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State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues

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STATE SENTENCING GUIDELINES: DIVERSITY, CONSENSUS, AND UNRESOLVED POLICY ISSUES

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State sentencing guidelines systems differ in their goals, scope of coverage, design, and operation. There are also many similarities, suggesting a substantial degree of consensus on some issues. This Essay surveys the field of state guidelines systems to identify critical areas of diversity and consensus—both in guidelines design and in the philosophical and policy goals of guidelines reform. For states considering adopting guidelines or modifying an existing guidelines system, the varying approaches found in existing systems provide a rich menu of reform options. At the same time, the Supreme Court's recent Blakely *jurisprudence has provided both the necessity and the opportunity to reexamine many of the most fundamental sentencing policy issues underlying guidelines reforms. To assist policymakers and scholars in their evaluation of these difficult issues, this Essay identifies and analyzes several of the most salient guidelines policy choices about which no consensus has yet been reached, and suggests avenues for future research. These issues include resolving conflicting aims of punishment, determining the role that existing resource constraints should play in the making of sentencing policy, evaluating competing enforcement methods for guidelines rules, deciding whether to retain parole release discretion, and determining the extent to which guidelines should regulate intermediate sanctions, misdemeanor sentencing, revocation of probation and postprison release, and prosecutorial charging decisions.*

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INTRODUCTION

Sentencing guidelines have been adopted in at least eighteen states and the District of Columbia, but the approaches taken are almost as numerous as the jurisdictions adopting them. State gnidelines systems differ in their goals, scope of coverage, design, and operation. There are also many similarities, suggesting a substantial degree of consensus on some issues. These similarities also suggest that states can learn and "borrow" from other states; to use a well-worn comparative law metaphor, donor and recipient systems are sufficiently compatible to permit viable "legal transplants."[1] At the same time, the many differences among these systems provide a rich menu of reform options. The differences also reflect important unresolved policy issues in the relatively young field of structured sentencing.

These reform options and areas of policy disagreement have taken on new importance in light of the Supreme Court's recent *Booker*[2] and *Blakely* decisions,[3] which increased the procedural requirements for an upward departure from a legally binding guidelines recommendation. Whatever the ultimate scope of this revolution in sentencing procedure, it is clear that some features of some forms of guidelines will be subject to stricter constitutional requirements, or in Justice O'Connor's terms, a "constitutional tax."[4] But legislators, other policymakers, and sentencing reformers cannot simply discard these features without making a judgment about how valuable they are—is the tax worth paying?

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1. Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, 78 Cal. L. Rev. 539, 551 (1990) [hereinafter Frase, Comparative Criminal Justice]; id. at 547–48 (citing A. Watson, Legal Transplants: An Approach to Comparative Law 21–35 (1974)).

2. United States v. Booker, 125 S. Ct. 738 (2005).

3. Blakely v. Washington, 124 S. Ct. 2531 (2004).

4. *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting).

Some observers undoubtedly believe that no version of guidelines sentencing is worth salvaging. On this view, the *Blakely* and *Booker* decisions would be a blessing in disguise if they resulted in the repeal or emasculation of all guidelines reforms. The federal guidelines in particular have been subject to widespread criticism.[5] But even the federal guidelines have their defenders, and not just among conservatives and prosecutors; an early draft of "consensus points" among non-Justice Department members of the American Bar Association's *Blakely* Task Force begins with the assumption that the federal system is better off with sentencing guidelines than without them.[6] Moreover, state sentencing guidelines reforms have enjoyed much broader support, and reactions to *Blakely* have focused on how to preserve these guidelines while meeting the new procedural requirements.[7] State guidelines are popular because they have proven more effective than alternative sentencing regimes as a means to promote consistency and fairness, set priorities in the use of limited correctional resources, and manage the growth in prison populations.[8] For these reasons, guidelines continue to be adopted in the states, and the most recent model sentencing standards have recommended an approach based on the best features of these state systems.[9]

Although full compliance with *Blakely*'s procedural requirements would not be difficult,[10] some states may prefer to avoid these requirements entirely. There seem to be a number of ways to "*Blakely*-proof" a guidelines system to avoid the upward-departure problem identified in that case.[11] For example: (1) Since the *Blakely* decision appeared to ex-

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5. See generally Michael Tonry, Sentencing Matters 72–99 (1996) [hereinafter Tonry, Sentencing Matters].

6. ABA *Blakely* Task Force, Points of Consensus Among Non-DOJ Members on Long Term Solution (Dec. 8, 2004) (unpublished draft, on file with the *Columbia Law Review*).

7. See U.S. Sentencing Comm'n, Individual State Responses to *Blakely v. Washington*, at http://www.ussc.gov/STATES/blakely.htm (last visited Feb. 27, 2005) (on file with the *Columbia Law Review*).

8. Richard S. Frase, Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective, 12 Fed. Sent'g Rep. 69, 75 (1999) [hereinafter Frase, Retrospective]; Am. Law Inst., Report, Model Penal Code: Sentencing 48–50 (Kevin R. Reitz reporter, Apr. 11, 2003), available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf (on file with the *Columbia Law Review*) [hereinafter MPC Sentencing Report]; Tonry, Sentencing Matters, supra note 5, at 25–64, 71.

9. ABA, Standards for Criminal Justice Sentencing xxi (3d ed. 1994) [hereinafter ABA Standards]; MPC Sentencing Report, supra note 8, at 46–50.

10. See Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1109–13 (2005) [hereinafter Reitz, Sentencing Conundrum] (discussing experience in Kansas, where state courts anticipated *Blakely* by several years).

11. See id. at 1113–18 (discussing voluntary guidelines and parole retention as ways to "avoid" *Blakely*'s procedural requirements); Jon Wool & Don Stemen, Aggravated Sentencing: *Blakely v. Washington*—Practical Implications for State Sentencing Systems, Pol'y & Prac. Rev. (Vera Inst. of Justice), Aug. 2004, at 1, 2, available at http://www.vera.org/publication_pdf/242_456.pdf (discussing various ways for states "to cure *Blakely* ills").

empt traditional indeterminate sentencing regimes from the new procedural requirements, "voluntary" guidelines systems appear to be exempt.[12] This is also the import of Justice Breyer's opinion in *Booker*, holding that the federal guidelines must be deemed "voluntary" until Congress acts to specify its preferred mode of compliance with the Court's new constitutional requirements.[13] (2) Courts and commentators in Michigan and Pennsylvania have stated that upward departures under the guidelines in those states are exempt from *Blakely* because the guidelines retain parole release discretion, and only set the minimum term to be served before parole eligibility.[14] (3) All upward "departures" could be eliminated by a variety of means, the most prominent proposal being to adopt "topless" guidelines—retaining the existing lower end of each guidelines range but replacing the top end with the statutory maximum penalty.[15] (4) Most upward departures could be eliminated by

12. See Benge v. State, No. 137, 2004 Del. LEXIS 506, at *2 (Nov. 12, 2004) (holding *Blakely* inapplicable to the Delaware Guidelines because they are "voluntary and nonbinding"); Reitz, Sentencing Conundrum, supra note 10, at 1106–07.

13. United States v. Booker, 125 S. Ct. 738, 764–68 (2005) (Breyer, J., opinion of the Court). Justice Breyer's analysis of the "remedy" issue also implies that the question might be jurisdiction-specific: What short-term solution—voluntary guidelines, total invalidity of the guidelines, a *Blakely*-compliant "graft"—would *this jurisdiction's legislature* prefer? See id. at 757 ("We answer the remedial question by looking to legislative intent."). A further uncertainty involves the meaning of Justice Breyer's standard of appellate review for "reasonableness," id. at 765–67; such review, or any more deferential standard, will apparently not create a *Blakely* problem for a voluntary guidelines system. See infra text accompanying notes 41–45, 141–142.

14. See, e.g., People v. Claypool, 684 N.W.2d 278, 286 n.14 (Mich. 2004) (stating that indeterminate sentencing in Michigan is unaffected by *Blakely*); Commonwealth v. Pugh, 67 Pa. D. & C.4th 458, 463 (Ct. C.P. 2004) (holding Pennsylvania indeterminate sentencing system unaffected by *Blakely*); Pa. Comm'n on Sentencing, Impact of *Blakely v. Washington* in Pennsylvania, at http://pcs.la.psu.edu (last updated June 30, 2004) (on file with the *Columbia Law Review*); Steven L. Chanenson, The Next Era of Sentencing Reform, 54 Emory L.J. (forthcoming 2005) (manuscript at 66–67, on file with the *Columbia Law Review*). This argument analogizes these guidelines' minimum terms to the mandatory minimum sentence laws upheld in Harris v. United States, 536 U.S. 545 (2002), and assumes that the latter case will not be overruled. This assumption may be incorrect. See, e.g., Reitz, Sentencing Conundrum, supra note 10, at 1097 & n.54 (noting possibility that Justice Breyer, who voted with majority in *Harris*, might vote differently should similar case arise after *Booker*); Jon Wool, Aggravated Sentencing: *Blakely v. Washington*—Legal Considerations for State Sentencing Systems, Pol'y & Prac. Rev. (Vera Inst. of Justice), Sept. 2004, at 1, 7 n.36, available at http://www.vera.org/publication_pdf/250_477.pdf (on file with the *Columbia Law Review*) ("Whether the additional weight of the *Blakely* decision will be sufficient to foster a majority to overrule *Harris* is an open question."); see also id. at 7 (questioning whether parole-eligibility guidelines are *Blakely*-compliant even if *Harris* is not overruled).

15. See Frank Bowman, Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with *Blakely v. Washington*, 16 Fed. Sent'g Rep. 364, 367 (2004). A similar but even more drastic approach would likewise recognize no upper limits other than the statutory maximum, but would replace the existing lower end with a mandatory minimum term. Another way to avoid upward departures is by means of "top down" or "inverted" guidelines—the statutory maximum would become the presumptive sentence, which could be mitigated by showing the absence of what were previously

greatly increasing the top end of each guidelines range. Each of these alternatives sacrifices sentencing policy and reform goals implicit in certain features of some guidelines systems. How important are those goals? Are "voluntary" guidelines weaker or otherwise less desirable than legally enforceable ones? What advantages and disadvantages accompany the retention of parole release discretion? How broad should sentencing ranges be? *Blakely* and its follow up cases will provide both the necessity and the opportunity to reexamine many of the most fundamental sentencing policy issues underlying guidelines reforms in the federal system and the states. These issues must also be examined by any jurisdiction that is considering whether and in what form to adopt guidelines. This Essay seeks to assist policymakers and scholars in these assessments. It first surveys the field of state sentencing guidelines systems to identify critical areas of diversity and consensus—both in guidelines design and in the philosophical and policy goals of guidelines reform. The Essay then identifies and analyzes several of the most important guidelines policy choices about which no consensus has yet been reached, and suggests avenues for future research that will assist states confronting these difficult decisions.

The remainder of this Essay is organized as follows. Part I provides an overview of the guidelines systems adopted during the past twenty-five years, and describes their principal similarities and differences. Part II identifies some of the critical, unresolved theoretical and policy questions concerning the philosophical and political purposes that underlie the varied approaches states have taken, argues in support of the principle of limiting retributivism, and identifies the limits of that principle. Part III addresses some of the most significant policy and structural design choices that states face when considering adoption or reform of a guidelines system, and suggests avenues of research by which academics and others can contribute to thoughtful decisionmaking by policymakers faced with such difficult choices. The Conclusion reflects on what we have learned from a quarter century of experience with guidelines sentencing in the states, and on future prospects for research and policy development.

I. SUMMARY OF GUIDELINES SYSTEMS

In 1980 Minnesota became the first jurisdiction to implement sentencing guidelines developed by a permanent sentencing commission, an idea that had been proposed by federal judge Marvin Frankel in the early 1970s.[16] A number of other states had previously experimented with

considered aggravating factors. Wool & Stemen, supra note 11, at 9. All these approaches, like the second alternative listed in the text, assume, perhaps incorrectly, that the Court will not overrule or substantially narrow its ruling in *Harris*.

16. Marvin E. Frankel, Criminal Sentences: Law Without Order 118–24 (1973). Several bills to create a guidelines system were introduced in Congress in the 1970s, but the federal enabling statute was not passed until 1984. The guidelines went into effect in

state-wide, judicially enacted, voluntary guidelines,[17] and one of these states (Utah) later created a legislatively mandated sentencing commission. Beginning in 1980, the Alaska Court of Appeals began to issue legally binding sentencing guidelines, or benchmarks, for certain crimes, but a permanent sentencing commission has never been established.[18] As of late 2004, at least eighteen states and the District of Columbia were using some sort of jurisdiction-wide sentencing guidelines system, and guidelines reforms were being considered in a number of other states.[19]

Most current guidelines states are members of the National Association of Sentencing Commissions (NASC), whose website[20] lists contact persons and sometimes a link to the website for individual state sentencing commissions.[21] The following summary[22] is based on the NASC website and its references, previous state guidelines surveys conducted by the

late 1987, but were not applied in all courts until their constitutionality was upheld in Mistretta v. United States, 488 U.S. 361 (1989).

17. See Michael Tonry, Structured Sentencing, 10 Crime & Just. 267, 276–82 (1988) [hereinafter Tonry, Structured Sentencing] (describing early efforts in various states).

18. See infra notes 29–30 and accompanying text.

19. This qualified statement ("at least") reflects an important caveat. Documenting the current status, provisions, and impact of state guidelines systems—or even their initial or continued existence—is a challenging task. In many states the guidelines themselves are not accessible on Lexis/Nexis or Westlaw since they are not formally enacted as statutes or administrative regulations.

20. U.S. Sentencing Comm'n, National Association of State Sentencing Commissions, at http://www.ussc.gov/states.htm (last visited Mar. 22, 2005) [hereinafter NASC Website].

21. However, this information is not always current. For example, as of March 22, 2005, the contact information bad not been updated since June 2003, the posted web links for Kansas, Michigan, and North Carolina were incorrect or not in operation, and no contact information was given for New Mexico. As of that date, websites existed for the Kansas, North Carolina, and New Mexico commissions. Kan. Sentencing Comm'n, at http://www.accesskansas.org/ksc (last visited Mar. 22, 2005); N.C. Court System, Sentencing and Policy Advisory Commission, at http://www.nccourts.org/Courts/CRS/Councils/spac/Default.asp (last visited Mar. 22, 2005); N.M. Sentencing Comm'n, at http://www.nmsc.state.nm.us (last visited Mar. 22, 2005). No website existed for the Michigan Commission, but that state's guidelines were available online. Mich. Sentencing Guidelines Manual (2005), available at http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm. The NASC website also provides access to The Sentencing Guideline (formerly titled Sentencing Commission News), an NASC newsletter that includes reports on state guidelines developments from March 1995 through February 2005. Nat'l Ass'n of State Sentencing Comm'ns, NASC Newsletters, at http://www.ussc.gov/states/stamews.htm (last visited Mar. 22, 2005) [hereinafter NASC Newsletters].

22. An earlier version of this summary appeared in Frase, Retrospective, supra note 8, at 69–72.

author and others,[23] and various published and unpublished state-specific reports.[24]

TABLE 1: SUMMARY OF SENTENCING GUIDELINES SYSTEMS

				Major Structural Features		Also Regulates			
Jurisdiction	Initial Effective Date	Permanent Sentencing Comm'n	Resource Impact Assessments	Appeals or Other Enforcement	Parole Release Abolished	Intermediate Sanctions	Misdemeanor Offenses	Revocation of Probation	Supervised Rel./Parole
Utah	01/1979	1983	1993	reasons		some	some		some
Alaska	01/1980			✓	mostly				
Minn.	05/1980	✓	✓	✓	✓			some	
Pa.	07/1982	✓	some	some		1994	✓		
Md.	07/1983	1996	1996	reasons			✓		
Fla.	10/1983	until 1998	1988–1998	some	✓				
Mich.	01/1984	1995–2002	1995–1997	some, 1999		some			
Wash.	07/1984	✓	✓	✓	✓	some		some	
Del.	10/1987	✓	✓	reasons	1990	✓	✓	some	
Federal	11/1987	✓	some	✓	✓	some	some	✓	✓
Or.	11/1989	✓	✓	✓	✓	✓			some
Tenn.	11/1989	until 1995	until 1995	some	some	✓	✓		
Va.	01/1991	1995	1995	reasons	1995	some		some	
1993 ABA Standards	✓	✓	✓	✓	✓	✓	some		
Kan.	07/1993	✓	✓	✓	✓				some
Ark.	01/1994	✓	✓	reasons	some	✓			
N.C.	10/1994	✓	✓	some	✓	✓	✓		some
Ohio	07/1996	✓	✓	✓	✓			some	some
Mo.	03/1997	✓	✓			some			
Wis.	1985–1995	✓							
[11 crimes]	02/2003	✓	some		✓	some			
D.C. [pilot]	06/2004	✓	some		✓			some	some

A. *Guidelines Varieties*

The accompanying table summarizes the sentencing guidelines systems currently in effect in eighteen states and the District of Columbia, showing when they were first implemented and whether they include cer-

23. See Richard S. Frase, Sentencing Guidelines in the States: Lessons for State and Federal Reformers, 6 Fed. Sent'g Rep. 123 (1993) [hereinafter Frase, Sentencing Guidelines in the States]; Kevin R. Reitz, The Disassembly and Reassembly of U.S. Sentencing Practices, *in* Sentencing and Sanctions in Western Countries 222, 259–92 (Michael Tonry & Richard S. Frase eds., 2001); Kevin R. Reitz, The Status of Sentencing Guideline Reforms in the United States, *in* Penal Reform in Overcrowded Times 31 (Michael Tonry ed., 2001); Michael Tonry, Sentencing Commissions and Their Guidelines, 17 Crime & Just. 137 (1993); Tonry, Structured Sentencing, supra note 17; Bureau of Justice Assistance, U.S. Dep't of Justice, NCJ 169270, 1996 National Survey of State Sentencing Structures (1998), available at http://www.ncjrs.org/pdffiles/169270.pdf (on file with the *Columbia Law Review*); Bureau of Justice Assistance, U.S. Dep't of Justice, National Assessment of Structured Sentencing (1996), available at http://www.ncjrs.org/pdffiles/strsent.pdf (on file with the *Columbia Law Review*); see also Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 771–98 (2005) (discussing state sentencing commissions); 20 L. & Pol'y, Nos. 3 & 4 (1998) (articles on structured sentencing); 6 Fed. Sent'g Rep., No. 3 (1993) (reports on guidelines in effect or being considered in Alaska, Minnesota, North Carolina, Ohio, Pennsylvania, Texas, Washington, and Wisconsin).

24. Many state-specific reports can be found in *Overcrowded Times*, a bimonthly newsletter published by Michael Tonry from March 1990 through December 1999, and in the *Federal Sentencing Reporter*.

tain key structural features. For comparison, the table also includes the federal sentencing guidelines as well as the model recommended in the most recent version of the American Bar Association's revised standards for sentencing.[25] A similar model, containing all of the key features shown in the table, has also been proposed in the early drafts of the project to amend the sentencing and corrections provisions of the Model Penal Code.[26] The adoption of commission-based guidelines is also under consideration in at least six states not listed in the table: Alabama, Georgia, Massachusetts, New Mexico, Oklahoma, and South Carolina.[27] A number of states, including Connecticut, Maine, Texas, Colorado, Nevada, New York, and Montana, have considered guidelines and chosen not to adopt them.[28]

As shown in the first column of the table, four guidelines states do not have a permanent sentencing commission. Alaska had a temporary commission from 1990 to 1993, but never a permanent one.[29] Alaska's guidelines consist of legislatively prescribed presumptive sentences for certain serious and repeat offenses and sentencing benchmarks imposed by decisions of the Alaska Court of Appeals for other crimes.[30] In Florida, Michigan, and Tennessee, the guidelines were written by commissions that were later abolished. Where they exist, state sentencing commissions are more widely representative than the federal commission, typically including judges, prosecutors, defense attorneys, correctional officials, public members, and sometimes legislators.[31] There are also major variations in the duties, staffing, and budget of state commissions, and in the role of the commission relative to the legislature.[32] For example, the Minnesota enabling statute gave the commission relatively little guidance and provided that the Commission's initial guidelines would be-

25. ABA Standards, supra note 9. The standards themselves (without commentary) were also published in 52 Crim. L. Rep. 2353, 2353–70 (1993).

26. Model Penal Code: Sentencing arts. 6, 7 (Preliminary Draft No. 3, 2004); MPC Sentencing Report, supra note 8, appx. b.

27. The most recent developments in these states are reported in recent issues of The Sentencing Guideline, NASC Newsletters, supra note 21. Information on developments in New Mexico is also available online. N.M. Sentencing Comm'n, supra note 21 (listing latest reports of commission).

28. Frase, Retrospective, supra note 8, at 70. The situation in Nevada is unclear. Compare Nev. Rev. Stat. 176.0123 (2001) (creating advisory commission on sentencing), with http://www.leg.state.nv.us/71st/Interim/NonLeg/Sentencing (last visited Feb. 27, 2005) (on file with the *Columbia Law Review*) (Nevada Legislature website listing Advisory Commission on Sentencing as inactive). As noted below, Louisiana and Wisconsin enacted but then repealed their guidelines, although Wisconsin reinstituted guidelines for certain crimes in 2003. See infra text accompanying notes 67–68.

29. Teresa White Carns, Sentencing Reform in Alaska, 6 Fed. Sent'g Rep. 134, 134 (1993).

30. Id. at 134–35.

31. For discussion of variations in the design and powers of sentencing commissions, see Barkow, supra note 23, at 735–98.

32. See generally id.; Symposium, A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, 28 Wake Forest L. Rev. 181 (1993).

come effective unless the legislature voted otherwise; in later years the legislature reclaimed some of the authority it had delegated, but the Minnesota Commission still retains primary control over the formulation of statewide sentencing policy.[33] In contrast, the Arkansas enabling statute provides a detailed mandate,[34] and in Washington State the legislature has dominated the guidelines revision process.[35]

The remaining seven columns in the table summarize important structural variations in state guidelines systems related to their functioning, degree of enforceability, and scope. In all states with permanent sentencing commissions, the commission (or occasionally another state agency) assesses the resource impact of proposed sentencing guidelines and statutes, in particular, the predicted effect on prison populations. The greater uniformity of guidelines sentencing makes such impact assessment more accurate than is possible in an indeterminate sentencing system, and the research and planning capacities of a permanent sentencing commission provide the necessary data and staff. Impact assessments have even been conducted by commissions that are not legally required or mandated to do so.[36] These assessments are also recommended by the ABA sentencing standards and the proposed revisions to the Model Penal Code.[37]

The next column in the table indicates which guidelines are legally binding and enforced by appellate review or otherwise. In seven states (Utah, Maryland, Delaware, Virginia, Arkansas, Missouri, and Wisconsin) and the District of Columbia, guidelines are "voluntary" and not subject to appeal. But there are several varieties of "voluntary" guidelines. In some of these states judges are required to give reasons for departure from the guidelines.[38] Moreover, "compliance rates" in some voluntary guidelines jurisdictions are quite high,[39] which suggests that in some jurisdictions peer pressure or other informal processes may effectively substitute for appellate review. For example, in Virginia, trial court judges must be periodically reappointed by the legislature, and many judges ap-

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33. See generally Richard S. Frase, Sentencing Guidelines in Minnesota, 1978–2003, 32 Crime & Just. 131, 153–70 (2005) [hereinafter Frase, Minnesota Guidelines] (describing legislative involvement in sentencing since enactment of Minnesota guidelines).

34. Ark. Code Ann. §§ 16-90-801 to -804 (Michie Supp. 1993).

35. David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71, 98 (2001).

36. Such assessments have been made in Pennsylvania since 1988. E-mail from Mark Bergstrom, Director of the Pennsylvania Commission on Sentencing, to Richard S. Frase (July 7, 2000) (on file with author).

37. Barkow, supra note 23, at 809.

38. See Wool & Stemen, supra note 11, at 5 (identifying Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia as voluntary guidelines states requiring judges to state reasons for departure).

39. Barkow, supra note 23, at 795 n.354 (noting seventy-nine percent compliance rate in Virginia in 2003).

parently fear that a high departure rate will jeopardize their reappointment.[40]

There are also several varieties of "legally binding" guidelines. In Pennsylvania, sentence appeal is available but the standard of review is highly deferential.[41] However, Pennsylvania may have found another way to encourage judicial compliance with guidelines recommendations: Since 1999, judges' departure rates have been made public, and this change appears to have slightly increased compliance rates.[42] In North Carolina, judges have very broad discretion to sentence within the presumptive, aggravated, or mitigated sentencing ranges and sentences are rarely reversed on appeal.[43] Appellate review is also limited in Florida, Ohio, and Tennessee.[44] The other states listed in the table have more active appellate review, which, particularly in Kansas, Minnesota, and Washington, has generated a substantial body of substantive appellate case law. But trial courts in these states still retain considerable discretion, as to both the type and the severity of sanctions; appellate review in these states does not appear to have limited trial court discretion as severely as in the federal system.[45] It is unclear which, if any, of the varying state appellate review standards corresponds to the "reasonableness" standard approved in Justice Breyer's *Booker* opinion.

The last five columns in the table reveal substantial variation in the decisions each system seeks to regulate, including whether the guidelines abolish parole release discretion, regulate the use of intermediate sanctions, apply to sentencing of misdemeanor crimes, or regulate decisions about the revocation of probation or revocation of postprison parole or

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40. See Nancy J. King & Roosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 Vand. L. Rev. 885, 916–18 (2004) (describing "judicial apprehension that . . . [guidelines] departures would be considered negatively by the legislature at reelection").

41. Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U. L. Rev. 1441, 1471–80 (1997) [hereinafter Reitz, Sentence Appeals]. However, recent cases suggest that the Pennsylvania Superior Court, which hears first-level appeals, may be shifting to a less deferential approach. See Chanenson, supra note 14 (manuscript at 71–72 & nn.280–287).

42. Pa. Comm'n on Sentencing, 2000 Annual Data Report fig.M (2002), available at http://pcs.la.psu.edu/2000%20Report—Tables-Only.pdf (on file with the *Columbia Law Review*) (chart showing that overall rates of guidelines "conformity" were slightly higher in 1999 and 2000 than in 1998). Since 1996, Washington State has also published judge-specific sentencing data. Boerner & Lieb, supra note 35, at 107.

43. Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, 29 Crime & Just. 39, 94 (2002). However, North Carolina judges may not go outside the aggravated and mitigated ranges, so more extreme durational departures are not permitted. Id. at 78–79.

44. See David Diroll, Ohio Adopts Determinate Sentencing, Overcrowded Times, Aug. 1995, at 1, 10 (discussing appellate review under Ohio truth-in-sentencing law); Frase, Retrospective, supra note 8, at 70–71 (Florida and Tennessee).

45. See Reitz, Sentence Appeals, supra note 41, at 1458–71 (discussing appellate review in five states and federal system).

supervised release. Eleven guidelines states and the District of Columbia have abolished parole release discretion for all or most felons, usually substituting limited "good time" credits for inmates who obey prison rules. Seven states retain parole for all or most offenses, and use guidelines only to regulate judges' decisions about the imposition and duration of prison sentences. In some of these states the judge's sentence only sets the minimum prison term before the offender becomes eligible for parole release; in other states the judge's sentence sets the maximum term the offender would serve if not released earlier by the parole board;[46] in Utah, the judge's sentence sets the "recommended" term.[47] Some parole retention states have separate guidelines specifying when offenders will ordinarily be released or considered for release.[48]

Twelve states and the federal system have guidelines regulating some aspect of decisions about the use of intermediate sanctions such as jail sentences, residential or outpatient treatment, home detention, intensive supervision, drug and alcohol use monitoring, community service, restitution, and fines. This feature is also recommended by the American Bar Association standards and the early drafts of Model Penal Code revisions.[49] However, as discussed more fully in Part III, no existing guidelines system regulates intermediate sanctions to the same degree that it regulates prison terms.

The next column in the table shows which systems use guidelines for misdemeanor as well as felony sentencing. Only six states (along with the federal system, the ABA Standards, and the early Model Penal Code revisions) include coverage of some or all misdemeanor crimes. There appears to be a correlation between this feature and the previous one: Six of the seven guidelines systems that cover some or all misdemeanors also regulate the use of intermediate sanctions. This pattern makes sense, given the substantial overlap between typical misdemeanor sentences—jail, home detention, probation, fines, community service, and restitution—and typical conditions of probation in felony cases.[50]

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46. The Michigan and Pennsylvania guidelines set the minimum term, see supra note 14 and accompanying text; Maryland's guidelines set maximum terms, see Charles F. Wellford & Clair Souryal, An Examination of Time-To-Serve in the Maryland State Correctional System (Md. State Comm'n on Criminal Sentencing Policy), Feb. 4, 1990, at http://www.msccsp.org/publications/timetoserve.html (on file with the *Columbia Law Review*) (studying difference between judicially imposed sentences and actual time served).

47. Under Utah's unique guidelines, which are advisory to the parole board as well as the courts, the recommended prison term is the "typical length of stay" in prison. Utah Adult Sentencing Guidelines Manual 8 (2004), available at http://www.sentencing.utah.gov/guidelines/adult/manual2004.pdf (on file with the *Columbia Law Review*).

48. See, e.g., Mich. Dep't of Corr., Parole from Past to Present (Feb. 6, 2003), at http://www.michigan.gov/corrections/0,1607,7-119-1435-61290-,00.html (on file with the *Columbia Law Review*) (discussing Michigan parole guidelines).

49. ABA Standards, supra note 9, §§ 18-3.12, 18-4.4; Model Penal Code: Sentencing §§ 6A.06, 6B.02(6) (Preliminary Draft No. 3, 2004).

50. See infra text accompanying note 177 (comparing regulation of serious misdemeanor sentences to that of lesser felony sentences).

The last two columns in the table indicate which jurisdictions have guidelines regulating aspects of the decision to revoke probation, post-prison supervised release, or parole in guidelines states that retain parole release discretion. Only about half of the jurisdictions have such guidelines, and most of these jurisdictions only regulate the duration of custody imposed upon revocation, not the revocation decision itself.[51]

Many important structural variations among guidelines systems are not shown in the table. For example, Delaware, Florida, and Ohio use "narrative" or "point system" guidelines rather than the standard two-dimensional grid of offense severity by criminal history or offender risk score.[52] In a number of states, certain offenses have a separate grid or grids.[53] Guidelines grids also vary in such details as the number of cells, breadth of cell ranges, whether distinct "mitigated" and "aggravated" sentencing ranges are provided, and in the latter case, whether existing statutory maximum prison terms are retained to limit upward departures or are replaced by the upper end of an aggravated sentencing range.[54] Some guidelines permit two or more disposition options for a given case, such as prison and restrictive intermediate sanctions. A few states include recommendations as to the choice among sentencing purposes. There are also major variations in how criminal history is defined, scored, and weighted,[55] the rules governing consecutive or otherwise enhanced sentencing of multiple current offenses, the nature and extent of listed factors that permit or do not permit departure, and the extent to which statutorily based mandatory minimum prison terms determine or override guidelines rules.

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51. In Table 1, "regulation" of probation revocation does not include guidelines specifying the same prison term on revocation as the judge could have imposed originally without a durational departure. See, e.g., Or. Sentencing Guidelines R. 213-010-0002 (2003), codified at Or. Admin. R. 213-010-0002 (2004), available at http://www.ocjc.state.or.us/SG.htm (on file with the *Columbia Law Review*) [hereinafter Or. Sentencing Guidelines] (providing for prison term upon revocation up to maximum presumptive term which could have been imposed initially).

52. See, e.g., Del. Benchbook: 2003–2004, at 5–8 (2004), available at http://www.state.de.us/cjc/PDF/Good2003BBook.better.yet.11.25.03.pdf (on file with the *Columbia Law Review*) [hereinafter Del. Benchbook] (explaining guidelines methodology).

53. See, e.g., Kan. Sentencing Guidelines Desk Reference Manual 18–19 (2004), available at http://www.accesskansas.org/ksc/2004forms.htm (on file with the *Columbia Law Review*) [hereinafter Kan. Sentencing Guidelines] (separate grid for drug crimes).

54. See, e.g., id. at 19 (specifying that upper number in each grid cell is for aggravated cases, but courts may depart upward up to double the upper grid numher); Wright, supra note 43, at 78–79 (noting that in North Carolina, top of aggravated range is maximum sentence allowed).

55. For example, in Minnesota the presumptive prison duration for the highest criminal history category is, on average, about two times the duration for the lowest criminal history score. Minn. Sentencing Guidelines and Commentary § IV (2004), available at http://www.msgc.state.mn.us/sentencing_guidelines.htm#guidelines (on file with the *Columbia Law Review*) [hereinafter Minn. Sentencing Guidelines] (sentencing grid). In Kansas, the average ratio is over three to one. Kan. Sentencing Guidelines, supra note 53, appx. G at 2 (sentencing grid for nondrug offenses).

State guidelines systems also differ somewhat in the nature and priority of their punishment and sentencing reform goals. Adoption of a guidelines system is always motivated at least in part by a desire to make sentencing more uniform and to eliminate unwarranted disparities, but some jurisdictions, especially those with voluntary guidelines or those retaining parole discretion, give this objective much less weight. Another goal inherent in commission-based guidelines sentencing is to promote more rational sentencing policy formulation—decisionmaking that is at least partially insulated from short term political pressures and is comprehensive and informed by data.[56] But states differ substantially in their levels of funding of and deference to the commission. States that abolished parole release discretion and substituted limited "good time" credits were seeking not only to reduce disparity but also to achieve "truth in sentencing," the notion that the length of prison sentences imposed by courts should correspond closely to the amount of time inmates actually serve. However, guidelines systems differ substantially in how closely they match sentences imposed and served. In Minnesota, for example, offenders receive good time credit of up to one-third of their guidelines prison term.[57] But in the federal system and many states, the sentence reduction for good conduct in prison cannot exceed fifteen percent.[58]

A few jurisdictions have more or less "descriptive," or historically based, guidelines[59]: Recommended sentences reflect existing sentencing norms and the goal is simply to get judges to apply these norms more consistently. But even these states usually make some changes in prior norms—especially to reduce racial disparities. Other states, with "prescriptive" guidelines, usually seek to increase sentence severity for certain offenses, particularly violent and drug crimes. Several states, including Minnesota and Kansas, explicitly based their guidelines on retributive, or just deserts, theories of punishment, with increased emphasis on the severity of the current offense and less on offender characteristics.[60] But these and other guidelines states still leave substantial room for offender-based sentences designed to achieve crime control purposes, applying a "limiting retributive" model.[61] For example, under Minnesota's "modi-

56. Frase, Retrospective, supra note 8, at 72–73.

57. Minn. Stat. Ann. § 244.01(8) (West 2003).

58. See, e.g., 18 U.S.C. § 3624(b) (2000) (limiting availability of good time credit to fifty-four days per calendar year).

59. See D.C. Advisory Comm'n on Sentencing, 2002 Annual Report appx. A, tbl.A-1 (2001), available at http://acs.dc.gov/acs/lib/acs/pdf/2002_Appendix.pdf (on file with the *Columbia Law Review*) (reporting that Florida, Maryland, Michigan, Tennessee, Utah, Virginia, and Wisconsin have descriptive guidelines).

60. See, e.g., Minn. Sentencing Guidelines Comm'n, Report to the Legislature 9 (Jan. 1, 1980) (explicitly basing sentencing grid on "modified just deserts approach"); David J. Gottlieb, Kansas Adopts Guidelines, 6 Fed. Sent'g Rep. 158, 158–59 (1993). However, the purported emphasis on just deserts in Kansas is contradicted by the strong weight given to criminal history under that state's guidelines. See supra note 55 and accompanying text.

61. See infra text accompanying notes 96–103 (discussing limiting retributivism).

fied just deserts" approach, rehabilitation, reintegration, and offender risk management remain very important goals, pursued primarily by varying the conditions of probation.[62] The determination of these conditions is not regulated under the Minnesota guidelines, and almost eighty percent of felony sentences are to probation.[63] Moreover, appellate case law permits judges to depart from presumptive prison or probation sentences on the basis of the defendant's particular "amenability" or "unamenability" to probation—a concept that at least implicitly includes assessments of rehabilitation potential and public safety.[64] Other guidelines states recognize similar "amenability" concepts and generally permit judges and corrections officials to consider offender treatment needs and risk when setting the conditions of probation or postprison supervised release.[65] Moreover, recommended prison sentences under sentencing guidelines systems have always given substantial emphasis to the defendant's prior record—a factor that has very little significance under a just deserts theory.[66]

Guidelines systems, once enacted, do not remain static. As shown in the table above, Utah, Maryland, Michigan, and Virginia began with judicially developed guidelines and later established a permanent, legislatively mandated sentencing commission. Delaware's, Virginia's, and Wisconsin's initial guidelines retained traditional parole release discretion, which was later abolished. Michigan's guidelines were initially voluntary, but became enforceable via sentence appeals in 1999. Several of the earlier guidelines states (Utah, Maryland, Florida, Michigan, and Virginia) began using resource impact assessments in later years. In 1994, Pennsylvania added provisions regulating the use of intermediate sanctions.

On the other hand, two states implemented guidelines but then repealed them. The Louisiana guidelines were in effect from 1992 to

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62. See Minn. Sentencing Guidelines, supra note 55, § III.A.2 (listing "retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct" as penal objectives to be considered in establishing conditions of probation).

63. Frase, Minnesota Guidelines, supra note 33, at 193 fig.5 (showing prison sentence rates of slightly more than twenty percent in most years; all nonprison sentences are to probation, which often includes jail time as a condition).

64. Id. at 155. Offenders are also encouraged to pursue rehabilitative programs in prison. Although the 1978 guidelines enabling act specified that prison treatment programs would henceforth be entirely voluntary, a 1992 amendment to the act allows corrections officials to withhold "good time" credits from offenders who refuse to participate in prison programs. Id. at 164.

65. See, e.g., N.C. Structured Sentencing Training and Reference Manual 15 (2004), available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/trainingandreferencemanual2004.pdf (on file with the *Columbia Law Review*) [hereinafter N.C. Sentencing Manual] (including as mitigating factors "good character," successful completion of treatment program, family support, "support system in the community," "positive employment history," and "good treatment prognosis").

66. See infra text accompanying notes 104–116 (discussing weight given to prior record under just deserts theory).

1995.[67] As shown in the table, Wisconsin repealed its initial guidelines in 1995 but reinstituted guidelines for certain crimes in 2003.[68] In other states, guidelines survived but grew weaker or narrower over time. Sentencing commissions, although not the guidelines themselves, were abolished in Florida, Michigan, and Tennessee.[69] In addition, the binding force of Florida's guidelines was limited in 1995 when trial judges were given unreviewable discretion to impose any sentence between the minimum recommended guidelines term and the statutory maximum.[70] In 1994, Oregon voters approved a ballot measure that turned many of the recommended guidelines prison sentences into mandatory minimum prison terms, and the legislature substituted a citizen policy board for the sentencing commission.[71]

The probability that a guidelines system will be repealed or substantially weakened appears to be related in part to the scope of the system—voluntary guidelines and those that retain parole seem more likely to be totally or partially repealed. The two total repeal states, Louisiana and Wisconsin, each had voluntary guidelines for judges and also retained parole at the time of repeal. Likewise, two of the three states that abolished their sentencing commissions, Michigan and Tennessee, had retained parole. Perhaps the narrower scope of these reforms made them appear less worthwhile, or reflected weaker support for them at the outset.

Sentencing reform goals have also evolved over time. Although offender risk management has always been at least an implicit goal of most guidelines systems, as is reflected in the substantial weight these systems give to prior criminal record, public safety has come to play an increasingly important role. For example, in 1989 the Minnesota legislature amended the guidelines enabling statute to specify that public safety should be the commission's "primary" consideration.[72] The legislature then also passed numerous laws providing increased penalties for dangerous or repeat offenders.[73] Some of the newer state guidelines systems explicitly include public safety as a goal, or provide for individualized risk assessment procedures for certain offenses.[74]

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67. Frase, Retrospective, supra note 8, at 70 tbl.

68. Wis. Sentencing Comm'n, History, at http://wsc.wi.gov/category.asp?linkcatid=34&linkid=3&locid=10 (last modified Apr. 26, 2004) (on file with the *Columbia Law Review*).

69. Frase, Retrospective, supra note 8, at 72 (Florida and Tennessee); E-mail from Phoenix Hummel, Research Attorney, Michigan Courts, to Richard S. Frase (Dec. 14, 2004) (on file with author) (Michigan).

70. Frase, Retrospective, supra note 8, at 70. This change only eliminated restrictions on judicial severity, not leniency, as evidenced by the fact that downward departure still requires a written statement of reasons and is subject to appeal by the prosecution. Id.

71. Id.

72. 1989 Minn. Laws 290(2)(8).

73. See Frase, Minnesota Guidelines, supra note 33, at 159–62 (discussing 1989 changes to Minnesota's sentencing guidelines system).

74. See, e.g., Ala. Code § 12-25-2 (2004) (providing that guidelines shall secure public safety); Wis. Sentencing Guidelines Notes § II, available at http://wsc.wi.gov/docview.asp?

Another important reform goal that Minnesota recognized at the outset, and that almost all other states have now adopted, is to use guidelines sentencing as a resource management tool—in particular to avoid prison overcrowding, set priorities in the use of limited prison capacity, and gain better control over the growth in prison populations and expenditures. Indeed, every guidelines system adopted or revised since 1983 has included resource impact assessments in some form. As state prison populations began to shoot up in the 1980s, increasing costs and raising problems of overcrowding and court intervention, resource management became the most important reason for adopting guidelines and a sentencing commission.[75] The third edition of the ABA Standards, adopted in 1993, reflected this shift in reform goals and the operation of guidelines sentencing; resource management, which had not even been mentioned in previous editions of the standards, was recognized as a central principle.[76] Resource management goals also figure prominently in the early drafts of proposals to revise the Model Penal Code sentencing and corrections provisions.[77] However, resource impact projections have been used in very different ways. Some states routinely use them in the drafting of guidelines and statutory provisions; other states use them sporadically; in the federal system they were used only in the early years, and even then only after the guidelines had been written—as a warning to the legislature to expand prison capacity in order to accommodate the new rules, not as a means to avoid overcrowding, set priorities, or manage prison growth.[78]

Later guidelines systems and revisions of existing systems are also more likely to abolish parole release discretion, regulate the use of intermediate sanctions, and regulate aspects of probation and parole revocation. Parole abolition reflected increased emphasis on the goal of truth in sentencing, and was strongly encouraged by a 1994 federal statute providing substantial funds for prison construction to states that required inmates convicted of serious crimes to serve at least eighty-five percent of their sentences.[79] Regulation of intermediate sanctions and revocations serves to reduce disparity and may also discourage unnecessary imprisonment, thus avoiding prison overcrowding and reducing prison costs.

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docid=48 (last visited Feb. 27, 2005) (on file with the *Columbia Law Review*) (including risk assessment evaluation in computation of guidelines sentence); Richard P. Kern & Meredith Farrar-Owens, Sentencing Guidelines with Integrated Offender Risk Assessment, 16 Fed. Sent'g Rep. 165, 166–68 (2004) (describing legislatively mandated risk assessments for nonviolent offenders and sex offenders).

75. Frase, Sentencing Guidelines in the States, supra note 23, at 124, 126.

76. ABA Standards, supra note 9, § 18-2.3.

77. Model Penal Code: Sentencing § 1.02(2) cmt. 1 (Preliminary Draft No. 3, 2004); MPC Sentencing Report, supra note 8, at 49–50, 78–85.

78. See infra Part III.A (discussing varying ways in which resource impact assessments can be used).

79. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102, 108 Stat. 1796, 1816 (codified as amended at 42 U.S.C. § 13702 (2000)).

Such regulation may also better promote public safety by keeping some vulnerable offenders out of prison and increasing control and accountability for offenders who would otherwise receive less restrictive conditions of release. Regulation of intermediate sanctions and revocations can also serve to discourage overuse of such sanctions against low-risk offenders ("net widening"),[80] which is wasteful and may even result in increased imprisonment when such offenders violate unnecessary release conditions and are revoked to prison.

B. *Similarities*

The discussion above has highlighted the many differences in the designs and aims of state guidelines, but it is important also to note the similarities. There are some matters about which most state systems, especially the ones implemented or revised in recent years, seem to agree. This strong consensus suggests that certain features of guidelines sentencing have proved valuable in practice in multiple jurisdictions and should be adopted by states designing new guidelines and retained in existing guidelines systems.

First, there is broad agreement that sentencing must reflect a wide variety of sentencing theories, reform goals, and systemic needs, and that sentencing and reform purposes must and will evolve over time. Although guidelines are often viewed as deliberately, and perhaps inherently, designed to emphasize retributive goals of proportionality and uniformity, all state guidelines reforms, even at their inception, have also given substantial weight to crime control purposes. As noted above, the latter purposes, along with resource management and truth in sentencing, have received increased emphasis in recent years.[81]

Second, there is strong—but not universal—agreement that sentencing guidelines need to be developed, implemented, monitored, and periodically revised by a permanent, broadly based, independent sentencing commission.[82] One of the most important features of sentencing guidelines reforms is their research component. Most legislatively created guidelines commissions have been charged with the responsibility of collecting and analyzing sentencing data, as background for drafting the initial guidelines and then as a means of monitoring implementation and proposing revisions. This empirical component has become more and more important, as states have begun to focus on resource management goals. Prison and other resource management projections require detailed information on past and current sentencing practices, and the application of sophisticated modeling techniques. Granted, a few states

80. D.C. Advisory Comm'n on Sentencing, Report 78 (Apr. 5, 2000), available at http://acs.dc.gov/acs/lib/acs/pdf/acs.2000SentenceRecommendations.pdf (on file with the *Columbia Law Review*).

81. Supra text accompanying notes 72–79.

82. As shown in Table 1, all but four guidelines states maintain a permanent sentencing commission.

abolished their commissions once the guidelines were in effect, but as noted above, most of these jurisdictions either had weaker guidelines to begin with or abolished the commission after having first substantially cut back the scope of the guidelines. Under these circumstances there may not be much practical difference between merely abolishing the commission and repealing the entire guidelines reform, as was done by Louisiana and Wisconsin.

Third, there is near-universal agreement on the importance of using the greater predictability of guidelines sentencing, and the research and analytic capacities of a permanent commission, to prepare and publish resource impact assessments.[83] However, as noted earlier, guidelines jurisdictions differ in the way in which such assessments are used.[84]

A fourth area of implicit consensus in guidelines states involves the allocation of sentencing authority between various institutions and actors. As Kevin Reitz has shown, sentencing outcomes depend on decisions made both at the systemic level by legislatures and sentencing commissions, and at the case level by the parties, trial and appellate courts, and corrections officials.[85] Reitz argues that the relative influence of these various decisionmakers needs to be kept in balance. He concludes that the federal guidelines have concentrated too much power at the systemic level, both in Congress and the federal sentencing commission, and in the hands of prosecutors.[86] He finds a better balance in state guidelines systems, particularly in Minnesota.[87] State guidelines have generally succeeded in obtaining and preserving broad acceptance by legislators and practitioners; an important reason for this acceptance is that state guidelines allow substantial inputs from all systemic and case-level actors, and avoid concentrations of sentencing power.[88]

A review of state guidelines provisions and their implementation reveals a fifth area of implicit agreement: the importance of keeping guidelines rules relatively simple. Offenders and the public need to be able to understand the rules, and the rules must remain fairly easy for courts and other officials to apply. Complex rules promote errors and disparity; they also waste scarce court and attorney time. Some state guidelines drafters have explicitly recognized the goal of simplicity.[89] The federal guidelines commission clearly did not view simplicity as a vir-

83. See supra text accompanying notes 36–37 (discussing resource impact assessments).

84. See supra text accompanying note 78.

85. Kevin R. Reitz, Modeling Discretion in American Sentencing Systems, 20 Law & Pol'y 389, 389–90 (1998) [hereinafter Reitz, Modeling Discretion].

86. Id. at 408–09.

87. There is strong support for that conclusion. See Frase, Minnesota Guidelines, supra note 33, at 208 (finding support for Reitz's position in history of Minnesota's guidelines).

88. Frase, Retrospective, supra note 8, at 74; Frase, Sentencing Guidelines in the States, supra note 23, at 123, 125–26; Reitz, Modeling Discretion, supra note 85, at 410–19.

89. Frase, Minnesota Guidelines, supra note 33, at 133, 206.

tue, and its guidelines remain far more complex than those found in any state.

State guidelines have remained simple, in part, because they do not seek to regulate in detail all major aspects of sentencing. Indeed, there is considerable consensus in the states that certain matters, such as intermediate sanctions and revocation decisions, should *not* be closely regulated, and that some matters, such as misdemeanor sentencing, prosecutorial discretion, plea bargaining, and granting of leniency in exchange for other forms of cooperation, should not be regulated *at all.* Some of the latter are covered by the federal guidelines. One of the most controversial aspects of the federal guidelines is their attempt to indirectly regulate prosecutorial discretion and plea bargaining concessions by means of the notorious "relevant conduct" provision.[90] State systems, in contrast, base recommended sentences much more closely on the conviction offense(s).[91]

II. Major Unresolved Normative Questions

The varied approaches reflected in state guidelines provide a rich and thus far largely unexplored field for theoretical, comparative, and empirical research. The differences between these systems reflect, in part, divergent approaches to certain foundational problems of sentencing reform, including normative questions about the purposes of punishment and the purposes of a guidelines sentencing system, and practical needs and constraints, particularly those imposed by limited state resources. Many of these issues were hidden in the preguidelines era of indeterminate sentencing[92] but must now be addressed by any state considering adoption or reform of a guidelines system. This Part of the Essay examines several of these foundational problems and concludes that the theory of limiting retributivism is the most useful way to resolve many of them. The issues considered in this Part will then be used to frame the discussion in Part III, which analyzes the difficult policy choices states face in designing a guidelines system.

A. *Conflicting Sentencing Purposes, Other Reform Goals, and Systemic Needs*

Guidelines systems, like any instrument of public policy, are informed and shaped by the purposes they are intended to serve. Policymakers must make decisions or assumptions about the nature and prior-

90. U.S. Sentencing Guidelines Manual § 1B1.3 (2004).

91. The federal relevant conduct enhancements, in their mandatory form, were struck down in United States v. Booker, 125 S. Ct. 738, 746–56 (2005) (Stevens, J., opinion of the Court) (holding unconstitutional nonjury determinations of relevant conduct resulting in higher presumptive sentences under guidelines).

92. Cf. John C. Coffee, Jr., The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975 *passim* (1978) (cautioning sentencing reformers not to overlook hidden causes of sentence disparity under indeterminate sentencing system).

ity of various punishment purposes, such as retribution and rehabilitation, reform goals independent of those purposes—for example, truth in sentencing and "transparency,"[93] as well as systemic needs and other practical considerations, such as avoidance of prison overcrowding and encouraging guilty pleas. For example, in deciding between appellate review and other methods for enforcing guidelines rules, policymakers must make decisions or assumptions about, inter alia, the importance of the purposes served by uniformity of sanctions, which include retribution, general deterrence, and accurate resource impact assessments, versus other purposes which are best served by more flexible rules, such as offender risk management, restorative justice, and efficiency. Indeed, as discussed more fully in Part III, the choices between uniformity and flexibility, and the purposes served by each, underlie most of the major guidelines design policy choices, including the use of parole release discretion and the regulation of intermediate sanctions, misdemeanor sentences, revocation decisions, prosecutorial discretion, and plea bargaining.

The list of relevant sentencing purposes, reform goals, and systemic needs is long, yet guidelines reformers often explicitly purport to embrace almost *all* of them. For example, the enabling statute creating the Alabama Sentencing Commission states that the commission shall recommend changes in the state's statutes, rules, policies and practices which will secure public safety, provide an "effective, fair, and efficient sentencing system," ensure certainty in sentencing, maintain judicial discretion and sufficient flexibility to permit individualized sentencing as appropriate, avoid unwarranted sentencing disparities, promote truth in sentencing, prevent prison overcrowding and the premature release of prisoners, encourage a wider array of sentencing options, limit the charging discretion of district attorneys, promote respect for the law, provide "just and adequate punishment," deter criminal conduct, impose sanctions that are least restrictive while consistent with the protection of the public and the gravity of the crime, and promote the rehabilitation of offenders.[94] Numerous sentencing reform and systemic goals are specified in this charge, and most of the traditional purposes of punishment are at least implicit, including retribution (uniformity and proportionality) and crime control by means of deterrence, rehabilitation, and incapacitation of dangerous offenders. Although this list is long, it leaves out other punishment purposes and reform or systemic goals that have been widely recoguized. Additional punishment goals include expressive and communicative functions, such as defining and reinforcing important societal norms, persuading the offender of his wrongdoing, and promoting repen-

93. Michael Tonry, U.S. Dep't of Justice, NCJ 175721, The Fragmentation of Sentencing and Corrections in America 6 (1999), available at http://www.ncjrs.org/pdffiles1/nij/175721.pdf (on file with the *Columbia Law Review*).

94. Ala. Code § 12-25-2 (2004).

tance.[95] Other reform or systemic goals include improved rationality of sentencing policy formulation; efficient (parsimonious) and prioritized use of limited correctional resources; accommodation of local variations in law enforcement needs, community values, available resources, and available data about those resources; transparency and accountability of policy formulation and case outcomes; recognition of victims' rights; restorative and community justice; encouraging guilty pleas and other forms of defendant cooperation; and ensuring that sentencing rules are fairly simple to understand and apply.

How can all of these goals be reconciled, particularly when they often are in conflict with each other, posing difficult tradeoffs? The most prominent conflicts are between retributive and crime control goals: An offender's mental illness or addiction to drugs reduces his or her capacity to obey the law, thus making the offender less blameworthy and less deterrable, but more dangerous and in need of incapacitation and treatment; the pursuit of crime control goals premised on assessments of the individual offender's dangerousness or amenability to treatment inevitably produce disparate sentences for equally culpable offenders. Moreover, crime control goals often conflict with each other: Increased rates of imprisonment may increase the general deterrent effect on other would-be offenders, yet entering prison may make some of the incarcerated offenders substantially more dangerous and less able to cope with freedom. Reform and systemic goals may also conflict. As discussed more fully in Part III, the retention or adoption of "backdoor" parole releasing authority applicable to large numbers of offenders may promote efficiency by allowing the release of offenders when changed circumstances indicate that they are no longer dangerous, but undermines retributive values, truth in sentencing, the accuracy of resource impact assessments, and the self-restraint policymakers feel when there is no potential backdoor "safety valve."

Clearly it is not possible to fully achieve all relevant purposes and limitations in all cases; compromise is unavoidable. As I have argued in previous writings, Norval Morris's theory of limiting retributivism appears to be the best way to resolve the most fundamental goal conflicts, both between retributive and crime control goals and within the latter.[96] Under this theory, retributive values of uniformity and proportionality

95. See, e.g., R.A. Duff, Desert and Penance, *in* Principled Sentencing: Readings on Theory and Policy 161, 165 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (describing punishment as "communicative process which aims to induce repentance, self-reform and reconciliation"); Kent Greenawalt, Punishment, *in* 3 Encyclopedia of Crime & Justice 1282, 1286–87 (Joshua Dressler et al. eds., 2d ed. 2002) (describing various punishment goals).

96. See Richard S. Frase, Limiting Retributivism, *in* The Future of Imprisonment 83 *passim* (Michael Tonry ed., 2004) [hereinafter Frase, Limiting Retributivism] (arguing for Morris's theory as providing superior resolution to conflicts arising between crime control and retributive goals); Richard S. Frase, Sentencing Principles in Theory and Practice, 22 Crime & Just. 363 *passim* (1997) [hereinafter Frase, Sentencing Principles] (describing

(and perhaps also utilitarian proportionality principles[97]) set upper and lower limits on sentencing severity. Within these outer limits, other purposes and principles determine the sentence imposed in a particular case. These other purposes and principles include not only traditional crime control purposes such as deterrence, incapacitation, and rehabilitation, but also considerations of equality (uniformity) and a concept Morris calls parsimony: a preference for the least severe alternative that will achieve the purposes of the particular sentence.[98] The parsimony principle is expressly recognized in some state guidelines[99] and is also endorsed in the current and prior editions of the ABA Standards.[100] This principle is grounded in reasons of economy and humane treatment of offenders and finds counterparts in many fields of American and foreign law.[101]

Morris's approach not only makes sense in theory, it also appears to be the model that best describes the approach Minnesota and other guidelines states have implicitly adopted.[102] Because limiting retributivism reflects a reasonable hybrid approach and is the de facto choice of most state guidelines reforms, this model has been adopted as the normative basis for the proposed revisions of the Model Penal Code sentencing and corrections provisions.[103]

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remarkable correspondence between Morris's limiting retributive model and the theory and practice of Minnesota's guidelines).

97. For example, sentences proportional to crime severity match public costs with threatened social harms and also give offenders an incentive to choose less rather than more serious crimes. For a discussion of these and other utilitarian arguments in favor of penalties proportionate to offense seriousness, see Richard S. Frase, Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?, 89 Minn. L. Rev. 571, 592–96 (2005) [hereinafter Frase, Proportionality].

98. Norval Morris, The Future of Imprisonment 59–62 (1974).

99. See, e.g., Ala. Code § 12-25-2(b)(5) (listing as one purpose of sentencing, "[i]mposing sanctions which are least restrictive while consistent with the protection of the public and the gravity of the crime"); Minn. Sentencing Guidelines, supra note 55, § II.A.2 (urging judges to utilize least restrictive conditions consistent with objectives of sanction).

100. Model Penal Code: Sentencing § 1.02(2)(2)(a)(iii) (Preliminary Draft No. 3, 2004); Frase, Limiting Retributivism, supra note 96, at 94–95; see also Morris, supra note 98, at 61–62 (noting ABA's earlier strong support for parsimony principle). This principle is also explicitly recognized in the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a) (2000), but it has not been given much attention by the United States Sentencing Commission or federal courts. The parsimony principle may play a greater role in the future, in light of Justice Breyer's opinion in *Booker*, emphasizing the importance of that section of the Act. See United States v. Booker, 125 S. Ct. 738, 764–65 (2005) (Breyer, J., opinion of the Court) (making repeated reference to § 3553(a)).

101. See Frase, Proportionality, supra note 97, at 598–627 (discussing examples of similar proportionality principles in American and foreign law); Frase, Sentencing Principles, supra note 96, at 373–75 (discussing origins of parsimony concept).

102. Frase, Limiting Retributivism, supra note 96, at 84, 98–107, 112.

103. Model Penal Code: Sentencing § 1.02(2) cmt. b; MPC Sentencing Report, supra note 8, at 36–41 (describing merits of limiting retributivism).

B. *Some Special Problems*

Morris's theory does not resolve all of the conflicts between and among punishment, reform, and systemic goals. Two of the unresolved problems are discussed below.

1. *Repeat Offenders and the Limits of Limiting Retributivism.* — As was illustrated by the Supreme Court's recent refusal to condemn California's extreme three strikes law,[104] there are great difficulties in seeking to reconcile proportionality values and utilitarian sentencing goals when dealing with repeat offenders—those who have committed multiple current offenses or who have a large number of prior convictions. Such offenders undoubtedly pose a higher risk of reoffending, and politicians, judges, sentencing commissions, and the public seem determined to impose very long sentences on them. But from a retributive perspective it is fundamentally unfair to impose long sentences upon persons convicted of minor crimes; the offender has already "paid" for his prior crimes, and consecutive sentencing for multiple current offenses—which may have been committed in a single crime spree, or reflect a single course of conduct or moral error—can easily exaggerate the seriousness of the offender's crimes and exceed his culpability and the need for censure, denunciation, and penal communication. These issues are most acute in the case of multiple violent crimes; it is hard to insist on strict retributive upper limits on punishment severity when serious, traumatic, and perhaps irreparable physical and psychic harms are involved. In such cases, one must seriously consider not only fairness to the offender but also fairness to potential victims.

Punishment theory is quite underdeveloped here. Even among retributivists there is no agreement on the proper weight to give to repeat offending. Writers such as George Fletcher would give prior record no weight,[105] while others, such as Andrew von Hirsch and Norval Morris, would permit modest penalty increases for recidivists.[106] These unresolved tensions may help to explain not only the Supreme Court's unwillingness to impose meaningful Eighth Amendment limits on lengthy prison terms, but also the wide variations among sentencing guidelines systems in the handling of repeat offending, including variations in criminal history scoring, the relative weight given to prior record versus cur-

104. Ewing v. California, 538 U.S. 11, 20–28 (2003). *Ewing*, other Eighth Amendment cases, and various concepts of proportionality are discussed in Frase, Proportionality, supra note 97.

105. George P. Fletcher, Rethinking Criminal Law 460–66 (1978) (questioning whether prior record increases an offender's culpability to any degree).

106. See Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 77–91 (1985) [hereinafter von Hirsch, Past or Future Crimes] (arguing repeat offenders deserve somewhat greater punishment than first offenders); Andrew von Hirsch, Desert and Previous Convictions, *in* Principled Sentencing, supra note 95, at 191, 192 (same). See generally Julian V. Roberts, The Role of Criminal Record in the Sentencing Process, 22 Crime & Just. 303, 317–19 (1997) (summarizing desert theories of punishment).

rent offense severity, and the treatment of consecutive sentencing. These issues are complex and require much more extensive analysis than can be provided in this Essay, but it is worthwhile to consider briefly the range of policy options available. Given the weight that most modern sentencing systems give to repeat offending,[107] it seems completely unrealistic to hope that policymakers and the public will ever adopt the Fletcher view that prior record is not an aggravating factor. Indeed, it is probably also unrealistic to expect widespread adoption of von Hirsch's view, permitting very limited prior record enhancements.[108] It is possible that policymakers and the public would accept a less restrictive version of the von Hirsch approach, permitting substantial imputations of increased culpability and penalty enhancements based on the offender's prior record or multiple current convictions. But how can the degree of such enhancements be specified and defended? More work needs to be done on this question, which raises issues of immense practical and theoretical importance.

A second option would be to concede that the real reasons for giving repeat offenders increased punishment have nothing to do with culpability and are based on purely utilitarian goals such as a need for incapacitation arising from the increased risk of reoffending, reduced amenability to treatment and supervision, and a greater need for deterrence of this and similar offenders. Under this approach, if concepts of desert are to remain as limits on maximum allowable punishment severity, the range of desert, or in Morris's terms, "not undeserved" punishment,[109] must be quite substantial. But at some point, this relaxed version of limiting retributivism breaks down; very broad retributive proportionality limits have little real meaning and practical value.[110] Determining the point at which that breakdown occurs (which may vary by offense or other offender characteristics) is a matter that requires much more thought and perhaps also some empirical research on perceptions of fairness under different versions of this approach. It should be noted, however, that even within a broad range of retributive and utilitarian proportionality[111] relative to crime severity, another utilitarian proportionality principle may set further limits: Sanctions must not be more severe than necessary to achieve their intended purposes. This principle of "parsimony," or

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107. von Hirsch, Past or Future Crimes, supra note 106, at 77.

108. Professor von Hirsch has rejected even the moderate criminal history enhancements permitted under the Minnesota Guidelines. See Andrew von Hirsch, Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards, *in* The Politics of Sentencing Reform 149 *passim* (Chris Clarkson & Rod Morgan eds., 1995) (criticizing treatment of prior record under Minnesota guidelines).

109. Norval Morris, Madness and the Criminal Law 151 (1982).

110. See Frase, Limiting Retributivism, supra note 96, at 84, 104 (arguing that limiting retributivism theory must be "kept within some limits").

111. See supra note 97 and accompanying text (discussing utilitarian proportionality values).

"means proportionality," finds strong support in many areas of U.S., foreign, and international law.[112]

A third way to retain meaningful proportionality limits on criminal sentences is to divert the most troubling cases to the mental health system.[113] Many states have taken this approach with sex offenders in recent years, including presumptive guidelines states such as Minnesota, Washington, and Kansas, in which proportionality of sentences is seen as a very important goal.[114] One problem with this approach is that mental health commitments may be much more expensive than imprisonment.[115] This solution is also somewhat dishonest; an offender who is sent to a secure hospital—especially one who has just completed a lengthy prison term—is being "punished" in everything but name.

Further study may reveal other ways to reconcile conflicting punishment goals in cases of repeated criminality. In any case, decisions about sentencing repeat offenders have important implications for the design of sentencing systems. For example, if repeat offenders receive very long prison sentences, there may be a stronger argument for retaining the option of early release on parole.[116] On the other hand, if such high risk offenders are instead given lengthy periods of supervised release on probation or after release from prison, it may be more important to regulate decisions to revoke such release.

2. *Symbolic or Deferred Punishment Versus the Requirement of "Hard Treatment."* — Like repeat offense enhancements, suspended sentences are widely employed in guidelines states[117] but raise suhstantial goal conflicts. Minnesota, for example, relies heavily on suspended prison terms and suspended imposition of a prison term (deferred sentencing)—almost eighty percent of felony sentences are suspended, or "stayed."[118] The fre-

112. See supra notes 98–101 and accompanying text.

113. Some repeat offenders can also be diverted to the immigration system. That device, as well as mental health diversions, have also been used in a number of other Western countries. See Richard S. Frase, Comparative Perspectives on Sentencing Policy and Research, *in* Sentencing and Sanctions in Western Countries, supra note 23, at 259, 266 [hereinafter Frase, Comparative Perspectives].

114. See Wash. Rev. Code Ann. § 71.09.010 (West 2002) (summarizing legislature's findings that existing involuntary commitment act was inadequate to deal with unique problems of sexual predators); Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (upholding constitutionality of Kansas involuntary commitment law); Frase, Minnesota Guidelines, supra note 33, at 165 n.17 (Minnesota).

115. See Frase, Minnesota Guidelines, supra note 33, at 212 (noting far higher cost of civil commitment).

116. See infra Part III.C (weighing advantages and disadvantages of parole retention).

117. Washington State is one exception. See Wash. Rev. Code Ann. § 9.94A.575 (West 2000) (abolishing power to defer or suspend execution or imposition of sentence, except for certain sex offenders). Suspended or conditional prison sentences are also widely used in other Western countries. Frase, Comparative Perspectives, supra note 113, at 278.

118. See Frase, Minnesota Guidelines, supra note 33, at 193 fig.5 (showing that from 1978 to 2002 only about twenty percent of felony sentences were unsuspended prison terms).

quent use of suspended sentences is consistent with limiting retributivism[119] and serves the goals of efficiency (parsimony), flexibility, and accommodation of local values and needs. But do such sentences adequately serve other important goals? Do suspended prison terms—at least if combined with various positive and negative conditions and a serious threat of later revocation—impose sufficient penal "consequences," "censure," norm reinforcement, and denunciation to meet the minimum requirements of general and specific deterrence, just deserts (uniformity and proportionality), and the expressive and communicative purposes of punishment? Are revocation rates sufficiently predictable to maintain accurate resource impact assessments? There is substantial disagreement about suspended sentences even among retributive theorists. Andrew von Hirsch has suggested that immediate imposition and execution of the prison sentence (in his terms, "hard treatment") may not be needed to achieve adequate "censure";[120] on the other hand, Antony Duff believes that actual hard treatment is required.[121] Empirical research may be able to shed some light on this debate. How do offenders, victims, and the general public view suspended sentences, with and without onerous conditions and a real threat of follow-up sanctions for breach?

The resolution of these underlying normative questions has important implications for the design of a guidelines system. In particular, a system that makes frequent use of suspended sentences will clearly have a greater need to regnlate the use of intermediate sanctions and revocation decisions. These and other implications are discussed more fully below.

III. Design Issues and Choices

Part I highlighted some of the significant differences that exist among state guidelines systems. As discussed in Part II, these differences to some extent reflect different views about the purposes of punishment, the goals of a guidelines sentencing system, and the accommodation of various administrative needs. These divergent goals and constraints provide the context within which to consider the critical policy and design choices that states face when adopting or revising a gnidelines system.

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119. See Frase, Comparative Perspectives, supra note 113, at 278 (arguing that suspended sentences are consistent with limiting retributivism); Frase, Sentencing Principles, supra note 96, at 401–02 (explaining how stay revocations reflect theory of limiting retributivism by serving utilitarian goals within limits of maximum deserved punishment).

120. Andrew von Hirsch, Proportionality in the Philosophy of Punishment, 16 Crime and Just. 55, 73–74 (1992) [hereinafter von Hirsch, Philosophy of Punishment] (arguing that punishment does not just serve to "censure," but keeps behavior within tolerable limits).

121. See Duff, supra note 95, at 164–65 (viewing hard treatment as "secular species of penance" with several salutary purposes).

This Part of the Essay discusses several such choices and suggests avenues for future research to aid states in the decisionmaking process.[122]

A. *How Should Resource Impact Assessments Be Used?*

Arguably the most important innovation of state guidelines systems, and the key to their survival and effectiveness, is their use of prison and other resource impact assessments.[123] As was noted in Part 1, such assessments can be employed in quite different ways. In Minnesota they are routinely used in the formulation of guidelines and statutory provisions; if the impact projections show that a proposed guidelines rule or statute will substantially increase prison populations, that proposal is likely to be rejected or greatly narrowed in scope.[124] North Carolina followed a similar practice at the outset, but in recent years resource impact assessments have been used only in response to specific legislative request.[125] In the federal system, detailed impact assessments were used only once—after the guidelines had been written—to advise Congress of the need to expand prison capacity in order to accommodate the new rules.[126] These very different ways of using resource impact assessments reflect fundamental differences in guidelines reform goals. Minnesota and many other states view these assessments as essential mechanisms for avoiding prison overcrowding, setting priorities in the use of scarce and expensive correctional resources, and managing the growth in prison populations and expense.[127]

Under the Minnesota approach, impact assessments affect sentencing policy decisions at both the commission and the legislative level. When the commission is drafting the initial guidelines or considering proposed amendments, resources such as prison beds are assumed to be constant, including only existing capacity and fully funded expansion projects. A capacity constraint is imposed: Projected prison populations may not exceed ninety-five percent of future capacity. If projections indicate that the capacity limit will be exceeded, changes are made to reduce recommended sentences. Similar projections are applied to proposed legislation, although in that context the legislature has more options: It may cut back or abandon the proposed legislation, authorize funding to expand capacity, or pursue a combination of these responses.

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122. Most of these issues correspond to the major structural variations summarized in Part 1 and Table 1, and are discussed in the order in which they were taken up there.

123. See Barkow, supra note 23, at 804–10 (highlighting value of resource impact assessments to state legislatures).

124. See Frase, Minnesota Guidelines, supra note 33, at 146–47, 204–05 (discussing Minnesota's use of resource impact assessments).

125. Telephone Interview by Rachel Anderson with Karen Jones, Senior Research & Policy Associate, N.C. Sentencing and Policy Advisory Comm'n (Jan. 10, 2005).

126. Richard S. Frase, Lessons of State Guidelines Reforms, 8 Fed. Sent'g Rep. 39 (1995).

127. Frase, Sentencing Guidelines in the States, supra note 23, at 124, 126.

Of course, some believe that prison expansion should be encouraged in order to fight crime and provide employment and other benefits, especially in economically depressed rural areas,[128] or at least to win votes. Such proprison advocates argue that the use of a capacity constraint by the sentencing commission is unwarranted—prison populations should reflect optimum punishment policy, not an arbitrary "cap" dictated by prior funding decisions.[129] On this view the commission should first decide how many people ought to be in prison, then tell the legislature to provide any needed additional funding. But determining optimum prison populations is a daunting task, from either a just deserts or a crime control perspective. Just deserts proponents concede that it is much harder to define absolute degrees of deserved punishment than it is to make relative, or ordinal, comparisons: This crime is more reprehensible than that one.[130] Optimum imprisonment for crime control purposes would require collection of data and highly complex modeling of the effects of given punishment policies on crime rates over time, as well as the crime control effects of spending the same money on preventive measures outside of the criminal justice system.

In the absence of such data, policymakers should not assume that current capacity is too low. American jurisdictions already have substantial capacity to incarcerate, and a comparison of crime and incarceration rates in other Western nations suggests that most American jurisdictions are already making excessive use of custodial sanctions, at least for nonviolent offenders.[131] The question is not whether more capacity is needed,

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128. See Fox Butterfield, Study Tracks Boom in Prisons and Notes Impact on Counties, N.Y. Times, Apr. 30, 2004, at A19 (describing how large inmate population can benefit depressed area because inmates are counted in census for purposes of determining federal funding for health care and social services).

129. See Barkow, supra note 23, at 809 n.408, 810 n.416 (summarizing views expressed in debates within ABA, and in Senate Report accompanying Sentencing Reform Act of 1984); see also Franklin E. Zimring & Gordon Hawkins, The Scale of Imprisonment 206 (1991) (noting differing and unexamined assumptions about needed prison capacity).

130. von Hirsch, Past or Future Crimes, supra note 106, at 43–46.

131. See, e.g., Floyd Feeney, U.S. Dep't of Justice, German and American Prosecutions: An Approach to Statistical Comparison (1998), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/gap.pdf (on file with the *Columbia Law Review*) (comparing U.S. and German sentencing policy for violent, theft, and drug crimes); Richard S. Frase, Sentencing in Germany and the United States: Comparing Äpfel with Apples 16–39 (Max Planck Inst., 2001), available at http://www.iuscrim.mpg.de/verlag/Forschaktuell/Frase-Endausdruck.pdf (on file with the *Columbia Law Review*) (finding higher incarceration rate for nonviolent offenses in U.S. notwithstanding methodological difficulty of cross-country statistical comparison); Richard S. Frase, Sentencing Laws and Practices in France, 7 Fed. Sent'g Rep. 275, 276 (1995) (estimating U.S. adult incarceration rate at two and a half times that of France). But cf. James P. Lynch, A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis, 79 J. Crim. L. & Criminology 180 (1988) (finding that West Germany, but neither England nor Canada, had substantially lower offense-specific incarceration rates for nonviolent crimes than the United States). See generally Sentencing and Sanctions in Western Countries, supra note 23.

but rather whether better use could be made of the existing capacity. Moreover, even if a commission could determine an optimum, higher prison level, what assurance is there that the legislature will respond, and do so quickly? Expansion of prison capacity is a slow process, and legislatures often fail to provide sufficient funds in time to avoid significant overcrowding; the best way to avoid such overcrowding is to adopt the conservative assumption that *no* further prison expansion will be provided beyond what the legislature has already funded.

The assumption of no further growth in capacity encourages the sentencing commission and other policymakers to explore alternatives to incarceration that may be just as effective, and are almost always cheaper and more humane.[132] Such an assumption, coupled with sophisticated resource impact projections, also encourages policymakers to debate and make decisions openly about priorities in the use of limited resources. And it forces advocates of greater severity, both within the commission and outside it, to take responsibility for the fiscal impact of their proposals, in terms of increased taxes and reduced penalties for other offenders.[133]

Most of these benefits are unavailable under the federal approacb, which does not use resource impact assessments to formulate policy or set priorities. Instead, policy is made without regard to cost, then projections are made and Congress is told to pay the bill. This approach may be one reason for the dramatic escalation in federal prison populations under the guidelines—far greater than the rate of growth in the states, especially in guidelines states.[134]

Minnesota-style resource impact assessments have proven to be an effective means to control prison population growth, but their impor-

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132. See Norval Morris & Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System 37–81 (1990) (arguing that incarceration and other types of punishment are often interchangeable).

133. See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines 43–44 (1988) (describing how capacity constraints forced legislators to view prison space as "scarce resource to be allocated rationally").

134. From 1988 to 2003, the federal per capita incarceration rate more than tripled, whereas the increase in state per capita incarceration rates over the same period was less than double. See Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 205335, Bulletin: Prisoners in 2003, at 4 tbl.4 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf (on file with the *Columbia Law Review*); Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 116315, Bulletin: Prisoners in 1988, at 2 tbl.2 (1989); see also Frase, Retrospective, supra note 8, at 75 (noting federal annual growth rate was almost twice as high as rate in guidelines states that emphasized resource management goals); Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696, 697 (1995) (states emphasizing correctional management had lower than average prison growth rates); Jon Sorensen & Don Stemen, The Effect of State Sentencing Policies on Incarceration Rates, 48 Crime & Delinquency 456, 465–66 (2002) (guidelines states had lower imprisonment rates); Kevin R. Reitz, Questioning the Conventional Wisdom of Parole Release Authority, *in* The Future of Imprisonment, supra note 96, at 199, 224 [hereinafter Reitz, Conventional Wisdom] (parole abolition states had lower prison growth rates).

tance goes beyond resource management. In a recent article, Professor Rachel Barkow argues convincingly that such assessments are critical to the survival of sentencing commissions because they allow commissions to provide politically and publicly acceptable administrative expertise.[135]

In fact, there are several other important types of commission expertise that may be just as important and politically saleable. A sentencing commission can help the legislature set punishment priorities based on analysis of social harms associated with different crimes, evaluation of available means to combat those harms, and careful analysis of complex systemic interactions and trade-offs. For example, faced with a proposed three strikes law or mandatory minimum statute, a commission, working with outside researchers, could gather and present available data from other jurisdictions, showing the limited crime control benefits of such a law.[136] Commissions could also collect and report data on more cost-effective alternative crime preventive measures within[137] and outside of[138] the criminal justice system. Of course, additional tasks require additional funding. But well-designed crime control cost-effectiveness studies pay for themselves and may even receive budget priority. Commissions may also be able to call on foundations and university researchers for financial or staffing assistance. Many commissions are sitting on a large store of criminal justice data that would be of great interest to such researchers.

B. *What Guidelines Enforcement Mechanisms Are Needed?*

Experience with judicially imposed guidelines in the 1970s led many observers to conclude that voluntary guidelines have little if any effect.[139] But eight guidelines jurisdictions have voluntary guidelines, and four of the five states with guidelines awaiting legislative approval (Alabama, Georgia, Oklahoma, and South Carolina) are proposing only voluntary standards. The most recent jurisdiction to adopt the voluntary approach, Washington, D.C., noted that some states with voluntary guidelines report

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135. Barkow, supra note 23, at 804–10.

136. See Frase, Proportionality, supra note 97, at 642 n.307 (summarizing research on California three strikes law).

137. Some guidelines enabling statutes instruct the commission to assess the cost effectiveness of correctional programs. See Barkow, supra note 23, at 784 & n.287 (discussing North Carolina enabling statute); Kern & Farrar-Owens, supra note 74, at 166–68 (discussing Virginia legislature's directives to commission to conduct risk assessment studies).

138. Some states have a government agency doing this kind of research. For example, the Washington State Institute for Public Policy has information on its website, at http://www.wsipp.wa.gov, listing cost-benefit evaluations of early childhood intervention and other prevention programs, as well as criminal justice policies. Similar studies of the cost-effectiveness of prevention programs have been carried out at the Rand Corporation. See Rand Corp., Child Policy Research Area, at http://www.rand.org/child/projects/bstprcts.html (last modified Dec. 1, 2004).

139. Tonry, Structured Sentencing, supra note 17, at 282.

substantial compliance rates, and concluded that any additional compliance produced by formal enforcement mechanisms would be outweighed by the cost of those mechanisms and the concomitant loss of judicial flexibility.[140] As discussed in Part II, decisions about guidelines enforcement and the degree of flexibility built into the guidelines themselves involve fundamental normative questions about the relative importance of values associated with greater uniformity, such as general deterrence, and those promoted by case-specific sentencing, such as offender risk management. These normative issues also raise empirical questions about the extent to which different purposes are served by varying degrees of uniformity or flexibility.

As noted earlier, there are several varieties of voluntary guidelines, and also several ways of enforcing guidelines recommendations. Some voluntary guidelines require judges to state reasons for departure; such reasons facilitate appellate review, but even with highly deferential review, or none at all, the exercise of stating reasons may help trial judges to clarify their assumptions and reasoning.[141] Prior to *Booker*, some observers had suggested that a reasons requirement might render an otherwise voluntary guidelines system subject to *Blakely* attack, but that concern now seems unwarranted.[142]

As for enforcement mechanisms, appellate review is the most common device, but it can mean many things—from review that is so deferential as to be ineffectual, to review that is so intrusive it denies trial courts the flexibility they need to accommodate case-specific circumstances and experiment with different approaches.[143] Appellate review is not the only way to enforce guidelines rules; publishing judge-specific departure rates also tends to discourage judges from departing.[144] There may also be ways to increase the power of peer pressure, at least within a small court; internal publication of departure rates is one example.

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140. D.C. Advisory Comm'n on Sentencing, 2003 Annual Report 18–21 (2003), available at http://acs.dc.gov/acs/cwp/view,a,3,q,591664.asp (on file with the *Columbia Law Review*).

141. Model Penal Code: Sentencing § 7.XX cmt. e (Preliminary Draft No. 3, 2004).

142. See Wool & Stemen, supra note 11, at 5–9 (arguing voluntary systems may be subject to *Blakely* if judges must state reasons for departure). This interpretation seems doubtful in light of Justice Breyer's opinion in *Booker*. If guidelines subject to reasonableness review are still deemed voluntary and *Blakely*-compliant, United States v. Booker, 125 S. Ct. 738, 756–69 (2005) (Breyer, J., opinion of the Court), it is unclear why a requirement of reasons, with or without any appellate review, would present more difficult *Blakely* problems. See also Benge v. State, No. 137, 2004 Del. Lexis 506, at *2 (Nov. 12, 2004) (holding *Blakely* inapplicable to Delaware guidelines, even though judges in that state must state reasons for departure); Wool & Stemen, supra note 11, at 5. As noted earlier, it is very unclear what Justice Breyer means by "reasonableness" review or how this standard compares with the appellate review standards that have evolved in guidelines states authorizing sentence appeals. See supra text accompanying note 45.

143. See generally Reitz, Sentence Appeals, supra note 41.

144. See supra note 42 and accompanying text (discussing Pennsylvania and Washington experience).

Which of these approaches is best? One issue that seems beyond dispute is that only a guidelines system with meaningful appellate review can develop a body of case law that interprets guidelines and statutory provisions and further develops sentencing policy in light of concrete cases and judicial experience, as common law courts have done for centuries in other areas of the law.[145] Appellate review also promotes greater transparency and accountability of sentencing decisions.[146] Furthermore, appellate review will likely be the most effective means to promote compliance, especially in large jurisdictions and jurisdictions with guidelines that seek to change existing practice. Higher compliance rates, in turn, reduce unjustified disparities and permit more accurate resource impact assessments. However, it should be noted that such assessments are made by a number of states with voluntary guidelines;[147] these jurisdictions apparently believe that their assessments are sufficiently accurate to provide information of some use to policymakers. On the other hand, there is some evidence suggesting that prison populations have escalated more sharply in states with voluntary guidelines.[148]

More research is needed on all of these points, but the first challenge will be to develop measures permitting valid cross-jurisdictional comparisons of guidelines compliance rates. At present such rates are not comparable because they reflect major differences in legal definitions of what constitutes a departure. For example, probationary sentences given to certain first offenders would be deemed departures in Minnesota, but not in Washington.[149]

C. *Should Parole Release Discretion Be Retained for Some or All Offenders?*

A minority of existing state guidelines systems retain parole release discretion for all felons sentenced to prison, and several other states retain it for certain crimes. There are several potential advantages to parole retention:

(1) States can allocate limited prison beds to the most dangerous offenders.

(2) Prison durations can be modified to reflect changed circumstances that could not be, or were not, foreseen at the time of original sentencing and that may make the original sentence unnecessary from a public safety standpoint. Examples of such changed circumstances include successful treatment or training in prison, maturation, genuine repentance, and changes in the offender's health, family, or neighborhood environment. Such reassessments of the continuing need for custody seem especially important for offenders serving very long prison terms.

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145. Reitz, Sentencing Conundrum, supra note 10, at 1114.

146. See id. (discussing importance of "meaningful" appellate review).

147. Barkow, supra note 23, at 796 & n.359.

148. Reitz, Sentencing Conundrum, supra note 10, at 1115 & fig.2.

149. Frase, Sentencing Guidelines in the States, supra note 23, at 127.

(3) Sentence durations may be tailored to general deterrence needs dictated by current crime patterns, and lower-risk offenders can be released early when necessary to avoid prison overcrowding.[150]

However, there are also many disadvantages of discretionary parole release, which led to its abolition in most guidelines systems and in many nonguidelines states. Parole discretion defeats or seriously undercuts a number of important sentencing goals, in particular:

(1) Unequal penalties are imposed on equally deserving offenders (those who have committed the same offense, with similar prior records) who are deemed to pose different levels of risk; indeed, it is almost inevitable that some offenders who are identical in level of risk as well as desert will be treated differently as a result of human error or systemic flaws. Parole release guidelines can ameliorate problems of disparity, but they inevitably reduce flexibility and the benefits that parole release discretion purports to serve.

(2) Highly discretionary release interferes with the general deterrent and expressive functions of sentences, and early release undercuts the goal of truth in sentencing.

(3) Discretionary release reduces the predictability of prison sentences, which makes it much more difficult to forecast the cost of particular sentencing rules. Without accurate resource impact assessments, legislators and commission members need not take responsibility for the costs of their proposals, and are tempted to increase prison terms while claiming that the full penalty will not have to be served; the result may be a spiral of steadily increasing announced penalties, with a steady decrease in the proportion of the prison term actually served.[151]

Further research is needed to determine whether the disadvantages of parole retention, with and without parole guidelines, outweigh the advantages. A critical issue is whether parole release risk assessments, based on inmate behavior and attitudes in prison as well as group base expectancy rates, are significantly more reliable today than they were twenty-five years ago when parole release discretion fell out of favor.[152] One issue as to which there is already considerable evidence is the relationship between parole abolition and rates of prison population growth: Parole abolition states—especially those with sentencing guidelines—tend to have lower-than-average growth rates.[153]

Parole abolition is not an all-or-nothing proposition; some guidelines states have retained parole release discretion for certain offenders. In Minnesota, for example, first degree murder carries a mandatory penalty

150. See Albert W. Alschuler, Monarch, Lackey, or Judge, 64 U. Colo. L. Rev. 723, 724 (1993) ("[T]he goal of matching sentences to resources can best be implemented through administrative mechanisms at the back end of the criminal justice system.").

151. Frase, Sentencing Guidelines in the States, supra note 23, at 126.

152. See generally 16 Fed. Sent'g Rep., No. 3 (Feb. 2004) (issue devoted to "Risk Assessment: Methodologies and Application").

153. Reitz, Conventional Wisdom, supra note 134, at 220–24.

of life imprisonment, with parole eligibility after thirty years.[154] But there bave been several recent proposals to greatly expand the number of offenders eligible for lengthy prison terms subject to parole release. Reacting to a highly publicized case of kidnaping and murder allegedly committed by a released sex offender, legislators and the sentencing guidelines commission have proposed to give some or all sex offenders indeterminate sentences subject to parole discretion.[155] An alternative "new parole" proposal is aimed not at incapacitating dangerous offenders but rather as a back-end safety valve to allow for exceptional, changed circumstances.[156] Some other parole abolition states already have substantial numbers of parole eligible offenders.[157] Further research should be conducted in these states to see how well this hybrid approach works. An argument in its favor is that risk assessments are more reliable for certain types of offenders.[158] On the other hand, it seems likely that such islands of indeterminacy within a guidelines system may expand over time.

Another set of parole retention issues involves the relationship between judicial guidelines and parole release: In some parole retention states, the judge's sentence determines the minimum prison term before parole eligibility, while in otber states it determines the maximum or the recommended term.[159] In minimum-term jurisdictions, the maximum may be determined by statute[160] or by a formula keyed to the minimum; in maximum-term jurisdictions, statutes or parole board policies may determine the earliest date of parole eligibility. As noted at the outset, one potential advantage of the former approach is that it may insulate a legally binding guidelines system from *Blakely* attack. Minimum-term guidelines may also raise fewer truth-in-sentencing issues, at least if the primary concern, particularly of crime victims, is with offenders serving much less than the prison term announced by the sentencing judge. On the other hand, maximum-term guidelines have at least one very important advantage. Setting a case-specific maximum sentence encourages trial courts to address an issue that tends to be obscured by a minimum-term procedure: What is the highest penalty the defendant deserves? This is a critical issue from a limiting retributive perspective, with its strong emphasis on avoiding disproportionately severe punishment.

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154. Minn. Stat. Ann. § 244.05(4) (West 2004).

155. Frase, Minnesota Guidelines, supra note 33, at 211–12.

156. Conrad deFiebre, Bills Reduce Prison Terms to Save Cash: One Lets Inmates out Early; Another Cuts Drug Sentences, Star Tribune (Minneapolis), Mar. 15, 2004, at B1.

157. See, e.g., Carns, supra note 29, at 134 (Alaska).

158. See Kern & Farrar-Owens, supra note 74, at 168–69 (discussing Virginia's selective use of risk assessment for certain types of offenders).

159. See supra text accompanying notes 46–47.

160. See, e.g., Mich. Dep't of Corr., supra note 48 (maximum set by statute).

D. *How Should the Use of Intermediate Sanctions Be Addressed?*

Regulation of the use of intermediate sanctions can serve a number of valuable functions,[161] and many guidelines systems now include this feature in some form. Still, no jurisdiction regulates probation conditions and other intermediate sanctions as much as it regulates prison sentences. In part, this may be because prison and nonprison sentences are intended to serve different purposes, with the purposes served by nonprison sentences requiring assessment of offender characteristics and other case-specific factors not suited to close regulation. For example, the Minnesota guidelines state that the proper penal objectives to be considered in establishing conditions of stayed prison sentences include "retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct."[162] The guidelines further provide that "the relative importance of these objectives may vary with both offense and offender characteristics," and that "multiple objectives may be present in any given sentence."[163] In other words, the guidelines view the use of intermediate sanctions the way the use of prison sanctions was viewed under indeterminate sentencing. In contrast, prison terms are closely regulated under the guidelines: When addressing the imposition and duration of such terms, the guidelines contain no comparable statement of multiple sentencing purposes or the need for individualized assessment.

Another reason not to regulate intermediate sanctions is that, in Minnesota and most other guidelines states, these sanctions are usually carried out and paid for at the local rather than state level. Greater flexibility in the use of such sanctions permits state guidelines systems to take account of differences in local corrections resources, local values, and local crime problems. In contrast, there is a greater need to set statewide priorities in the use of state prison resources, and data on the capacity and historical use of such resources is more available and easier to collect. Moreover, when offenders are sent to state-run prisons, any disparities in local sentencing decisions are more apparent and troubling.

Many of these problems would be lessened or avoided if it were possible to devise a point system or set of exchange rates for the various nonprison sanction options—including jail terms, since they are also served and paid for locally and are often combined with noncustodial sanctions. The idea would be to define a range of sanction severity for each nonprison cell in the guidelines grid, or for each group of presumptive nonprison cases in systems without a grid, scaled to maintain ordinal proportionality.[164] The range could be stated in terms of a single sanction type

161. See supra text accompanying note 80.

162. Minn. Sentencing Guidelines, supra note 55, § III.A.2.

163. Id.

164. See generally Morris & Tonry, supra note 132, at 56–108 (discussing interchangeability of punishments and exchange rates); von Hirsch, Philosophy of Punishment, supra note 120, at 80 (discussing interchangeability of punishments within

(jail days, day fines, etc.), with exchange rates permitting other sanction types to be substituted. Alternatively, the ranges could be stated in terms of punishment severity points, with a defined number of points for each unit of each sanction type. Using these exchange rates or point systems, judges would be allowed to impose any combination of sanction types provided that the overall punitiveness of the sentence falls within the permissible severity range—or the judge departs from the guidelines.

However, narrow severity ranges for nonprison sentences are problematic.[165] It is very difficult to develop consensus on precise exchange rates for all types of sanctions.[166] Minimum severity requirements are particularly difficult to enforce consistently when practitioners feel that such severity serves no practical purpose. In practice, minimum severity standards are weakly enforced, since the only party with standing to object or appeal—the prosecutor—often agrees to the downward departure as part of a plea bargain.[167] To the extent that such minimum requirements could be enforced, this would make the sentencing system much more complex, contrary to the goal of simplicity. Such requirements would increase the number of probation conditions imposed, which in turn would increase the frequency of probation violations and revocations, thus overloading local resources and violating legitimate local value choices. Finally, since felony intermediate sanctions overlap substantially with typical misdemeanor sentences that remain unregulated in most state guidelines systems,[168] regulating the former but not the latter would produce serious proportionality problems.

It is therefore not surprising that no state has yet adopted a regime as restrictive as the point range or exchange rate systems described above. Some states limit the duration of jail sentences[169] or seek to provide guidance on the use of various intermediate sanctions.[170] The states that follow the latter approach classify all sanction types into three or more groups—custody, restrictive intermediate (RI), and less restrictive intermediate (LRI)—and specify, for each grid cell, which of these three types

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limits of ordinal proportionality); Andrew von Hirsch et al., Punishments in the Community and the Principles of Desert, 20 Rutgers L.J. 595, 600–09 (1989) (same).

165. Frase, Sentencing Principles, supra note 96, at 423–25.

166. See von Hirsch et al., supra note 164, at 603 (noting difficulty of making comparisons of severity across a large variety of possible sanctions).

167. Frase, Limiting Retributivism, supra note 96, at 93–94.

168. See infra text accompanying notes 176–178.

169. For example, the Washington, Oregon, and Pennsylvania guidelines grids contain numerous cells witb recommended felony level custody sentences of less than one year. Or. Sentencing Guidelines, supra note 51, appx. 1, sentencing guidelines grid; Pa. Sentencing Guidelines § 303.16 (2004), codified at 204 Pa. Code § 303.16 (2004), available at http://pcs.la.psu.edu (on file with the *Columbia Law Review*) [hereinafter Pa. Sentencing Guidelines] (basic sentencing matrix); Wash. Adult Sentencing Guidelines Manual appx. C (2004), available at http://www.sgc.wa.gov/PUBS/Manual_2004/Man04_Section_IV.pdf (on file with the *Columbia Law Review*) (sentencing grid).

170. The states that bave done the most in this regard appear to be Delaware, North Carolina, and Pennsylvania.

may be used. However, these systems provide little guidance about the choice between sanction types when, as is often the case, more than one type is allowed.[171] Nor do they recommend, for noncustodial sanctions, how much of that sanction to impose.

Nevertheless, more experimentation and research needs to be done on these matters. Certain forms of regulation or partial regulation may be much more feasible and desirable than others. In particular, guidelines systems should seriously consider imposing upper presumptive limits on the use of the most severe nonprison sanctions. Such an "asymmetric" limitation is consistent with a central tenet of the limiting retributivism model endorsed in Part II and clearly evident in the Minnesota system—that it is especially important to prevent disproportionately severe punishments.[172] Setting upper limits on intermediate sanction severity also serves to avoid overloading local correctional resources. Oregon provides a working example of this severity-capping approach: For each grid cell with a presumptive nonprison sentence, the guidelines specify a presumptive upper limit on the maximum number of "sanction units" (including jail, residential treatment, home detention, and community service), and also a presumptive maximum number of jail days that may be imposed.[173]

Whether or not guidelines regulate the use of intermediate sanctions, the use of such sanctions can and should be promoted by providing state resources to establish and expand their availability at the local level. Several guidelines states have already done so.[174] This strategy not only gives judges much needed sentencing options, it may actually save the state money in the long run. When local sentencing resources are limited and paid for by local governments, judges are encouraged to send offenders to prison, at the state's expense, a phenomenon which Zimring and Hawkins have dubbed the "correctional free lunch."[175] Even if an offender is kept in the community, inadequate funding of local correctional programs increases the odds that he or she will fail on probation or reoffend, and "graduate" to the state prison system.

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171. North Carolina permits a noncustody sentence in 34 of its 54 felony grid cells, but precludes custody in only 3 of these cells (1 of which requires LRI). N.C. Sentencing Manual, supra note 65, at 2 fig.A (prescribing levels of punishment for felonies). Pennsylvania permits a noncustody sentence in 19 of its 104 grid cells (including misdemeanors), but precludes custody in only 2 of these cells (both of which require LRI). Pa. Sentencing Guidelines, supra note 169, § 303.16 (basic sentencing matrix).

172. Frase, Limiting Retributivism, supra note 96, at 92; Frase, Sentencing Principles, supra note 96, at 366–68.

173. One day spent in any of these sanctions counts as one unit, except for community service, which requires sixteen hours per unit. Or. Sentencing Guidelines, supra note 51, R. 213-005-0012.

174. See, e.g., Robin L. Lubitz, Recent History of Sentencing Reform in North Carolina, 6 Fed. Sent'g Rep. 129, 132 (1993); Fritz Rauschenberg, Ohio Guidelines Take Effect, Overcrowded Times, Aug. 1997, at 1, 10.

175. Zimring & Hawkins, supra note 129, at 140, 211–15.

E. *How Important Is It to Regulate Misdemeanor Sentences?*

All but a handful of state guidelines systems are limited to felony crimes. In those states, sentencing of most misdemeanor offenses continues to be governed by a version of indeterminate sentencing. In some of these jurisdictions, however, the least serious violations are subject to a determinate sentencing regime—scheduled fines payable at a violations bureau or other administrative agency.[176] Having guidelines for the most serious and the most petty offenses might seem anomalous, but it is not. For traffic and other minor, high volume offenses, the purposes of punishment are primarily deterrent; case-specific factors are less important, and the potential for serious disparity is limited. For more serious misdemeanor crimes, the more varied sentencing purposes and wider range of penalties require a more individualized approach, just as appears to be true in the sentencing of lesser felonies for which alternative sanctions are appropriate.[177]

But the substantial overlap between serious misdemeanor and minor felony sentencing poses its own problems. Since typical misdemeanor sentences (jail, home detention, probation, fines, community service, restitution) overlap substantially with typical conditions of probation in felony cases, misdemeanor and felony sentences are competing for the same limited correctional resources, which are usually paid for by local government. Moreover, failure to regulate sentences in misdemeanor cases can mean that some of these offenders receive more severe sentences than many felons, raising serious problems of sentencing disparity. Such inconsistent treatment may also fail to provide sufficient marginal deterrence by eliminating any incentive to commit the lesser crime,[178] and may fail to achieve expressive or educative goals of defining and reinforcing attitudes about the relative seriousness of different crimes. Moreover, since felony offenders have often received prior misdemeanor sentences and vice versa, unregulated misdemeanor sentencing may cause different parts of the system to work at cross purposes.

A few jurisdictions do regulate misdemeanor sentences. Research is needed into how the misdemeanor sentence recommendations are written and applied, and how misdemeanor and felony sentencing practices and resources interact. Such research will help to better coordinate these two separate sentencing systems, and may also provide ideas for improved regulation of intermediate sanctions in felony cases.

As with intermediate sanctions in felony sentencing, the funding of misdemeanor sentencing options is often inadequate. Although the "correctional free lunch" problem is less acute, states may find that state fund-

176. Frase, Comparative Criminal Justice, supra note 1, at 647.

177. See supra text accompanying notes 161–163.

178. The marginal deterrence argument was used by early utilitarian writers Beccaria and Bentham to argue in favor of sentences proportionate to crime seriousness. See Frase, Proportionality, supra note 97, at 593.

ing of expanded misdemeanor sentencing options saves the state money in the long term by lowering the number of minor offenders who "graduate" to the state system, and perhaps also by encouraging prosecutors to forego felony charges.

F. *How Should Revocation of Probation and Postprison Release Be Regulated?*

Another issue closely related to the previous two is whether and how to regulate decisions to revoke, release, or substantially modify the terms of release. The revocation issue arises in two very different contexts—one involving offenders who were placed on probation, and the other involving offenders who were sent to prison (initially, or upon revocation of probation) and then released from custody. In addition, different agencies may make the revocation/modification decision. In the probation context, probation officers may be authorized to make minor adjustments, with sentencing judges deciding whether to revoke or make substantial changes in release conditions.[179] Postprison release issues are usually decided by a parole or other corrections board and its agents. In either case, however, release conditions and alleged violations are similar, and there is a similar range of dispositional options.

As noted previously, regulation of revocation decisions serves a number of important functions, including reduction of disparity, avoiding unnecessary imprisonment, and improving public safety.[180] Indeed, the need for closer regulation is becoming critical; a substantial and increasing percentage of prison admissions in many states result from revocation of release rather than direct commitment following conviction.[181] However, only about half of the guidelines systems appear to regulate any aspect of probation or parole revocation or modification. Few jurisdictions regulate probation decisions, and those that do impose only vague or rudimentary standards. For instance, the Delaware guidelines define five levels of increasingly intrusive sanctions; judges and corrections officials decide when an offender should move up or down the ladder, based on his or her behavior while on release.[182] The Minnesota guidelines state that probation revocation "should not be undertaken lightly and . . . should not be a reflexive reaction to technical violations" of release conditions, even in more serious cases.[183] Tbe guidelines further recommend "great restraint" in imprisoning released offenders who were origi-

179. Del. Benchbook, supra note 52, at 59–60.

180. See supra text accompanying notes 79–80.

181. Frase, Minnesota Guidelines, supra note 33, at 197 (noting that by 2001 almost half of prison admissions were for violation of release conditions); Reitz, Conventional Wisdom, supra note 134, at 214 tbl.8.1 (showing that in 1999 parole revocation alone accounted for sixty-seven percent of prison admissions in California; rates in other states ranged from seven to forty-one percent, averaging twenty-one percent).

182. The first three levels are administrative, field, and intensive supervision; level four is part-time incarceration (nine or more hours per day), and level five is full-time incarceration. Del. Benchbook, supra note 52, at 5, 59–60.

183. Minn. Sentencing Guidelines, supra note 55, § III.B.

nally convicted of "low severity offenses" or who have "short" prior records; instead, the commission recommends shifting to "more restrictive and onerous" probation conditions, including "periods of local confinement," i.e., jail time.[184] The Commission views revocation to prison as justified when (1) the offender has been convicted of a new crime carrying a presumptive executed prison term; or (2) the defendant "persists" in violating probation conditions despite prior escalation of the severity of release conditions.[185]

Another regulatory approach is to set presumptive targets or upper limits on the duration of the custodial term that may be imposed if release is revoked. The Minnesota guidelines permit substantial prison terms to be imposed if probation is revoked, scaled to the seriousness of the original conviction offense and the offender's prior record.[186] Other jurisdictions permit—or in some cases, require—only shorter jail terms, unless the offender has received a new conviction and is sentenced under the guidelines for that offense.[187]

A few guidelines jurisdictions regulate decisions to revoke or modify parole or other postprison release,[188] but most do not, probably for the same reasons that probation revocation and modification are often not closely regulated—these decisions are viewed as case specific and based on crime control considerations; uniformity, proportionality, and predictability values are not given much weight here.

Since revocations of probation and postprison release account for siguificant proportions of prison admissions in many states, closer regulation of these decisions seems desirable.[189] Whether such regulation is feasible is another question, which should be addressed by examining the varying rules and experiences in jurisdictions that have tried to impose limits on these discretionary decisions.

G. *Should Prosecutorial Discretion and Cooperation Bargaining Be Regulated?*

Charging and plea bargaining decisions have the potential to undercut guidelines reforms by allowing unregulated decisions by prosecutors and defense attorneys to determine in what grid "cell" the offender ends up, which in turn determines the presumptive sentence. Although attorneys clearly bargain "in the shadow" of the guidelines, producing out-

184. Id.

185. Id.

186. Id. § IV (sentencing grid); Frase, Sentencing Principles, supra note 96, at 410.

187. For example, the federal guidelines define three grades of probation and supervised release violation, with ranges of presumptively required custody terms (depending on criminal history) running from three to nine months to fifty-one to sixty-three months. U.S. Sentencing Guidelines Manual §§ 7B1.1–7B1.5 (2004).

188. Almost all states that have abolished parole still have periods of postrelease supervision, for example, the "supervised release term" in Minnesota, consisting of the good time credit earned in prison—up to one-third of the maximum prison sentence authorized by the trial court. Minn. Stat. Ann. § 244.05 (West 2003).

189. See supra note 181 and accompanying text.

comes which tend to mirror the results the law would impose without negotiation,[190] many case-specific factors, including unequal resources and bargaining ability and differentials in risk aversion, inevitably produce results at odds with guidelines rules and policies. Among the guidelines states, only Washington has addressed this issue, and its statewide charging guidelines are not legally enforceable.[191]

The federal guidelines went too far in the opposite direction, attempting to limit the effects of charging leniency by providing presumptively binding enhancements for "relevant conduct"[192] even if that conduct is not charged or retained to conviction—indeed, even if it is based on charges of which the defendant was acquitted, so long as the sentencing judge finds by a preponderance of the evidence that the crime was committed. Such "real-offense" sentencing has been severely criticized by scholars,[193] and presumptive relevant conduct enhancements are now unconstitutional under *Blakely* and *Booker* (barring one of the "fixes" described in the Introduction).[194]

Another prosecution tool under the federal guidelines, and one that is not affected by *Blakely*, is the power of the government to grant or deny mitigation to offenders based on whether they are deemed to have provided "substantial assistance" in the form of testimony or other cooperation in obtaining convictions of other offenders.[195] Although prosecutors also bargained for such cooperation before there were guidelines, judges had discretion to mitigate sentences of cooperating defendants even if the prosecution did not agree.

Can prosecutorial discretion, plea bargaining, and cooperation bargaining be subjected to meaningful and effective control? Perhaps not. The absence of any serious attempt by state guidelines systems to regulate these matters reflects the extraordinary difficulty of enforcing such controls in an adversary system. It is particularly difficult to impose *lower* limits on charging severity and recommended sentence leniency since, in most cases, neither the prosecution nor the defense will appeal cases of leniency.

But maybe the problem is not that serious, at least in well-desigued guidelines systems. Unlike the federal system, there have been relatively few complaints about prosecutorial dominance in state systems,[196] so per-

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190. Cf. Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 950 (1979) (suggesting law provides framework within which parties reach negotiated settlements).

191. Boerner & Lieb, supra note 35, at 89–90, 96–97.

192. U.S. Sentencing Guidelines Manual § 1B1.3.

193. See, e.g., Tonry, Sentencing Matters, supra note 5, at 68, 77–78, 90, 93–95; Kevin R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 Stan. L. Rev. 523, 573 (1993).

194. See supra text accompanying notes 10–15.

195. U.S. Sentencing Guidelines Manual § 5K1.1.

196. It is, of course, hard to document the absence of something. However, one indication of the lack of concern in the states about prosecutorial discretion is that this

haps closer regulation is not needed. Specifically, my hypothesis is that, in a properly balanced guidelines system—one with reasonable sentence severity levels and few mandatory minimum statutes, and in which courts retain substantial discretion to depart—it is rare that prosecutorial or plea bargaining decisions force judges to impose sentences with which the judges strongly disagree, as often seems to have occurred in federal courts. To some extent, this is a testable hypothesis. Research could measure the degree and nature of judicial, defense, and probation officer complaints about charging, plea bargaining, and cooperation bargaining in different state guidelines systems, and seek to determine whether these complaints are associated with the various forms of balance, or imbalance, mentioned above. It seems likely that complaints will be much more frequent in jurisdictions with severe statutory or presumptive sentences for certain crimes (particularly mandatory penalties), broad three strikes laws or other criminal record enhancements, and outdated, overlapping, or otherwise overbroad criminal prohibitions.

H. *Other Important Design Issues*

The summary above includes only a few of the important design issues that guidelines drafters and revisers must address. Some other important issues include the structure and powers of the sentencing commission—its makeup, legislative mandate, and relationship to other branches of state government;[197] the use of a single sentencing grid, multiple grids, or a nongrid ("narrative") format; the extent to which guidelines rules reflect existing norms ("historical" or descriptive guidelines) rather than independent ("prescriptive") policy choices of the legislature or commission; whether guidance is provided as to the choice of sentencing purposes or the relationship between certain purposes and certain sentencing options; the use of categorical presumptions as to risk, amenability, or desert for groups of offenders, rather than individualized assessments; and the relationship between sentencing law reform and criminal code reform.

CONCLUSION

The varied approaches of state guidelines reforms provide state and federal sentencing policymakers with a broad range of options. At the same time, these varied approaches—and similar choices of what *not* to regulate—raise many important policy issues that theoretical and empirical researchers need to address. In all likelihood there is no "ideal" sentencing guidelines model; rather, each state must choose a combination of desigu features and policy goals appropriate to its local circumstances

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topic has been rarely discussed in meetings and newsletters of the National Association of Sentencing Commissions (an organization that focuses on state guidelines). See NASC Website, supra note 20.

197. See Barkow, supra note 23, *passim.*

and political realities. What is needed, and what this Essay hopes to facilitate, is a growing understanding of what tends to work best under different circumstances, the reasons why that is so, the nature of the unresolved policy choices states face, and the most profitable avenues of future research to facilitate these policy and design choices.

Are sentencing guidelines the best way to achieve all of the varied purposes and limitations of punishment in the early twenty-first century? As I have argued elsewhere, it is unlikely that these purposes and limitations can be accommodated by any of the alternative sentencing regimes, whether indeterminate sentencing, highly determinate sentencing, a desert model with interchangeable sanction types, or emerging models such as restorative justice, community justice, and sentencing based on offender risk management.[198] But sentencing guidelines of the kind implemented in the states provide sufficient flexibility to achieve all contemporary sentencing, reform, and systemic goals—including increased use of intermediate sanctions, restorative and community justice programs, and offender risk management. Guidelines have proved popular in the states not just as a means of limiting unjustified disparities, but also as a way to manage prison population growth, avoid overcrowding, and set priorities in the use of limited and expensive correctional resources. The purposes served by state guidelines have evolved considerably over the past quarter century and will continue to evolve and incorporate new theories and conditions.

Thus, there is reason to believe that sentencing guidelines will continue to thrive and spread in the states, and will be modified as little as possible to comply with the demands of *Blakely*. In any case, it seems likely that the *Blakely* revolution will cause scholars to pay more attention to the critical normative and empirical issues underlying the design and operations of guidelines sentencing, and the huge store of data and experience to be found in a quarter century of guidelines reform in the states.

198. Frase, Limiting Retributivism, supra note 96, at 107–11; Frase, Retrospective, supra note 8, at 78–80.