Windows for Discretion in the Pennsylvania Sentencing Guidelines

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In 1982, Pennsylvania embarked on an ambitious program to channel and control the discretion of sentencing judges in the Commonwealth. In a novel and far-reaching plan, the state instituted sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing. The guidelines, which apply to all felonies and misdemeanors committed on or after July 22, 1982, are the most comprehensive endeavor in modern Pennsylvania history to regulate the decisions of sentencing judges, whose discretion had gone virtually unfettered by either the legislature or the appellate courts for much of this century.

In the very same year in which the guidelines went into effect, the General Assembly passed aggressive new legislation prescribing stiff mandatory minimum terms of imprisonment for a variety of repeat and violent offenses. These statutes partially or completely remove judicial discretion from sentencing decisions for limited categories of crimes.

As implemented, the guidelines and mandatory-minimum

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1. The guidelines are published at 204 Pa. Code §§ 303.1-.9 (1986). For a discussion of the process of their adoption, see infra notes 21 & 52.
2. See 42 Pa. C.S. §§ 9712-9718; 75 Pa. C.S. §§ 3731(c), 3735.
sentencing acts together will increase sentence severity in Pennsylvania for most crimes across the board. The new laws thus reflect a public perception that sentencing judges have been far too lenient, even guilty of contributory negligence, with respect to the incidence of crime in the Commonwealth.

The concept of sentencing guidelines, however, did not originate solely with the idea that judges were too soft on crime. The primary support for sentencing guidelines came from those who believed that sentencing judges simply had too much discretion, resulting in disparate treatment of similar offenders and even random harshness in sentencing. One scholar commenting on this phenomenon ranked the prerogative of the sentencing judge among "the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system." 4

The theory that gained momentum in this country in the 1970's, and eventually spurred many states to adopt sentencing reform, held that the best way to promote justice in sentencing was to rein in the discretion of the sentencing judge. In Pennsylvania, the groundswell of negative opinion about the way judges had exercised the sentencing power precipitated a virtual revolution in sentencing practice and procedure. As a result, in virtually every aspect of sentencing, the Pennsylvania courts are under much tighter strictures today than they were only a decade ago.

As a judge, I have listened to the criticism, but I remain somewhat skeptical of the movement to take away judicial sentencing discretion. The focus on the judge as the root of all evil in the sentencing process has obscured the considerable influence exerted on sentencing decisions by a number of other players behind the scenes: prosecutors, defense attorneys, police, probation and parole officers, correctional authorities, psychoanalysts, the victims, the public through their representatives in the legislatures, and the media all have an impact on final dispositions in criminal cases, yet the roles of these other parties have generated


neither the intense debate nor the attempts to confine discretion that presently all but engulf the sentencing judge. To blame lenient judges for the magnitude of the crime problem, moreover, is to confuse the source of the problem with one of its byproducts. Light sentences probably owe more to overcrowded prisons than to any lack of resolve on the part of judges to take a tough stand on crime.5

More than professional esprit de corps, however, makes me question the wisdom of removing sentencing decisions from the hands of judges. Having been a prosecutor and a defense attorney before becoming a trial judge in the Montgomery County Court of Common Pleas, I have developed more than one perspective on the criminal justice system. As a judge, I was called upon countless times to exercise the awesome responsibility of the sentencing power. My collective experience has convinced me that no one is in a better position than the judge to render a judgment of sentence.

Everyone can agree that in general the courts have a duty to dispense criminal justice with a stern but even hand. Judges know that nothing less will suffice for the criminal sanction to be effective. What the casual observer might not appreciate, however, is that criminal cases are among the least uniform and predictable known to the law. The very irrationality of the criminal act translates into a less-than-rational pattern of cases. I have sat in judgment of crimes carried out with cold, premeditated brutality, and others committed in the heat of passion where, unfortunately for all concerned, the harm resulting was the same. I have stared down ruthless felons who stood before me without remorse for their deeds, and looked upon just as many penitent wrongdoers who approached the bench hat in hand, willing to expiate their crimes and fully deserving of the mercy of the court. What I have found is that the human variables between different cases of the same offense make it impossible to decree one just punishment for all cases.6 No matter how well-conceived the effort to stand-


6. No less a jurist than Justice Nix, now Chief Justice of the Pennsylvania Supreme Court, declared that "[t]he sentencing decision is the most complex and difficult function a jurist is called upon to perform." Commonwealth v. Martin, 466 Pa. 118, 136, 351 A.2d 650, 659 (1976) (Nix, J., dissenting). Removing sentencing decisions from the realm of judicial discretion does not render them less complex, only less difficult. Indeed, the human complexities of the individual case are ignored when a tribunal divorced from the case predeter-
ardize and control sentencing decisions from outside the courtroom, cases inevitably will arise where statistical assumptions about offense or offender do not hold true, and where imposition of sentence based on a preset formula would lead to injustice.

The sentencing judge, who usually will have sat as trial judge as well, is by virtue of his position the only participant in the sentencing process who can calmly consider all appropriate factors bearing on the offender, impartially balance the needs of the offender with those of society, and aptly fit the punishment to the particular crime. To properly discharge this function, the judge must have reasonable discretion, within limits set down by the legislature, to fashion a penalty suitable to the case at hand.

This article, after initiating the reader to Pennsylvania's law of discretionary sentencing, will briefly outline the new sentencing guidelines which have been superimposed on the system since 1982. The article will then highlight the avenues for discretion wisely built into the guidelines for judges who find, in untypical cases, that the range of sentences suggested by the guidelines is not appropriate. In conclusion, I will attempt to point out some of the virtues of maintaining a healthy amount of discretion in the person faced with the sentencing decision.  

7. Of course, "windows" for judicial discretion in the new mandatory sentencing acts are slim or nonexistent. Unlike the guidelines, these laws react not to general concerns about the fairness of the sentencing process but to the public's specific fears about the courts not dealing effectively with its worst crime problems—like "the tyranny of armed felons." Commonwealth v. Wright, 508 Pa. 25, 42, 494 A.2d 354, 363 (1985) (Larsen, J., concurring), aff'd sub nom. McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986) (upholding constitutionality of mandatory minimum five-year prison term for certain felonies committed with firearms). One legislator, commenting in support of an unenacted bill that would have established mandatory minimum five-year sentences for rape, robbery, and arson, stated:

A recent survey in my district indicated that 99.98 percent of the people . . . favored mandatory sentences for the crimes [of rape, robbery, and arson]. I think that it is our responsibility to be responsive to that particular interest of the people. They are tired of the judges and the lawyers talking about justice and talking about the proper treatment of criminal defendants . . . They are in favor of putting them in jail. If it takes legislation to do that, as it apparently does, then I think we ought to pass that legislation.


As Part IV of this article will propose, however, a side effect of the mandatory sentencing acts may be to replace judicial discretion in sentencing the offender with prosecutorial discretion in charging him.
II. THE PRE-GUIDELINES LEGAL CONTEXT

A. "Indeterminate" Sentencing

Since 1911, Pennsylvania has embraced a system of "indeterminate" sentencing of criminal offenders under which the legislature sets the maximum penalties for each type of offense, and, within those limits, the sentencing judge chooses a minimum and a maximum term of confinement, or no confinement at all, on a case-by-case basis. Pennsylvania's indeterminate sentencing procedure "carries with it 'an implicit adoption of the philosophy of individual sentencing.'" The idea of individualized sentencing, in turn, is rooted in the theory that the primary goal of criminal punishment is to rehabilitate the offender, and to restore him to society once rehabilitation has had its effect. Accordingly, the sentencing judge in an indeterminate sentencing system has broad discretion to impose a sentence tailored to the characteristics of the individual offender and the circumstances of the particular case. The indeterminate nature of the sentence imposed also means that the incarcerated offender probably will be released on parole before he serves the maximum limits of his prison term. The parole decision itself, of course, depends partly on the progress of the offender's "rehabilitation" while in prison.

B. The Sentencing Code

A wave of dissatisfaction with indeterminate sentencing policies broke in the early 1970's. Critics from all points on the political spectrum challenged both the rehabilitative theory on
which the policies rested and the unexplained sentencing disparity believed to result from them. Many urged a return to the forgotten goals of criminal punishment: retribution, deterrence, and incapacitation.

The Pennsylvania legislature’s first response was to placate the liberal observers of the sentencing process who merely wanted more accountability from the sentencing courts. In 1974, the legislature passed a new sentencing code, repealing all prior inconsistent laws on sentencing procedure. The Code lent structure to the trial judge’s exercise of sentencing discretion, while leaving the fundamental features of the indeterminate sentencing scheme intact.

Under the Code, the sentencing judge generally remains free to select a sentence from among alternatives which include probation, a determination of guilt without further penalty, partial confinement, total confinement, or a fine. The Code lists nonexclusive criteria for the judge to consider in choosing from among these alternatives. If the judge chooses a sentence of confinement, he determines the minimum and maximum limits of the prison term. The minimum may not exceed one half the maximum sentence imposed, while the maximum must be within the statutory maximum for the type of offense involved. The significance of the minimum sentence is that upon its expiration, the


See Dowd, supra note 5, at 4-5 & nn.13-14, 7 & n.21; Martin, supra note 3, at 22-23 & nn.1-7, 26-27 & nn.15-20.

See generally Dowd, supra note 5, at 2-3, 4-5, 11-12.


The year before the Sentencing Code was enacted, the Pennsylvania Supreme Court pursuant to its rule-making power adopted rules of criminal procedure applicable to sentencing proceedings. See Pa. R. Crim. P. 1401-1415. A later amendment to the rules suspends some of the procedural provisions of the Sentencing Code. See Pa. R. Crim. P. 1415(g).

See 42 Pa. C.S. §§ 9703, 9721.

Id. §§ 9722-9726. The particularized nature of the circumstances and characteristics which these sections permit the judge to consider make it clear that under the original Sentencing Code, the judge retained considerable case-by-case discretion in the selection of a penalty. But see infra note 21 and accompanying text.

42 Pa. C.S. § 9756(b); see also id. § 9755(b) (relating to partial confinement).

See id. § 9756(a). In general, the Crimes Code prescribes the maximum permissible penalties for the various grades of criminal offenses. See 18 Pa. C.S. §§ 1101-1106.
prisoner becomes eligible for parole for the remainder of his term.\textsuperscript{20}

Aside from the statutory maximum for the offense, the Code places no limitation on the maximum sentence a judge can select. Consequently, the judge also has considerable discretion in determining the length of the minimum sentence. The Code does advise, as a general statement of policy, that "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."\textsuperscript{21}

The General Assembly has carved out limited exceptions to the rule of indeterminate sentencing. For example, the sheer gravity of the crime of murder has prompted the legislature to vastly curtail sentencing discretion for that offense. For certain types of murder in Pennsylvania, the penalty is automatic life imprisonment, or worse.\textsuperscript{22}

\textsuperscript{20} See Commonwealth v. Butler, 458 Pa. 289, 294-95 & n.8, 328 A.2d 851, 854-55 & n.8 (1974). The Pennsylvania Board of Probation and Parole has general power to grant paroles except where the maximum sentence is less than two years, in which case the sentencing court itself can parole the prisoner at any time. See 61 P.S. §§ 314, 331.17, 331.21, 331.26 (Purdon 1964 & Supp. 1986).

\textsuperscript{21} 42 Pa. C.S. § 9721(b). This language is a modification of the original language of the Code that "the sentence imposed should call for the minimum amount of confinement that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." Act of Dec. 30, 1974, No. 345, sec. 1, § 1321(b), 1974 Pa. Laws 1052, 1055 (emphasis added), amended by Act of Nov. 26, 1978, No. 319, sec. 1, § 1321(b), 1978 Pa. Laws 1316, 1316. Thus, the legislature in 1978 abandoned its preference for "minimum" confinement and leaned toward endorsing whatever "confinement" it took to protect the public, vindicate the victim and the community, and rehabilitate the defendant.

The 1978 amending act, in section 3, also created the Pennsylvania Commission on Sentencing. See infra note 52 and accompanying text. Section 1 of the Act prospectively amended the Code to require trial courts to consider guidelines to be promulgated by the Commission and to provide written reasons for deviations from the guidelines. Sec. 1, § 1321(b) (current version at 42 Pa. C.S. § 9721(b)). The Act further provided for enhanced appellate review of sentences once the guidelines were adopted. Id. sec. 3, § 1386 (current version at 42 Pa. C.S. § 9781(c)).

The Act also codified the requirement of Commonwealth v. Riggins, 474 Pa. 115, 577 A.2d 140 (1977), that the sentencing court state reasons for its sentence on the record. Sec. 1, § 1321(b) (current version at 42 Pa. C.S. § 9721(b)); see also infra note 33 and accompanying text.

Finally, section 5 of the amending act directed courts to consider an interim sentencing guideline of four years' minimum confinement for certain repeat, violent felonies. In 1982, the legislature went even further by enacting mandatory minimum five-year prison terms for such crimes. See infra note 23 and accompanying text.

\textsuperscript{22} See 18 Pa. C.S. § 1102(a) (sentence for first-degree murder shall be life
In the 1982 amendments to the Sentencing Code, the General Assembly has taken further steps to reduce sentencing discretion with mandatory minimum terms of imprisonment for certain crimes. The 1982 legislation responds to the hard-line critics of indeterminate sentencing whose concerns were not answered by the original Code; in other words, those who see long and definite terms of confinement as the only effective way to deter, punish, and incapacitate violent and dangerous criminals. Although sentencing under most of these acts is still "indeterminate" since each prison sentence has a minimum and a maximum limit, in practice the acts leave little or no room for judicial discretion, since the judge can never sentence lower than the mandatory minimum, and frequently he can sentence no higher.

23. See 42 Pa. C.S. §§ 9712-9718; 75 Pa. C.S.A. §§ 3731(e) & 3735 (Purdon Supp. 1986). In 1982, shortly before the sentencing guidelines went into effect for all felonies and misdemeanors, the General Assembly passed mandatory minimum five-year prison sentences for certain felonies committed with firearms (42 Pa. C.S. § 9712), certain felonies committed on public transportation (id. § 9713), and certain repeat violent felonies (id. § 9714). See also id. § 9715 (life imprisonment for repeat third-degree murderers). Later in the year, the General Assembly followed up with mandatory minimum sentencing acts for drunk driving (75 Pa. C.S. § 3731(e)), homicide by vehicle while driving drunk (id. § 3735), and certain crimes against the elderly and minors (42 Pa. C.S. §§ 9717-9718).

24. The latter result holds true where the mandatory minimum constitutes half the statutory maximum for the offense. For example, aggravated assault under 18 Pa. C.S. § 2702(a)(1), if committed on public transportation, begets a mandatory five-year minimum sentence under 42 Pa. C.S. § 9713(a); aggravated assault under 18 Pa. C.S. § 2702(a)(1) is a felony of the second degree under id. § 2702(b), with a statutory maximum prison sentence of ten years under id. § 1103(2); hence, five to ten years is at once the shortest and the longest prison term the court can impose. See McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986) (citing 42 Pa. C.S. § 9756(b)); cf. 18 Pa. C.S. § 6121 (mandating consecutively imposed sentence of "imprisonment for not less than five years" for third-degree felony of possessing armor-piercing bullets in commission of violent crime; maximum sentence for third-degree felony seven years under § 1101(3)).

While the new acts sharply curtail judicial discretion, they do not affect the ability of the parole board to grant parole after the mandatory minimum sentence expires. Even a prisoner serving a mandatory life sentence still has a chance for parole. See Commonwealth v. Gillespie, 333 Pa. Super. 576, 595 & n.2, 482 A.2d 1023, 1032-33 & n.2 (1984) (Cirillo, J., dissenting), rev'd on other grounds, 516 A.2d 1180 (Pa. 1986). Nor, by and large, do the new acts limit the
The 1982 amendments emphatically announce the legislature's displeasure with the sentencing leniency of the judicial branch, and may herald a new era in which the legislature assumes an even greater role in the sentencing process. For now, however, crimes with mandatory penalties still make up but a small proportion of the offenses which require judicial sentencing decisions in Pennsylvania. For the vast majority of offenses, the sentencing guidelines, not mandatory sentencing acts, will shape the pattern of sentencing in the Commonwealth for the foreseeable future.

C. Appellate Review of Sentences

Just as the General Assembly had traditionally left sentencing decisions in the hands of trial courts, the appellate courts of Pennsylvania were loath to intrude on this area of trial court discretion. As late as 1973, the supreme court said:

[T]he sentence imposed on a person convicted of crime lies with one exception (where the conviction is for first degree murder following a jury trial) within the sole discretion of the trial court, and the sentence imposed will not be reviewed by an appellate court, unless it exceeds the statutorily prescribed limits or is so manifestly excessive as to constitute too severe a punishment.

Indeed, Justice Roberts could find "[n]o cases where this Court has reduced an appellant's sentence, except in . . . capital cases where the death penalty was imposed." The hands-off posture of the state appellate courts was based on the view that "the trial court is in a far better position to weigh the factors involved in discretion of the prosecutor whether to charge or seek punishment under the mandatory provisions.


26. See Martin, supra note 3, at 91-92, 99 ("about five percent").


sentencing determinations." 29

This absolute deference to trial court sentencing discretion began to crumble at about the same time that the legislature moved to impose more control under the Sentencing Code. Justice Roberts struck the first major blow in Commonwealth v. Martin, 30 where the supreme court indicated that it would begin to review sentences under a stricter standard. Martin dealt with consolidated appeals from the Lancaster County Court of Common Pleas wherein the trial court had imposed uniform three- to ten-year terms of imprisonment on a number of defendants for unrelated sales of heroin. On appeal, the supreme court held that the nature of the criminal act alone would no longer be a sufficient basis upon which to determine the length of a sentence. The court found that "at least two factors are crucial to such determination—the particular circumstances of the offense and the character of the defendant. . . . [T]he sentencing court must at least consider these two factors in its sentencing determination. Failure to give such individual consideration requires that these sentences be vacated." 31

A year and a half after Martin, Justice Roberts wrote the next major chapter in the assertion of appellate court control over sentencing: Commonwealth v. Riggins. 32 Riggins was another appeal from a drug conviction in Lancaster County. On this occasion, the trial court had imposed a two- to five-year sentence for possession of approximately 1.9 ounces of marijuana with intent to deliver. The supreme court vacated the sentence and remanded for resentencing. Writing for a plurality of the court, Justice Roberts (later Chief Justice) noted almost universal criticism of the "unlimited, unstructured and unreviewable discretion" confided

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29. Commonwealth v. Riggins, 474 Pa. 115, 123, 377 A.2d 140, 144 (1977) (plurality opinion); see also Commonwealth v. Martin, 466 Pa. 118, 131, 351 A.2d 650, 657 (1976). Justice Nix, dissenting in Martin, elaborated on one of these factors:

The consideration of the criminal himself is peculiarly within the sentencing judge's domain. Only he can judge attitude and demeanor of the defendant. Only he can judge defendant's repentance or lack of it. Only he can appraise defendant's awareness of the seriousness of his offense and his understanding of the affront to society. . . . No record, for example, could perpetrate [sic] a scowl of resentment or blind indifference.

Id. at 136 n.4, 351 A.2d at 659-60 n.4 (Nix, J., dissenting) (quoting United States ex rel. Huntt v. Russell, 285 F. Supp. 765, 770 (E.D. Pa. 1968), aff'd, 406 F.2d 774 (3rd Cir. 1969)).


31. Id. at 133, 351 A.2d at 658.

to trial courts,\textsuperscript{33} and fashioned a rule requiring courts to articulate reasons on the record for any sentence imposed.\textsuperscript{34}

One of the reasons offered in support of the \textit{Riggins} holding was that "[r]easoned sentencing decisions may . . . reduce disparity in sentences—decreasing the number of unusually lenient as well as unusually harsh sentences."\textsuperscript{35} In fact, the \textit{Riggins} plurality noted that "[d]isparity in sentencing is one of the most criticized aspects of the sentencing process. Requiring trial courts to articulate their reasons in selecting a particular sentence may substantially contribute to uniformity in sentences."\textsuperscript{36} Ironically, the year before in \textit{Martin}, it had been uniform sentences imposed on heroin dealers in Lancaster County that had sounded the death knell for uncontrolled sentencing discretion.\textsuperscript{37}

Ultimately, however, \textit{Riggins} and \textit{Martin} are reconcilable in that both reaffirmed Pennsylvania's overriding commitment to the practice of individualized sentencing. Neither uniform nor disparate sentences are per se valid unless the trial court considers individual circumstances and characteristics, and based thereon states why it has chosen a particular sentence for a particular offender.\textsuperscript{38}

\textsuperscript{33.} \textit{Id.} at 123, 377 A.2d at 144.
\textsuperscript{34.} \textit{Id.} at 133, 377 A.2d at 149. The reasons-on-the-record requirement has since been incorporated into the Sentencing Code (42 Pa. C.S. § 9721(b)), the Rules of Criminal Procedure (PA. R. CRIM. P. 1405(b)), and the sentencing guidelines (204 PA. CODE § 303.1(h)). In \textit{Commonwealth v. Kostka}, 475 Pa. 85, 379 A.2d 884 (1977), the \textit{Riggins} rule received the implicit imprimatur of a majority of the supreme court, when Chief Justice Eagen, who had concurred in the result in \textit{Riggins}, joined Justice Roberts' majority opinion in \textit{Kostka}.
\textsuperscript{35.} \textit{Riggins}, 474 Pa. at 130-31, 377 A.2d at 148 (emphasis added).
\textsuperscript{36.} \textit{Id.} at 131 n.22, 377 A.2d at 148 n.22.
\textsuperscript{37.} The \textit{Martin} court had mentioned "wide disparity in sentencing practices" as one of the evils of indeterminate sentencing, but under the circumstances the court had been more concerned with upholding the principle of individualized sentencing than with reducing any disparity that might result from it. \textit{Martin}, 466 Pa. at 131 n.22, 132, 351 A.2d at 657 & n.22.
The landmark proportions of Martin and Riggins lie mainly in


Despite the primary purpose of the sentencing guidelines to reduce sentencing disparity, no such judicial comparison of sentences occurs under them. Rather, the trial court selects each sentence from a grid based on the defendant's prior record and the gravity of the offense. See 204 Pa. Code § 303.9(b)
their having introduced the principle of appellate review to Pennsylvania’s indeterminate sentencing scheme. The supreme court has imposed no further significant restraints on the general sentencing power. For the most part, the court has been content to rely on the dictates of Martin and Riggins and the requirements of the Sentencing Code that the sentencer consider the particular circumstances of the case and characteristics of the offender and then give reasons for the sentence imposed.39

Notwithstanding the advent of appellate review, the Pennsylvania appellate courts continue to define the sentencing discretion of the trial court as broad,40 and continue to decline interference with the sentencing process “absent a manifest abuse

(1986). The appellate court simply determines whether the trial court has applied the guidelines correctly to that case. See 42 Pa. C.S. §§ 9721(b), 9781(c), 9781(d). Appellate review under the mandatory-minimum sentencing legislation is even more straightforward. See, e.g., id. § 9712(d) (“The appellate court shall vacate the sentence and remand for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section”).


of that discretion." Indeed, despite the supreme court's indication in Martin that it was less than happy with the prevailing standard for judging the excessiveness of a sentence on appeal, the courts still cling with undiminished tenacity to the pre-Martin rule that, "[o]n appeal, a sentence may not be disturbed unless it 'exceeds the statutorily prescribed limits or is so manifestly excessive as to constitute too severe a punishment.'"
Thus, the discretion of the sentencing court in Pennsylvania has weathered both the passage of the Sentencing Code and the institution of appellate review. Although the sentencing judge now must follow the procedural rules laid down by the legislature and the supreme court,44 the setting of the actual punishment still rests solely in the judge’s hands unless the punishment he selects is manifestly inappropriate to the case.45


III. THE SENTENCING GUIDELINES

The requirements that a court state reasons for its sentence and not inflict a manifestly excessive punishment obviously did not go as far as some had intended towards establishing uniformity in the sentencing policy of the Commonwealth. Accordingly, as the legislature and courts were experimenting gradually with procedural sentencing reforms, the opponents of sentencing disparity renewed their call for more substantive restraints on the sentencing power.

In 1978 the General Assembly answered the call by creating the Pennsylvania Commission on Sentencing and directing it to develop presumptive sentencing ranges to apply to every class of offense and offender. The fruits of the Commission's labor—the Pennsylvania Sentencing Guidelines—are a bittersweet victory for the original proponents of the guidelines idea. While the guidelines will somewhat reduce sentencing disparity, they also retain generous outlets for judicial discretion. A far more measurable and immediate effect of the guidelines, however, will be to increase the average length of sentences handed down in the Commonwealth over those that judges had been imposing.\(^\text{46}\) Undoubtedly this was not the goal borne foremost in mind by sentencing reformers who believed that "uncontrolled" judges were running amok with unduly harsh sentences.

The final form of the Pennsylvania Sentencing Guidelines owes much to the compromise between two forces which propelled their adoption. The guidelines’ original sponsors, of course, were concerned primarily with lessening the wide disparity between sentences given in different parts of the state or among different offenders charged with the same crime.\(^\text{47}\) Another faction, however, were advocates of mandatory-minimum sentencing legislation who decried judicial leniency in sentencing and sought primarily to increase the certainty and severity of sentences imposed in the Commonwealth.\(^\text{48}\) In fact, before these latter partisans would support the guidelines, they first led a successful move to reject proposed guidelines which the Commission

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46. See Martin, supra note 3, at 96-97 & n.363.
48. See Martin, supra note 3, at 66, 91. Between 1977 and 1980, a period encompassing the Commission’s formulation of the initial draft of the guidelines, sentencing severity in Pennsylvania was already on the rise. See id. at 95 & n.354. Judges, as well as legislators and commissioners, are attuned to the public’s attitude on crime.
submitted to the legislature in 1981, on the ground that the draft guidelines were too lenient and too inhibitive of judges' discretion.\textsuperscript{49} The guidelines eventually adopted, therefore, provided for longer sentences and more judicial discretion than those originally proposed.\textsuperscript{50} Indeed, by the time the Commission submitted the new guidelines, legislative concern about sentencing disparity had virtually disappeared, and had been replaced with a nearly unanimous desire to get tough on crime.\textsuperscript{51} Consequently, during the same period that the General Assembly was declining to exercise its legislative veto over the newer, more stringent guidelines, it was also putting the mandatory-minimum sentencing legislation into place.\textsuperscript{52}

The Commission's need to satisfy the diverse constituents of sentencing reform therefore played a large part in shaping its final product. However, aside from the basically political problem of responding to these competing interests, the Commission had what in my view was an even greater problem; that was to predetermine the appropriate range of permissible punishment for every crime thereafter committed in the Commonwealth. A single sentencing decision is hard enough, and the judge making it has access to a wealth of information on the individual before him and the case at hand. It is a task of geometrically greater complexity for a tribunal to sit independently of any case and set all future punishments by predicting and categorizing all the important variables about all the crimes yet to happen. Such a task, I submit, would have been impossible, and for that reason the guidelines finally implemented reflect not only a political compromise, but also a compromise with the idea that disparity in sentencing could or should be eliminated. In the end, the sentencing commissioners realized the fundamental need in a rational sentencing scheme for the sentencer to have reasonable leeway to adjust the sentence to the individual case, and therefore they adopted guidelines that provide substantial windows for judicial discretion.\textsuperscript{53}

\textsuperscript{49} See id. at 89-90 & nn.324-33.
\textsuperscript{50} See id. at 96-98 & nn.356-64, 366 & 369; id. at 111; see also id. at 86-89 & nn.310-23 (discussing changes in initial proposed guidelines before their rejection).
\textsuperscript{51} See id. at 91, 101-02, 110-11.
\textsuperscript{52} See id. at 99 & nn.373-75.
\textsuperscript{53} The guidelines, 204 Pa. Code §§ 303.1-.9 (Purdon 1986), went into effect July 22, 1982 after the General Assembly failed to reject them by concurrent resolution within 90 days of their publication by the Commission. See generally 42 Pa. C.S. § 2155 (Purdon 1986). For a comprehensive survey of the process lead-
A. Basic Structure of the Guidelines

The guidelines establish a recommended range of sentences from which the judge is asked to choose the minimum term of confinement, which, as we have seen, is the most important aspect of a prison sentence in the sense that it usually represents the time actually spent behind bars.

The two constant determinants of any guideline sentence are the "offense gravity score," which will range from one to ten, and the "prior record score," which goes from zero to six. For each separate combination of these two scores, the guidelines specify a "standard" range, a "mitigated" range, and an "aggravated" range of sentences. Thus, for example, a crime with an offense gravity score of seven with a prior record score of three has a mitigated guideline range of sixteen to twenty-two months, a standard range of twenty-two to thirty-nine months, and anag-


The guidelines adoption procedure came under immediate constitutional attack on the ground that the legislative veto provision included in the guidelines enabling act violated the requirement of article III, section 9 of the Pennsylvania Constitution that legislation be passed only with the concurrence of both houses of the General Assembly and after presentment to the Governor. See Commonwealth v. Kuphal, 347 Pa. Super. 572, 500 A.2d 1205 (1985) (en banc). Five of the nine judges hearing Kuphal agreed that the legislative veto was unconstitutional. However, Judge Beck, one of the five judges voting to invalidate the legislative veto, differed with her colleagues on the result, and concurred on other grounds with the four judges in the minority to uphold the guidelines. In her view, the legislature had made the legislative veto provision severable from all other provisions of the guidelines enabling legislation; in her view the only portions of the legislation which were not severable from each other were the sections which appropriated money to the Commission and 42 Pa. C.S. § 9781(a), which states: "The defendant or the Commonwealth may appeal as of right the legality of the sentence." Id.; see Kuphal, 347 Pa. Super. at 576-79, 500 A.2d at 1207-09 (Beck, J., concurring) (construing Act of Oct. 5, 1980, No. 142, § 218(c), 1980 Pa. Laws 693, 734 (repealed 1986) (corresponds to Act of Nov. 26, 1978, No. 319, § 7, 1978 Pa. Laws 1316, 1323, repealed by Act of Oct. 5, 1980, § 218(d))).


The Commission has amended the guidelines three times since their original promulgation in 1982, with the latest changes taking effect June 5, 1986. See generally 42 Pa. C.S. § 2155.

The mitigated, standard, and aggravated ranges are continuous like this within any combination of prior record and offense gravity scores. Each range in turn may span anywhere from one to seventy-two months, unless the range flatly specifies non-confinement or the statutory limit as the guideline sentence. A one point difference in offense gravity or prior record score will often raise or lower all three guideline ranges, but often the ranges still overlap with those in the next stratum of offense gravity or prior record score. Hence, if the prior record score in the hypothetical is four instead of three, the standard range becomes thirty-three to forty-nine months, thus overlapping with both the standard and aggravated ranges for the prior record score of three. This overlapping of the guideline ranges is more extensive for less serious offenses; for example, non-confinement remains a viable guideline sentence for many combinations of a low record score with an offense gravity score under six.

The wild card in the shifting guidelines scheme is the "deadly weapon enhancement," which requires the addition of twelve to twenty-four months to the guideline range otherwise suggested if a deadly weapon was possessed during the offense.

The "offense gravity score," as its name implies, is the Commission's way of measuring the seriousness of the various felonies and misdemeanors which the legislature has defined. Third-degree murder is the only crime that achieves the highest offense gravity score of ten; rape and several other first-degree felonies involving danger to the person weigh in at nine; and so on down the line to most misdemeanors of the third degree, which have scores of one. The offense gravity scores roughly follow the legislative classification of offenses into first-, second-, and third-degree felonies and first-, second-, and third-degree misdemeanors. But in many

55. See id. § 303.9(b).
56. See id.
57. See generally id.
instances the Commission has departed from this ranking and classified crimes independently of degree based on its own assessment of offense gravity. For example, robbery as a first-degree felony will obtain an offense gravity score of either nine or seven depending upon whether the robber inflicts serious bodily injury as defined by the Pennsylvania statute.\footnote{60} The first-degree misdemeanor of providing tools of escape to an inmate has an offense gravity score of seven, greater than the score of six assigned to the second-degree felony of assault by a prisoner.\footnote{61} The first-degree misdemeanor of possessing instruments of crime, on the other hand, merits an offense gravity score of only three, which is the same score as for the third-degree felonies of criminal trespass and unlawful use of credit cards.\footnote{62}

Legislative classifications do, however, remain important, primarily because they govern the maximum sentence a court can impose, and hence indirectly limit the minimum sentence as well. If the guidelines suggest a minimum sentence that exceeds one half the maximum allowed by law, that sentence would be illegal and the statutory limit would control instead.\footnote{63} A court could not, for example, add the deadly weapon enhancement to a sentence in the aggravated range for a crime with an offense gravity score of ten, two, or one, because those ranges already suggest the statutory limit.\footnote{64} Nor could the court select from among the full standard range of zero to six months minimum confinement provided for the offense of possessing a small amount of marijuana,\footnote{65} because the statutory maximum for that offense is thirty

\footnote{60. 18 Pa. C.S. § 3701(a)(1)(i); see also 204 Pa. Code § 303.8(d).}
\footnote{61. See id.}
\footnote{62. See id.}
\footnote{64. See 204 Pa. Code § 303.9(b); see, e.g., Commonwealth v. Hoover, 342 Pa. Super. 163, 167, 492 A.2d 443, 445 (1985).}
\footnote{65. See 204 Pa. Code, §§ 303.8(d), 303.9(b).}
The other element of the guidelines which the Commission used considerable discretion in devising is the "prior record score," which gauges the number and seriousness of the defendant's previous convictions. The guidelines award three prior record points for each conviction or juvenile adjudication for murder, voluntary manslaughter, and various first-degree felonies; two points for each infraction of various other felony statutes; and one point for each weapons misdemeanor or one of the remaining felonies. In addition, the Commission has allotted one point for two or three prior non-weapons misdemeanors, and two points for four or more such convictions. Regardless of the quantity and quality of a defendant's prior convictions, however, his prior record score can never be greater than six, which raises some questions about the court's proper response when the defendant's criminal record exceeds all expectations. This, however, is a topic for the discussion which follows.

B. The Windows for Discretion

Even before reaching the windows for discretion in the sentencing guidelines, we can well imagine that they provide ample scope for deviation in exceptional cases. A rudimentary review of the sentencing grid which the guidelines establish has revealed

66. 35 P.S. § 780-113(a)(31), (g) (Purdon Supp. 1986).
67. See 204 Pa. Code § 303.7(b).
68. See id. § 303.7(a). However, in Commonwealth v. Samuels, 354 Pa. Super. 128, 511 A.2d 221, appeal granted, 518 A.2d 801 (Pa. 1986), the superior court held that the Sentencing Commission had exceeded its authority in assigning prior record score points for non-weapons misdemeanors. The Samuels court interpreted the guidelines enabling act, which before a 1986 amendment stated, in pertinent part: "The guidelines shall: ... (2) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or convicted of a crime involving the use of a deadly weapon." 42 Pa. C.S.A. § 2154 (Purdon 1981) (prior to 1986 amendment). The court concluded that this section gave the Commission no power to mandate the inclusion of misdemeanants not involving the use of a deadly weapon in the calculation of prior record score. See 354 Pa. Super. at 135, 511 A.2d at 237; accord Commonwealth v. Washington, 516 A.2d 397 (Pa. Super. Ct. 1986). In Commonwealth v. Tilghman, No. 770 Philadelphia 1985 (Pa. Super. Ct. argued Apr. 7, 1986) (en banc), the court took up the related issue of whether the Commission had been empowered to include juvenile adjudications as part of the prior record score. The legislature, however, has now amended 42 Pa. C.S.A. § 2154, specifically directing the Commission to "[s]pecify a range of sentences of increased severity for defendants previously convicted of or adjudicated delinquent for one or more misdemeanor or felony offenses committed prior to the current offense." Act of Dec. 11, 1986, No. 165, sec. 3, § 2154(a)(2), 1986 Pa. Legis. Serv. 97, 105-06 (Purdon) (effective Feb. 9, 1987) (emphasis added).
69. See 204 Pa. Code § 303.7(i).
that the sentences prescribed there are not set in stone; instead, they allow reasonable movement even within a given range. Thus, a judge facing a two-time narcotics salesman with a considerable record in the County of Philadelphia, where such crimes are relatively commonplace, jails comparatively full, and sentences traditionally lenient, might well choose to impose a substantial though not oppressive sentence of five to ten years' imprisonment. His counterpart in Mercer County, where drug dealers are far scarcer and judges perhaps less disposed to leniency, might select six and a half to fifteen years for the same crime in the same circumstances. Both will have sentenced well within the guidelines, and within the applicable standard range of the guidelines at that. Indeed, the drafters of the guidelines contemplated precisely such regional variations in sentencing practice when they drew the guideline ranges so broadly.  

As I have already pointed out, the guidelines' liberal allowance for variation is at its widest at the bottom end of the offense gravity scale. In fact, the guidelines should have no substantial effect on incarceration rates and lengths for most misdemeanors of the second and third degrees, because, taking into account the aggravated and mitigated ranges for such crimes with offense gravity scores of one or two, the guidelines permit the selection of any sentence from non-confinement to the statutory limit as the guideline sentence, almost regardless of prior record score.  

In essence, therefore, according to one scholar, the guidelines leave

70. See 1978 Pa. House Legislative Journal, supra note 3, at 1475. Representative Scirica explained:

The directive in the statute to the commission is that the guidelines must prescribe a range of sentences. . . . Within that particular range, county X may feel more comfortable in sentencing at the bottom part of that range whereas county Y may want to go to the upper part of the range, so I think there is going to be enough flexibility in there to have some differences.

Id. Representative Scirica not only sponsored the guidelines bill in the House of Representatives, but he was also a member of the original Pennsylvania Commission on Sentencing as a legislator, and then acceded to the chairmanship of that body after his election to the Montgomery County Court of Common Pleas. See Martin, supra note 3, at 71-72, 94. Judge Scirica chaired the Commission that promulgated the version of the guidelines which successfully became law in 1982. He has since accepted appointment to the United States District Court for the Eastern District of Pennsylvania. If there exists an authority on the sentencing guidelines, it is Judge Scirica.

71. See 204 Pa. Code § 303.8(c)(3) (setting offense gravity scores of two and one respectively for most second- and third-degree misdemeanors). "Statutory limit" in this context means the longest minimum sentence permitted by law. Id. § 303.9(b).
Having to articulate the requisite aggravating or mitigating circumstances to take full advantage of the guidelines' ranges should not prove unduly burdensome for judges, since the guidelines permit any legally cognizable factor to serve as aggravation or mitigation. The court is subject only to the requirement that it state what factors it relied on to sentence within the aggravated or mitigated range. Thus, for example, the superior court has found the particular callousness and brutality of an offense to be sufficient reason to sentence in the aggravated range for murder of the third degree. Because the guidelines supplement and do not supersede the Sentencing Code, any factor which the Code weighs in favor of an order of probation would seem to weigh in favor of sentencing in the mitigated range of the guidelines, or, in the appropriate case, even going outside them where the mitigated range suggests confinement. Nor would the factors listed

74. See 204 PA. CODE § 303.3(2). The legislature rejected initial draft guidelines which contained exclusive lists of aggravating and mitigating circumstances. See Martin, supra note 3, at 82 & n.293, 90 & n.329. "It seems clear... that the legislature, while mindful of the guideline's purpose to promote more uniform sentencing across the Commonwealth, nevertheless, feared that adherence to an exclusive list of factors would unduly fetter the sentencing judge's traditional discretion in this area." Commonwealth v. Duffy, 341 Pa. Super. 217, 223, 491 A.2d 230, 232 (1985).
76. Section 9722 of the Sentencing Code provides:

The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of an order of probation:

1. The criminal conduct of the defendant neither caused nor threatened serious harm.
2. The defendant did not contemplate that his conduct would cause or threaten serious harm.
3. The defendant acted under a strong provocation.
4. There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.
5. The victim of the criminal conduct of the defendant induced or facilitated its commission.
6. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.
7. The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
8. The criminal conduct of the defendant was the result of circumstances unlikely to recur.
in section 9722 in any way exhaust the possibilities for sentence mitigation, which would seem to be limited only by the considerations in the Sentencing Code which favor substantial confinement.\textsuperscript{77}

An issue has arisen in the appellate courts over whether a defendant's prior record can be considered as an aggravating or mitigating circumstance notwithstanding that the prior record is already factored into any guideline sentence through the prior record score. Any defendant with two prior serious felony convictions garners the highest possible prior record score of six.\textsuperscript{78} However, suppose the defendant has an extensive history of criminal activity, of which the two felonies counted in the prior record score are but a small representative sampling. Could not the sentencing judge, in his sound discretion, determine that the sheer incorrigibility of the defendant in his devotion to criminal behavior warranted a sentence in or beyond the aggravated range? The superior court has found this to be a reasonable response where the defendant's excessive recidivism reflects on his character as someone unlikely to be rehabilitated.\textsuperscript{79} Similarly, although lack

\begin{itemize}
\item[(9)] The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
\item[(10)] The defendant is particularly likely to respond affirmatively to probationary treatment.
\item[(11)] The confinement of the defendant would entail excessive hardship to him or his dependents.
\item[(12)] Such other grounds as indicate the desirability of probation.
\end{itemize}

42 Pa. C.S. § 9722. Some, but not all, of these factors appeared in the exclusive list of mitigating factors which the legislature rejected along with the initial draft guidelines. See Martin, supra note 3, at 82 n.293. It could well be that the legislature did not want the guidelines interpreted as shortening the list of factors relevant to the alternative of probation.

One factor which made the Commission's original list of mitigating factors, but which is not specifically mentioned in the Sentencing Code, is the defendant's cooperation in the prosecution of others. See id. Since January 2, 1986, this consideration has been incorporated into the guidelines as a circumstance which "may warrant a sentence less severe than suggested in [the guidelines]." 204 Pa. Code § 303.1(e); see also Implementation Manual, supra note 63, at 37.

\textsuperscript{77} See 42 Pa. C.S. §§ 9721(b), 9725.

\textsuperscript{78} See 204 Pa. Code § 303.7(b)(2), (i).

of a criminal record is already taken into account in the prior record score, query whether a lifelong commitment to community involvement or peaceful and quiet citizenship in general would justify mitigating the guideline sentence or going below the floor of the mitigated range. The court has held, though, that a sentence should not be aggravated or mitigated based "solely" on a factor included in the calculation of prior record score.\textsuperscript{80}

Before proceeding from the liberal ranges of the guidelines themselves to the standards which govern deviations from them, we should touch upon some of the areas of sentencing discretion with which the guidelines do not deal at all. Certain types of sentencing decisions, whose importance should not be overlooked, are completely exempt from the guidelines' reach. The guidelines do not regulate the imposition of fines and restitution,\textsuperscript{81} nor the choice between total and partial confinement.\textsuperscript{82} Except insofar as the law requires that a maximum sentence must be at least twice the minimum, the guidelines do not govern the maximum sentence,\textsuperscript{83} i.e., "the maximum period that society must exercise


\textsuperscript{81} See \textit{204 PA. CODE} § 303.1(g).

\textsuperscript{82} Partial confinement is probably underutilized as a sentencing alternative. Partial confinement operates much like probation in that it can be made subject to the same terms and conditions and allows the offender to work, go to school, or pursue other gainful activities outside prison walls, yet at the same time it allows authorities to exercise closer supervision over the offender during the periods when he is confined. See \textit{generally 42 PA. C.S.} § 9755. The court may even order the offender to pay board in prison. See \textit{id.} § 9755(f)(1). However, the court should choose total over partial confinement where it finds that

\begin{enumerate}
\item there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;
\item the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
\item a lesser sentence will depreciate the seriousness of the crime of the defendant.
\end{enumerate}

\textit{Id.} § 9725.

\textsuperscript{83} See \textit{204 PA. CODE} § 303.9(a); Implementation Manual, \textsuperscript{supra} note 63, at 45 ("Factors which may not be used to justify an aggravated or mitigated range sentence include items which are already counted in the guidelines, such as offense of conviction, possession of a deadly weapon, and prior convictions and adjudications which are counted in the prior record score.") (emphasis added).
control over the offender to minimize the possibility of future antisocial behavior." The guidelines do not infringe on the jurisdiction of the Board of Probation and Parole to grant parole and revoke it, nor do they affect the power of the sentencing court to parole a prisoner before the end of the guideline sentence where the total maximum sentence is less than two years. The guidelines do not apply to sentencing decisions upon revocation of probation, nor to the length or conditions of a probationary sentence if probation is a permitted sentencing alternative or is added to the guideline sentence. They do not inhibit the court's ability to place the offender in pre-sentence diversionary programs or accelerated rehabilitative disposition. The guidelines also do not deal with summary offenses.

One of the most striking areas of sentencing discretion which the guidelines leave unregulated is the decision whether to impose consecutive or concurrent sentences for multiple crimes arising out of the same or separate transactions. The possible consequences for sentencing disparity are enormous because the offender upon whom the court imposes cumulative punishment may end up serving many times the sentence served by a similarly situated offender for whom separate sentences are ordered to run concurrently. The guidelines' only statement on consecutive sentences is that the defendant's prior record score counts only for the crime of highest offense gravity where the court gives separate sentences for convictions arising out of the same transaction. The Sentencing Code offers no further guidance on the matter, simply providing that "the court . . . may impose [the sanctioned sentencing alternatives] consecutively or concurrently . . . ." Thus, it has been left entirely to the common-law standard of abuse of discretion to arbitrate the reasonableness or propriety of sentences imposed consecutively for separate crimes.

85. See Implementation Manual, supra note 63, at 84.
86. 204 PA. CODE § 303.1(f). Probation revocations are governed by 42 PA. C.S. § 9771.
87. See Implementation Manual, supra note 63, at 83. See generally 42 PA. C.S. § 9722 (factors militating in favor of probation); id. § 9754 (relating to conditions of probation).
88. See generally PA. R. CRIM. P. 175-185.
89. See 204 PA. CODE § 303.6(a).
90. 42 PA. C.S. § 9721(a).
More notable still than either the width of the guidelines' ranges or the aspects of sentencing they leave unaffected, however, is the fact that the guidelines clearly are not nor were they intended to be mandatory; they are merely recommendatory or presumptive as to how the judge should exercise his discretion in the absence of good and sufficient reasons to the contrary. "The Sentencing Guidelines were enacted to provide a guide to the courts; they are not mandatory." 92 The guidelines are "advisory to all trial judges before they sentence any particular individual. . . . The guidelines are not mandatory on the sentencing judge. They are merely that, guidelines." 93

If in fact the guidelines are not mandatory in the sense that the judge is not necessarily bound to follow them, one might

and probation consecutively for one robbery); Commonwealth v. Button, 332 Pa. Super. 239, 481 A.2d 342 (1984) (consecutive life sentences not abuse of discretion); Commonwealth v. Green, 312 Pa. Super. 265, 458 A.2d 951 (1983) (consecutive sentences for robberies proper); Commonwealth v. Ziomek, 291 Pa. Super. 251, 435 A.2d 894 (1981) (consecutive sentences on seven counts totalling fourteen to thirty-two years not manifestly excessive). The supreme court in Martin stated that "the same factors relevant to other determinations of sentencing are applicable to the decision to have terms of imprisonment run consecutively rather than concurrently." Martin, 466 Pa. at 132 n.23, 351 A.2d at 657 n.23 (citing Standards Relating to Sentencing Alternatives and Procedures § 3.4 (Approved Draft 1968)). The appellate courts of the Commonwealth paid little attention to this statement in Martin until Commonwealth v. Simpson, 353 Pa. Super. 474, 510 A.2d 760 (1986), wherein the superior court found six consecutive robbery sentences totalling thirty to sixty years to be a manifestly excessive abuse of the trial court's discretion. The court noted that a cumulative minimum sentence of thirty years . . . would take a relatively young man through the prime of his life for a term twice as long as the average life sentence, under a system which . . . does not permit review and parole upon good behavior in substantially less time than the minimum sentence provides. . . .

To impose a minimum sentence of thirty years discounts the possibility of rehabilitation and effectively removes appellant from society for his potential working life, precluding the possibility of his ever becoming a contributing member of society.

Id. at 481-82, 510 A.2d at 763-64.

A further common-law restraint on consecutive sentences comes into play where multiple crimes in one transaction "merge," to wit, where the sentencing judge is empowered to impose only one sentence despite the Commonwealth's proof of multiple statutory violations. "Merger" of offenses for sentencing purposes occurs where one crime is "necessarily involved" in another and causes no distinct harm. See Commonwealth v. Williams, 344 Pa. Super. 108, 496 A.2d 31 (1985) (en banc); see also Commonwealth v. Sayko, 515 A.2d 894 (Pa. 1986). A court has no discretion to impose separate sentences on merged offenses, because such sentences are "illegal," and beyond the power of the court to impose. See Williams, 344 Pa. Super. at 125, 496 A.2d at 41.


wonder how they can achieve their goals of lessening sentencing disparity and instituting sentences of greater certainty and severity for society's worst offenders. The remainder of this discussion of the windows for discretion in the guidelines will focus on the manner in which they "guide" and "advise" the sentencing court, and on the ways in which the presumption of appropriateness of the guideline sentence may be overcome in favor of a greater or lesser sentence than the guidelines suggest.

The guidelines state that "[t]he court shall consider [the guidelines] in determining the appropriate sentence for felonies and misdemeanors." The Sentencing Code, after the 1978 amendments, similarly states that "[t]he court shall . . . consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect [pursuant to 42 Pa. C.S. § 2155]." In addition to requiring consideration of the guidelines, section 9721(b) of the Code states: "In every case where the court imposes a sentence outside the sentencing guidelines . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines." The guidelines contain nearly identical language in section 303.1(h).

Thus, the least common denominators of guidelines compliance are consideration of their sentencing ranges, and a statement of reasons on the record for sentencing above or below them. However, just as in the case for sentencing in the aggravated or mitigated ranges, the guidelines have little to say about how much consideration the guidelines are due in comparison

94. 204 PA. CODE § 303.1(a) (emphasis added).
95. 42 PA. C.S. § 9721(b) (emphasis added).
with other factors, or just what reasons are adequate to justify departing altogether from the guidelines.

Therefore, the provisions of the Sentencing Code which authorize appellate review of sentencing decisions under the guidelines take on crucial importance. As Representative Scirica was fond of saying, 98 what gives "teeth" to the guidelines is the limited right to appellate review which the guidelines enabling act established for both the Commonwealth and defendants. 99 Ultimately it will be up to the appellate court to determine how binding the guidelines are in a particular case.

As discussed earlier, the standard of common-law appellate review before the guidelines appeared was not particularly stringent. As long as the sentencing court followed the proper procedure in sentencing a defendant, the sentence would not be disturbed absent manifest excessiveness or illegality. 100 The Commonwealth had no right to appeal the sentence unless it was illegal. 101

However, the new Sentencing Code provisions have opened up the discretionary aspects of sentencing to a more searching appellate scrutiny. Under section 9781 of the Code, the legislature has specifically instructed the appellate court to determine whether the sentencing court has adequately considered the guidelines in imposing sentence. Section 9781's provisions, which are among the most explicit standards the legislature has directed to any appellate court on any subject, are worth setting forth here at length:

(b) Allowance of appeal.—The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

(c) Determination on appeal.—The appellate court

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100. See supra notes 39-44 and accompanying text.
101. See Commonwealth v. Wrona, 442 Pa. 201, 206-07, 275 A.2d 78, 80-81 (1971) (Commonwealth could not appeal sentence unless it was outside statutory limits or constitutionally impermissible).
shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

(1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

(d) Review of record.—In reviewing the record the appellate court shall have regard for:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.102

102. 42 Pa. C.S. § 9781(b)-(d). While allowance of appeal under subsection (b) is discretionary with the appellate court, subsection (a) of the statute preserves the right of the Commonwealth or the defendant to appeal the "legality" of the sentence. Id. § 9781(a). The distinction between the "legality" of a sentence and other aspects which bear on its validity is sometimes tricky to define, but as a general statement an "illegal" sentence is one the court had no power to impose, such as one exceeding the statutory limit, whereas an "improper" sentence would be one within the court's power to impose, but rendered voidable on appeal because the court proceeded improperly or otherwise abused its discretion. Judge Spaeth gave an instructive explanation of the difference in Commonwealth v. Tolassi, 303 Pa. Super. 177, 179-82, 449 A.2d 636, 637-38, appeal denied, 303 Pa. Super. 177 (Pa. 1982). The major significance of the distinction is that improprieties in sentencing can be waived, but illegality cannot. See 303 Pa. Super. at 180-82, 449 A.2d at 638; Commonwealth v. Whetstone, 344 Pa. Super. 246, 256-57, 496 A.2d 777, 782 (1985) (excessiveness and Riggins issues waived; merger issues preserved); Commonwealth v. Reardon, 297 Pa. Super. 193, 199-200, 443 A.2d 792, 795 (1981). Guidelines compliance is a waivable issue, and the superior court will find such issues waived where they have not been raised at the sentencing hearing or in a motion to modify ad-
Essentially, this statute decrees that the appellate court must consider the sentencing guidelines in determining whether the trial court has abused its discretion. Although guidelines compliance is not the only factor governing the determination on appeal, the record must at least show that the sentencing court gave due consideration to the guidelines before imposing sentence. This means that a prerequisite to the validity of any sentence outside the guidelines will be for the trial court to calculate offense gravity and prior record scores correctly, and identify the corresponding ranges of punishment recommended by the guidelines. Although the trial court is vested with the right, in the proper exercise of its discretion, to sentence outside the guidelines, it is imperative that before making that determination the correct starting point in the guidelines be determined. "[Where] that was not done . . ., it is necessary that the sentence be recon-

Another important provision of § 9781 is subsection (f), which states that "[n]o appeal of the discretionary aspects of the sentence shall be permitted beyond the appellate court that has initial jurisdiction for such appeals." 42 Pa. C.S. § 9781(f). The effect of this provision is to limit the jurisdiction of the Pennsylvania Supreme Court over sentencing questions under the guidelines, since the superior court has "initial jurisdiction" over appeals from judgments of sentence, except death sentences. To my knowledge the supreme court has not yet ruled on a sentencing issue under the guidelines, although it will be interesting to see what the court decides in Commonwealth v. Dixon, 344 Pa. Super. 293, 496 A.2d 802 (1985), appeal granted, 509 Pa. 490, 503 A.2d 929 (1986) and Commonwealth v. Parrish, 340 Pa. Super. 528, 490 A.2d 905, appeal granted, 508 Pa. 612, 499 A.2d 1063 (1985), since the sole issue in those cases was whether the sentencing court abused its discretion under the guidelines. See also Commonwealth v. Tuladziecki, No. 26 W.D. Appeal Docket 1986, slip op. at 5 n.4 (Pa. Mar. 10, 1987) (Larsen, J., dissenting ("I interpret section 9781(f) as permitting [the supreme court] to review a ruling by an intermediate appellate court which is an abuse of discretion or exceeds its authority." (emphasis added)); cf. Commonwealth v. Tomasso, 506 Pa. 344, 485 A.2d 395 (1984) (per curiam) (supreme court decided sentencing appeal under interim guidelines act with similar restriction on appellate review).

sidered.’’104 Of course, ‘’[i]f the court sentences within the guidelines’ suggested ranges, there is no need for the sentencing court to otherwise manifest on the record that it considered the guidelines. In such a case, consideration of the guidelines is presumed to be evidenced by the actual sentence imposed.”105

If the trial court duly considers the guidelines, but sentences outside their ranges, the statute directs the appellate court to strike down the sentence if it is “unreasonable.”106 If within the guidelines, the sentence will stand unless “clearly unreasonable.”107 Although the art of assessing the “reasonableness” of a sentence would not seem to be something that changes radically in a short period of time, appellate review under the guidelines has changed the definition of “reasonableness,” primarily because the court now must “have regard for” the guidelines along with the nature of the crime, the characteristics of the defendant, and the information before the trial court which traditionally went into determining the reasonableness of a sentence.108 The result is a more constrictive appellate review which presumptively defers to the propriety of the guideline sentence, and tolerates deviations “only in exceptional cases.”109 The idea of tailoring a sentence to the individual, and to the particular circumstances of his crime, has become secondary to the perceived goals of the guide-


106. 42 Pa. C.S. § 9781(c)(3).

107. Id. § 9781(c)(2). The statute’s threshold proviso that the appellate court may allow an appeal “where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter [the Sentencing Code],” is likely to weed out most appeals from sentences that are within the guidelines. See id. § 9781(b); Commonwealth v. Tuladziecki, No. 26 W.D. Appeal Docket 1986 (Pa. Mar. 10, 1987) (under section 9781(b), superior court may not reach question whether trial court abused its discretion under guidelines unless appellant first demonstrates there is a substantial question that the sentence is inappropriate under the Code); see also Commonwealth v. Easterling, 353 Pa. Super. 84, 87-90 & nn.1-4, 509 A.2d 345, 347-48 & nn.1-4 (1986) (discussing “substantial question” in terms of § 9781(c) criteria). Sentences that make it past the threshold finding still must be affirmed unless they are “clearly unreasonable.”

108. See 42 Pa. C.S. § 9781(d).

lines to "insure that more uniform sentences are imposed in this Commonwealth," and to make criminal sentences more rational and consistent.

Of course, implicit in the requirement of section 9721(b) that a trial court state reasons for departing from the guidelines is the recognition that there may be adequate reasons in particular cases why the guideline sentence is not appropriate. "Clearly, had the Legislature intended the Guidelines to remove the discretion of the trial judge from sentencing, it would not have included language in the Code that acknowledges inevitable instances of departure from them." However, in the vacuum left by the legislature's declining to dictate what reasons for departure are adequate, and by the guidelines' own silence on the subject save the stricture against double counting, the courts have been quick to reject reasons proffered for deviating from the guidelines, and hesitant to accept factors offered in support of deviation that under the old sentencing scheme would easily have justified a sentence in the appellate courts.

The "rehabilitative needs of the defendant," in particular, have lost favor, and usually will be viewed as weak reasons for guidelines deviation when presented in the context of a reprehensible offense. The superior court has found a twenty-two-month sentence for aggravated assault with a knife unreasonably lenient and unjustified by the court's rationale that it was the defendant's first prison sentence; a six-month sentence and three years' probation for a fourth drug violation unjustified by the trial jurist's concern that the defendant would not have an effective drug rehabilitation program in prison; eight months and probation

113. See supra notes 79-80 and accompanying text.
114. This style of appellate review may be close to that envisioned by the drafters of the original guidelines before their revision and submission to the legislature. These guidelines stated that the sentencing court could depart from the guidelines only for "compelling reasons." Martin, supra note 3, at 83 & n.294. Such a standard was adopted in Minnesota's guidelines, also a subject of Martin's article, providing for deviations only in "substantial and compelling circumstances." Id. at 55-56 & n.159.
for a kidnapping at gunpoint unwarranted by the judge’s desire to protect the defendant, who had twice been sexually assaulted in prison; 117 and a county jail sentence for burglary imposed so the court could retain parole authority over the defendant should he get into a drug program an unreasonable deviation from the lowest mitigated minimum sentence of twenty-five months imprisonment. 118 On the other hand, a well-conceived and convincingly explained departure from the guideline ranges based on either retributive considerations or a careful balancing of the offender’s needs with those of society will still find an open ear in the appellate courts. The superior court has affirmed precisely such well-reasoned guideline departures where the trial court took the time to list the factors which compelled it not to follow the guideline sentence. 119 The *sine qua non* of any guideline departure is a cogent statement of reasons by the sentencing jurist. 120 And a necessary condition to stating the reasons for a deviation is to first ascertain the range of sentences which would govern the case if it were not worthy of deviation. These are simple expedients, and any judge engaging in them will, if his reasons are reasonable,

120. After setting forth the requirement that the sentencing court state reasons for deviating from the guidelines, section 9721(b) states: “Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.” 42 Pa. C.S. § 9721(b). The superior court has relied on this provision independently of the requirements of § 9781(c) to vacate sentences departing from the guidelines solely for the trial court’s failure to state reasons for the departure. See, e.g., Commonwealth v. Chesson, 353 Pa. Super. 255, 509 A.2d 875 (1985); Commonwealth v. Catapano, 347 Pa. Super. 375, 500 A.2d 882 (1985). Since the above-quoted provision came into the Sentencing Code along with not only the guidelines legislation, but also the other 1978 amendments, the “failure to comply” it refers to may mean any failure to comply with the general standards of § 9721(b). Commonwealth v. Tuladziecki, No. 26 W.D. Appeal Docket 1986, slip op. at 6 (Pa. Mar. 10, 1987). Query, however, whether an appellate court must vacate a sentence departing from the guidelines for a failure to state reasons therefor if the sentence is not “unreasonable” under § 9781(c)(3).
face a far greater likelihood of seeing his sentence upheld on appeal.

There are windows for discretion in the sentencing guidelines. For judges wise enough to open them, the full panoply of reasoned discretion which sentencers enjoyed under the old system will continue to be available, and society's concerns about "undue, unjustifiable, or unwarranted disparity," and about the lack of fairness and certainty in criminal punishment will also be vindicated.

IV. An Overview

The Pennsylvania Sentencing Guidelines channel and control judges' sentencing discretion in order to reduce disparity and uncertainty in criminal sentencing, and the appellate decisions which have had to answer final questions on the guidelines' applicability have most emphasized this aspect of their nature. However, the guidelines supplement and do not displace a full-fledged indeterminate sentencing scheme under which the discretion of the judge is directed to the individual case at hand, and not to other cases in an attempt to impose a standard sentence. Moreover, reducing disparity was just one of the goals sought by the sentencing reform movement responsible for the guidelines; the other goal, equally if not more important, was to institute tougher sentencing policies over the objections of unwilling judges—in other words, to make sure that criminals did time.

From all appearances, the message from the legislature worked, and judges are doing their duty to put criminals behind bars. In some cases, judges simply no longer have a choice about the matter, with the mandatory-minimum sentencing acts being upheld and enforced. In other cases, judges continue to exercise discretion, but under constraints that would have seemed foreign to the American way of jurisprudence of their counterparts from the heyday of "uncontrolled" sentencing discretion.

Before rushing to praise the new system for its payoffs in certainty, severity, and predictability in sentencing, however, let us pause to reflect on the wisdom of the old ways, when judges, not legislators or committees, were primarily responsible for judgments of sentence. The eulogy will be delivered by a friend, Judge Scirica, who almost single-handedly brought the guidelines to fruition, first as legislative sponsor of the guidelines bill, then

as member and chairman of the Pennsylvania Commission on Sentencing. Judge Scirica spoke on the subject of mandatory sentencing, but his comments are equally applicable to any substantial fettering of a judge's discretion to fit the punishment to the particular crime and offender:

Mandatory sentences do not work. It is impossible to legislatively propose a single just sentence for all persons convicted of a particular crime and variations in sentencing necessarily result from taking into account individual differences in each case. Furthermore, mandated sentences fail to consider the problem of jury nullification, or the practical considerations of plea bargaining, backlog, problems of proof, prior relationship between victim and defendant, and reluctance of victims to prosecute.

No legal system can function without the exercise of discretion. To eliminate discretion from the courts where it is visible, is to reconstitute it in the police and prosecutors where it is invisible. 122

Judge Scirica's words are well worth remembering in the present haste to standardize sentences, and in the flurry to condemn sentencing judges as either too harsh or too lenient on particular criminals. The sentencing judge's exercise of discretion has always been a matter of public record and is often subjected to high public visibility through the news media. The checks on a judge's discretion are not only those imposed by law and the higher courts, but those which society exert collectively through the judge's awareness that his decisions are open to public scrutiny.

However, now consider the policeman walking the beat who decides to excuse or ignore a petty crime on the street, or the prosecutor who drops charges that he thinks are weak, or, more commonly, due to a plea bargain, or perhaps for other reasons. If these officers bring the accused into my court and he is convicted, I have no way of avoiding the decision that must come: the sentence. If, however, the charges are dropped, or bartered down, or never brought, I will not be criticized for my decision, and more than likely no one will criticize them for theirs, because their decision is not made in an open forum subject to procedural and

substantive examination. Compared to the discretion of the sentencing judge, the discretion of the prosecutor is truly vast and unreviewable.¹²³

Lest it be believed that I am not fond of prosecutors, or do not share their aims, nothing could be further from the truth. I have been one of their company, and they have always seen me as a judge who is "tough on crime," hence pro-prosecution. I heartily endorse the goals of the prosecutorial profession to protect and defend society from the ravages of crime. My quibble with prosecutors in this instance is not with their ends, but their means. They, just like the defense attorneys on the opposing side of the bar, come to court with an axe to grind. Notwithstanding the popular (and official) notion of the district attorney as an officer who impartially pursues justice rather than convictions, district attorneys are in court to win. I am not suggesting that they bring bad cases to court; what I am suggesting is that in most situations they are not appropriate officials to be making final decisions in criminal cases.

The appropriate official is the judge. The hallmark of the judiciary is impartiality. There are always two stories to every crime, assuming a crime is proven, and the judge has those two stories, each with its flaws and strong points, out of which to fashion a fitting sentence. A rape can be a brutal crime of impersonal violence, or the painful result of a relationship gone sour.²⁴ A theft might owe to simple avarice, or dire poverty. A killer can be a wanton and depraved individual thoroughly unfit to live in society, or simply out of control and full of remorse when the deed is done. The prosecutor faced with these conflicting situations would exercise discretion accordingly, but the sentencing judge, steeped in the rule of law and the tradition of impartiality, should determine the defendant's fate.

¹²³. See, e.g., Commonwealth v. Lutz, 508 Pa. 297, 310, 495 A.2d 928, 935 (1985) (district attorney has unrestricted discretion whether or not to submit case to accelerated rehabilitative disposition, absent some criteria for admission to program wholly unrelated to society's protection or offender's rehabilitation, such as race or religion) (dictum); Commonwealth v. Malloy, 304 Pa. Super. 297, 450 A.2d 689 (1982) (Cirillo, J.) (private complainant has no standing to appeal where district attorney decides to terminate prosecution of criminal action).

¹²⁴. The supreme court recently defined the "forcible compulsion" necessary to establish rape as "not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." Commonwealth v. Rhodes, 510 Pa. 587, 555, 510 A.2d 1217, 1226 (1986). Rape is a crime of offense gravity score nine with a mitigated minimum sentencing range with no prior record of 27 to 36 months. See 204 Pa. Code § 303.9(b).
Devices like the mandatory sentencing acts and even the guidelines remove judicial discretion, but it does not disappear. It goes over to the prosecutor, who might have gained an edge on the defendant by being able to bargain with a reduction in penalty that the judge can no longer offer, or, if he still retains some discretion, is very limited in his exercise of it. The prosecutor has always played a prominent role in our criminal justice system, but with the guidelines and the mandatory minimums in place, he threatens to eclipse the judge as its most powerful actor. The result is not all bad—sentencing disparity will be reduced. But discretion will be shifted to where it is unseen.

I have not imposed a sentence under either the mandatory acts or the guidelines that form the topic for this paper, having come to the superior court just before they became effective. I have reviewed guidelines determinations on appeal, however, and I am qualified to say it is not a satisfying type of appellate review. Making sure that the trial judge has correctly placed the defendant in a box on a grid does little to convince me the sentence was arrived at after careful consideration of crime and offender. I am not sure what would have convinced me in a recent case, Commonwealth v. Ruffo,\textsuperscript{125} in which our court vacated a sentence totalling twenty to forty years on a defendant who had kidnapped, brutality assaulted, and horribly slashed a two-year-old girl for no better reason than that she had interrupted his attempted burglary of her home. In an opinion in which I joined, our court said the trial court had erred in going beyond the guidelines' suggested ranges based solely on the seriousness of the offense. Possibly, the judge in \textit{Ruffo} overreacted to the heinousness of the crime, and the sentence would have been vacated even without the guidelines. I sincerely hope, however, that any sentence eventually imposed on that defendant has some rehabilitative effect to make up for the retributive motivation which our court held insufficient.\textsuperscript{126} I have no doubt that the sentences which I imposed on Walter Hill and his co-defendant fifteen years ago, each totalling twenty-three and one-half to forty-seven years in prison, would not have survived a minute of scrutiny under today's guidelines. As it was, the superior court affirmed Hill's sentence after a slight modification of


\textsuperscript{126} \textit{Cf.} Commonwealth v. Whitney, 512 A.2d 1152, 1158 (Pa. 1986) (plurality opinion) (society's interest in retribution a legitimate factor supporting the death penalty). But for a twist of fate, the defendant in \textit{Ruffo} might have been facing the death penalty.
one to two years on merger grounds, but vacated his co-defendant's and remanded for resentencing because of the disparity between their criminal records. In *Commonwealth v. Hill*, I had thought the only solution to these repeat offenders' ravaging society was to, in effect, put them away. While the guidelines and mandatory acts stand for a tough new attitude on crime, the thought of a sentence of twenty years' actual time is sobering, even upon my own reflection on this case.

The job of the sentencing jurist is without a doubt underappreciated, both in its complexities and in its mental turmoil for the judge. The goals of rehabilitation, retribution, deterrence, and incapacitation compete and coexist. Whatever choice the judge makes, he risks incurring the displeasure of some interest group or individual. The current climate of opinion reflects a definite "get-tough" outlook on crime, and for good reason: the streets of major cities and even small towns are being wracked with a violent and tumultuous crime epidemic the likes of which civilized society probably hasn't witnessed since the age of the Vandals. The only effective way known to deal with most hardened criminals is to lock them away from the law-abiding public for substantial prison terms. Any judge who dares exhibit leniency in the face of today's crime wave risks public outrage and censure as a criminal sympathizer. On the other hand, the seemingly random harshness sometimes doled out to individual offenders could lead the media-consuming public to conclude that the criminal justice system is essentially irrational in its operation.

Another conflict arises between the undervalued right of the victim of crime to expect that the offender be isolated in an institution, and society's pressing need to come to grips with the problem of burgeoning prisons. Warehousing criminals is the apparently easy solution to crime, but "rehabilitating" them in prison is a largely failed experiment in this country, either because the material is lacking or the setting completely conducive. Prisons cannot help most offenders who have gone far enough to reach their portals. In fact, the opposite of rehabilitation more accurately reflects what goes on in a prison; in most cases a sentence of any considerable length will commit the convict to a life of crime upon his release, because in prison he has learned to live by its laws, and they are not the laws of polite society.

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Are mandatory sentencing acts and guidelines that increase punishment the answer? They address a symptom, but not the causes, of crime. Moreover, the potential for unfairness in such legislation is one good reason for approaching it with caution. Legislators, judges, and law professors have all contributed examples of how Pennsylvania's mandatory sentencing acts might act unfairly. District attorneys, on the other hand, uniformly applaud them. I will exercise my judicial discretion not to commit myself until the verdict is in. I must admit, however, to seeing the utility of an act which announces to the armed felons who are terrorizing our communities that there is no mercy and they should expect none. Nor do I resent the sentencing guidelines now in place. After overcoming my initial leeriness of them, I have grudgingly come to accept that they provide sufficient range for the prudent exercise of sentencing discretion. What I fear, however, is that the legislature will see any success of the guidelines in meeting their objectives as a legitimate reason for curtailing the range of sentencing discretion even further, to the point where the sentencing decision is nothing but a perfunctory response to an outside command, and the judge can no longer effect individual justice. The wisdom of our legislators, I think, will warn them against letting that day arrive, and sentencing the individual will continue to be the predominant way by which sentences are determined in Pennsylvania.

V. CONCLUSION

The overarching purpose of the Pennsylvania Sentencing Guidelines is the laudable one of bringing rationality and predictability to the sentencing process. However, in striving to reach

128. See 1976 Pa. House Legislative Journal 6012-13 (statement of Rep. LaMarca) (posing example of love relationship gone bad leading to rape charge; speaking in opposition to mandatory minimum five-year sentence for rape); Schaffner, Mandatory Sentencing—An Assessment, 58 Pa. B.A.J. 26, 29 (1987) (posing disparity in sentencing between robbers robbing taxicabs serving different locations—robbing taxi serving public transportation facility subjects defendant to mandatory minimum five-year term); Dowd, supra note 5, at 16-17 (posing hypothetical where Farmer Brown is subject to mandatory penalty for shooing intruder off land with gun).

129. See Preat & Suss, Mandatory Sentencing—A Different Perspective, 58 Pa. B.A.J. 32 (1987). The prosecutors quote with favor a judge who voices the opinion that the sentencing guidelines are too lenient with respect to the crime of selling heroin. See id. at 36 & n.22. The guidelines address the judge's concern in § 303.1(e): "The Commission recognizes the difficulties in setting sentences in certain cases. These include but are not limited to major drug trafficking . . . . These crimes may warrant a sentence more severe than otherwise suggested in this chapter." 204 Pa. Code § 303.1(e).
this goal, we should be careful not to eliminate the human ele-
ment from sentencing, or we will have surrendered one of the
most vital functions of the justice system to an inflexible, mechan-
ical form of decision-making. We may have equality, but it will be
an arbitrary equality. A judge is not a sentencing machine, nor is
a criminal defendant a standard entity whose character and con-
duct can be judged solely by comparison with other cases or the
lines on a chart.

A non-judicial commission is not capable of sitting independ-
dently of any actual case and prescribing a correct presumptive
sentence applicable to all offenders convicted of a class of crimes.
It is not only mandatory sentences that “do not work” in all cases;
it is any predetermined sentence that robs the sentencing jurist of
sufficient discretion to deal with the facts and circumstances
presented by the conjunction of the individual before him and the
crime that he has committed.

The Pennsylvania Sentencing Guidelines, by retaining suf-fi-
cient “windows” for judicial discretion where they are needed,
strike a balance between the standardization and the individuali-
zation that are required in a rational sentencing scheme.