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# Reforming Criminal Sentencing in Wyoming

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# COMMENTS

## Reforming Criminal Sentencing in Wyoming

Wyoming Supreme Court Justice Rose has recently stated that the court is "in the throes of attempting to delineate sentencing standards."[1] Currently there are no sentencing standards in Wyoming other than the "standards" which can be gleaned from the supreme court's decisions which deal with sentencing.[2] An analysis of these decisions, however, reveals that they fail to give any clear guidance to the lower courts. Justice Rose is correct when he states that Wyoming needs sentencing standards. Without standards, disparity in sentencing decisions has been, and will continue to be, a problem in Wyoming.[3] Without standards, the state does not fully achieve its sentencing goals.

The supreme court should delineate sentencing standards. A clear set of sentencing standards would help to achieve the goals of sentencing and would also reduce disparity. The supreme court could best delineate sentencing standards by adopting mandatory judicial guidelines. Such guidelines would structure and limit, but would not eliminate, the discretion currently exercised by sentencing judges in Wyoming.

The goals of sentencing have changed throughout the past two centuries. In the period following the American revolution, legal sanctions were usually applied uniformly to the guilty, without regard to aggravating or mitigating factors. Little individualization was permitted. Individualization later became an important aspect of sentencing. In order to help achieve the goal of individualization states looked to indeterminate sentencing. By 1922 thirty-seven states had adopted some form of indeterminate sentencing.[4] Indeterminate sentencing is a form of sentencing in which a definite term is not fixed by the court but is left to the determination of penal authorities within the minimum and maximum period fixed by the court.[5] Indeterminate sentencing is the dominant sentencing structure in the United States today.[6]

The indeterminate sentence is the result of the shifting policy toward individualizing sentencing. This shift was a result of the increasing emphasis on rehabilitation as a primary goal of criminal sentencing. The indefinite term is an important mechanism to encourage inmate participa-

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1. Robinson v. State, 678 P.2d 374, 376 (Wyo. 1984).
2. The Wyoming Supreme Court will review any sentence imposed under an "abuse of discretion" standard. *See infra* text accompanying notes 27-44.
3. Roberts, *The Changing Structure of Criminal Sentencing*, 18 LAND & WATER L. REV. 592 (1983).
4. THE COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 3-5 (1976). [hereinafter cited as DEFINITE SENTENCING].
5. BLACK'S LAW DICTIONARY 694 (5th ed. 1979).
6. Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT (Twentieth Century Fund Task Force on Criminal Sentencing 1976).

tion in treatment programs because the length of imprisonment is determined by the inmate's responsiveness to treatment programs.[7]

Wyoming's sentencing structure is based on the indeterminate sentence.[8] Not only do the Wyoming statutes provide for indeterminate sentences, they also provide for very large ranges for some crimes. For example, first degree sexual assualt is punishable by imprisonment for not less than five nor more than fifty years.[9] In addition, the range of actual imprisonment can be varied to a greater extent by placing the offender on probation.[10] Thus, in Wyoming a person who commits first degree sexual assualt may be sentenced to as little as five years of probation or to as much as fifty years in prison.

What guidelines are available to help the sentencing judge in Wyoming determine the appropriate penalty for a particular offender? The only real guidance is contained in the Wyoming Constitution[11] which proclaims that the penal code shall be framed on the humane principles of reformation and prevention.[12] Within these broad parameters a judge can rely on the general aims of sentencing in order to determine an appropriate sentence.

## SENTENCING GOALS

The general body of criminology literature reveals that sentencing is aimed at accomplishing four different goals: retribution, incapacitation, deterrence, and rehabilitation.[13] The Wyoming Supreme Court has held that all four of these goals are legitimate objectives under the Wyoming Constitution.[14]

Retribution or punishment is a sentencing goal which has received increased attention in recent years.[15] Retribution is not based on personal vengeance and revenge but is society extracting the threatened penalty for failure to comply with its rules.[16] An example of the recent emphasis on retribution is California's penal code, which has explicitly stated that punishment is the primary goal of its Determinate Sentencing Law.[17]

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7. DEFINITE SENTENCING, *supra* note 4, at 7. In Wyoming the indeterminate sentencing structure has some features which modify the above statement to some extent. *See* Roberts, *supra* note 3.

8. WYO. STAT. § 7-13-201 (1977) provides in part: "[T]he court imposing the sentence shall not fix a definite term of imprisonment. . . ."

9. WYO. STAT. § 6-2-306(a)(i) (June, 1983 replacement).

10. WYO. STAT. § 7-13-301 (1977) authorizes the court to grant probation except for crimes punishable by death or life imprisonment. *See infra* text accompanying notes 97-116. The Wyoming Supreme Court has noted that probation is constructive confinement. *See infra* text accompanying notes 55-57.

11. Roberts, *supra* note 3, at 607.

12. WYO. CONST. art. 1, § 15.

13. DEFINITE SENTENCING, *supra* note 4, at 11.

14. *See infra* text accompanying notes 95-96.

15. *See, e.g.*, Bayley, *Good Intentions Gone Awry - A Proposal for Fundamental Changes in Criminal Sentencing*, 51 WASH. L. REV. 529 (1976).

16. *Id.* at 550.

17. CAL. PENAL CODE § 1170(a)(i) (West Supp. 1982). For an analysis of California's system see Von Hirsch & Mueller, *California's Determinate Sentencing Law: An Analysis of its Structure*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 253 (1984).

A second major goal of sentencing is deterrence. Deterrence consists of both specific and general deterrence. Specific deterrence is achieved by the actual punishment of the individual. General deterrence is not achieved by punishing an individual, but is achieved through the threat of punishment to all members of society.[18] The certainty, and not necessarily the severity, of punishment is the necessary attribute of a sentencing system with deterrence as its goal.[19]

Another goal of sentencing is incapacitation. Through incapacitation the primary objective of reducing the frequency and/or severity of criminal acts is achieved by simply keeping potential actors isolated from society. Incapacitation is based on the premise that an offender will commit another crime after he is released.[20]

Finally, the most important goal of sentencing in many penal codes is rehabilitation. Rehabilitation is based on the premise that the offender's behavior has been shaped by social forces beyond his control and sanctions should be applied as they are needed to modify this behavior.[21] Indeterminate sentencing has been viewed as vital to the goal of rehabilitation.[22]

It is important to note the goals of sentencing because part of the difficulty in sentencing decisions is that these goals often conflict.[23] For example, there is an inherent conflict between general deterrence and rehabilitation. General deterrence depends on certain punishment. A sentence imposed solely under the goal of rehabilitation is based on factors such as family background, job training, education, economic stability, and alcohol or drug problems.[24] Sentences which are based on such factors cannot deliver the clear message, needed for general deterrence, that violations of the rules will be met with certain sanction.

In addition to identifying the goals of the sentencing decision, it is important to prioritize these goals so, when they do conflict, some clear policy will favor one over the other. If any sense is to be made out of sentences, the judge must have clear goals and objectives.[25]

Different priorities can be placed on these goals by the individual judge as he makes each sentencing decision. This allows priority to be placed on different goals in different cases. The problem with allowing ad hoc

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18. Bayley, *supra* note 15, at 544.

19. *Id.* at 547-48, *citing* Andenaes, *General Prevention Revisited: Research and Policy Implications,* 66 J. CRIM. L. & CRIMINOLOGY 338, 347 (1975).

20. Bayley, *supra* note 15, at 549. Isolation is more accurate because inmates often retain the capacity to commit crimes upon one another and are thus not incapacitated but are nevertheless isolated from most of society. Dershowitz, *supra* note 6, at 131.

21. Dershowitz, *supra* note 6, at 73-74.

22. The goal of rehabilitation has come under considerable attack in recent years and as a result some states have emphasized other goals in their penal codes. *See, e.g.,* CAL. PENAL CODE § 1170(a)(i) (West Supp. 1982); MINN. STAT. § 244.09, subdiv. 5 (Supp. 1984).

23. S. Ringold, *A Judge's Personal Perspective on Criminal Sentencing,* 51 WASH. L. REV. 631 (1976).

24. Bayley, *supra* note 15, at 536.

25. S. Ringold, *supra* note 23, at 635.

determinations is that no overall policy controls each decision. The goal (or most important goal) of the penal code is determined by one man every time a sentence is imposed. We believe that a system of guidelines can be developed which takes into consideration these various goals. Guidelines would be based upon clearly established priorities and would eliminate sentences based on the perceived need to emphasize a certain goal in an individual case. Although this would be a restraint on the ability of the courts to emphasize a different goal in different cases, we believe this restraint is needed to achieve some equality and rationality in the state's overall sentencing system. Finally, it should be noted that the legislature has mandated that in some circumstances one goal of sentencing must take priority. For example, mandatory lengthy sentences for the habitual criminal means that the legislature has placed priority on incapacitation.

Although the Wyoming Legislature has indicated that the goal of incapacitation must control in the case of habitual offenders, the legislature has not provided the judiciary with the guidance needed to determine which goals the penal code is intended to secure in most cases. The Wyoming Constitution also provides little insight since the Wyoming Supreme Court has held that a sentence aimed at achieving rehabilitation, punishment, deterrence, or removal (incapacitation) is within the constitutional parameters of reformation and prevention.[26]

The legislature and the constitution have given little guidance to the sentencing judge in Wyoming. Guidance could be given by the Wyoming Supreme Court through the supreme court's review of sentences. The following section analyzes supreme court review of sentencing decisions and looks for the "guidance" that may be gleaned from the supreme court's opinions.

## APPELLATE REVIEW OF SENTENCES

Under the common law rule, a criminal sentence is not subject to appellate review if it is within the limits set by the legislature.[27] The Wyoming Supreme Court claims that Wyoming does not follow the common law rule.[28] The Wyoming rule allows the state supreme court to modify a legal sentence if the trial court abused its discretion in imposing it.[29] This rule was set forth in *State v. Sorrentino*.[30] According to *Sorrentino*, the source of the Wyoming Supreme Court's authority to alter a trial court's sentencing decision is article 5, section 2 of the Wyoming Constitution, which establishes the supreme court's general appellate jurisdiction in civil and criminal cases and its general superintending control over

26. Wright v. State, 670 P.2d 1090, 1093 (Wyo. 1983).
27. *Id.* at 1091.
28. *Id.*
29. *Id.* at 1092.
30. 36 Wyo. 111, 118-19, 253 P. 14, 15-16 (1927).

all inferior courts.[31] Justice Blume, writing the opinion in *Sorrentino*, reasoned that this constitutional provision clearly granted the Wyoming Supreme Court the right to review criminal cases, including the sentence.[32] Since *Sorrentino*, the question of sentencing review has come before the Wyoming Supreme Court repeatedly.[33] Despite the persistence of this question, a trial court's discretion in sentencing remains unclear.[34]

Before analyzing the concept of "abuse of discretion," the meaning of "discretion" should be clarified. Discretion is the legal authority to act officially in certain circumstances according to the dictates of one's own judgment and conscience, but its exercise is bounded by the rules of law and must not be arbitrary or capricious.[35] Judicial discretion in sentencing is the power of the trial judge to exercise reasonably his independent judgment in fixing punishment within limits prescribed by the legislature. The legal limits within which the judge may exercise his discretion define the scope of that discretion. Outside of those limits, the court has no discretion.

Conceptually, abuse of discretion in sentencing is distinguishable from unlawful judicial action which exceeds the scope of sentencing discretion. The court cannot "abuse discretion" it does not have. A purported exercise of judicial discretion which exceeds the scope of the trial court's authority, such as imposing a penalty in excess of the statutory maximum, is an error of law, as opposed to an abuse of discretion.[36] Apparently then, sentencing discretion is abused when its exercise is legal in scope but is otherwise arbitrary, capricious, or unreasonable under the circumstances.

In *Martinez v. State*, the Wyoming Supreme Court defined abuse of discretion by a trial court as an action taken "in a manner which exceeds the bounds of reason under the circumstances."[37] By itself, this part of the definition suggests that the trial court's exercise of discretion may be legal in scope but unreasonable, arbitrary, or capricious under the circumstances. However, the supreme court blurred this distinction by going on to describe abuse of discretion as "an *error of law* committed by the court under the circumstances."[38] This is confusing. If judicial discretion is bounded by the rules of law, then an error of law is outside the scope of judicial discretion. Adherence to the law is not discretionary. For example, in *Hicklin v. State*,[39] the trial court required a probation bond

31. WYO. CONST. art. 5, § 2 provides that "[t]he supreme court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."
32. Sorrentino v. State, 36 Wyo. 111, 118-19, 253 P. 14, 15 (1927).
33. *Wright*, 670 P.2d at 1092.
34. *Id.*
35. BLACK'S LAW DICTIONARY 419 (5th ed. 1979).
36. Hicklin v. State, 535 P.2d 743, 754 (Wyo. 1975).
37. 611 P.2d 831, 838 (Wyo. 1980).
38. *Id.*
39. 535 P.2d 743 (Wyo. 1975).

of fifty thousand dollars, although the maximum fine for the particular conviction was only one thousand dollars. The Wyoming Supreme Court concluded that while the trial court had acted in excess of its punitive powers (clearly an error of law), in doing so it was not "abusing its discretion" because there is no discretion to impose an illegal sentence.[40]

The Wyoming Supreme Court claims that it can review a "legal" sentence for abuse of discretion.[41] But the supreme court has also equated abuse of discretion with an error of law committed by the court. This ambiguity apparently prompted Justice Thomas to point out that a sentence within the statutory limits "cannot be considered an 'error of law committed by the court under the circumstances'."[42] Evidently, if a sentence is "legal" when it comes within the statutory limits, then the error of law to which the court refers must not be the sentence itself but rather the procedure followed by the court in arriving at the particular sentence. In other words, while a sentence within the statutory limits may be legal, the trial court may have committed an error of *procedural* law in making its sentencing decision. In *Wright v. State,* the Wyoming Supreme Court associated sentencing *procedures* with abuse of discretion.[43] Then, in *Robinson v. State* the supreme court stated that "we will not find discretion to have been abused when we are able to conclude that, in the *sentencing process,* the judge has considered the purposes of sentencing . . . and has applied them to the facts of the case in a reasonable way."[44] The error of law in *Hicklin* involved the sentence imposed rather than the sentencing procedure, hence no abuse of discretion was found.

The substantive law with respect to permissible criminal penalties is clearly spelled out in the statutes. However, except concerning the death penalty,[45] the procedural law or standards of reasonableness to guide the trial court in exercising its sentencing discretion within the substantive statutory limits is less clear.[46] Whether abuse of sentencing discretion is viewed as unreasonableness under the circumstances or an error of law, resistance to a delineation of guidelines for reasonable sentencing within statutory limits is apparently based upon concern that such guidelines will calcify into rigid rules.[47] It is feared that such rules would reduce the scope of the sentencing court's discretion to "sentencing by computer" thereby relegating the sentencing court to a ministerial role.[48]

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40. *Id.* at 754.
41. *Wright,* 670 P.2d at 1092.
42. *Id.* at 1097-98 (Thomas, J., specially concurring).
43. *Id.* at 1092.
44. Robinson v. State, 678 P.2d 374, 377 (Wyo. 1984) (emphasis added).
45. WYO. STAT. §§ 6-2-102 to -103 (June, 1983 replacement); Engberg v. State, 686 P.2d 541, 553-57 (Wyo. 1984). In capital cases the legislature has specified a detailed procedure which must be followed in imposing the sentence and for reviewing the sentence imposed.
46. *Robinson,* 678 P.2d at 376; Taylor v. State, 658 P.2d 1297, 1301 (Wyo. 1983) (Rose, J., specially concurring).
47. Sanchez v. State, 592 P.2d 1130, 1138 (Wyo. 1979).
48. 644 P.2d 172, 180 (Wyo. 1982).

*Scope of Sentencing Discretion*

The power to prescribe punishment for prohibited acts belongs to the legislature.[49] The legislature is free to retain or delegate sentencing discretion when defining and setting punishment.[50] The Wyoming Legislature has vested in the courts authority to impose sentences within the statutory limits[51] and also to suspend execution of all or part of the sentence imposed.[52] This wide discretion to impose a prison term, of any length, within the statutory limits[53] may not, however, encompass authority to sentence a person to the Wyoming State Hospital as part of the *penalty* for criminal activity.[54] Moreover, since probation is "constructive confinement,"[55] the trial court's authority to impose a sentence of probation also comes from the legislature.[56] As with a sentence of actual confinement, the trial court may not impose a sentence of probationary restraints for a period in excess of the maximum term of imprisonment authorized by the statute violated.[57]

In most cases there is a broad range of sentences available under the applicable statutes. Consequently, even within the statutory limits the scope of sentencing discretion is very broad and its exercise is prone to disparity. The Wyoming Supreme Court has conceded that criminal sentencing is a highly subjective matter[58] and that there is more than one view on the appropriate terms of probation.[59] In addition to the statutes, Wyoming case law and the Wyoming Rules of Criminal Procedure further define the scope of sentencing discretion by recognizing the trial court's authority to impose disparate sentences upon co-perpetrators of a crime;[60] to determine whether sentences on two or more counts will be served concurrently or consecutively;[61] to grant or deny credit for time

49. Schuler v. State, 668 P.2d 1333, 1342 (Wyo. 1983).

50. Evans v. State, 655 P.2d 1214, 1224 (Wyo. 1982).

51. WYO. STAT. § 6-10-104 (June, 1983 replacement) provides that "[w]ithin the limits prescribed by law, the court shall determine and fix the punishment for any felony or misdemeanor, whether the punishment consists of imprisonment, or fine, or both."

52. WYO. STAT. § 7-13-301 (1977) provides that "[a]fter conviction or plea of guilty for any offense, except crimes punishable by death or life imprisonment, the court may suspend the imposition of sentence, or may suspend the execution of all or a part of a sentence and may also place the defendant on probation or may impose a fine applicable to the offense and also place the defendant on probation."

53. Jones v. State, 602 P.2d 378, 380 (Wyo. 1979).

54. Dean v. State, 668 P.2d 639, 646 (Wyo. 1983).

55. Hicklin v. State, 535 P.2d 742, 753 (Wyo. 1975).

56. *Id.* at 752; WYO. STAT. § 7-13-301 (1977).

57. *Hicklin*, 535 P.2d at 753-54.

58. Taylor v. State, 658 P.2d 1297, 1298 (Wyo. 1975).

59. *Hicklin*, 535 P.2d at 752.

60. Beaulieu v. State, 608 P.2d 275, 276 (Wyo. 1980); Daellenbach v. State, 562 P.2d 679, 683 (Wyo. 1977). Granting mercy to one accomplice in a capital crime does not prevent sentencing another to death. Osborn v. State, 672 P.2d 777, 793 (Wyo. 1983). Neither the Fourteenth Amendment to the United States Constitution nor article 1, section 2 of the Wyoming Constitution, which states that "[i]n their inherent right to life, liberty, and the pursuit of happiness, all members of the human race are equal," requires exact equality in the sentencing of co-defendants. Daniel v. State, 644 P.2d 172, 180 (Wyo. 1982).

61. Eaton v. State, 660 P.2d 803, 806 (Wyo. 1983).

served in pre-sentence custody when the pre-sentence custody is not due to the defendant's indigency (e.g., violation of a bail agreement), and the sum of the time spent in pre-sentence custody plus the sentence does not exceed the maximum allowable sentence;[62] to grant or deny reduction of a sentence already imposed, notwithstanding the defendant's excellent record at the Wyoming State Penitentiary;[63] to grant or deny probation,[64] except for offenses punishable by death or a minimum of life imprisonment;[65] to revoke probation previously granted;[66] to impose conditions upon probation or suspension of sentence,[67] but not upon *post-* incarceration parole;[68] to consider information that would not be admissible under the Wyoming Rules of Evidence for the determination of guilt;[69] to follow or deviate from the American Bar Association Standards for Criminal Justice;[70] to accept or reject the recommendations for sentencing in a pre-sentence report;[71] to not explain its reasons for imposing a particular sentence or denying probation.[72]

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62. Jones v. State, 602 P.2d 378, 380-81 (Wyo. 1979).

63. Montez v. State, 592 P.2d 1153, 1154 (Wyo. 1979). However, the trial court must exercise its discretion to reduce a sentence within a period of time provided by Rule 36 of the Wyoming Rules of Criminal Procedure. Wright v. State, 670 P.2d 1090, 1094 (Wyo. 1983).

64. Minchew v. State, 685 P.2d 30, 33 (Wyo. 1984).

65. WYO. STAT. § 7-13-301 (1977); Peterson v. State, 586 P.2d 144, 156-57 (Wyo. 1978). Probation is not available for a habitual criminal conviction under WYO. STAT. § 6-1-110 (June, 1983 replacement), which carries a mandatory life sentence. Schuler v. State, 668 P.2d 1333, 1342 (Wyo. 1983).

66. Buck v. State, 603 P.2d 878, 879 (Wyo. 1979).

67. WYO. STAT. § 7-13-303 (Supp. 1984) provides that "(a) [t]he court shall determine and may, by order duly entered, impose in its discretion, and may at any time modify any condition of probation or suspension of trial or sentence." WYO. STAT. § 7-13-308 (Supp. 1984) directs that "[i]f the sentencing court orders suspended imposition of sentence, suspended sentence or probation, the court *shall* consider as a condition that the defendant . . . promptly prepare a plan of restitution." (emphasis added).

68. Sorenson v. State, 604 P.2d 1031, 1038 & n.6 (Wyo. 1979).

69. Wright v. State, 670 P.2d 1090, 1096 (Wyo. 1983). Even mere *allegations* of "offenses similar to that charged against the defendant" may properly be considered by the trial court in exercising its sentencing discretion. Cavanaugh v. State, 505 P.2d 311, 312 (Wyo. 1973). Rule 33(c)(2) of the Wyoming Rules of Criminal Procedure indicates that information may properly be considered if it is "helpful in imposing sentence or in granting probation." Similarly, the trial court is "not categorically barred" from considering hearsay in determining whether or not probation should be revoked, although the prior finding of a probation violation "must be based on verified facts." Mason v. State, 631 P.2d 1051, 1055 (Wyo. 1981).

70. Sanchez v. State, 592 P.2d 1130, 1137-38 (Wyo. 1979); Hanson v. State, 590 P.2d 832, 835 (Wyo. 1979).

71. Wright v. State, 670 P.2d 1090, 1095 (Wyo. 1983). In *Wright* the trial court did not abuse its discretion by deciding that the seriousness of the offense of unlawful delivery of a controlled substance, albeit a small amount, made the defendant "not a fit subject for probation," despite the facts that he was twenty years old, a first time felony offender, an honor student at Sheridan College, and the probation agent recommended that he be given probation. *Id.* at 1091, 1094-95. *See supra* text accompanying notes 91-94.

72. *Wright*, 670 P.2d at 1095; Kenney v. State, 605 P.2d 811, 812 (Wyo. 1980). The Wyoming Supreme Court will affirm a trial judge "on any legal ground appearing in the record." Jones v. State, 602 P.2d 378, 382 (Wyo. 1979). While there is no statutory or judicial requirement for the trial judge to enter into the record his reasons for revoking probation, Buck v. State, 603 P.2d 878, 880 (Wyo. 1979), Rule 33(f) of the Wyoming Rules of Criminal Procedure requires the court to apprise the defendant of the grounds on which the revocation of his probation is proposed.

*Abuse of Sentencing Discretion*

The Wyoming cases addressing the issue of abuse of discretion in sentencing generally focus upon whether or not the trial court *considered* certain factors in making its sentencing decision. Review based on whether the appropriate factors were considered is consistent with the concept of abuse of sentencing discretion as unreasonableness under the circumstances or an error of procedural law. Accordingly, an exercise of sentencing discretion which is legal in scope might still be arbitrary, capricious, or unreasonable if certain pertinent factors were not considered in the process. The Wyoming Supreme Court has indicated some factors which the trial court should consider in order to exercise its sentencing discretion in a reasonable manner.[73]

The supreme court has stated that in exercising his sentencing discretion, the trial judge should consider all mitigating and aggravating circumstances.[74] Considering mitigating and aggravating circumstances is necessary to effectuate the policy of individualized sentencing that is implicit both in Wyoming's statutory system of indeterminate sentencing[75] and in the vesting of broad sentencing discretion in the trial judge.[76]

Factors which can help inform the sentencing judge are the crime itself, its surrounding circumstances, and the character of the criminal.[77] When considering the crime, the court may include its seriousness, as reflected in the severity of punishment allocated by the legislature,[78] and its violent or non-violent nature.[79] The circumstances surrounding the crime may include the relative reprehensibility of the motive.[80] The character of the criminal includes both positive and negative aspects of her background and should also be considered.[81] The defendant's rehabilitative needs and potential to be a productive member of society,[82] family background, education, intelligence, employment history, age, training, criminal and delinquent record, attitude,[83] financial condition,[84] tendencies toward violence,[85] and possibly even mere allegations of offenses similar to that charged against the defendant[86] are factors that might properly have a bearing upon the sentence.

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73. *Wright*, 670 P.2d at 1092.
74. Daellenbach v. State, 562 P.2d 679, 683 (Wyo. 1977).
75. Daniel v. State, 644 P.2d 172, 178-79 (Wyo. 1982). WYO. STAT. § 7-13-201 (1977) provides that "[w]hen a convict is sentenced to the state penitentiary, otherwise than for life, for an offense or crime, the court imposing the sentence shall not fix a definite term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in said prison."
76. Daniel v. State, 644 P.2d 172, 178 (Wyo. 1982).
77. *Wright*, 670 P.2d at 1092.
78. *Id.*
79. *Id.* at 1092-93.
80. *Id.* at 1093.
81. Daniel v. State, 644 P.2d 172, 180 (Wyo. 1982).
82. *Id.*
83. *Wright*, 670 P.2d at 1093.
84. WYO. R. CRIM. P. 33(c)(2).
85. Hicklin v. State, 535 P.2d 743, 751 (Wyo. 1975).
86. Cavanaugh v. State, 505 P.2d 311, 312 (Wyo. 1973).

In order to promote consideration of these factors, rule 33(a) of the Wyoming Rules of Criminal Procedure directs that, before imposing sentence, the court shall address the defendant personally and ask him if he wishes to present any information in mitigation of the punishment.[87] In addition, rule 33(c)(2) provides that, unless waived, a pre-sentence report shall contain such information as may be helpful in imposing sentence or granting probation.[88] Although, as previously noted, acceptance of the recommendation in a pre-sentence report is discretionary,[89] the court may be abusing its discretion if it fails to consider information contained in the report.[90]

While the supreme court has indicated that the trial court should consider all of the above factors, the supreme court has not been true to its holdings. For example, in *Smith v. State*,[91] the trial judge imposed a sentence of twenty to forty years for a second degree murder. The defendant appealed the sentence. The Wyoming Supreme Court noted that while forty years is a long time, the defendant could have received a life sentence and that in *Jaramillo v. State*,[92] a life sentence for the same offense was upheld.[93] The supreme court failed to note that in Smith's case a forty year sentence may have been an abuse of discretion while a life sentence for Jaramillo may have been justified. The court's sole reliance on the length of the two sentences coupled with its failure to note aggravating and mitigating circumstances seems to be at odds with its pronouncement in *Daellenbach v. State*,[94] that aggravating and mitigating factors should be considered by the sentencing judge.

The Wyoming Supreme Court has also stated that the trial court should consider the philosophy and purposes of sentencing in making its sentencing decision.[95] The Wyoming Supreme Court has recognized four purposes as being in accord with article 1, section 15 of the Wyoming Constitution, which directs that the "penal code shall be framed on the humane principles of reformation and prevention." The four purposes are: "(1) rehabilitation, (2) punishment (specific deterrence and retribution), (3) example to others (general deterrence), and (4) removal from society (incapacitation or protection of the public)."[96]

Although the supreme court has held that any of these four goals is within the constitutional parameters, it has not stated that any one goal is more important than any of the others. Nor has the court stated that

87. Hicklin v. State, 535 P.2d 743, 750 (Wyo. 1975).

88. Daellenbach v. State, 562 P.2d 679, 683 (Wyo. 1977); Dean v. State, 668 P.2d 639, 645 (Wyo. 1983).

89. *Wright*, 670 P.2d at 1095. *See supra* note 71.

90. *Wright*, 670 P.2d at 1095.

91. 564 P.2d 1194 (Wyo. 1977).

92. 517 P.2d 490 (Wyo. 1974).

93. Both Smith and Jaramillo were convicted under WYO. STAT. § 6-55 (1957) which provided for a range of twenty years to life for the offense of second degree murder.

94. 562 P.2d 679, 683 (Wyo. 1977).

95. *Id.*; Robinson v. State, 678 P.2d 374, 377 (Wyo. 1984).

96. *Wright*, 670 P.2d at 1093.

all of the goals should be sought in one sentencing decision. Without any explicit prioritization, the sentencing court is free to emphasize any goal in any individual's case. This allows different judges to impose different sentences in identical cases only because each judge felt that a different goal needed to be emphasized. This creates problems of disparity and difficulty in achieving the goals of the penal code. These problems are discussed at greater length below.

*Probation and Abuse of Discretion*

The supreme court has also mandated that certain procedures must be followed when an offender has applied for probation in a case in which probation is permissible.[97] If he does, the trial court must at least consider the application.[98] Failure to consider a defendant's application for probation is an abuse of discretion[99] because, although the trial judge is not required to spell out her reasons for denying probation,[100] the denial "must not be based upon mere whim or caprice nor upon any ground not sanctioned by the law."[101]

To further the policy of individualizing criminal justice,[102] the Wyoming Supreme Court has identified some factors of particular concern in granting or denying probation. The trial court should consider the defendant's rehabilitative needs,[103] the seriousness assigned to the offense by the legislature,[104] and the possibility that releasing the defendant on probation would unduly depreciate the seriousness of the offense[105] or endanger the public.[106] For example, in *Taylor v. State,* the sentencing court properly considered whether these ends would be served by granting probation to a defendant convicted of an offense (DWUI) related to his uncured drinking problem when the defendant had failed to seek proper treatment.[107]

Although the seriousness of an offense may be considered in deciding whether to grant or deny probation,[108] generalizations about types of offenses alone are not a proper basis for deciding *not to consider* probation in the first place.[109] Similarly, general public sentiment against the type of crime (e.g., rape) for which a particular defendant was convicted, should

97. WYO. STAT. § 7-13-301 (1977) authorizes the trial court to grant probation except for "crimes punishable by death or life imprisonment." In Peterson v. State, 586 P.2d 144, 156-57 (Wyo. 1978), the supreme court read the statute to mean that probation was unavailable only for crimes punishable by death or a *minimum* of life imprisonment. *See supra* note 65 and accompanying text.

98. *Wright* 670 P.2d at 1094.

99. Sanchez v. State, 592 P.2d 1130, 1137-38 (Wyo. 1979).

100. *Wright,* 670 P.2d at 1095.

101. *Sanchez,* 592 P.2d at 1137.

102. Peterson v. State, 586 P.2d 144, 157 (Wyo. 1978).

103. Taylor v. State, 658 P.2d 1297, 1300 (Wyo. 1983).

104. *Wright,* 670 P.2d at 1094-95; Eaton v. State, 660 P.2d 803, 806 (Wyo. 1983).

105. *Taylor,* 658 P.2d at 1300.

106. *Id.;* Jones v. State, 602 P.2d 378, 382 (Wyo. 1979).

107. *Taylor,* 658 P.2d at 1300.

108. *Wright,* 670 P.2d at 1095.

109. *Sanchez,* 592 P.2d at 1138.

not play a role in the trial court's decision whether or not to *consider* probation in a particular case.[110]

The Wyoming Supreme Court has indicated that the prior criminal record of a defendant may be a factor properly considered by the trial court in deciding whether to grant or deny probation.[111] However, the Wyoming Supreme Court has also indicated that the American Bar Association Standards of Probation, though not binding, should be taken into account in determining a grant or denial of probation,[112] and according to section 1.3(a) of those standards the probation decision should not turn upon the existence of a prior criminal record.[113]

The revocation of probation calls for a two-stage process. Initially the court must determine whether or not a condition of probation was in fact violated. If there was a violation, the court must then decide whether or not to revoke probation.[114] In making the revocation decision, the court should consider the reasons for imposing the probation conditions that were violated, the nature of the violation, the reasons for the violation,[115] and, possibly, alternatives to revoking probation.[116]

Finally, although Wyoming does not have explicit standards to guide the trial judge in the exercise of his sentencing discretion,[117] other sources of guidance, such as the American Bar Association Standards for Criminal Justice (Sentencing Alternatives, Probation), are available.[118] While it is within the discretion of the trial judge whether or not to follow the A.B.A. Standards in making his sentencing decision, failure at least to consider them may be an abuse of discretion.[119]

*Establishing Abuse of Sentencing Discretion*

The trial court's failure to consider pertinent factors in making its sentencing decision may amount to an abuse of discretion, but this has not been very fertile ground for overturning sentences on appeal. The Wyoming Supreme Court has emphasized its great reluctance to disturb a sentencing decision unless a clear abuse of discretion is shown.[120] The defendant has the burden of establishing an abuse of sentencing discretion.[121] The supreme court has defined abuse of discretion as both unrea-

110. *Id.*
111. Beaulieu v. State, 608 P.2d 275 (Wyo. 1980); WYO. R. CRIM. P. 33(c)(2).
112. *Sanchez,* 592 P.2d at 1138.
113. *Id.*
114. Buck v. State, 603 P.2d 878, 880 (Wyo. 1979).
115. *Id.* at 879.
116. *Id.* at 880.
117. Robinson v. State, 678 P.2d 374, 376 (Wyo. 1984); *Taylor,* 658 P.2d at 1301 (Rose, J., specially concurring).
118. *Sanchez,* 592 P.2d at 1137.
119. *Id.;* Daniel v. State, 644 P.2d 172, 179 (Wyo. 1982).
120. *Taylor,* 658 P.2d at 1298-99.
121. Jahnke v. State, 682 P.2d 991, 1005 (Wyo. 1984). Even if the defendant establishes that the trial court failed to consider pertinent factors in making its decision, the remedy will most likely be a remand to the same court for re-sentencing based upon appropriate considerations. *Sanchez,* 592 P.2d at 1138; Jones v. State, 602 P.2d 378, 383 (Wyo. 1979).

sonableness under the circumstances and an error of law.[122] In addition the court has declared that it will not notice an alleged abuse of discretion unless the defendant cites some precedent or authority to support his allegation.[123]

In *Jahnke v. State,* Jahnke argued that, in the absence of standards under which the fairness of a sentence can be measured, there is no possibility of demonstrating an abuse of discretion.[124] The sentence in question was within the statutory limits, and, as noted earlier, if there was any abuse of discretion it could only have been an error in the sentencing procedure. The Wyoming Supreme Court observed that the trial judge had considered all circumstances surrounding the crime, the character of the appellant, and the relevant sentencing purposes. The court concluded that there had been no abuse of discretion.[125] The supreme court added that the same result would have been reached had the case been reviewed under the standards urged by the appellant.[126]

While the Wyoming Supreme Court may be presently in the throes of attempting to determine sentencing standards,[127] it has regularly managed to find that the trial court sufficiently considered the pertinent factors to affirm their sentencing decisions. The supreme court finds sufficient consideration even though the sentencing judge is not required to enter into the record his reasons for the sentence imposed or the denial of probation.[128] This is not surprising since no particular amount of consideration is required, but only that the pertinent factors be considered "however slightly."[129]

The case law is illustrative. The mere ordering of a pre-sentence report by the trial judge may be enough to satisfy the supreme court on review that mitigating and aggravating circumstances were considered in the sentencing process.[130] A direct statement by the trial judge to reflect that he considered probation is not necessary,[131] nor does the word "probation" even need be mentioned.[132] The supreme court has found evidence that probation was adequately considered merely from the fact that probation was requested and that the pre-sentence report contained a probation plan.[133] This amounts to an assumption that if probation should have been

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If an initial sentence was reversed, the same court may re-sentence the defendant to the same amount of jail time he had received under the first sentence. The defendant also has the burden of presenting persuasive reasons to support any claim that the new sentence was retaliatory or vindictive. *Taylor,* 658 P.2d at 1299.

122. *Wright,* 670 P.2d at 1092.

123. Bentley v. State, 502 P.2d 203, 209 (Wyo. 1972); *Taylor,* 658 P.2d at 1299.

124. 682 P.2d 991, 1008-09 (Wyo. 1984). *See also* Eaton v. State, 660 P.2d 803, 805-06 (Wyo. 1983).

125. Jahnke v. State, 682 P.2d 991, 1009 (Wyo. 1984).

126. *Id.*

127. Robinson v. State, 678 P.2d 374, 376 (Wyo. 1984).

128. Kenney v. State, 605 P.2d 811, 812 (Wyo. 1980).

129. Beaulieu v. State, 608 P.2d 275 (Wyo. 1980).

130. Daellenbach v. State, 562 P.2d 679, 683 (Wyo. 1977).

131. *Kenney,* 605 P.2d at 812.

132. *Beaulieu,* 608 P.2d 275 (Wyo. 1980).

133. *Id.*

considered, then it must have been considered. The supreme court has even affirmed the denial of probation when the record reflected the passage of sufficient time in which the judge *could have* considered his options.[134] Yet the supreme court has stated that the "mere parroting" of acceptable reasons for a sentencing decision is not a substitute for actually considering the pertinent factors.[135]

In *Sanchez v. State* the supreme court did find an abuse of sentencing discretion. The court's holding was based not so much upon the trial court's improper denial of probation as upon the trial court's failure even to consider probation.[136] In *Sanchez,* the sentencing judge commented on his reasons for not considering probation, and from his comments the supreme court found an abuse of sentencing discretion.[137] The comments strongly suggested that the decision *not to consider* probation turned upon generalizations about types of offenses, rather than upon the facts and circumstances of the particular case.[138] Ironically, the supreme court would not have found an abuse of discretion if the judge had simply failed to give any reasons for his probation decision.[139] This situation encourages judges not to state the reasons for their decisions. This may reduce the number of sentences which are overturned but it also "hides" the sentence that was imposed for inappropriate reasons.

## NEED FOR CHANGE

The above section makes it clear that appellate review for abuse of discretion in sentencing in Wyoming is based on such a nebulous concept as to make it practically non-existent. Both Justice Thomas and Justice Rose have concluded that some changes in the current review process are needed, however, they diverge sharply on what those changes are.

Justice Thomas has urged the court to adopt the common law rule and refuse to review a sentence that is within the statutory limits.[140] Justice Rose, on the other hand, believes that the court should continue to review criminal sentences. He has stated, however, that the current law in Wyoming is that only illegal sentences are reviewable.[141] Justice Rose has consistently urged that the court adopt sentencing guidelines in order to facilitate rational sentencing practices and provide a firm basis for appellate review.[142]

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134. *Wright,* 670 P.2d at 1095.
135. Jones v. State, 602 P.2d 378, 382 (Wyo. 1983).
136. 592 P.2d 1130, 1138 (Wyo. 1979). In fact, since the sentencing judge thought he *could not* consider probation, he really did not exercise any discretion. *Id.* at 1137.
137. *Id.* at 1137-38.
138. *Id.* at 1138.
139. *Wright,* 670 P.2d at 1095.
140. *Id.* at 1097 (Thomas, J., specially concurring). Justice Thomas states that the Wyoming Supreme Court has as a matter of practice, adopted this rule of non-review for legal sentences.
141. Daniel v. State, 644 P.2d 172, 188 (Wyo. 1982) (Rose, C.J., specially concurring).
142. *See, e.g.,* Scheikofsky v. State, 636 P.2d 1107, 1115-17 (Wyo. 1981).

Justice Thomas believes that there should be no review of the legal sentence because the trial judge can best evaluate the defendant's characteristics.[143] The importance to Justice Thomas of having the defendant before the sentencer is exemplified by his statements in *Wright v. State*.[144] In *Wright* he stated that such review amounts to adjusting sentences based upon a cold record and that it is not possible to *experience* another individual through a file of papers.[145] Justice Thomas' concern, and a frequently stated policy argument opposing appellate review of sentencing, is that the sentencing judge is in the best position to determine the appropriate sentence.[146] This argument has been criticized for a number of reasons.

Many commentators have suggested that an appellate court can "experience" a defendant if two devices are employed. First, a pre-sentence investigation, designed to provide a "case history of the offender's past arrests, personal difficulties, employment record, and family relations,"[147] must be in the record for review. Second, the sentencing judge must provide a reasoned opinion for the sentence.[148] With this information the appellate court will have most of the information used by the sentencing judge. If the judge imposed the sentence for reasons not appearing in the pre-sentence investigation report, then his reasons should appear in the sentencing opinion.

Even with these devices the trial judge could still be allowed discretion. Appellate courts are quite used to according latitude "to the man on the scene," but where his judgment is wrong, (clearly excessive, without a rational basis, dictated by emotion or suffers from some similar defect), they will intervene.[149] The trial judge has the offender before him when he imposes the sentence, but it really does not seem necessary to know what the offender "looked like" in order to determine if a sentence is excessive. If the sentence is based on lack of remorse, etc., the judge should be required to articulate such reasons for the sentence.

Justice Thomas acknowledges that there should be review of illegal sentences. Clearly, when the legislature has authorized a range of sentences for an offense, it did not intend for judges to impose sentences beyond that range. Just as surely, when a legislature authorizes a range of years for an offense, it does not mean that it makes no difference what

143. *Wright*, 670 P.2d at 1098 (Thomas, J., specially concurring).
144. *Wright*, 670 P.2d 1090 (Wyo. 1983).
145. *Id.* at 1098 (Thomas, J., specially concurring).
146. *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L. J. 1453, 1454 & n.9 (1960).
147. Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207, 216 (1971).
148. Along with providing a basis for appellate review, articulating the reasons for a sentence should improve each sentence and contribute to the development of a rational sentencing policy for the future. STANDARDS FOR CRIMINAL JUSTICE - APPELLATE REVIEW OF SENTENCES § 2.3 commentary at 23 (1978).
149. *Id.* at 29.

sentence within that range is selected.[150] The legislature provided for a broad range of sentences in order to allow the courts to impose different sentences for the same crime. The rationale for such broad ranges must be that offenders who have committed the same crime should be treated differently depending on the facts of each case. Reviewing only an illegal sentence indicates that any range may be selected for any reason.[151] This could not be what the legislature intended. If the legislative intent in authorizing ranges for sentences is to be upheld, then there must be review of "legal" sentences in order to determine whether the facts of the case justify the range selected.

There cannot be review of "legal" sentences unless there is guidance given as to the appropriate factors for sentencing decisions. The Wyoming Supreme Court has sent confusing signals to a sentencing judge concerning appropriate factors and goals. The legislature has given even less guidance. As stated above, Wyoming's penal code authorizes some very broad penalty ranges. When the legislature establishes a sentence of five to fifty years, it has told the judge that the offender convicted under the worst circumstances should be sentenced to no more than fifty years. The offender at the other extreme should receive no less than five years. The legislature has focused on the offenders at each extreme, and, in the process, has given the judiciary little guidance for determining what sentence should be imposed upon the offenders who do not fall at these extremes.[152]

What effect does this lack of guidance have? First, it produces fertile ground for disparate sentences. Second, it creates a situation in which every judge becomes an independent policy-maker.

Disparity is a potential problem whenever individuals impose sentences. Perhaps the least controllable factor which determines the sentence in any given case is the background and personality of the trial judge.[153] That the background of judges is critical to the issue of disparity was shown in a survey of federal judges.[154] In the study, each one of fifty federal judges was given the files of twenty offenders and each judge was asked to determine the appropriate sentence for each offender. One offender, who

150. STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 1.2 commentary at 25 (1968).

151. The Wyoming Supreme Court has, at times, seemed to embrace the philosophy that it does not make any difference what range is selected for someone convicted of a serious crime. In Scheikofsky v. State, 636 P.2d 1107 (Wyo. 1981), the court stated that the seriousness of the crime can outweigh all other things favorable to the offender. Such a standard clearly violates the legislature's intent in devising a range of sentences for that offense. If the maximum sentence can be imposed, regardless of a number of mitigating factors, solely because the judge feels the crime is serious, then the provision for sentences below the maximum is eliminated from the statute.

152. *See* Dershowitz, *supra* note 6, at 12.

153. Coburn, *supra* note 147, at 210.

154. *See* Sen. Kennedy, *Toward a New System of Criminal Sentencing-Law with Order*, 16 AM. CRIM. L. REV. 353, 358 (1979), *citing* A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974).

had been convicted of extortion, was "sentenced" to twenty years and a $65,000 fine by one judge and to three years and no fine by another.[155]

In his recent article,[156] David Roberts pointed out that disparity in Wyoming does exist among the various judicial districts. Roberts compared the average sentences imposed in the different judicial districts in Wyoming. Although the disparity that did exist was less than might have been expected, it was significant nevertheless.[157] In addition, Roberts' analysis does not present the entire picture. The emphasis in Roberts' survey was placed on disparity between judicial districts on average sentences.[158] Such analysis de-emphasizes other problems with the current sentencing structure. First, it does not point out the unexplained disparity between two individual sentences that may be given by different judges or even by the same judge at different times. Second, such a survey does not indicate what policies of sentencing, if any, were the basis for each individual sentence. Therefore, the survey does not indicate whether the sentences were imposed pursuant to an overall policy or whether such policy even exists.

Although disparity is a problem in Wyoming, it is only a symptom of a larger problem. The lack of a clear sentencing policy or the failure to explicitly state a policy is the underlying problem in Wyoming. Without explicit goals for the sentencing judge, each judge becomes an independent policy-maker, possibly seeking different and even conflicting goals from other judges. The judge may even impose sentences pursuant to a goal which conflicts with the goal he sought when he imposed his last sentence. The judge may impose a sentence without any clear policy in mind. The penal code cannot achieve its goals through such unbridled sentencing practices.

Disparity in sentencing exists in Wyoming. The current status of appellate review of sentences clearly provides little, if any, hope to change legal yet excessive sentences. The goals of sentencing in Wyoming are unclear and have not been clarified by case law. All of these problems can be alleviated to some extent if sentencing guidelines are adopted by the judiciary. These guidelines should be developed by the judiciary and implemented within the current framework of Wyoming's penal code.

By adopting sentencing guidelines the legislature's intent in promulgating the current penal code would not be trammeled. At the same time, sentences would be imposed based upon more than one judge's view of the "proper" sentence. Developing this rational sentencing structure is dependent upon structuring and limiting, but not eliminating, discretion.[159]

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155. Sen. Kennedy, *supra* note 154, at 358-60.
156. Roberts, *supra* note 3.
157. *Id.* at 631-35.
158. *Id.* at 626-33.
159. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 6 (1978) [hereinafter cited as L. WILKINS].

SENTENCING GUIDELINES

There are two approaches for developing guidelines: descriptive and prescriptive. While they are different, both usually result in the development of a grid which contains four major features: an offender score, an offense score, presumptive sentence cells, and a dispositional line. The Minnesota sentencing grid below is typical of guidelines containing these features. A brief general description using the Minnesota grid is helpful in understanding the more detailed discussion below.

The offender score (criminal history score) is placed on one axis and the offense score (severity level) on the other. Each one of these scores is derived by totaling points assigned to significant factors. The sentencing judge then charts each of the scores. The point of intersection within the matrix contains the presumed sentence. The presumed sentence can be either a single figure or a narrow range within which the judge may sentence. The dispositional line is a fixed dividing line running throughout the grid which determines the "in/out" decision. The cells below the line contain a presumptive sentence, but the offender is not actually incarcerated. Instead he is placed in some kind of constructive confinement such as probation. The cells above the line contain a presumptive sentence for the period of incarceration.

Although most guidelines have this grid consisting of these four features, there are substantial variations in guidelines. The most important distinction between the guidelines themselves is the method used to determine the offender and offense scores. The scores are derived by adding points given various factors. Determining what factors to include and the point values to assign to those factors is what differentiates the prescriptive and descriptive guidelines.

*Descriptive Guidelines*

Descriptive guidelines mirror past sentencing practices. A descriptive sentencing guideline is based on the assumption that, while judges are making sentencing decisions on a case-by-case basis, they are simultaneously, as a by-product, making decisions on a policy level.[160] The object of descriptive guidelines is to uncover this latent policy and mirror past sentencing practices by determining which factors have been important in making sentencing decisions. Judicial discretion is then structured by making this previously latent policy explicit. An example of the process of developing descriptive guidelines is provided by a feasibility study conducted in two jurisdictions from July, 1974 to June, 1976.[161]

The initial step was to identify the items of information which judges had previously used in imposing sentences. The items used in prior cases

160. *Id.* at 10.

161. Although four court sites were selected to take part in the study only two, Denver County, Colorado and Vermont, were active participants from which data was collected. *Id.* at xiii.

**IV. SENTENCING GUIDELINES GRID**

Presumptive Sentence Lengths in Months

**Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.**

**Offenders with nonimprisonment felony sentences are subject to jail time according to law.**

| SEVERITY LEVELS OF CONVICTION OFFENSE | | CRIMINAL HISTORY SCORE | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | 0 | 1 | 2 | 3 | 4 | 5 | 6 or more |
| *Unauthorized Use of Motor Vehicle*<br>*Possession of Marijuana* | I | 12* | 12* | 12* | 13 | 15 | 17 | 19<br>*18-20* |
| *Theft Related Crimes ($250-$2500)*<br>*Aggravated Forgery ($250-$2500)* | II | 12* | 12* | 13 | 15 | 17 | 19 | 21<br>*20-22* |
| *Theft Crimes ($250-$2500)* | III | 12* | 13 | 15 | 17 | 19<br>*18-20* | 22<br>*21-23* | 25<br>*24-26* |
| *Nonresidential Burglary*<br>*Theft Crimes (over $2500)* | IV | 12* | 15 | 18 | 21 | 25<br>*24-26* | 32<br>*30-34* | 41<br>*37-45* |
| *Residential Burglary*<br>*Simple Robbery* | V | 18 | 23 | 27 | 30<br>*29-31* | 38<br>*36-40* | 46<br>*43-49* | 54<br>*50-58* |
| *Criminal Sexual Conduct, 2nd Degree (a) & (b)*<br>*Intrafamilial Sexual Abuse, 2nd Degree subd. (i)(i)* | VI | 21 | 26 | 30 | 34<br>*33-35* | 44<br>*42-46* | 54<br>*50-58* | 65<br>*60-70* |
| *Aggravated Robbery* | VII | 24<br>*23-25* | 32<br>*30-34* | 41<br>*38-44* | 49<br>*45-53* | 65<br>*60-70* | 81<br>*75-87* | 97<br>*90-104* |
| *Criminal Sexual Conduct 1st Degree*<br>*Assault, 1st Degree* | VIII | 43<br>*41-45* | 54<br>*50-58* | 65<br>*60-70* | 76<br>*71-81* | 95<br>*89-101* | 113<br>*106-120* | 132<br>*124-140* |
| *Murder, 3rd Degree*<br>*Murder, 2nd Degree (felony murder)* | IX | 105<br>*102-108* | 119<br>*116-122* | 127<br>*124-130* | 149<br>*143-155* | 176<br>*168-184* | 205<br>*195-215* | 230<br>*218-242* |
| *Murder, 2nd Degree (with intent)* | X | 120<br>*116-124* | 140<br>*133-147* | 162<br>*153-171* | 203<br>*192-214* | 243<br>*231-255* | 284<br>*270-298* | 324<br>*309-339* |

**1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.**

**At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.**

**Presumptive commitment to state imprisonment.**

***one year and one day**

**(Rev. Eff. 8/1/81; 11/1/83; 8/1/84)**

were then sought for each sentencing decision imposed for the cases sampled. Although 205 items of information were sought, a large number were often unavailable for a particular case.[162]

The second step was to determine the effect that each of these items had on the sentencing decisions.[163] Those items which were determined to have a significant impact[164] on the decision were then used in developing a predictive model. In one area of the study only six items were statistically significant. These six items included: (1) number of offenses for which the offender was convicted; (2) number of prior incarcerations; (3) seriousness of the offense at the time of the conviction in terms of the maximum sentence which could be imposed; (4) use of a weapon in committing the offense; (5) legal status of the offender at the time of the offense (e.g., was the offender on probation?); (6) length of the offender's employment prior to the offense.[165]

These factors were then used to create a predictive model. The model was tested by comparing sentences imposed in new cases with the sentence that the model would have arrived at by using the factors that had been weighted based on sentences imposed in previous cases. Through this testing the weight given to each factor was adjusted so that the model became more accurate.

After the model reached its maximum accuracy, it was implemented as the guideline for future sentencing decisions. The judges began imposing sentences guided by factors that were determined to have been most significant in previous sentencing decisions.

Descriptive guidelines are merely an explanation of what the "average" judge would have sentenced a particular offender to in the past. No new policy is developed by the guidelines. They only reflect the past policy.[166] Because of this, and because of the method used to develop descriptive guidelines, such guidelines have been subjected to strong criticism.

First, the empirical formulation used to develop descriptive guidelines is claimed to provide "only weak predictions and even weaker explanations of judicial sentencing behavior."[167] Specifically two of the flaws in

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162. A list of the 205 items is produced at pages 41-44 of the study. In the Denver Pilot Study, 48 items of information were missing in over 25 percent of the cases. In the Vermont sample, 32 items were missing from at least 25 percent of the cases. *Id.* at 11.

163. Multiple regression was the technique employed to determine the effect each factor had on sentencing decisions. Multiple regression is used by determining the independent variable (information item) which, by itself, accounts for the greatest amount of variation in the dependent variable (sentencing decision) and then using the same process for each of the remaining independent variables.

164. Statistically significant was defined as accounting for more than .01 of the variation. L.WILKINS, *supra* note 159, at 12-13.

165. *Id.*

166. J. MILLER, M. ROBERTS & C. CARTER, SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY 42 (1981). [hereinafter cited as J.MILLER]

167. W. RICH, L. SUTTON, T. CLEAR, & M. SAKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES xxiv (1982) [hereinafter cited as W. RICH].

the empirical formulation appear to be that researchers unavoidably must make "research decisions that have significant policy implications." This turns researchers into policy-makers.[168] Another flaw of the empirical formulation is that it cannot produce an adequate *explanatory* account of the sentencing process.[169]

Second, the empirical formulation has been attacked for reasons other than the "statistical" problems involved. Descriptive guidelines (those produced by an empirical formulation) regulate but do not alter sentencing practices, and in doing so they have been criticized for making legitimate undesirable and unfair sentencing practices.[170]

*Prescriptive Guidelines*

Prescriptive guidelines do not simply attempt to mirror past sentencing practices. Instead of using some empirical analysis of past sentences to determine guidelines for the future, a prescriptive approach determines what factors should be considered in imposing sentences. The factors that should be considered can be determined by a sentencing commission, by the legislature, by trial judges, or by the supreme court.[171]

Prescriptive guidelines are superior to descriptive guidelines for a number of reasons. Descriptive guidelines are intended to represent past latent sentencing policies. It is questionable whether they even accurately represent past sentencing. Even if they do, they only represent what the average judge did. They do not determine why the judges acted as they did; therefore, there is no way to determine what policies, if any, were guiding each judge.

Prescriptive guidelines force appropriate policy-makers to determine at which goals the sentencing system should be aimed. They do not merely reflect and then institutionalize past practices which may be questionable. The prescriptive approach may infringe on the sentencing judge's discretion, but it does so because there are now explicit policy goals being sought; policy goals which have been determined by some elected or judicial body and not by researchers.

## VARIATIONS IN GUIDELINES

Whether a prescriptive or descriptive approach is taken in developing guidelines, variations still exist. These variations consist of differences within the guidelines themselves, and the manner in which they are implemented and enforced.

*Single or Multiple Grid*

The first major variation is whether one sentencing grid is used for all crimes or whether a separate grid is developed for different "classes"

168. *Id.* at 86.
169. *Id.* (emphasis added).
170. Flaxman, *The Hidden Dangers of Sentencing Guildelines*, 7 HOFSTRA L. REV. 259, 270-71 (1979).
171. J. MILLER, *supra* note 166, at 41.

of crime. In the Denver study, five felony classes and three misdemeanor classes were developed from the Colorado penal code.[172] Within each of the classes different crimes were assigned a value which would be a part of the offense score. The value assigned would increase with an increase in the perceived seriousness of the crime. This offense score was then charted on a grid which contained only crimes of the same "class."

On the other hand, it is possible to develop one single grid to be applied to all classes of crimes. If one "master" grid is developed, then it is used in all sentencing decisions regardless of the offense. Again, an offense seriousness score is used, and part of the score is the point value assigned to each class of offense. Because all crimes are included on a single grid, each point value classification is very broad in that it includes a number of offenses all deemed to be of equal seriousness. A single grid model is defective if different offenses are included within the same classification when they are not truly equally serious.[173] Classifications may become over encompassing if the creators of the grid place too much emphasis on keeping the grid simple by limiting the range of scores on the offense axis.

*Offense Score*

A second variation between guidelines is the exact method used to determine offender and offense scores. The offense score is usually the sum of the points assigned to various factors relating to the seriousness of the offense.[174] The major portion of the total offense score is the value assigned to the offense itself. Other factors, which are deemed to make the offense more serious, are assigned values. These factors are then added to the value assigned to the offense, and the sum is the total offense score. The values assigned and the factors considered differ among various guidelines.

In Maryland's guidelines, a value is assigned to different offenses based upon the "seriousness" category that encompasses the offense.[175] Three other factors are also assigned point values: victim injury, weapon use, and special vulnerability of the victim. The score given for each of these three factors plus the value assigned for the seriousness class is the offense score.[176] The factors used in Maryland's guidelines differ from those used in the Denver study.

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172. L. WILKINS, *supra* note 159, at 53.

173. Such a scheme would violate what Von Hirsch has labelled ordinal proportionality. *See* Von Hirsch, *Commensurabilty and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale,* 74 J. CRIM. LAW & CRIMINOLOGY 209, 213 (1983).

174. The seriousness of criminal conduct has two major components: harm and culpabilty. *Id.* at 214.

175. In Maryland's guidelines, all offenses were categorized into only seven classes. Since classes five, six, and seven were assigned the same point value for determining an offense score, it could be argued that in fact only five classes were created. *See* Levin, *Maryland's Sentencing Guidelines - A System By and For Judges,* 68 JUDICATURE 172, 177 (Oct.-Nov. 1984).

176. *Id.* at 176. The point ranges for each factor were: 1-10 for category seriousness; 0-2 for victim injury; 0-2 for weapon usage; and 0-1 for victim vulnerability.

The Denver study used assigned values for three or four seriousness groups for an offense score (depending for which of the multiple grids they were used). The only other factor was a harm/loss modifier which was developed to more accurately reflect the real seriousness of the offense.[177] Since offenders often are convicted of offenses while not demonstrating the type of behavior normally associated with that offense, this modifier was used to help reflect the offender's actions in greater detail than the seriousness category alone could.[178] The value assigned to the seriousness category plus the score for the harm/loss modifier was the offense score.

The rationale behind the offense score is that it should increase as the seriousness of the activity increases. The offense seriousness rating is usually derived from the sentencing practice currently used in the jurisdiction.[179] When a large number of offenses are included within the same offense category, they may cover conduct that varies in its degree of seriousness.[180] Therefore additional factors, such as those in the Maryland guidelines, are used to insure that the total offense score more accurately reflects the seriousness of the offender's actions.

*Offender Score*

The offender score is found on the other axis of the matrix. The factors used to calculate the total offender score also vary among different guidelines. The offender scores in the different guidelines do have a common ground: they consist primarily of the offender's prior criminal history.

The Maryland and Denver study guidelines provide an example of the differences in offender scores. In Maryland, the offender score consisted of points for: the current relationship to the criminal justice system; juvenile delinquency history; prior adult criminal record; and prior parole/probation violations.[181] The Denver study's offender score included five factors: prior incarcerations,[182] probation or parole revocations, legal status of the offender at the time of the offense, prior convictions, and employment history.[183]

The major difference in the offender scores of the two guidelines is the emphasis placed on employment history. By including this factor, the

177. L. WILKINS, *supra* note 159, at 65.

178. The harm/loss modifier ranged in value from 0-5 (victimless crime to death), while the remainder of the offense score ranged in value from 1-7. *Id.*

179. Ozanne, *Bringing a Rule of Law to Criminal Sentencing: Judicial Review, Sentencing Guidelines and a Policy of Just Deserts* 13 LOYOLA U. L. J. 721,736 (1982). *See* Von Hirsch, *supra* note 173, at 216 for a criticism of basing guidelines on existing ranges for offenses.

180. Von Hirsch, *supra* note 173, at 227.

181. Levin, *supra* note 175, at 178. Note that all of the Maryland offender factors relate to past criminal history.

182. Prior incarcerations were used instead of prior arrests for "moral" considerations and because the substitution of one for the other did not affect the model's accuracy. L. WILKINS, *supra* note 159, at 65.

183. *Id.* at 24. By including employment history, the Demonstration Model reflected an indication of social stability that was not included in Maryland's guidelines.

guidelines are intended to reflect the offender's social stability.[184] A "socially stable" offender need not be specifically deterred or rehabilitated to the same extent as the socially unstable offender.

Regardless of the exact factors ultimately included in the offense and offender scores and regardless of the number of grids used, the guidelines are expected to achieve at least two goals. They are intended to reduce the differences between judges and to reduce the individual judge's inconsistency[185] by developing a consistent policy basis for sentencing. The prescriptive guidelines are also intended to change past practice if judges had considered improper factors or goals. How well guidelines achieve these goals depends to a large extent on the manner in which they are implemented.

### IMPLEMENTING GUIDELINES

Both Maryland's guidelines and the Denver descriptive guidelines were implemented through voluntary acceptance by the judiciary. Not only were the guidelines implemented through voluntary methods, but even if they were accepted, the sentencing judge was free to depart from the guidelines in any case.[186] The judges were requested to explain any deviations from the presumptive sentence.[187]

Researchers have questioned the usefulness of guidelines in light of voluntary implementation, and the lack of any monitoring functions. A study of the impact of the Denver study guidelines on disparity reached the conclusion that voluntary guidelines have no impact. They failed to reduce sentence disparity.[188] An analysis of Maryland's voluntary guidelines also showed that the guidelines, as implemented, led to only a modest decrease in sentencing disparity.[189]

Although both studies indicated that the guidelines achieved few if any of the benefits they were designed to achieve, neither recommended dismissing guidelines as a potential avenue for sentencing reform. Both, in fact, indicated that guidelines still represented an avenue worth pursuing.[190]

Whether the descriptive guideline itself has shortcomings may be subject to debate. What is clear, however, is that guidelines of any kind cannot be implemented in a "loose" fashion. The shortcomings of the Maryland guidelines appeared to lie with their voluntary implementation.[191] Only seventy per cent of the eligible scoresheets were filed in the

184. *Id.*
185. W. RICH, *supra* note 167, at xxvi.
186. L. WILKINS, *supra* note 159, at 29.
187. *Id.;* Levin, *supra* note 175, at 178.
188. W. RICH, *supra* note 167, at xxvii.
189. Carrow, *Judicial Sentencing Guidelines: Hazards of the Middle Ground,* 68 JUDICATURE 161, 163. (Oct.-Nov. 1984).
190. *Id.* at 171; W. RICH, *supra* note 167, at 207.
191. Carrow, *supra* note 189, at 171.

Maryland sample cases.[192] The failure of many judges to "procedurally" comply with the guidelines is also illustrated by another study of voluntary guidelines. In the guidelines studied, there was a request that any deviation from the sentence recommended by the guidelines be accompanied by a reason for the deviation. In one jurisdiction in the study only twelve per cent of the deviations were accompanied by a written statement.[193]

### ENFORCEMENT

If guidelines are to be effective, they must be mandatory and they must be enforced. The Maryland guidelines and others implemented through voluntary compliance obviously cannot be enforced through formal methods. Mandatory guidelines can, however, be enforced through appellate review of sentences.

Minnesota's and Pennsylvania's systems provide examples of enforcement through appellate review. Both allow the prosecution and the defense to appeal the appropriateness of sentences.[194] The Pennsylvania guidelines were aimed at increasing the number of serious offenders sent to prison and at making punishments more uniform. The guidelines have increased the number of serious offenders put in jail and have made sentences more uniform.[195] The Minnesota guidelines also accomplished their goal of reserving prison space for serious offenders, although this success has eroded somewhat since the first year of the guidelines' existence.[196] The success of the guidelines in these states, and the limited success of those in states without appellate review, suggests that an enforcement mechanism such as appellate review is a necessary component of successful guidelines.[197]

Appellate review can be facilitated by including a requirement that the sentencing judge give a written explanation for any deviation from the presumptive sentence.[198] If the appellate court determines that the explanation shows that the sentencing judge was justified in refusing to apply the guidelines, then the sentence should be upheld. The reviewing court should not normally accept a deviation based upon a factor which was already considered in creating the guidelines. If it did, it would be allowing each sentencing judge to rearrange the structure of priorities created by the guidelines.

This required explanation can also help the guidelines' evolution. If, for example, judges consistently impose a sentence below the guidelines' recommendations for a specific offense, then the guidelines may be un-

192. *Id.* at 170. In the Florida cases only 57 percent of the eligible scoresheets were filed. *Id.* at 169.

193. W. RICH, *supra* note 167, at 117.

194. MINN.STAT. § 244.11 (Supp. 1984); PA. CONS. STAT. ANN. § 9781 (Purdon 1982).

195. *State's Sentencing Rules Lead to Longer, More Uniform Terms*, 15 CRIM. JUST. NEWSLETTER 5, 6 (June 15, 1984) [hereinafter *Sentencing Rules*].

196. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181, 189 (Oct.-Nov., 1984).

197. *Id.* at 183.

198. STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 2.3 commentary at 47 (1968).

reasonably severe and should be changed.[199] This type of feedback is necessary if the guidelines are descriptive, and useful to makers of prescriptive guidelines who may wish to reevaluate aspects of the guidelines which are consistently questioned by these deviations.

## SENTENCING GUIDELINES FOR WYOMING

If judicial guidelines are accepted as an appropriate avenue for sentencing reform, three major steps must be undertaken. First, the guidelines must be developed. Second, the form of implementation must be selected. Third, some type of enforcement device must be established. The following sections offer some suggestions regarding each of these steps by discussing the matrix model normally developed for guidelines. Four features of the model, the offense score (which is placed on one axis), the offender score (placed on the other), the individual cells (which contain a presumptive sentence), and the dispositional line (running through the matrix cells and determining the "in/out" decision) will be the focus of the discussion.

### *Developing Guidelines*

The first step in developing guidelines is to determine whether they should be descriptive or prescriptive. Even if descriptive guidelines do accurately reflect an "average" sentence for the past few years, it is an outcome resulting from several different sentencing philosophies applied in various fashions by different judges. In addition, instead of rectifying past injustices and biases, the descriptive guideline institutionalizes them.[200] Prescriptive guidelines, on the other hand, do not merely reflect an average of past sentences imposed pursuant to four different goals. They can reflect a single explicit policy or an articulated priority of a number of policies. Prescriptive guidelines should be developed for Wyoming. Although the legislature could institute such guidelines it is not necessary for the legislature to act. The Wyoming Supreme Court, acting under its general supervisory power, could adopt sentencing guidelines.[201]

Developing prescriptive guidelines means that a goal of sentencing must be adopted as the basis of the guidelines. The policy goals of any Wyoming guidelines would, of course, be circumscribed by the constitutional provision that "[t]he penal code shall be framed on the humane principles of reformation and prevention."[202] "Reformation and prevention" has been interpreted by the Wyoming Supreme Court to include all four of the major goals of sentencing.[203] Therefore any one of the four goals

199. *See Sentencing Rules, supra* note 195, at 6.

200. Knapp, *Guidelines for Sentencing Reform: Minnesota Experience,* 7 STATE COURT JOURNAL 12 (Sum. 1983).

201. Although the legislature has been urged to adopt sentencing guidelines it has failed to do so. *See* Roberts, *supra* note 3. This does not impair the supreme court's ability to adopt guidelines in order to facilitate review under the abuse of discretion standard.

202. WYO. CONST. art. 1, § 15.

203. *See supra* text accompanying notes 95-96.

could serve as a basis for Wyoming guidelines. A single-goal guideline system would, however, conflict with the constitution unless it can achieve both reformation and prevention.

A single-goal system would conflict with the constitution, but a multi-goal system with priority given to the goals deemed more important would not. Currently in Wyoming, there is no explicit policy to guide judges. Every judge is an independent policy-maker who can apply different theories of punishment and prioritize goals in each case. Prescriptive guidelines would not implement goals that are not already in use, but would maintain the same order of priority from case to case.[204] If placing a different priority on the goals of sentencing in each case is within the bounds of the constitution, then creating guidelines based upon prioritizing goals should also be within the constitution's parameters.

Judicially created guidelines must also comport with current legislation. As previously noted, the legislature has only provided (1) a very flexible policy statement that sentences should be indeterminate, and (2) a correspondingly broad range for specific offenses.[205] Legislative intent could be accommodated by developing a different grid for each class of offense with the criteria for classification being the sentence range provided by the legislature.[206] Different offenses within each grid can then be assigned values according to their perceived seriousness.

*Offense Score*

The offense score should reflect the seriousness of the offense as it was committed. The offenses within each classification grid can be assigned point values based on the estimated harmfulness of the offense. If the offense score is determined solely by the value assigned to the offense, as defined by the statute, then the guidelines fail to acknowledge that the same "offense" can be more serious when committed under different circumstances. The offense score can more accurately reflect the seriousness of the offender's actions if it includes a number of other factors which are also assigned point values.

An example of how the offense score might work in Wyoming is provided by using the "class" of crimes which have been assigned a sentence range of five to twenty-five years. Aggravated robbery,[207] aggravated burglary,[208] and aggravated blackmail[209] are all within this class. Although each may carry the same sentence, under usual circumstances aggravated

204. The guidelines would not be a method to insure that every judge would treat the same case in exactly the same way because judges would still be free to deviate from the presumptive sentence if they could justify the deviation. There would thus be some cases in which a judge may feel that a deviation was appropriate when another judge would not.

205. *See supra* text accompanying notes 8-10.

206. This type of borrowing has, however, been attacked by commentators. *See, e.g.*, Von Hirsch, *supra* note 173, at 216.

207. WYO. STAT. § 6-2-401(c) (June, 1983 replacement).

208. *Id.* § 6-3-301(c).

209. *Id.* § 6-2-402(c).

robbery may be deemed more serious than the other two, and so it should be assigned a higher point value. Under certain circumstances, however, each crime may be considered to be more serious than it normally is. Therefore factors which are deemed to make a crime more serious, but which do not raise the actions to a higher offense, can also constitute part of the offense score. For example, the actual use of a weapon may be given a point value. Special vulnerability of the victim may also be considered an appropriate indicator making the usual offense more serious. Thus, an offender who commits aggravated robbery by brandishing a firearm in the presence of an eighty year old victim is given a much higher offense score than the offender who enters a warehouse, and recklessly causes the security guard to suffer a bloody nose, when he slams the door in the guard's face while making a hasty exit.

*Offender Score*

The offender score consists primarily of the past history of the offender.[210] Its range begins with a first time offender and ends with the offender whose past history qualifies him as an habitual offender under the Wyoming statutes.[211] Although there are a number of factors which can be used to determine the total offender score, there are two primary considerations. The first is whether any type of social stability factor should be a part of the offender score, or whether past criminal history should be the sole criterion. The second consideration is the weight that the offender score should have in determining the presumptive sentences in relation to the offense score.

If the policy of sentencing is determined to be solely retribution, then social stability factors should be excluded from the offender score. On the other hand, if the guidelines are based primarily on incapacitation or rehabilitation, then social factors such as age, employment, and drug history should be part of the offender score.[212] A middle ground can also be chosen. Maryland's guidelines provide such a middle ground. The Maryland guidelines do not include a social stability value in the offender score. Instead they allow "social stabilty" to be a valid mitigating factor in explaining a deviation from the presumed sentence.[213] The weight assigned to social stability factors in relation to that assigned to the criminal history should be a reflection of the primary policy goal of sentencing. The policies of rehabilitation and special deterrence would favor a heavier emphasis on the social stability score than would the policies of general deterrence and incapacitation.

The weight assigned to the offender score in relation to the offense score should also be a reflection of the primary policy goal. If the goal

210. Von Hirsch, *supra* note 173, at 237. Both the frequency and seriousness of past offenses should be considered. *Id.* at 239. Some desert theorists believe that prior offenses are irrelevant because the person was already punished for the prior offense. *Id.* at 218, *citing* G. FLETCHER, RETHINKING CRIMINAL LAW 460-66 (1978).

211. WYO. STAT. § 6-10-201 (June, 1983 replacement).

212. Von Hirsch, *supra* note 173, at 233.

213. Levin, *supra* note 175, at 179-80.

is primarily punishment, the offender score should, at most, be a modest factor.[214] Under a policy of specific deterrence and incapacitation based on the prediction that prior history is the strongest single indicator of recidivism, the offender score should influence sentences to a greater extent than should the offense score.[215] This is because guidelines based on a policy of punishment are most concerned with the offender's latest actions, while guidelines based on incapacitation and rehabilitation are concerned with predicting the offender's future behavior. Emphasis on one of the scores is reflected in the sentence variations within the grid.

*Presumptive Sentence*

The cells of a guideline matrix must contain a presumptive sentence *range* so that indeterminacy may be maintained. An indeterminate sentence places discretion in the parole board. Discretion in the parole board can also help to reduce disparity. Balancing the discretionary power among those responsible for administering criminal sanctions is a method to reduce disparity.[216] The individual cells would range, of course, from the minimum sentence provided by the legislature for the class of crime to the maximum for the same.

The order in which the cells increase, (i.e., whether the increase in sentences is steeper as the offense score increases or whether it is steeper as the offender score increases) should be determined by the sentencing goal. If punishment is the primary goal, then the increases should be steeper along the offense axis. If incapacitation or rehabilitation is of maximum importance, then the increases should be steeper along the offender axis.

*Dispositional Line*

The dispositional line, which represents the in/out decision, can serve a number of functions. First, it can be used to control the total number of offenders that will be sentenced to incarceration.[217] Minnesota's guidelines placed a high priority on control of prison space,[218] and if the same concern is deemed a major priority for Wyoming, then the dispositional line should be adjusted accordingly. On the other hand, if deterrence is a more important goal, then the certainty of punishment must be reflected by the dispositional line.[219] Placing the dispositional line at a point which would incarcerate a high percentage of offenders would send the clear message, needed for general deterrence, that offenders will be punished. Finally, the goal of incapacitation may also be achieved, to a greater extent, by a low dispositional line. The position of the dispositional line should be constantly adjusted as the sentencing goals of the state change.

214. Von Hirsch, *supra* note 173, at 240.
215. *Id.* at 240-41.
216. J.MILLER, *supra* note 166, at 43.
217. Von Hirsch, *supra* note 173, at 220-26.
218. *See, e.g.*, MINN. STAT. § 244.09 (Supp. 1984).
219. Bayley, *supra* note 15, at 547-48.

*Implementation*

What may be even more important than the guidelines themselves is the manner in which they are implemented. It seems clear that voluntary guidelines at best only eliminate the very excessive and lenient sentences. Although voluntary guidelines may be accepted initially, it appears that when the sentencing judge realizes that the "average" sentence does not equal his own norms, he will refuse to change his old practice and will refuse to sentence by the guidelines.[220] Closely aligned with this overall voluntary implementation is the "voluntary guideline" policy of allowing the judge to deviate from the guideline's presumptive sentence whenever he wishes. Certainly a system is not going to work if no one follows it except when it is convenient. The Wyoming Supreme Court could mandate the use of a guideline system through its supervisory powers.[221]

*Enforcement*

Once implemented, the guideline system must be enforced. Appellate review has often been suggested as an appropriate aid to enforcement.[222] Such a system should present no problems to the Wyoming Supreme Court because the court currently will review any sentence for an abuse of discretion.[223] Therefore guidelines would not increase the number of appeals. In fact, guidelines would facilitate review because the court would base its review on whether the sentence is within the established guidelines and, if there is a deviation, then whether the deviation is justified.

Review under the guidelines will be clearer. The standard could still be labeled abuse of discretion, but with guidelines the standard would now have some teeth. Deviations from the presumed range should be allowed since a model obviously cannot duplicate every possible set of circumstances. Any deviation must be accompanied by a written statement explaining the deviation. If the reason justifies the deviation then there would be no abuse of discretion.[224]

## CONCLUSION

A sentence is currently imposed in Wyoming by a judge who has been given little legislative guidance for performing such an important task. The judge has been told by the Wyoming Supreme Court that he can rely on any of four goals in imposing a sentence. He has not been told which of the four goals must be given priority or that he must consistently emphasize the same goal in similar cases. Such a system has, of course, led

220. Carrow, *supra* note 189, at 165.

221. WYO. CONST. art. 5, § 2. The court has already held that this provision gives them the power to review any sentence imposed. State v. Sorrentino, 36 Wyo. 111, 253 P.2d 14 (1927).

222. *See* Carrow, *supra* note 189, at 171; Knapp, *supra* note 196, at 183.

223. *See supra* text accompanying notes 37-117 for a discussion of the current standard for review of sentences.

224. Note that the reason for deviation would have to be something not already accounted for by the guidelines, otherwise the guidelines would be susceptible to manipulation whenever the sentencing judge decided they did not comport with his views.

to sentences which can be justified only by applying the most lax standard of review. This standard of appellate review has produced only piecemeal guidance which has been both confusing and contradictory. Without clearer guidelines under which the reasonableness of a sentence can be judged, there is little possibility of demonstrating an abuse of discretion,[225] and the *review* of sentencing decisions itself appears arbitrary.

Explicit guidelines can be developed and implemented by the Wyoming judiciary within the current framework provided by the Wyoming penal code. These guidelines, if mandatory and enforced through appellate review, could reduce disparity between districts, lead to a rationale sentencing policy, and provide a real basis for striking down the excessive sentence. Guidelines would actually promote the policy of *individualizing* criminal justice[226] by insuring that the sentencing process includes consideration of individualizing factors in each case. Emphasis should be on the unique circumstances of each individual case, not on the unique disposition of each judge.[227]

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225. JAHNKE v. STATE, 682 P.2d 991, 1008-09 (WYO. 1984).

226. PETERSON v. STATE, 586 P.2d 144, 157 (WYO. 1978); DANIEL v. STATE, 644 P.2d 172, 178-79 (WYO. 1982).

227. BEAULIEU v. STATE, 608 P.2d 275, 276 (WYO. 1980).