Pennsylvania Sentencing: Striking a Different Balance

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"run amok"
"fetish with absolute arithmetic"
"most sensitive, and difficult, task"
"said to be rational"
"These are just numbers"
Fraud
"black stain on common sense"
"utter travesty of justice"
2B1.1
sentencing
Guidelines
"patently absurd"

Imagine a Different Place.

- Imagine a place with fewer levels – 14 instead of 43 – and grid boxes.
- But still plenty of complexity.
- And its own set of challenges.
  - Important disclaimer.

Setting the (Simplified) Stage.

- Indeterminate.
  - Pennsylvania Board of Probation & Parole.
  - Trial Judge.
- Sentencing lingo.
  - Min-max.
- Advisory guidelines.
  - Commission since 1979.
  - First guidelines effective in 1982.

Pennsylvania Guidelines.

- Advisory.
  - A benchmark for Judges.
- Must be considered for each felony and misdemeanor conviction.
- Largely charge based.
- Modest appellate review.

Pennsylvania Guidelines.

- No recommendations for concurrent/consecutive.

- Mandatory minimums trump with cliffs.
  - Most are “notice” mandatories.
  - Most are for guns or drugs.
  - Other offenses, including theft, for older victims.

Guidelines Basics.

- Minimum (only) sentence recommendations in a range of months.
- Based on combination of:
  - Offense Gravity Score (OGS).
  - Prior Record Score (PRS).
- Three recommendations in each cell:
  - Standard Range.
  - Aggravated Range.
  - Mitigated Range.
- Departures above or below.

Sentencing Levels

- **Level 5**
  State Sentence/State Facility (SIP)
- **Level 4**
  State Sentence/County Facility (CIP/SIP)
- **Level 3**
  County Sentence/County Facility (CIP)
- **Level 2**
  County Sentence/County Facility or Non-confinement
- **Level 1**
  Non-confinement

Level	OGS	Example Offenses	0	1	2	3	4	5	RFEL	REVOC	AGG/MIT
LEVEL 5 State Incar	14	*Murder 3* *Inchoate Murder/SBI*	72-240	84-240	96-240	120-240	168-240	192-240	204-240	240	+/- 12
	13	*Inchoate Murder/no SBI* Drug Del. Result in Death PWID Cocaine, etc. (>1,000 gms)	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	*Rape* *IDSI* *Robbery (SBI)* *Robbery/car (SBI)*	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	*Agg Asslt (SBI)* *Voluntary Manslaughter* Sexual Assault PWID Cocaine,etc.(100-1,000 gms)	36-54 BC	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	*Kidnapping* *Arson (person inside)* *Agg Asslt (att. SBI)* *Robbery (threat. SBI)* Agg. Indecent. Asslt Causing Catastrophe(F1) PWIDCocaine,etc.(50-<100 gms)	22-36 BC	30-42 BC	36-48 BC	42-54	48-60	60-72	72-84	120	+/- 12
	9	*Robbery/car (no SBI)* *Robbery (F1/F2)* *Burglary (home/person)* *Arson (no person)*	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12
LEVEL 4 State Incar/ RIP trade	8 [F1]	Agg Asslt (BI w/DW) Agg Asslt (att. BI w/DW) Invol. Mansl. (when DUI) Hom. by Vehicle (when DUI) Theft (>$100,000) PWID Cocaine,etc. (10-<50 gms)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9
LEVEL 3 State/ County Incar RIP trade	7 [F2]	Robbery (inflicts/threatens BI) Burglary (home/ no person) Statutory Sexual Assault Theft (>$50,000-$100,000) Sexual Abuse/Child (take photo) PWID Cocaine,etc.(2.5-<10 gms)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	NA	+/- 6
	6	Invol. Mansl.(when no DUI) Hom. by Vehicle (when no DUI) Burglary (not home/person) Theft (>$25,000-$50,000) Arson (property) PWID Cocaine,etc.(<2.5 gms)	3-12 BC	6-14 BC	9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	NA	+/- 6
LEVEL 2 County Incar RIP RS	5 [F3]	Burglary (not home/no person) Corruption of Minors Robbery (prop by force) Firearms (loaded) Theft (>$2000-$25,000) PWID (1-<10 lb of marij)	RS-9	1-12 BC	3-14 BC	6-16 BC	9-16 BC	12-18 BC	24-36 BC	NA	+/- 3
	4	Indecent assault Forgery (money, stock, etc.) Firearms (unloaded) Crim Trespass (breaks in)	RS-3	RS-9	RS-<12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	NA	+/- 3
	3 [M1]	Simple Assault Terr. Threats Theft ($200-$2000) Retail Theft (3rd) DUI (M1) Drug Poss.	RS-1	RS-6	RS-9	RS-<12	3-14 BC	6-16 BC	12-18 BC	NA	+/- 3
LEVEL 1 RS	2 [M2]	Theft ($50-<$200) Retail Theft (1st ,2nd) DUI (M2) Bad Checks	RS	RS-2	RS-3	RS-4	RS-6	1-9	6- <12	NA	+/- 3
	1 [M3]	Most Misd. 3's;Theft (<$50) Drug Paraph. Poss. Small Amount Marij.	RS	RS-1	RS-2	RS-3	RS-4	RS-6	3-6	NA	+/- 3

1. Yellow (Level 4) and Blue (Level 3) shaded areas of the matrix indicate restrictive intermediate punishments may be imposed as a substitute for incarceration.
2. When restrictive intermediate punishments are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.
3. When the range is RS through a number of months (e.g. RS-6), RIP may be appropriate.
4. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 PA.C.S. §9755(b) and §9756(b).

Key: Level 1 = Purple, Level 2 = White, Level 3 = Blue, Level 4 = Yellow, Level 5 = Green, AGG/MIT = Tan

CNTY	=	county	RIP	=	restrictive intermediate punishments
INCAR	=	incarceration	RS	=	restorative sanctions
PWID	=	possession with intent to deliver	< ; >	=	less than;greater than
REVOC	=	repeat violent offender category	BC	=	boot camp
RFEL	=	repeat felony 1 and felony 2 offender category	Italics	=	Three Strikes Offense

	9	*Robbery/car (no SBI)* *Robbery (F1/F2)* *Burglary (home/person)* *Arson (no person)*	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12
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Conformity to the Guidelines.

- In 2012, 90% of all sentences conformed.
  - 75% standard; 8% mitigated; 7% aggravated
  - 3% departure above; 6% departure below.
    - 89% of felony theft sentences conformed , but reflected more mitigated and departure below.
- Possible reasons:
  - Broad ranges plus nature of mandatories.
  - Judicial buy-in.
  - Appellate review.
  - Release of judge-specific sentencing data.

PA Economic Offenses.

- Loss is actual.
- Wide loss groupings per the Commission.
- Further factual differentiation is left to the attorneys and the Judge.
- USSG case comparisons are challenging.
  - Including scope and data capture issues.

Theft (3d Deg. Felony; 7yr max.)

- Sub-categorizations:
  - >$100,000 – OGS 8 – [RS – 9-16 – 25]
  - >$50K-$100K – OGS 7 – [RS – 6-14 – 20]
  - >$25K-$50K – OGS 6 – [RS – 3-12 – 18]
  - >$2K-$25K/car – OGS 5 – [~ – RS-9 – 12]
    - Assuming PRS 0

Not Everyone Is Happy.

- Concerns about:
  - Judicial disparity.
  - Predictability.
  - Fairness.

- Some suggest adding additional factors and levels (OGS).
  - Selected USSG provisions highlighted as potentially attractive, including acceptance of responsibility.

Talk of Change Is Unsurprising.

- The “right” balance is elusive.

- “The greatest obstacle to [simplification] is, I believe, the legal mind itself. We judges and lawyers love to make distinctions.”
  - Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT. R. 180 (1999).

What can PA offer?

- Perspective on the “endless struggle” between uniformity and individualization.
- Evidence that different choices are possible.
- Food for thought.

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