Delaware's unique guidelines offer a fourth approach. One device is to create cells in guidelines grids that expressly authorize judges to choose between sentencing options. The second is to establish "interchangeability policies" that allow judges to substitute equivalently burdensome punishments for imprisonment. The third is to create categorical exception policies that allow judges to disregard otherwise applicable guidelines for qualifying offenders. These usually involve boot camps, first offenders, or sex offenders. Delaware's guidelines set five "sanctioning levels." Because they are voluntary guidelines, the interchangeability question does not arise. Because they establish a continuum of sanctions of graded severity, they warrant mention.

1. *Interchangeability.* Every guidelines system allows for interchangeability between prison and nonprison sentences, although the extent of interchangeability varies widely. Just deserts arguments have been made that such interchangeability should never or only seldom be permitted because sanctions vary fundamentally in their character (e.g., von Hirsch, Wasik, and Greene 1989). If punishment is largely about attributions of blameworthiness, the argument goes, punishments should be closely proportioned to the seriousness of crimes. Punishments are qualitatively different and permitting substitutions

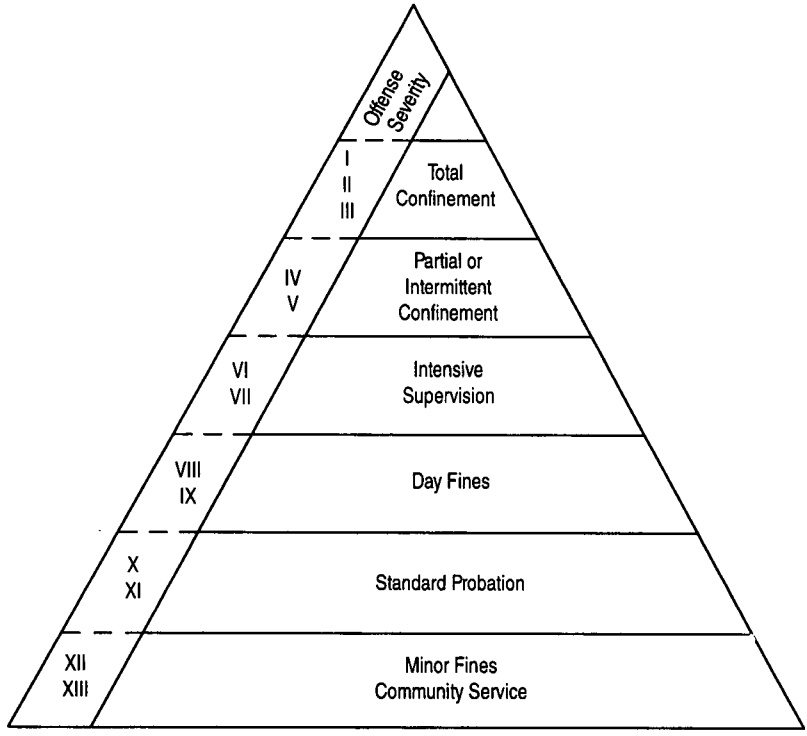

FIG. 1.—Just deserts pyramid grid

among them obscures differences in offenders' blameworthiness. Thus, guidelines incorporating different kinds of punishments should permit little or no overlap in their use.

Figure 1 shows what such a system might look like. The most serious crimes are at the top of the pyramid and for them only full-time incarceration would be authorized. In the next lower tier, partial incarceration such as day or night confinement, house arrest, work release, or day-reporting would be permitted. The third tier might include intensive forms of supervision, the fourth substantial fines, the fifth standard probation, and the sixth minor fines. Within each tier, choices could be made only between sanctions that were equivalently burdensome, and imposition of punishments from different tiers on comparable offenders would ordinarily be forbidden. Thus, for particular defendants, judges would seldom be permitted to choose between incarcerative and nonincarcerative sentences.

To be realistic, figure 1 would need to be developed in more detail.

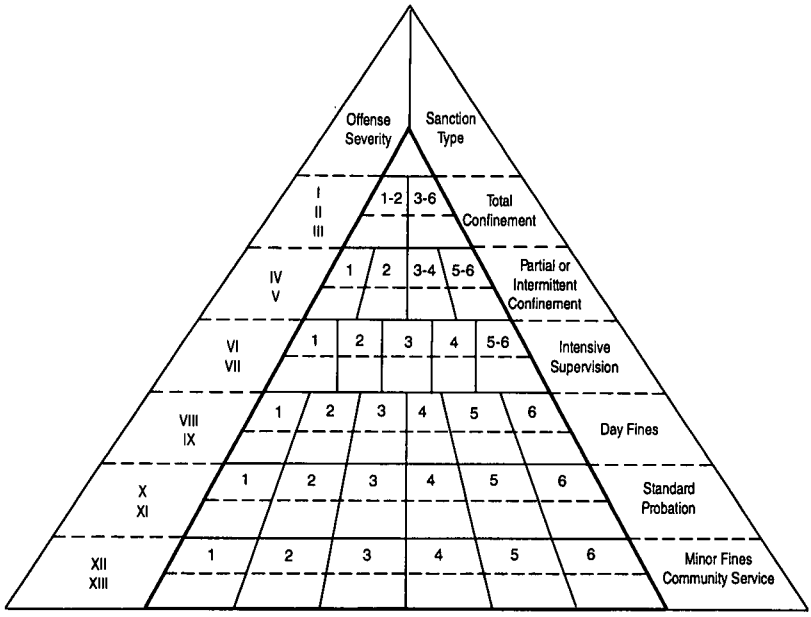

FIG. 2.—Just deserts pyramid grid with criminal history. Applicable criminal history categories are shown in each cell. One is the lowest.

How that might be done is shown in figure 2. Within offense severity levels, for example, sublevels could specify ranges of allowable sentence durations or amounts for different offenses. In a similar manner, taking account of prior records could be done in various ways. Figure 2 does this by indicating criminal record categories atop each cell. At the grid's top, where offense severity is the primary consideration, the relative weight of prior records is small. Lower down, where offense severity is less, the weight of prior records, and of discrimination among them, is greater.

No jurisdiction has adopted a system like those set out in figures 1 and 2. Plausible arguments can be made that their premise—that blameworthiness measured only in terms of current and past crimes is the only valid calibrator of sentences—is oversimplified (e.g., M. Tonry 1996, chap. 1). In any event, every existing guidelines system permits some interchangeability between incarcerative and nonincarcerative punishments.

a. *Residual Interchangeability.* Minnesota's guidelines, for example (fig. 3 shows Minnesota's grid as it was in 1985), permit interchange-

Severity Levels of Conviction Offense		Criminal History Score						
		0	1	2	3	4	5	6
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12 *	12 *	12 *	13	15	17	19 *18-20*
Theft Related Crimes ($150 - 2,500) Sale of Marijuana	II	12 *	12 *	13	15	17	19	21 *20-22*
Theft Crimes ($150 - 2,500)	III	12 *	13	15	17	19 *18-20*	22 *21-23*	25 *24-26*
Burglary—Felony Intent Receiving Stolen Goods ($150 - 2,500)	IV	12 *	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Simple Robbery	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Assault, 2nd Degree	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree	IX	97 *94-100*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree	X	116 *111-121*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

FIG. 3.—Minnesota sentencing guidelines grid, 1985 (presumptive sentence lengths in months). * Indicates one year and one day. Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. First-degree murder is excluded from the guidelines by law and continues to have a mandatory life sentence. Source: Knapp (1985).

ability in three ways. First, for any case falling into a cell above the bold black line, judges have broad discretion to choose among a jail term up to twelve months, any combination of nonincarcerative punishments, and split sentences combining jail time with other penalties. This is no small power since 80–85 percent of felony defendants fell within cells above the line (Knapp 1984). Moreover, the guidelines do not cover misdemeanors so judges have comparable discretion over them.

Second, because Minnesota's guidelines are presumptive, judges have authority in every case not governed by a statutory mandatory minimum, if they give reasons, to depart from recommended prison sentences and impose a nonincarcerative sentence or a split sentence in its place. Judges do this in about a third of the cases for which imprisonment is the presumptive sentence (Frase 1991, 1993), just as in a smaller percentage of presumptive nonprison cases they impose prison sentences. The bold black line is arbitrary, and there are inevitably many cases falling in cells on either side of it that elicit judicial ambivalence.

Third, judges and lawyers can negotiate sentences different from those provided by guidelines. Sometimes this involves substitution of a nonincarcerative penalty for a lengthy presumptive prison sentence in a case in which there are no valid grounds for a departure (because, for example, the state supreme court has expressly held those considerations insufficient). Some people may see departures of this sort as inappropriate circumvention of guidelines—but both experience and research instruct that it not uncommonly happens (Nagel and Schulhofer 1992). Although "illicit departures" are always possible, mention of this special kind of interchangeability situation is not reiterated under each of the following headings.

Most of the early presumptive guidelines systems gave judges comparable discretion over interchangeability decisions. In Oregon, as in Minnesota, guidelines cover only felonies and 18–20 percent of convicted felons are sentenced to state prison (Mosbaek 1994, fig. 1). Pennsylvania's guidelines cover misdemeanors, but as figure 4 (the August 1991 version of Pennsylvania's guidelines grid) shows, both incarcerative and nonincarcerative punishments were authorized for most misdemeanors and the less serious felonies, meaning that Pennsylvania judges had about the same authority to choose between incarceration and nonincarceration as did Oregon and Minnesota judges.

b. *Limited Interchangeability.* The federal guidelines provide for

	Offense Gravity Score #	Prior Record Score						
		0	1	2	3	4	5	6
10	Third-degree murder	120 48 - 120 36 - 48	120 54 - 120 40 - 54	120 60 - 120 45 - 60	120 72 - 120 54-72	120 84 - 120 63 - 84	120 96 - 120 72 - 96	120 102 - 120 76 -102
9	For example: Rape; Robbery inflicting serious bodily injury	60 - 75 36 - 60 27 - 36	66 - 82 42 - 66 31 - 42	72 - 90 48 - 72 36 - 48	78 - 97 54 - 78 40 - 54	84 - 105 66 - 84 49 - 66	90 - 112 72 - 90 54 - 72	102 - 120 78 - 102 58 - 78
8	For example: Kidnapping; Arson (Felony I); Voluntary manslaughter	48 - 60 24 - 48* 18 - 24*	54 - 68 30 - 54 22 - 30*	60 - 75 36 - 60 27 - 36	66 - 82 42 - 66 32 - 42	72 - 90 54 - 72 40 - 54	78 - 98 60 - 78 45 - 60	90 - 112 66 - 90 50 - 66
7	For example: Robbery threatening serious bodily injury	12 - 18* 8 - 12* 4 - 8	29 - 36 12 - 29* 9 - 12*	34 - 42 17 - 34* 12 - 17*	39 - 49 22 - 39* 16 - 22*	49 - 61 33 - 49 25 - 33	54 - 68 38 - 54 28 - 38	64 - 80 43 - 64 32 - 43
6	For example: Robbery inflicting bodily injury; Theft by extortion (Felony III)	12 - 18* 4 - 12* 2 - 4	12 - 18* 6 - 12* 3 - 6	12 - 18* 8 - 12* 4 - 8	29 - 36 12 - 29* 9 - 12*	34 - 42 23 - 34* 17 - 23*	44 - 55 28 - 44 21 - 28*	49 - 61 33 - 49 25 - 33
5	For example: Criminal mischief (Felony III); Theft by unlawful taking (Felony III); Theft by receiving stolen property (Felony III); Bribery	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 3 - 11 1/2 IP - 3	11 1/2 - 18* 5- 11 1/2 IP - 5	11 1/2 - 18* 8 - 11 1/2 4 - 8	27 - 34 18 - 27* 14 - 18*	30 - 38 21 - 30* 16 - 21*	36 - 45 24 - 36* 18 - 24*
4	For example: Theft by receiving stolen property, less than $2,000, by force or threat of force, or in breach of fiduciary obligation	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 5 - 11 1/2 IP - 5	11 1/2 - 18* 8 - 11 1/2 4 - 8	27 - 34 18 - 27* 14 - 18*	30 - 38 21 - 30* 16 - 21*
3	Most misdemeanor I's	6 - 12* 0 - 6 Nonconfinement	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 0 - 11 1/2 Nonconfinement	11 1/2 - 18* 3 - 11 1/2 IP - 3	11 1/2 - 18* 5 - 11 1/2 IP - 5	11 1/2 - 18* 8 - 11 1/2 4 - 8
2	Most misdemeanor II's	IP - 6 0 - IP Nonconfinement	3 - 6 0 - 3 Nonconfinement	11 1/2 - 12* 0 - 11 1/2 Nonconfinement	11 1/2 - 12* 0 - 11 1/2 Nonconfinement	11 1/2 - 12* 0 - 11 1/2 Nonconfinement	11 1/2 - 12* 2 - 11 1/2 IP - 2	11 1/2 - 12* 5 - 11 1/2 IP - 5
1	Most misdemeanor III's	IP - 3 0 - IP Nonconfinement	3 - 6 0 - 3 Nonconfinement	6 0 - 6 Nonconfinement	6 0 - 6 Nonconfinement	6 0 - 6 Nonconfinement	6 0 - 6 Nonconfinement	6 0 - 6 Nonconfinement

Aggravated range
Standard range
Mitigated range

FIG. 4.—Pennsylvania guidelines sentence ranges, August 1991. * Indicates eligibility for boot camp programs. IP = intermediate punishments. There is a weapon enhancement of at least twelve months and up to twenty-four months confinement to be added to sentence lengths when the offense involves a deadly weapon. All of the guidelines sentencing ranges are months of minimum confinement as defined in 42 Pa. C.S. § 9756(b) (relating to partial and total confinement). Source: Adapted from Pennsylvania Commission on Sentencing (1991).

very limited use of intermediate sanctions and for little interchangeability. Probation and prison are the only alternatives. Fines are not authorized as sole penalties for individuals. Nor are intermediate sanctions such as community service, house arrest, or intensive supervision probation; these may be ordered only as conditions of probation. Figure 5 shows the federal grid in effect on November 1, 1993. It applied to all federal felonies and misdemeanors. Confinement is authorized for every offender. Only for the bottom eight (of forty-three) offense levels (zone A), where sentencing ranges start at zero, did judges sometimes have complete discretion to choose between prison and probation (in 1993, only 13.7 percent of 34,642 cases on which the commission received complete guideline application information fell within those eight levels: U.S. Sentencing Commission 1995, table 30). In levels 9–10 (zone B), judges could sometimes substitute partial, community, or home confinement on a day-for-day basis for total incarceration for a period not less than the minimum specified period. In levels 11–12 (zone C), some substitution was permitted, but at least half of the guideline minimum had to be served in total confinement.[2]

Judges could also depart from the guidelines (though the permitted grounds for departures are much narrower than in most state systems). Even taking departures into account, in 1996 only 12 percent of sentenced offenders received a probation sentence without a confinement condition (U.S. Sentencing Commission 1997, fig. D). Another 7.2 percent received probation with a confinement condition.

c. *Bounded Interchangeability.* In most jurisdictions, the vast majority of convicted felons and misdemeanants are not sentenced to state prison. By the late 1980s, it was widely recognized that achievement of sentencing reform goals required that nonincarcerative penalties be brought within the scope of guidelines (e.g., Morris and Tonry 1990, chaps. 1–3). This was equally evident whether the goals were idealistic (reduce sentencing disparity, avoid unnecessary harshness) or managerial (improve predictability and resource planning).

The first approach that received attention was to replace Minnesota's and Washington's "in or out" approach, in which guidelines cells either specified a range of authorized prison sentences or accorded the judge complete authority to choose between confinement and nonconfinement sentences, with a larger number of bounded choices.

[2] The textual description applies to offenders in the lowest criminal history category; as the lines defining zones A, B, and C show, for offenders with ampler criminal histories, judges had less discretion.

		Criminal History Category (Criminal History Points)					
	Offense level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
Zone A	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	2-8	3-9
	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
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	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
Zone D	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	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	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

FIG. 5.—U.S. Sentencing Commission sentencing table (in months of imprisonment). Source: U.S. Sentencing Commission (1993).

District of Columbia. The prototype was developed by the District of Columbia Superior Court Sentencing Commission. Figure 6 shows the proposed grid for unarmed offenses. It is divided into four zones. For offenses falling in cells marked with an "a," the sentence is to be served in the community (including probation, restitution, fines, community service). In "b" cells, the community sentences are presumptively appropriate, but incarceration may be ordered if the judge states for the record the reason "why an alternative sentence has not been selected." In "c" cells, both incarcerative and community sentences are presumptively appropriate, and the judge may impose either without being required to provide special justification. In the remaining cells, the presumption is for imposition of a prison sentence from within a narrow range of authorized sentence lengths; a community sentence would be a departure and require that reasons be given in justification.

Pennsylvania. Pennsylvania in 1994 implemented revised guidelines that adopted the District of Columbia approach. Figure 7 shows the Pennsylvania guidelines for felonies and misdemeanors occurring on or after August 12, 1994. They create four zones of discretion. Cells in level 1 provide for "restorative sanctions," such as standard probation, community service, and restitution.

Cells in level 2, although they vary in detail, in general authorize judges to choose among restorative sanctions, "restrictive intermediate punishments" (RIPs), and short jail terms. The RIPs involve full or partial confinement (e.g., inpatient drug treatment, day-reporting centers, halfway houses) or intensive community penalties (e.g., house arrest or intensive supervision probation with electronic monitoring). If confinement is required, policy statements recommend a treatment component. If only restorative sanctions or RIPs are authorized, policy statements recommend restorative sanctions. Level 2 encompasses many nonviolent crimes and some less serious violent crimes.

Cells in level 3 provide for total or partial confinement or for RIPs. The guideline ranges for confinement set outer limits on RIP sentence length. Judges are free to choose among the different kinds of punishments. Policy statements encourage judges to consider restoration of the victim or rehabilitation of the offender as primary goals and point out that partial confinement coupled with work release and restitution or inpatient drug treatment are authorized means to those goals.

Cells in level 4, which primarily apply to offenders convicted of major violent or drug offenses, often with prior violent crime records,

Offense Score	Criminal History Score A 0	B .5-1.5	C 2-3.5	D 4-5.5	E 6+
1	6 [a]	6 [a]	6 [b]	9 [c] 6-12	15+
2	6 [a]	6 [a]	9 [b]	12 [c] 9-15	18+
3	6 [a]	6 [b]	9 [c] 6-12	15 12-18	21+
4	9 [b]	9 [b]	12 [c] 9-15	18 15-21	24+
5	9 [b]	12 [c] 9-15	18 15-21	24 18-30	33+
6	12 [c] 9-15	18 15-21	24 18-30	30 24-36	42+
7	24 18-30	30 24-36	36 30-42	42 36-48	54+
8	36 30-42	42 36-48	48 42-54	54 48-60	66+
9	48 42-54	54 48-60	60 54-66	66 60-72	78+
10	72 66-78	78 72-84	84 78-90	90 84-96	102+
11	96 84-108	102 90-114	108 96-120	114 102-126	132+

FIG. 6.—Unarmed grid (time reported in months). [a] The presumptive guideline sentence for this offense would be served in the community. Along with probation, the court might impose a fine, restitution, a requirement of community service, or a combination of these and other similar sanctions. The number shown is the longest minimum sentence that would be imposed and suspended or imposed after revocation on the basis of noncompliance with the conditions of the community-based sentence. [b] At the discretion of the judge, a community sentence (as defined above) or an incarcerative sentence may be imposed; the number shown is the longest minimum sentence that may be imposed if the initial sentence is one of incarceration or the longest minimum sentence that would be imposed if a community sentence is initially imposed and later revoked. Before imposing sentence, the judge shall consider alternatives to incarceration (i.e., intensive probation supervision and other highly structured supervision programs) for cases in this cell. If an incarcerative sentence is imposed, the judge is required to state on the record why an alternative sentence has not been selected. [c] Before imposing a sentence, the judge may consider alternatives to incarceration for cases in this cell provided that the conviction offense does not involve use of a gun (including assault with a deadly weapon) or injury to a victim and the offender was not on probation or parole at the time of the offense. Source: D.C. Superior Court, Sentencing Guidelines Commission (1987).

Level	Offense Gravity Score	Prior Record Score							AGG/ MIT
		0	1	2	3	4	5	RFEL	
	13	60-120	66-120	72-120	78-120	84-120	90-120	96-120	±12
Level 4 Incar	12	54-72	57-75	60-78	66-84	72-90	78-96	84-102	±12
	11	42-60	45-63	48-66	54-72	60-78	66-84	72-96	±12
	10	30-48	33-51	36-54	42-60	48-66	54-72	60-84	±12
Level 3 Incar Cnty Jail/ RIP	9	8-20	12-27	15-30	21-36	27-42	33-48	39-60	±6
	8	6-18	9-21	12-24	18-30	24-36	30-42	36-48	±6
	7	4-12	7-15	10-18	16-24	22-30	28-36	34-42	±6
	6	3-9	6-11[1/2]	9-15	12-18	15-21	18-24	21-27	±3
Level 2 Incar RIP RS	5	RS-6	1-6	3-9	6-11[1/2]	9-15	12-18	15-21	±3
	4	RS-3	RS-6	RS-9	3-9	6-11[1/2]	9-15	12-18	±3
	3	RS-RIP	RS-3	RS-6	RS-9	3-9	6-11[1/2]	9-15	±3
Level 1 RS	2	RS	RS	RS-RIP	RS-3	RS-6	1-6	3-9	±3
	1	RS	RS	RS-RIP	RS-RIP	RS-3	RS-6	RS-6	±3

KEY:

AGG = aggravated sentence addition
INCAR = incarceration
MIT = mitigated sentence subtraction
RFEL = repeat felony I and felony II offender category
RIP = restrictive intermediate punishments
RS = restorative sanctions
11 1/2 = denotes county sentence of less than 12 months

NOTES:

1. When the offender meets the statutory criteria for boot camp participation, the court should consider authorizing the offender as eligible.
2. Levels 1, 2, and 3 of the matrix indicate restrictive intermediate punishments may be imposed as a substitute for incarceration.
3. When restrictive intermediate punishments are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.
4. When the range is RS through a number of months (e.g., RS-6), RIP may be appropriate.
5. When RIP is the upper limit of the sentence recommendation (e.g., RS-RIP), the length of the restrictive intermediate punishment programs shall not exceed 30 days.

FIG. 7.—Pennsylvania guideline, August 12, 1994, standard ranges. Source: Pennsylvania Commission on Sentencing (1994).

provide for presumptive minimum prison terms to be served before parole eligibility.

Compared with the federal guidelines, Pennsylvania continues to delegate substantial discretion to the sentencing judge over the choice of sentence and allow a much greater scope for nonconfinement sentences. Figure 8 shows how Pennsylvania offenders sentenced in 1992

Offense Gravity Score	Prior Record Score							
	0	1	2	3	4	5	RFEL	Totals
13	148	14	21	9	18	12	7	229
12	1	-	-	-	-	-	-	1
11	620	45	92	23	67	51	50	948
10	252	20	32	12	18	14	14	362
9	1619	190	302	111	181	170	236	2809
8	1254	133	223	84	115	116	144	2069
7	334	19	36	12	15	17	22	455
6	2416	264	518	167	250	249	206	4067
5	3909	423	588	249	325	349	420	6263
4	1079	113	130	69	65	62	93	1611
3	8112	803	1130	417	542	563	563	12130
2	3582	385	434	140	205	205	221	5142
1	2730	288	305	93	143	108	140	3731
Totals	26057	2590	3808	1386	1944	1916	2116	39817

Note: RFEL = repeat felony I and felony II offender category.

= 5,212 offenders in imprisonment cells

= 10,465 offenders in imprisonment/restrictive intermediate punishment ("RIP") cells

= 17,261 offenders in restorative sanctions/RIP/short jail term cells

= 6,879 offenders in restorative sanctions cells
39,817 total offenders

FIG. 8.—1992 sentenced Pennsylvania offenders redistributed among cells in August 12, 1994, grid. Source: Data provided by Pennsylvania Commission on Sentencing (1994).

would have been distributed among the cells in the 1994 guidelines grid, had it then existed. The four level 1 cells, which authorize only restorative sanctions and preclude any confinement, govern sentencing of 6,879 offenders, 17 percent of the total. The sixteen level 2 cells, all of which authorize restorative sanctions or RIPs, and some of which also authorize confinement of three or six months, govern sentencing of 17,261 offenders, 43 percent of the total. Of these, 8,944 (23 per-

cent) fall into cells in which only restorative sanctions or RIPs are authorized. Only 5,512 offenders, 13 percent, fall within level 4 cells in which total confinement is the only presumptively appropriate sentence.

Compared with the federal guidelines, Pennsylvania's mechanically simpler guidelines represent a more complex philosophy of sentencing. Confinement is not the only punishment available for most offenders. Judges have substantial discretion to choose among different kinds of punishments. Even within a single level, judges may individualize sentences depending on how they weigh restorative, rehabilitative, and retributive considerations.

North Carolina. North Carolina is the first state to attempt from the outset to include in its guidelines standards for felonies and misdemeanors and for incarcerative and nonincarcerative punishments. Pennsylvania got there, but thirteen years after its initial guidelines took effect. The North Carolina guidelines took effect October 1, 1994.

North Carolina's guidelines have surface similarity to Pennsylvania's but are more different than may at first appear. Figure 9 shows the grid for felony sentencing. As in Pennsylvania, three ranges of presumptive lengths of prison sentences are shown—standard, mitigated, and aggravated. Also as in Pennsylvania, interchangeability is provided by use of a zones of discretion approach.

In other ways they are substantially different. Pennsylvania's guidelines set minimum parole eligibility dates; North Carolina abolished parole release and good time; guidelines thus prescribe time-to-be-served. More importantly, North Carolina's guidelines are much more restrictive of judicial discretion. A Pennsylvania judge who departs from the guidelines need only "provide a contemporaneous written statement of the reason or reasons." There is no general evidentiary test that must be met and appellate courts tend to use a deferential "abuse of discretion" standard in considering sentencing appeals.

In North Carolina, if the guidelines specify a prison sentence, judges must set a term from within the authorized range unless, for less serious cases, the court finds "that extraordinary mitigating factors of a kind greater than the normal case exist and that they substantially outweigh any factors in aggravation." In addition, the court must also find that imposition of a prison sentence would be a "manifest injustice." Even then, the possibility of an intermediate punishment is forbidden

PRIOR RECORD LEVEL

OFFENSE CLASS	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Death or Life Without Parole						
B1	A *240-300* **192-240** *144-192*	A *288-360* **230-288** *173-230*	A *336-420* **269-336** *202-269*	A *384-480* **307-384** *230-307*	A *Life Without Parole* **346-433** *260-346*	A *Life Without Parole* **384-480** *288-384*	Disposition *Aggravated Range* **PRESUMPTIVE RANGE** *Mitigated Range*
B2	A *135-169* **108-135** *81-108*	A *163-204* **130-163** *98-130*	A *190-238* **152-190** *114-152*	A *216-270* **173-216** *130-173*	A *243-304* **194-243** *146-194*	A *270-338* **216-270** *162-216*	
C	A *63-79* **50-63** *38-50*	A *86-108* **69-86** *52-69*	A *100-125* **80-100** *60-80*	A *115-144* **92-115** *69-92*	A *130-162* **104-130** *78-104*	A *145-181* **116-145** *87-116*	
D	A *55-69* **44-55** *33-44*	A *66-82* **53-66** *40-53*	A *89-111* **71-89** *53-71*	A *101-126* **81-101** *61-81*	A *115-144* **92-115** *69-92*	A *126-158* **101-126** *76-101*	
E	I/A *25-31* **20-25** *15-20*	I/A *29-36* **23-29** *17-23*	A *34-42* **27-34** *20-27*	A *46-58* **37-46** *28-37*	A *53-66* **42-53** *32-42*	A *59-74* **47-59** *35-47*	
F	I/A *16-20* **13-16** *10-13*	I/A *19-24* **15-19** *11-15*	I/A *21-26* **17-21** *13-17*	A *25-31* **20-25** *15-20*	A *34-42* **27-34** *20-27*	A *39-49* **31-39** *23-31*	
G	I/A *13-16* **10-13** *8-10*	I/A *15-19* **12-15** *9-12*	I/A *16-20* **13-16** *10-13*	I/A *20-25* **16-20** *12-16*	A *21-26* **17-21** *13-17*	A *29-36* **23-29** *17-23*	
H	C/I *6-8* **5-6** 4-5	I *8-10* **6-8** 4-6	I/A *10-12* **8-10** 6-8	I/A *11-14* **9-11** 7-9	I/A *15-19* **12-15** 9-12	A *20-25* **16-20** 12-16	
I	C *6-8* **4-6** *3-4*	C/I *6-8* **4-6** *3-4*	I *6-8* **5-6** *4-5*	I/A *8-10* **6-8** *4-6*	I/A *9-11* **7-9** *5-7*	I/A *10-12* **8-10** *6-8*	

FIG. 9.—North Carolina felony punishment chart, 1994 (numbers shown are in months). A = active punishment; I = intermediate punishment; C = community punishment. Source: North Carolina Sentencing and Policy Advisory Commission (1994*a*).

for all drug traffickers, offenders convicted of murder or first-degree rape, and offenders with any significant prior record.

North Carolina recognizes three types of sentences: "active punishments" (immediate total confinement), "intermediate punishments" (split sentences, residential programs, electronic house arrest, and intensive supervision probation), and "community punishments" (supervised or unsupervised probation, community service, outpatient treatment programs, fines). Figure 9 has two principal bands—active

punishments ("A" cells) or either active or intermediate punishments ("I/A" cells). In addition, two cells authorize only intermediate punishments, two authorize intermediate or community punishments, and one authorizes only community punishments.

At first impression, it may appear that North Carolina's guidelines are more restrictive of the use of community punishments than are Pennsylvania's, just as North Carolina's prison guidelines are more restrictive of judicial discretion than are Pennsylvania's. That impression may be misleading. Pennsylvania's grid includes felonies and misdemeanors. North Carolina's applies only to felonies; a second grid (fig. 10) sets the guidelines' rules for misdemeanors. It authorizes community punishments for all misdemeanors and authorizes intermediate and active punishments for some. Precisely how the two states' policies compare in relation to the restrictions they impose on judicial discretion can be determined only by analysis of data showing precisely which crimes appear in each cell of each grid and how many offenders are affected by each cell.

The choice between separate and combined grids for felonies and misdemeanors raises at least two significant considerations. First, it could be argued that misdemeanors are typically less serious crimes and that the offense itself should be the principal sentencing consideration. Thus North Carolina has only three criminal history categories for misdemeanors but six for felonies and authorizes community penalties for all misdemeanors. Pennsylvania's seven criminal history categories might be seen as overkill.

Second, however, Pennsylvania's approach permits policy makers to look behind statutory offense classes and to distinguish among misdemeanors depending on the behavior they involve. Thus while most Pennsylvania misdemeanors (there are three statutory classes) are included in the bottom three of Pennsylvania's thirteen offense-severity levels, some involving firearms, drugs, and offenses against children were placed in levels 4 and 5. Misdemeanor manslaughters involving driving under the influence (DUI) convictions were placed in levels 7 and 8, and providing weapons to an inmate was placed in level 9.

There is as yet no literature that shows how the different approaches described in this section work in practice, although the National Institute of Justice in 1996 and 1997 awarded a number of grants for evaluation of new guidelines systems. The D.C. Superior Court guidelines were never implemented, and the absence of policy concerning inter-

Class	Prior Conviction Levels		
	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
1	1 - 45 days C	1 - 45 days C/I/A	1 - 120 days C/I/A
2	1 - 30 days C	1 - 45 days C/I	1 - 60 days C/I/A
3	1 - 10 days C	1 - 15 days C/I	1 - 20 days C/I/A

FIG. 10.—North Carolina misdemeanor punishment chart, 1994. A = active punishment; I = intermediate punishment; C = community punishment. Cells with slashes allow either disposition at the discretion of the judge. Source: North Carolina Sentencing and Policy Advisory Commission (1994*b*).

mediate sanctions in most states has meant that the small sentencing reform evaluation literature has little to say on the subject.

2. *Substitution of Penalties.* Two other related approaches for setting policies governing substitution of incarcerative and nonincarcerative punishments have been tried. The first is to develop a generic common currency, typically called punishment units or custody units, into which all punishments can be exchanged. This approach was discussed extensively during the development phase of the U.S. Sentencing Commission's work (Morris and Tonry 1990, chap. 2), but only in Oregon has it been implemented in part. Louisiana included a punishment unit approach in its voluntary guidelines, but they were repealed in 1995.

The second approach is to set specific exchange rates between different kinds of penalties. No jurisdiction has developed a complete scheme. Day fines were introduced in Germany in the early 1970s to serve as a substitute for prison sentences up to six months (Weigend 1995, 1997). Community service orders were introduced in England and Wales (Pease 1985), Scotland (McIvor 1995), and the Netherlands (Tak 1997), also as substitutes for prison sentences up to six months. Oregon and Washington initially established exchange rates of two or

three days' community service for one day's confinement. New York City's community service program was designed to require seventy hours community service as a substitute for six months in jail (McDonald 1986).

a. *Punishment Units.* The idea is to create generic "punishment units" into which all sanctions can be converted. A hypothetical system might provide, for example, for the following conversion values:

* One year's confinement	100 units
* One year's partial confinement	50 units
* One year's house arrest	50 units
* One year's standard probation	20 units
* 25 days' community service	50 units
* 30 days' intensive supervision	5 units
* 90 days' income (day fines)	100 units
* 30 days' electronic monitoring	5 units

That is by no means a complete list; such things as drug testing, treatment conditions, and restitution might or might not be added. The values could be divided or multiplied to obtain values for other periods (e.g., 75 days' confinement equals 20 units).

If guidelines, for example, set 120 punishment units as the presumptive sentence for a particular offender, a judge could impose any combination of sanctions that represented 120 units. One year's confinement (100 units) plus 60 subsequent days' intensive supervision (10 units) on electronic monitoring (10 units) would be appropriate. So would a 90-unit day fine (100 units) plus one year's standard probation (20 units). So would 25 days' community service (50 units) and six months' intensive supervision (30 units), followed by two years' standard probation (40 units).

Oregon's guidelines have since their initial promulgation incorporated "sanction units" (originally "custody units") in relation to nonprison sentences. Figure 11 shows the 1993 version. The cells above the bold black line contain two numbers and create a presumption that confinement is the appropriate sentence for cases falling within that cell; the numbers are the upper and lower limits in months of the range of presumptive sentences. Cases falling within cells below the bold black line also contain two numbers, these are presumptive local sanction cases: the bottom number is the maximum jail term, in sanction units (days), that can be imposed without a departure; the top number

Crime Seriousness Scale			Criminal History Scale								
			Multiple (3+) Felony Person Offender	Repeat (2) Felony Person Offender	Single (1) Felony Person W/Felony Non-Person Offender	Single (1) Felony Person Offender	Multiple (4+) Felony Non-Person Offender	Repeat (2-3) Felony Non-Person Offender	Significant Minor Criminal Record	Minor Criminal Record	Minor Misdemeanor or No Criminal Record
			A	B	C	D	E	F	G	H	I
	Murder	11	225-269	196-224	178-194	149-177	149-177	135-148	129-134	122-128	120-121
	Manslaughter I, Assault I, Rape I, Arson I	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60
	Rape I, Assault I, Kidnapping I, Arson I, Burglary I, Robbery I	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36
	Manslaughter II, Sexual Abuse I, Assault II, Rape II, Using Child in Display of Sexual Conduct, Drugs—Minor, Cult./Manuf./Del., Comp., Prostitution, Neg. Homicide	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18
	Extortion, Coercion, Supplying Contraband, Escape I	7	31-36	25-30	21-24	19-20	16-18	180 90	180 90	180 90	180 90
	Robbery II, Assault III, Rape III, Bribe Receiving, Intimidation, Property Crimes (more than $50,000), Drug Possession	6	25-30	19-24	15-18	13-14	10-12	180 90	180 90	180 90	180 90
	Robbery III, Theft by Receiving, Trafficking, Stolen Vehicles, Property Crimes ($10,000 - $49,999)	5	15-16	13-14	11-12	9-10	6-8	180 90	120 60	120 60	120 60
	Failure to Appear I, Custodial Interference II, Property Crimes ($5,000 - $9,999), Drugs—Cult./Manuf./Del.	4	10-10	8-9	120 60	120 60	120 60	120 60	120 60	120 60	120 60
	Abandon Child, Abuse of Corpse, Criminal Nonsupport, Property Crimes ($1,000 - $4,999)	3	120 60	120 60	120 60	120 60	120 60	120 60	90 30	90 30	90 30
	Dealing Child Pornography, Violation of Wildlife Laws, Welfare Fraud, Property Crimes (less than $1,000)	2	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30
	Altering Firearm ID, Habitual Offender Violation, Bigamy, Paramilitary Activity, Drugs—Possession	1	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30

FIG. 11.—Oregon sentencing guidelines grid, 1993. Numbers in cells above black line are presumptive maximum and minimum prison sentences (in months). Below the black line, upper number is the added nonjail custody units; lower number is the maximum number of jail days that may be imposed. Source: Oregon Criminal Justice Council (1993).

is the presumptive maximum number of applicable sanction units that can be imposed in lieu of jail (including penalties following revocations). The maximum number of authorized sanction units increases from 90 to 120 to 180 as crime seriousness or criminal history increase. One day in jail, inpatient treatment, partial confinement, or house arrest equals one sanction unit, as does sixteen hours of community ser-

vice. Sanction units not used as part of a jail term remain available for use in order to punish violations of probation conditions.

Oregon's sanctions-unit scheme bears no relation to the hypothetical scheme described above. No values are attached to intensive supervision, fixed fines and day fines, restitution, outpatient drug or sex offender treatment, or electronic monitoring. All of the sanctions affected by it, but community service, are forms of custody and for them a day equals a day equals a day, and there is little that is novel in such a scheme. Prison administrators have long had the authority to assign prisoners to institutions with different levels of control, including prisons of different custody levels, halfway houses, and house arrest. No sanctions-unit scheme is required to express that equivalence. The sixteen hours' community service equals a day of confinement policy could be expressed in a simple one sentence statement. Oregon's sanctions-unit scheme does provide a system for limiting the scope of back-up penalties attached to condition violations, but this too could be done simply by stating the maximum number of days such penalties can involve.

There are probably two reasons why Oregon's scheme is so limited in scope. First, many people start from the idea that confinement is the basic form of punishment and that any other "equivalent" sanction must be equally burdensome. Thus, many people would be uneasy with a system that treated one year's imprisonment as equivalent to thirty days' community service or a fine equal to ninety days' income. Second, if conditions like house arrest, drug testing, electronic monitoring, and community service are given unit values, the resulting combinations of numbers seem arbitrary. After the Pennsylvania commission failed to work out the details of such a scheme in 1994, it was abandoned as unworkable.

b. *Exchange Rates.* Another approach is simply to specify equivalent custodial and noncustodial penalties and to authorize judges to impose them in the alternative. Washington's commission did this (Boerner 1985) and later proposed a more extensive system (Washington State Sentencing Guidelines Commission 1992, pp. 19–23), which the legislature did not adopt. Partial confinement and community service were initially authorized as substitutes for presumptive prison terms on the bases of one day's partial confinement or three day's community service for one day of total confinement.

Like the punishment unit proposals, the equivalency approaches have also so far been unable to overcome the psychological and politi-

cal pressures to make "equivalent" punishments as objectively burdensome as prison, which limits their use to the most minor offenses and offenders. Washington's three-days'-community-service-equals-one-day's-confinement policy would permit community service in place of from three to ten days' confinement if existing successful programs were used as models.

The difficulty is that community service programs, to be credible, must be enforced, and experience in this country and elsewhere instructs that they must be short. That is why the best-known American program in Staten Island, New York (McDonald 1986) set seventy hours as a standard and the national policies in England and Wales, Scotland, and the Netherlands set 240 hours as the upper limit. A system like New York's seventy-hours' community service in place of six months' jail can be justified (the idea was to give repetitive property offenders some meaningful enforced penalty rather than impose an expensive jail term that no one expected would have deterrent effects), but it requires a loosening of punitive literalism that no sentencing commission has been prepared to accept.

3. *Categorical Exceptions.* Categorical exception policies, focusing not on the sanction but on the offender, are permissive. They authorize, but do not direct, judges to disregard otherwise applicable sentencing ranges if offenders meet specified criteria. One example is a federal guidelines provision (Rule 5.K.1) that empowers judges to depart from guidelines if the prosecution files a motion proposing such a departure on the rationale that the defendant has provided "substantial assistance [to the government] in the investigation or prosecution of another person." Once the motion is made, the judge is free from guidelines presumptions about appropriate sentences. This is an enormously significant escape hatch from the federal guidelines because it mostly benefits offenders convicted of serious multiparty offenses and because it affects large numbers of cases. Of all federal sentences in fiscal year 1996, 21.7 percent were downward substantial assistance departures, including 35 percent of all drug trafficking sentences (U.S. Sentencing Commission 1997, table 27).

Only one state, Washington, has developed extensive categorical exception policies. Under the First-time Offender Waiver, judges may disregard otherwise applicable guidelines in sentencing qualifying offenders and "the court is given broad discretion in setting the sentence" (Washington State Sentencing Guidelines Commission 1994*a*, p. I-18). Available alternatives include up to 90 days' jail or two years'

probation and financial penalties, compulsory treatment, and community service. To be eligible, the offense must be a first conviction for a nonviolent, nonsexual offense (some drug offenders are also ineligible). In 1993, 2,139 offenders (of 7,224 eligible) were sentenced under the first offender exception (Washington State Sentencing Guidelines Commission 1994*a*, pp. I-18–I-19).

Washington's special sex offender sentencing alternative authorizes judges to suspend prison sentences for most first-time sex offenders (Washington State Sentencing Guidelines Commission 1994*b*, pp. I-19–I-21). To qualify, the offender must agree to two examinations by certified sex offender treatment specialists and to preparation of a treatment plan. Following a decision that the offender is amenable to treatment, the judge may suspend the presumptive sentence and impose a community sentence that includes sex offender treatment, up to ninety days in jail, community supervision, various financial obligations, and community service. In 1993, of 940 eligible offenders, 400 received special sex offender departures (Washington State Sentencing Guidelines Commission 1994*a*, p. 18).

No other state has attained as much experience with use of categorical exceptions to sentencing guidelines (Washington also has a "work ethic [boot] camp" program that permits substitution of four to six months' boot camp for twenty-two to thirty-six months in prison). The idea, however, has potentially broad application to guidelines systems.

4. *Delaware's Voluntary Continuum of Sanctions.* Delaware is a special case. In some ways, its approach does not fit into this discussion. Here the emphasis is on presumptive guidelines that attempt to structure sentencing discretion. Delaware's guidelines are voluntary and judges are as free to ignore as to follow them. The guidelines lack legal authority and no one may appeal if a judge ignores them.

However, Delaware in the mid-1980s became the first state explicitly to incorporate nonprison sanctions into its sentencing policies and more recently adopted "truth-in-sentencing" when it abolished parole release. The chairman of Delaware's Sentencing Accountability Commission (SENTAC) has published articles presenting data that suggest that the guidelines have increased use of intermediate sanctions and achieved greater consistency and predictability in sentencing (e.g., Gebelein 1996).

Delaware Supreme Court rules provide standards for sentences for typical instances of specific offenses. Sentences are increased or de-

creased to take account of aggravating or mitigating circumstances that SENTAC has identified. Judges are required to give statements of reasons on the record for sentences that deviate from the standards. The adequacy or persuasiveness of those reasons, however, cannot be appealed to higher courts.

Delaware's Sentencing Accountability Commission drafted the sentencing standards and also devised a five-level continuum of punishments that judges incorporate in their sentences: "Level V" (imprisonment), "Level IV" (house arrest or residential treatment programs), "Level III" (intensive supervision), "Level II" (standard probation), and "Level I" (unsupervised probation).

Judges can use the sanction levels in three ways. First, sentences are sometimes expressed in terms of *X* months at Level V, followed by *Y* months at Level III, and *Z* months at Level II. Second, judges use the levels as a way to provide measured responses to condition violations. Judges need not choose between ignoring a violation and sending the offender to jail or prison. A Level II offender who violates conditions can be sanctioned by a control upgrade to Level III or Level IV. Third, an offender who is doing well can be rewarded by a downgrade. A Level III offender who is performing conscientiously may have his or her control status reduced to Level II.

Little has been written about Delaware's guidelines and no evaluations have been published. The crucial and in the absence of an evaluation unanswerable question is how they are used by Delaware judges, including whether they achieve greater use of intermediate sanctions and better or worse consistency in sentencing than elsewhere.

C. Interchangeability among Nonincarcerative Punishments

No jurisdiction to my knowledge has devoted significant attention to alternate ways to structure or guide judicial discretion over choices among different nonincarcerative punishments. The North Carolina and Pennsylvania zones of discretion distinguish among "community" (North Carolina) or "restorative" sanctions (Pennsylvania) like standard probation, community service, and fines, and more restrictive sanctions like house arrest and intensive supervision. Both states' guidelines contain a few cells in which only community or restorative sanctions are authorized. Within any zone of discretion, however, judges receive little guidance for their decisions among authorized nonincarcerative sanctions. Pennsylvania commentary urges judges to take rehabilitative considerations into account in fashioning nonprison

sentences, and North Carolina commentary suggests (and implicitly recommends) normal durations for various nonprison sanctions.

Each of the methods for integrating intermediate sanctions into sentencing guidelines previously discussed could be adapted to govern such choices. As figures 1 and 2 illustrated, for example, many more zones of discretion could be established that would relate particular kinds of nonincarcerative sanctions to differences in offense severity. Table 1 shows a ten-category punishment classification that Delaware considered (but rejected) in the early 1980s that could have been used in that way. Delaware's current five punishment levels provide a simpler approach. Or, combining the exchange-rate and categorical exceptions approaches, exchange rates could be developed for many more kinds of sanctions, and policy statements could specify the kinds of offenses or offenders to which particular sanctions apply. Thus, rules might provide that property offenders should ordinarily receive financial penalties or community service, drug-dependent offenders should ordinarily receive intensive supervision coupled with drug treatment conditions, and all moderately serious violent offenders should ordinarily receive partial or intermittent confinement with restitution or treatment conditions as appropriate.

No jurisdiction, however, has done any of those things. Except for the few cells in the North Carolina and Pennsylvania grids that preclude both restrictive intermediate punishments and confinement and limits, as in Oregon, on the duration of community confinement sentences (like house arrest, partial confinement, or day-reporting centers), once systems authorize judges to impose a nonconfinement sentence, judges have wide unguided discretion to choose.

D. Authority

The question here concerns the nature and weight of the legal presumptions concerning choices between incarcerative and nonincarcerative punishments and among nonincarcerative punishments. Judges typically have wide, unregulated discretion concerning both choices, with the exception that in systems like Pennsylvania's and North Carolina's that adopted a zones of discretion approach, a sentence to a generic type of sanction more severe than is authorized by the band is a departure that requires reasons. Thus in the four cells in Pennsylvania's guidelines, and the one cell in North Carolina's felony guidelines, that specify only restorative or community punishments, intermediate or incarcerative sentences are presumptively inappropriate.

The distinctions between voluntary and presumptive guidelines, and among the latter between those that are restrictive and those that are flexible, are important in relation to imprisonment sanctions. They are nearly irrelevant in relation to nonimprisonment sanctions. Within the (usually broad) range of sanctions permitted in any cell, judges in every system have complete discretion to choose among them. This is so concerning choices between prison and nonprison penalties and among nonprison penalties. In North Carolina, for example, for cases falling into the intermediate punishments zone of the grid, judges may impose any combination of the authorized punishments, for any duration up to five years, and may in addition impose any combination of the lesser punishments included within the community punishments category. No reasons need be given and no appeal is available.

The scope of legal authority to sentencers is potentially different in "zone of discretion" and "penalty units" systems. In Oregon, for example, one function that is served by the penalty units system for non-state-prison sentences is to limit the defendant's maximum vulnerability to punishment, even in relation to back-up sanctions for breaches of technical conditions. Because the Pennsylvania and North Carolina systems do not limit judges' choices among nonincarcerative sentences, there are few limits on offenders' vulnerability. In cell H of North Carolina's grid, for example, a judge could impose twelve months of unsupervised probation on one offender and a five-year term of probation including six months in jail (as part of a split sentence), residential drug treatment, intensive supervision with electronic monitoring, a fine, restitution, and community service on another.

A different way to make this point is to observe that reduction in disparities in prison sentences is a major goal of many guidelines systems but that few efforts are typically made to reduce or avoid disparities in nonprison sentences. There are various ways that policy makers could try to reduce disparities among nonprison sentences. To date, few attempts have been made to do so.

II. Problems and Prospects

The task of incorporating intermediate sanctions into sentencing guidelines is in the late 1990s at about the same stage that sentencing guidelines were at in the early 1980s. The need to devise means to structure judicial discretion was widely recognized and a few states, notably Minnesota, Pennsylvania, and Washington, had adopted policies aimed at doing so. Today, the need to incorporate intermediate sanc-

TABLE 1

Accountability Levels in the Delaware Sentencing Approach

Restrictions	I (0–100)	II (101–200)	III (201–300)	IV (301–400)	V (401–500)	VI (501–600)	VII (601–700)	VIII (701–800)	IX (801–900)	X (901–1,000)
Mobility in the community*	100 percent (unrestricted)	100 percent (unrestricted)	90 percent (restricted, 0–10 hours/ week)	80 percent (restricted, 10–30 hours/week)	60 percent (restricted, 30–40 hours/week)	30 percent (restricted, 50–100 hours/week)	20 percent (restricted, 100–140 hours/week)	10 percent (90 percent of time restricted, incarcer- ated)	0 percent (incarcer- ated)	0 percent (incarcer- ated)
Amount of supervision	0	Written report monthly	1–2 face-to- face/ month, 1–2 phone contacts/ week	3–6 face-to- face/ month, weekly phone con- tact	2–6 face-to- face/week, daily phone, weekly writ- ten reports	Daily phone, daily face- to-face	Daily on-site supervision, 8–16 hours/ day	Daily on-site supervision, 24 hours/ day	Daily on-site supervision, 24 hours/ day	Daily on-site supervision, 24 hours/ day
Privileges with- held on spe- cial conditions†	(100 percent) same as prior offense	(100 percent) same as prior con- viction	1–2 privileges withheld	1–4 privileges withheld	1–7 privileges withheld	1–10 privi- leges with- held	1–12 privi- leges with- held	5–15 privi- leges with- held	15–19 privi- leges with- held	20 or more privileges withheld
Financial obli- gations‡	Fine and/or cost may be applied (0–2 day fine)	Fine, costs, restitution, and/or pro- bation supervisory fee may be applied (1–3 day fine)	Same (increase probation fee by $5– $10/ month, 2–4 day fine)	Same (increase probation fee by $5– $10/ month, 3–5 day fine)	Same (pay par- tial cost of food, lodg- ing and/or supervisory fee, 4–7 day fine)	Same as V (8– 10 day fine)	Same as V (11–12 day fine)	Fine, costs, and/or res- titution pay- able on release to VII or lower (12– 15 day fine)	Same as VIII	Same as VIII

Examples (these are examples only—many other scenarios could be constructed meeting the requirements of each level	$50 fine and/or court cost, 6 month unsupervised probation	$50 fine, restitution, and/or court costs; 6 month supervised probation; $10/month fee; written report	Fine, costs, and/or restitution; 1 year probation; weekend community service; no drinking	Weekend community service or mandatory treatment, 5 hours/day; $30/month probation fee; no drinking; no out-of-state trips	Mandatory rehabilitation skills program, 8 hours/day; restitution; probation fee of $40/month; no drinking; curfew	Work release; pay partial cost of room, board, and/or restitution; no kitchen privileges outside meal time; no drinking; no sex; weekends home	Residential treatment program, pay partial program costs, limited privileges	Minimum security prison	Medium security prison	Maximum security prison

SOURCE.—DuPont (1986).

* Restrictions on freedom essentially structure an offender's time, controlling his schedule, whereabouts, and activities for the designated amount of time. To the extent that monitoring is not standard or consistent or to the extent that no sanctions for accountability accrue for failure on the part of the offender, the time is not structured. It could consist of residential, part-time residential, community service, or other specific methods for meeting the designated hours. The judge could order the hours be met daily (e.g., two hours per day) or in one period (e.g., weekend in jail).

† Privileges/conditions: choice of job, choice of residence, mobility within setting, driving, drinking (possible use of Antabuse), out-of-state trips, phone calls, curfew, mail, urinalysis, associates, and areas off-limits.

‡ As a more equitable guide to appropriate fine, the amount would be measured in units equivalent to daily income, such as one day's salary = one day's fine.

tions into guidelines is widely recognized and a few states, notably North Carolina and Pennsylvania, have attempted to do so.

Some of those methods for incorporating intermediate sanctions into guidelines are promising and warrant further development. Others appear to be at dead ends. Still other possible ways to structure judicial discretion concerning intermediate sanctions deserve consideration.

Among the goals of comprehensive guidelines systems are to achieve consistency in sentencing; to avoid racial, gender, and other unwarranted disparities; and to generate flows and types of offenders who can be accommodated in existing and planned corrections programs, both institutional and community based. The first two of those goals are shared by every existing guidelines system, though the degree to which they are realized varies.

The third goal, tying policies to resources, is sought in relation to prison beds by those states that have adopted "resource constraint" policies (see M. Tonry 1996, chap. 2). Some states, including Minnesota, Washington, Oregon, and Kansas, have been markedly successful for extended periods.

Movement toward realization of the three goals in relation to intermediate sanctions is the subject of this essay. If improved consistency and reduced disparities are to be achieved, sentencing rules must be established to which sentences imposed can be compared. If policy is to be tied to resources, sentencing must be made predictable.

By those criteria, progress toward incorporation of intermediate sanctions into guidelines has been slight. Even in North Carolina and Pennsylvania, no rules govern choices among intermediate sanctions or, in the portions of their guidelines grids in which both confinement and intermediate sanctions are options, between them. In the long term, some mechanisms must be developed that will set policies governing those choices. Much of the discussion below of how that can be done is speculative and exploratory since it extrapolates from, rather than documents, relevant experience.

A. Building on the Past

Section I describes the four approaches so far taken for incorporating intermediate sanctions in sentencing guidelines—zones of discretion, punishment units, exchange rates, and categorical exceptions. This section suggests ways those initiatives can be extended.

1. *Zones of Discretion.* Zones of discretion, adopted in North Carolina and Pennsylvania, offer the broadest promise. By defining various offense/offender combinations for which only confinement, an intermediate sanction, or a community penalty is presumptively appropriate, they make some proportionality and predictability in the use of various sanctions more likely. However, because they set no presumptions governing choices among intermediate sanctions or between intermediate sanctions and confinement, such sentencing decisions must be made in a policy vacuum. That vacuum can be filled.

Zones of discretion are likely to be adopted in most guidelines systems that attempt to take account of intermediate sanctions. If ways can be devised to establish policies governing choices between confinement and intermediate sanctions, and among intermediate sanctions, zones of discretion will provide the context within which those policies can operate.

North Carolina and Pennsylvania have taken small steps to provide guidance concerning choices among intermediate sanctions. North Carolina's Training and Reference Manual (North Carolina Sentencing and Policy Advisory Committee 1994*a*, pp. 29–30), although it neither creates dispositional presumptions nor makes recommendations, provides information on typical durations of intermediate sanctions. For example, "The current average length of electronic monitoring is ninety days or less" and "the current average length of intensive probation is from six to nine months." The rationales presumably are that such information will help judges decide what duration to impose and that judges will be inclined to follow those conventions.

Pennsylvania, likewise, provides information to judges that may be intended to influence their decisions. Pennsylvania's guidelines manual (Pennsylvania Commission on Sentencing 1994, pp. 6–7) reminds judges that, in selecting among confinement and restrictive intermediate sanctions in zone 3 (prison or a restrictive intermediate sanction), they "may choose to place the primary focus of the sentence on treatment of the offender by placing the offender in an inpatient treatment facility." In slightly less neutral language, the manual suggests that judges "should consider" sentences to boot camp or drug or alcohol treatment for qualifying offenders in zone 2.

2. *Punishment Units.* At least in the 1990s, the punishment units approach does not appear to have broad relevance. Oregon is the pioneer and progress has been slight with prison equivalences having been

established only for partial confinement and community service. Oregon uses punishment units in a second way, however, that may have broader relevance. Sanction units not used as part of a jail term remain available for use to punish violations of probation conditions. In effect, punishment units can operate as aggregate limits on "back-up" sanctions that can be imposed for breach of conditions of the initial penalty. In many courts, judges sentence offenders who have breached conditions of a community penalty to jail or state prison as a penalty. When the breach is of a technical condition such as prohibitions on alcohol or drug use or violation of curfews, imprisonment may be disproportionately severe and, from a cost-benefit perspective, disproportionately costly. Use of punishment units to constrain use of back-up sanctions is a way to control both excesses.

The core idea—establishment of guidelines for back-up sanctions proportioned to the seriousness of the original crime—has, however, no inherent link with punishment units. That general idea is developed further below.

3. *Exchange Rates.* Exchange rates are but a simpler version of a punishment units approach, and at least in the 1990s are no likelier to be broadly useful. Rather than establish some generic currency into which all sanctions can be converted, and then exchanged, exchange rates directly identify equivalent punishments. In Washington's initial guidelines, for example, one day's confinement was made exchangeable for one day's partial confinement or three days' community service, but they do not take account of such common penalties as fines, restitution, and intensive supervision. For so long as prevailing views require that imprisonment be considered the normal punishment and that substitutes for imprisonment be comparably burdensome and intrusive, exchange rates are unlikely to play a significant role in sentencing guidelines.

4. *Categorical Exceptions.* Categorical exceptions, both permissive and presumptive, have a role to play in incorporation of intermediate sanctions into sentencing guidelines. Permissive exceptions are like Washington's special sex offender sentencing alternative: they authorize but do not direct the judge to set aside the normally presumptive range of sentences for a specific category of offenders. In effect, they operate as trumps that the judge may decide whether and when to use. Washington judges often assert their authority over permissive exceptions to craft individualized sentences for sexual offenders and first-time offenders.

Presumptive exceptions indicate that defined categories should ordinarily be handled in a particular way. The Federal Sentencing Reform Act of 1984, for example, in Section 994(j) provided that the federal guidelines shall "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." The U.S. Sentencing Commission could have reiterated that precise language in its guidelines (it did not: M. Tonry 1996, chap. 3); had it done so, federal judges would have operated under a presumption that some sentence other than imprisonment was appropriate for most first offenders.

Both permissive and presumptive exceptions can potentially be useful in incorporating intermediate sanctions into sentencing guidelines.

B. Looking to the Future

This final section looks to the future and offers more speculative suggestions that policy makers might consider as they continue their efforts to build intermediate sanctions into sentencing guidelines.

Zones of discretion and categorical exceptions have roles to play in integrating intermediate sanctions and guidelines policies. Use of zones of discretion has permitted policy makers to specify categories of offenses and offenders for which only particular kinds of sanctions are presumptively appropriate, but little guidance has as yet been provided for choosing between imprisonment and other sanctions or among nonincarcerative sanctions. Categorical exceptions are the most promising tools available for providing that guidance.

Before I describe how that can be done, two simple jurisprudential concepts that have special relevance to intermediate sanctions should be introduced. These are the distinctions between purposes of and at sentencing and the concept of parsimony.

1. *Purposes at Sentencing.* There has in recent years been widespread belief that abstract sentencing purposes have either near-absolute, or virtually no, relevance to sentencing policy. This is a mistake. Proponents of just deserts theories (e.g., von Hirsch 1976, 1992) have urged that ideals of proportionality should be the primary criteria for setting sentencing policy. Because this would leave little role for rehabilitative, deterrent, incapacitative, and other purposes that many policy makers and practitioners believe are relevant, no jurisdiction has adopted such a single-purpose scheme. Although indeterminate sentencing was nowhere a single-purpose system, rehabilitative consider-

ations were especially influential. There are, however, few contemporary proponents of primarily rehabilitative systems.

Most modern sentencing systems purport to be multipurpose, but it has proven difficult to give operational meaning to that idea. Although there have long been vigorous debates over the merits of retribution, reprobation, rehabilitation, prevention, general and specific deterrence, and incapacitation as penal goals, consensus is seldom reached that one is more important than the others. This is partly because the various purposes are relevant to different cases in different ways.

Among three offenders in a convenience store robbery (without firearms), for example, one may have been involved in ten prior robberies; incapacitation may seem the most important sentencing purpose and confinement the mechanism. A second may be a drug-dependent first offender, rehabilitation the most important purpose, and outpatient drug treatment the mechanism. A third may be a non-drug-dependent first offender, employed and with a family, retribution and deterrence the primary purposes, and a combination of a substantial fine and house arrest during nonworking hours the mechanisms.

The three sentences described in the preceding paragraph are difficult to reconcile with any single punishment purpose, which is why policy makers frequently adopt all purposes. The difficulty with this is that telling a judge that all purposes are relevant provides no guidance whatever in sentencing particular cases. If the choice is between a single purpose or multiple purposes, the lack of guidance may appear unavoidable.

These problems go away once a distinction is recognized between purposes of sentencing and purposes at sentencing. Traditional debates are about purposes of sentencing, that is, about the overall purposes of the sentencing process or system. Purposes at sentencing are those that are relevant to disposition of individual cases, and they vary with the circumstances of the offense and the offender. The three convenience-store robbers above offer an example.

The idea of purposes at sentencing is especially relevant to nonincarcerative sanctions. When guidelines dealt only with who went to jail or prison and for how long, the lack of guidance provided by multiple purposes created few problems. When guidelines encompass intermediate sanctions, the idea of purposes at sentencing, when combined with the idea of categorical exceptions, provides a tool for providing guidance to judges in choosing among different sanctions. Guidelines

could easily provide that judges choosing between confinement and intermediate sanctions, or among intermediate sanctions, are to be guided by a series of presumptions about purposes relevant to individual cases. Any sentence inconsistent with the presumption would be a departure and require provision of reasons that could be reviewed on appeal.

2. *The Principle of Parsimony.* The principle of parsimony, or the concept of the least restrictive appropriate alternative, is a second jurisprudential idea that is relevant to intermediate sanctions (Morris 1974, chap. 1; Morris and Tonry 1990, chap. 3). For reasons both of humane treatment of offenders and economy in public expenditure, law reform bodies including the American Law Institute (1962) in the Model Penal Code, the National Commission on Reform of Federal Criminal Laws (1968), and the American Bar Association (in all three editions of its standards for sentencing) have long urged adoption of least restrictive alternative policies.

The least restrictive alternative concept has a long history. The utilitarian philosopher Jeremy Bentham, for example, asserting that all avoidable human suffering is undesirable, urged adoption of a "principle of parsimony" by which punishment could be justified only to the extent that suffering by others was reduced. Contemporary writer Norval Morris (1974) proposed an influential theory of "limiting retributivism" in which retribution (or "just deserts") sets upper limits on deserved punishments and lower limits for especially serious crimes; within those limits concern for parsimony calls for the least restrictive alternative unless articulable rationales justify harsher treatment for particular offenders (Frase 1997).

Placed in the context of intermediate sanctions and sentencing guidelines, concern for parsimony would yield a least-restrictive-alternative presumption that intermediate sanctions are to be preferred to confinement, and among intermediate sanctions the least restrictive and intrusive among those authorized are to be preferred.

3. *Intermediate Sanctions in Sentencing Guidelines.* Efforts to incorporate intermediate sanctions into sentencing guidelines are in their early days. Although current efforts are modest and limited, mechanisms are available from which comprehensive sentencing policies could be devised that build existing guidelines systems and provide guidance for judges in all their sentencing decisions.

a. *Guidelines Should Contain from Four to Six Zones of Discretion.* Polar zones would be those in which the crimes are so serious that any

punishment less harsh than imprisonment would unduly depreciate the seriousness of the crime and in which the crimes are so venial that any punishment harsher than standard probation, a minor fine, or restitution would be unjust. At least two other zones should be created: one would authorize restrictive sanctions like inpatient drug or other treatment and partial confinement, the other would authorize less restrictive sanctions like day fines, intensive supervision, house arrest, and community service. At its upper and lower margins, each zone would overlap with the next, thereby giving judges authority without departing to choose among a wide range of sanctions.

These proposals are but a sketch. A sentencing commission staff document explaining all the choices made in such a proposed grid, and the considerations for and against each, might be fifty pages long. Four general observations might, however, be made.

First, it potentially applies to all guidelines systems, even those like Florida's, Ohio's, and Delaware's that do not use a grid. The absence of grids in such jurisdictions is entirely cosmetic. To help overcome negative judicial stereotypes about guidelines and "sentencing by mathematics," Delaware's Sentencing Accountability Commission promulgated its guidelines in narrative form: the normal sentence for offense *X* should be *Y*. This is much less efficient than a grid because it requires many pages of text, but with a few days' work an analyst could start from the statements and collapse their content into a grid. Conversely, the contents of North Carolina's grid, including its intermediate sanctions elements, could be expressed in a lengthy narrative manual. Except in this paragraph, I discuss grids but always with the assumption that readers understand that grids, though an efficient way to organize and display information, are not essential.

Second, in order to maintain norms of proportionality, guideline cells in each zone could specify maximum durations or amounts for sanctions authorized in each cell, and these could vary with offense seriousness or extent of criminal history. The cells could also specify maximum aggregate penalties, including back-up sanctions.

Third, grids containing more than four zones could be particularly useful in setting back-up sanctions when offenders breach conditions of their sentences. Often today, judges faced with an offender breaching conditions of a nonincarcerative penalty believe their only choices are, in effect, to ignore the breach or to lock up the offender. Under a six-zones-of-discretion system, however, depending on the se-

riousness of the breach, a judge could punish condition breaches by a zone 2 offender by imposing sentences authorized by zones 3–6. Policy statements could provide guidance to judges on the details of revocation and resentencing to a higher zone's sanctions. Delaware's five sanction levels are used in this way.

Fourth, the preceding few paragraphs mention confinement only in reference to the top zone. In practice, both North Carolina and Pennsylvania authorize confinement as an alternative to other sanctions in a large majority of the cells in their guidelines. This undermines the abstract notion of proportionality in a continuum of sanctions and the mechanism of zones of discretion. In many jurisdictions, however, the availability of confinement as an authorized penalty for most crimes may be politically necessary. This could be achieved by permitting judges to depart from guidelines in which confinement is not presumptively applicable, giving reasons why they are doing so. Even if departure authority is not enough, because policy makers want the availability of confinement to be evident on the face of the guidelines grid, many concerns about proportionality and predictability can be addressed by means of categorical exceptions and presumptions. For example, cells could authorize both confinement and nonconfinement sanctions, but subject to a least restrictive appropriate punishment presumption, that would require judges to provide reasons for imposing confinement (these could be made appealable, depending on how strong policy makers want the presumption to be).

b. *The Guidelines Should Include Dispositive Presumptions.* A significant limitation of the zones of discretion approach adopted by North Carolina and Pennsylvania is that judges are given little guidance in choosing among types of sanctions authorized in various zones. Many cells in Pennsylvania's level 2, for example, allow judges to select among restorative (least severe), intermediate, and short confinement options. In level 3, judges choose among any intermediate sanction and prison or jail terms.

Some policy guidance could be given by means of presumptions. One possibility, mentioned earlier, is to adopt a least restrictive alternative presumption and to establish policies that order sanctions in terms of restrictiveness. One possible ordering might be unsupervised probation, probation, small fines, community service, large fines, intensive supervision, house arrest, partial or intermittent confinement (day-reporting centers, halfway houses, night or weekend jail con-

finement), and total confinement. Judges might be directed to impose the least restrictive sanction authorized in the applicable cell or to explain why another sanction was chosen and why each less restrictive option was deemed inappropriate.

A second, related, possibility is to adopt a series of offender- or offense-specific dispositive presumptions for choosing among sanctions authorized in the applicable cell. The following are illustrative possibilities.

1. Nonviolent property offenders who are not drug dependent should ordinarily be sentenced to standard probation, community service, or fines (separately or in combination) if those sentences are authorized in the applicable cell.

2. Drug-dependent property, drug, and minor violent (e.g., robberies not involving weapons or injuries) offenders should ordinarily be required to participate in drug treatment (outpatient or residential, depending on their drug-use history) and, to the extent feasible, should also be sentenced as if they were not drug-dependent.

3. Persons convicted of crimes involving gratuitous infliction of violence (that is, beyond that otherwise inherent in their crimes) should ordinarily be sentenced to confinement.

4. Offenders who are primary care or income providers to their families should ordinarily be sentenced to a community penalty that will permit them to continue in those roles; any confinement required should be partial or intermittent.

A sentencing commission might adopt a dozen such dispositive presumptions. Their cumulative effect would be to provide guidance to judges in choosing among authorized sanctions. The dispositive presumptions would interact with the least restrictive alternative presumption. For example, for a drug-dependent person convicted of robbery not involving guns or injuries, the drug-dependency presumption would override the least-restrictive-alternative presumption and might, depending on the circumstances, justify intensive supervision with outpatient drug treatment or inpatient drug treatment.

Three sets of issues warrant mention. First, a cynic would argue that a series of presumptions like these would be mere boilerplate that would either be ignored by judges or invoked disingenuously by rote. If that is true, dispositive presumptions would add nothing useful, but they would do no harm. More importantly, however, that view is too cynical. Judges are sworn to uphold the law and are accustomed to

working with evidentiary and probative presumptions. Most conscientious judges would take such presumptions seriously, especially if they comported with widely shared views about meaningful differences between cases. Even if only some judges took the presumptions seriously, the overall effect would be to make sentencing more consistent and predictable.

Second, an observer might suggest that, if greater consistency in use of intermediate sanctions is a good thing, a series of dispositive presumptions would leave too much discretion in the hands of judges. From that perspective, guidelines systems should become much more detailed and set clear rules tying offenders and particular guideline cells to particular sanctions. The difficulties with this are that we know from the federal guidelines experience that judges deeply dislike and actively resist guidelines that they believe are too rigid and detailed (M. Tonry 1996, chap. 3). Even were it feasible to devise highly detailed guidelines for intermediate sanctions, they would likely be even more detailed than the federal guidelines (which mostly involve confinement) and provoke similarly negative reactions from judges and others.

Third, such presumptions would authorize imposition of different kinds of punishments on "like-situated" offenders, which would violate just deserts concerns that sentencing should be tied only or primarily to the severity of the crime. This is true. To people who are persuaded by the purposes of and at sentencing distinction, it will be unimportant; the distinction is premised on the assumption that many or most judges believe that both the offense and the offender's ethically relevant circumstances are relevant sentencing considerations.

c. *Guidelines Should Authorize Judges to Declare and Be Guided by the Relevant Purposes at Sentencing in Every Case.* This concept provides a rationale for the use of dispositive presumptions. Whether there are three, six, or ten zones of discretion, for all but the most and least serious offenses judges would often be able to choose among generically different penalties.

Whether a particular penalty is appropriate often depends on the offender's characteristics. For crimes of comparable severity, falling in the same offense-severity level of a guidelines grid, but of different character, noncustodial penalties may be variously appropriate.

1. For a drug-dependent shoplifter or burglar or a drug dealer, prevention of future crimes and rehabilitation may be the most important

purposes at sentencing; compulsory drug treatment (residential or outpatient backed up by intensive supervision, depending on the offender's drug problem and prior treatment experience) might be the optimal primary sentence with restitution or community service as an adjunct.

2. For a bank-teller embezzler, retribution and general deterrence may be predominant purposes at sentencing, and restitution and community service or a fine the optimal sentences.

3. For the perpetrator of a commercial fraud, retribution and general deterrence may be the predominant purposes and restitution, stigmatizing community service, and a very substantial fine the optimal sentence.

4. For an employed blue-collar head of family who has committed a serious assault while intoxicated, retribution and deterrence may be the predominant purposes and a substantial fine and nighttime and weekend confinement the optimal sentence, thereby permitting him to continue to work and support his family.

5. For a third-time street mugger, deterrence and incapacitation may be the predominant purposes, and a short period of confinement followed by intensive supervision the optimal sentence.

Current guidelines systems provide no guidance to judges in discriminating among different offenders falling in the same guidelines categories. A purposes-at-sentencing approach would provide a framework within which judges could work, and their statements of governing purposes and their relation to the sentence imposed would enable observers to understand the judge's reasoning. There is a reasonable chance that greater consistency in sentences would result.

d. *Guidelines Should Establish Policies concerning Categorical Exceptions.* Some types of offenders have distinctive characteristics or present distinctive challenges that may justify having every case decided on its individual merits. Policies governing such offenders are typically permissive rather than presumptive. They authorize but do not direct the judge to treat defined categories of offenders as eligible for exceptional treatment.

First offenders are one example. Washington's first-offender exception authorizes judges to disregard the applicable guidelines and impose some other, usually less intrusive or burdensome, sentence. Sometimes this may be because the offense seems out of character and unlikely to be repeated, and the offender a fundamentally law-abiding

person. Sometimes it may be because the offense occurred under circumstances of unusual stress or emotionality. Sometimes it may be because the defendant's family would suffer unduly were he incarcerated. Whatever the reasons, first offenders often provoke compassion from judges and prosecutors; a permissive exception would allow them openly to treat the case as special rather than, as often happens, do so surreptitiously.

Intrafamilial sex offenders are another example. Because such offenses often involve psychopathology, because a prison sentence will break up the family, possibly leaving the victim feeling guilt-ridden for having done so, and because such conditions are sometimes successfully treated, judges will often be more interested in treatment and family preservation than in deterrence and retribution. Yet guidelines often set lengthy presumptive prison sentences for sex offenses. Creating a permissive exception allows judges openly to impose what seem to them to be just and appropriate sentences.

There is partial overlap between permissive exceptions and both the purposes at sentencing notion and creation of dispositive presumptions. The purposes-at-sentencing notion, however, deals with judges' discretion as bounded by applicable guidelines cells and zones. Permissive exceptions are broader and apply throughout the guidelines system. Permissive exceptions and dispositional presumptions differ with their literal meanings. Exceptions are permissive; they authorize but do not direct judges to treat cases exceptionally. Presumptions do direct judges to treat cases in a particular way; judges who choose to do otherwise must offer convincing reasons for why they did so.

III. Conclusion

Together, the suggestions offered in this essay for incorporating intermediate sanctions into sentencing guidelines may appear to constitute a system of bewildering complexity, but that is a misimpression. Each of the suggestions is simple. Because they move beyond current practice and are discussed in close succession, they appear more complicated than they are. Singly or together they constitute modest incremental steps toward creating comprehensive sentencing systems that incorporate confinement and nonconfinement sanctions and attempt to achieve reasonable consistency in sentencing while allowing judges to take account of meaningful differences between cases.

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