1999

Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective

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Recommended Citation

Richard Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING R. 69 (1999), available at https://scholarship.law.umn.edu/faculty_articles/524.

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Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective

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This article examines and compares the evolution, successes, and failures of sentencing guidelines reforms in the states and in the federal courts. Greater emphasis will be placed on the Minnesota Guidelines because they have been in effect longer than any other fully-developed guidelines system, and have been subject to the most extensive monitoring and outside evaluation.¹

The idea of sentencing guidelines overseen by a permanent sentencing commission was originally proposed by federal judge Marvin Frankel in the early 1970s.² Several bills to accomplish this were introduced in Congress, but Minnesota was the first jurisdiction to place such a system in operation. As of 1999, about one-third of the states had sentencing guidelines in effect, and guidelines reforms were being considered in a number of other states. But guidelines systems are not all alike; some states have attempted to go farther than Minnesota, while many others have done much less.

Although state guidelines systems are very diverse, they have a couple of things in common which distinguish them from the federal guidelines. Without exception, state systems are more flexible than the federal guidelines. There is a range; some state systems are so

flexible that they are hardly "guidelines" at all, others are much more restrictive. But anyone who thinks that sentencing guidelines are inherently inflexible and take away all discretion would be very mistaken.

Another thing that distinguishes state guidelines is that they are relatively simple to apply. The federal guidelines are quite ambitious; they try to regulate every decision. This is related to the flexibility point, but it goes beyond that. State guidelines are generally relatively short documents; sometimes very short. The Minnesota guidelines commission, for one, has been explicit about the value of simplicity; it is important to keep guidelines relatively easy to apply and easy for courts, defendants, and the public to understand. That is an important point which was lost in the federal system.

The remainder of this article is organized into five parts. Part One provides an overview of Guidelines reforms which have been proposed, adopted, and in some cases, abolished. The wide variety of guidelines systems provides a rich source of experience and law-reform options for states considering adopting or revising guidelines. Part Two examines the purposes which sentencing guidelines are intended to serve, and shows how those purposes have evolved over time. Part Three evaluates the extent to which state and federal guidelines reforms have achieved their various purposes. Part Four examines several persistent challenges faced by guidelines reforms in all jurisdictions: the lack of effective controls over prosecutorial discretion and plea bargaining practices, and the limited attempts to regulate and encourage the use of intermediate sanctions. Part Five argues that state guidelines, even with their limitations, are much better than any other sentencing system which has been tried or proposed. The Conclusion summarizes what we have learned about guidelines in the last two decades.

- I. Overview of State and Federal Systems:
Where, When, and What Kinds of Guidelines?
 - A. Jurisdictions that have, once had, are considering, or have rejected Guidelines

As shown in the accompanying table, some form of sentencing guidelines is currently being used in seventeen states and in the federal courts. Furthermore, at least eight other jurisdictions (listed at the bottom of the table) are considering the adoption of guidelines. In 1993, the American Bar Association's revised standards for sentencing strongly endorsed the adoption of sentencing guidelines incorporating all six of the key structural features listed in the table.³

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Questions, comments, and factual corrections are very welcome, and should be addressed to Professor Frase at: frase001@maroon.tc.umn.edu

Guidelines have suffered some defeats, however. Although the number of guidelines systems has grown steadily, at least six states have considered and rejected the idea of sentencing guidelines. Moreover, two states (Louisiana and Wisconsin) formerly had guidelines but then repealed them, and three other states have substantially weakened their guidelines. Oregon voters approved a ballot measure which turned many of the recommended guideline prison sentences into mandatory minimum prison terms, and the legislature replaced the sentencing commission with a citizen "policy" board; Florida and Tennessee abolished their commissions completely. Moreover, Florida's remaining "guidelines" no longer limit judicial severity: trial judges have complete discretion to impose any sentence between the recommended guidelines term and the statutory maximum, whereas sentences below the guidelines still require a written statement of reasons, and are appealable by the prosecution.

B. Not all Guidelines are Alike—Major variations

The accompanying table indicates some of most important structural differences among guidelines systems, but there are actually many more variations. For instance, Delaware, Florida, and Ohio don't use a grid (although their "narrative" or "point-system" guidelines could be translated into a grid). State and federal grids vary considerably in such things as: whether certain offenses have a separate grid; the number of grid cells; the breadth of cell ranges; and whether the ranges of adjoining cells overlap. Guidelines systems also differ in the number of disposition options permitted for a given case (e.g., prison, jail, restrictive intermediate sanctions, etc.); whether any guidance is offered as to the choice among sentencing purposes; how criminal history is defined; how multiple offenses are sentenced; and the extent to which the sentencing commission has made independent judgments about appropriate sentences (so-called "prescriptive" rules), rather than simply compiling guidelines which are descriptive of past judicial and paroling practices.

Summary of Sentencing Guidelines Systems (Fall 1999)

Jurisdiction	MAJOR STRUCTURAL FEATURES						
	Initial Effective Date	Permanent Sentencing Commission	Parole Release Abolished	Effective Appellate Review	Resource-Impact Assessments	Incorporates Intermediate Sanctions	Also Covers Misdemeanor Offenses
Utah	1/79	(1983)			(1993)		(some)
Alaska	1/1/80		(mostly)	✓			
Minnesota	5/1/80	✓	✓	✓	✓		
Pennsylvania	7/22/82	✓				(1994)	✓
Maryland	7/1/83	(1996)					
Florida	10/1/83	(until 1998)	✓	(some)	(1994-98)		
Michigan	1/17/84	(1995)	(some, 1999)	(1999?)	(1999)		
Washington	7/1/84	✓	✓	✓	✓	(some)	
Delaware	10/10/87	✓	(1990)		✓	✓	✓
Federal	11/1/87	✓	✓	✓	✓	(some)	(some)
Oregon	11/1/89	✓	✓	✓	✓	✓	
Tennessee	11/1/89	(until 1995)		(some)	(until 1995)		
Virginia	1/1/91	(1994)	(1995)		(1995)		
ABA Sentencing Standards (3rd ed.)							
	2/93	✓	✓	✓	✓	✓	✓
Kansas	7/1/93	✓	✓	✓	✓		
Arkansas	1/1/94	✓			✓	✓	
North Carolina	10/1/94	✓	✓	(some)	✓	✓	✓
Ohio	7/1/96	✓	(mostly)	(some)	✓		
Missouri	3/97	✓			✓	✓	

Under consideration: Alabama, Georgia, Iowa, Massachusetts, Oklahoma, South Carolina, Washington, D.C., & Wisconsin

Considered and rejected guidelines: Connecticut, Maine, Texas, Colorado, New York, & Montana

Guidelines implemented and later repealed: Louisiana (1992-95) & Wisconsin (1985-95)

Three guidelines states lack a permanent sentencing commission. Alaska's guidelines were created by statute, and have been greatly expanded by appellate caselaw; the guidelines in Florida and Tennessee were written by commissions that were later abolished. Utah and three other states initially did not have a permanent sentencing commission. State sentencing commissions vary considerably in their makeup, but most of them are larger and more widely representative (e.g., including attorneys and probation officials) than the federal commission. The duties, staffing, and budget of sentencing commissions varies a lot. However, an essential component of guidelines is a commission that can do research on past sentencing practices, evaluate the use of resources, and prioritize the use of those resources. Perhaps most importantly, a commission can predict and seek to avoid prison overcrowding (a function which I will say more about in a moment). In short: a permanent sentencing commission is now generally seen as an essential component of guidelines.

Guidelines systems also differ greatly in their scope. The most important differences relate to parole: six states (Utah, Pennsylvania, Maryland, Tennessee, Arkansas, and Missouri) retain parole release discretion for all offenses, and have only adopted guidelines to structure judges' sentencing decisions. Two states (Alaska and Michigan) retain parole for a substantial number of crimes. Some guidelines states retain parole only for a few, very serious offenses, usually those subject to life imprisonment. Ohio has a judicial releasing option. In short: abolition of parole release is apparently not seen as an essential feature of state guidelines, although it has become more common in recent years.

Another important structural feature has to do with whether guidelines rules are legally enforceable — that is, binding on trial courts, and subject to effective appellate review. Six states (Utah, Maryland, Delaware, Virginia, Arkansas and Missouri) explicitly provide that their guidelines are "voluntary" and not subject to appeal. In Pennsylvania, sentence appeal is available, but appeals have almost no impact due to the lax standard of review. In North Carolina, the guidelines are very strict as to some sentencing issues but very loose as to others, and there is almost no appellate caselaw. Sentencing caselaw is limited in Tennessee, due in part to very broad guidelines ranges and retention of parole. In Florida and Ohio, some decisions applying the guidelines are appealable, and some are not. To summarize: effective appellate review is found in less than half of the state guidelines systems.

The next column shown in the table indicates which jurisdictions have required their sentencing commission or some other state agency to assess the resource-impact of proposed sentencing guidelines and statutes, in particular, the predicted effect on prison populations. Impact-assessment is more accurate under

guidelines, because guidelines sentences are more uniform and predictable. Such assessment has always been a key feature of the Minnesota Guidelines, but it was lacking in most other early systems. In later years, however, as state prison populations began to shoot up, increasing costs and raising problems of overcrowding and court intervention, more and more states began to see resource-impact analysis as an essential feature of guidelines — and indeed, a major reason to adopt guidelines and a sentencing commission. Almost every new guidelines system created since the mid-1980s has required resource-impact studies, and several older systems have added this feature (which is also recommended by the revised ABA Standards). It must be stressed, however, that guidelines systems use resource-impact studies in very different ways. Some, like Minnesota, use these studies to shape sentencing policy; if the impact projections show that a proposed guideline rule or statute will substantially increase prison populations, that proposal is likely to be rejected or greatly narrowed in scope. But other systems, such as the federal one, generally use resource-impact studies only after the rules have been written — that is, as a warning to the legislature to expand prison capacity in order to accommodate the new rules.

The next-to-last column in the table shows which systems have attempted in some way to structure decisions on the use of intermediate sanctions — that is, sentences which are less severe than imprisonment but more restrictive than standard probation, such as residential or outpatient treatment, home detention, intensive supervision, drug- and alcohol-use monitoring, community service, restitution, and fines. The earliest guideline systems only regulated prison decisions, that is, who should go to prison and for how long; non-prison sentences were left to the judges. This is still true of Minnesota, where non-prison sentences are given in almost 80 percent of felony cases (and where almost all jail sentences, which can be for up to one year, are not regulated by the Guidelines). This is a good example of how even a system that is fairly ambitious about regulating discretion can still retain a lot of flexibility. However, since the mid-1980s, more and more guidelines systems have incorporated intermediate sanctions, and this is also recommended by the revised ABA standards. This trend, like the growth in resource-impact analysis, probably reflects rising prison populations, and a desire to encourage judges to consider effective non-custodial sentencing options. Nevertheless, only about half of existing guidelines systems attempt to regulate intermediate sanctions. I will return to this topic later in this article.

The far right-hand column in the table shows the systems which have guidelines to regulate misdemeanors as well as felonies. Only five jurisdictions (and the ABA Standards) propose guidelines for misde-

meanors (or at least, the more serious ones). Perhaps surprisingly, there does not seem to be a strong correlation between the attempt to regulate intermediate sanctions and the decision to promulgate misdemeanor guidelines — even though intermediate sanctions would seem to be especially appropriate for less serious cases. Of course, there are also many inmates in state prison who are appropriate candidates for intermediate sanctions. The judicial sentencing seminars pioneered at Yale by Dan Freed, and now being conducted at a number of other law schools, have been helping judges explore these issues; the cases discussed in these seminars suggest that there are many people in state prisons who really don't need to be there. The same is undoubtedly true of federal prisons.

The table as a whole identifies a number of “strong” guidelines systems — those with at least four of the key features referred to above. These systems include Minnesota, Washington, Delaware, the federal system, Oregon, Kansas, and North Carolina. At the other extreme are very “weak” systems — those with no more than two of these key features, such as Maryland (which recently reexamined its approach, but decided not to make any major changes), Alaska, and Tennessee. However, these variations do not necessarily mean that the weaker forms of sentencing guidelines are always wrong. Perhaps a less ambitious guidelines reform is all that some states are able to enact; under these circumstances, it may be that some form of guidelines is better than none. Moreover, several jurisdictions (e.g., Virginia) began with weak guidelines, then substantially upgraded them. On the other hand, weaker guidelines do appear to be more vulnerable to being partially or entirely repealed. The two total-repeal states (Louisiana and Wisconsin) both had voluntary guidelines for judges, retained parole, and were missing at least one other key feature shown in the table. The two states (Florida and Tennessee) that abolished their sentencing commissions were also both relatively weak systems. Finally, it is not necessarily the case that relatively strong systems are always better; there are a number of major problems (discussed further in Part III) with the relatively “strong” federal guidelines.

II. The Changing Purposes of Sentencing Guidelines

What were the original goals of guidelines reforms, and how have these goals evolved over time? The initial goals provide familiar but important background — we have to know where we've been, and how we got here, in order to evaluate the present situation and our options for the future. In particular, we need to recognize when supposedly new sentencing reforms are actually just “re-runs” of old ideas — we don't want to make the same mistakes all over again. At the same time, we also need to recognize that the goals of sentencing reform have evolved over time. These changes

show how guidelines have responded to new as well as old policy concerns, all of which must be accommodated in any successful sentencing system.

A. Initial goals

The original goals of sentencing guidelines reforms were two-fold. First, to reduce sentencing discretion and its resulting disparities; and second, to promote more rational sentencing policy developed and monitored by a specialized sentencing commission.

The goal of disparity reduction was closely tied to a debate about the purposes which criminal penalties should be designed to serve. Prior to adoption of sentencing guidelines, the dominant purposes of punishment were rehabilitation (seeking to change the underlying causes of the defendant's criminal behavior) and incapacitation (preventing crime by confining dangerous offenders). To achieve these goals, judges and parole boards were given extremely broad discretion to individually assess the rehabilitation potential and dangerousness of each offender. Under this “indeterminate” sentencing system, judges could impose any sentence from probation to the maximum prison term authorized by law. Most but not all systems required offenders to serve some fraction of their prison term before becoming eligible for parole; after that point, the parole board had unreviewable discretion to decide how much of the remaining sentence would have to be served.

In the 1970s, a broad, “bi-partisan” consensus emerged that discretion in sentencing must be substantially reduced. Unregulated discretion was seen as having failed to provide sufficiently certain and severe punishment to discourage crime and incapacitate dangerous offenders. It also produced unjust disparities in the treatment of equally serious cases. Studies were done which showed that when a sentencing file was given to a group of judges they proposed very different sentences; it wasn't just that “each case is different.” Many people also came to believe that individualized assessments of each offender's treatment needs, progress in treatment, and degree of dangerousness were too unreliable to justify the disparities they produced, and that most treatment programs could not be shown to be effective. Broad parole discretion also left both the public and prisoners themselves with no way of knowing how long imprisonment would last. Some observers argued that the solution to all of these problems was a sentencing system based not on crime prevention but upon retribution or “just deserts” — each offender should be punished in direct proportion to his or her culpability and the seriousness of the conviction offense, with little or no consideration given to the defendant's need for rehabilitation or incapacitation.

The goal of achieving more rational sentencing policy has two facets. First, the use of an independent,

appointed commission was designed to insulate sentencing policy decisions from short-term political pressures (and the tendency of elected politicians to prefer more punitive policies, so as not to appear “soft on crime”). Second, the commission, like other administrative agencies, was expected to collect data and develop expertise which would contribute to more informed sentencing policy. The commissions’s database and expertise (and in Minnesota, its mandate to avoid prison overcrowding), were also expected to promote a more comprehensive, long-term, and fiscally responsible view — setting sentencing policy for all crimes (or at least, all felonies), thus avoiding piecemeal reforms in response to the current “crime of the week,” and helping to more effectively set priorities for the use of limited correctional resources.

B. Evolving goals

Since Minnesota’s Guidelines first became effective, sentencing goals and values in Minnesota and other guidelines jurisdictions have evolved considerably. Of the original goals summarized above, it appears that the goal of disparity reduction has become somewhat less important, while other goals have become more important. In order to achieve all of these goals, many state guidelines systems have, in effect, adopted a hybrid sentencing theory sometimes known as “limiting retributivism” (or as it is known in Minnesota, “modified just deserts”). Under this approach, retributive or “just deserts” values merely set upper and lower bounds — sentences must not be either excessively severe or unduly lenient. This theory thus defines a range of “deserved” punishments, within which courts may consider crime-prevention, resource limits, victim and community concerns, and other appropriate sentencing goals.⁴

The evolution in guidelines goals is evident in the accompanying table. Almost every guidelines system which was adopted or revised since the mid-1980s has included resource-impact assessments, in an attempt to avoid prison overcrowding and control the growth of prison populations. More recent guideline reforms are also more likely to regulate and attempt to encourage the use of intermediate sanctions. Broader use of such sanctions is intended to reduce unnecessary prison use — thus avoiding prison over-crowding and reducing prison costs — and also to better promote public safety.

Here are some of the other important goals which have been added or given greater emphasis as guidelines reforms have evolved over the past two decades.

Truth in Sentencing. Although this term has several meanings, the most common refers to the goal of ensuring that offenders serve a high percentage of the prison sentence imposed by the court, and are not released early by parole or prison officials. In one sense, truth in sentencing was always part of guidelines

reforms which included the abolition of parole release discretion. But truth in sentencing has come to mean abolishing parole, period — whether or not judicial sentencing guidelines are enacted. Moreover, the emphasis has shifted from disparity-reduction to systemic “honesty” and increased sentence severity. Thus, whereas several early guidelines reforms including abolition of parole allowed offenders to receive a subsequent sentence reduction of up to thirty-three percent for good conduct in prison, the Federal Sentencing Guidelines — and an increasing number of states — define “Truth in Sentencing” so that offenders receive a sentence reduction of no more than *fifteen percent* for good conduct. Adoption of this definition (and of guidelines which include abolition of parole) was strongly encouraged by a 1994 federal statute, providing substantial funds for prison construction to states which abolish parole and require inmates convicted of serious crimes to serve at least 85 percent of their sentences.⁵ At the same time, this statute has also encouraged some states to consider adopting guidelines. The reason is that prisoners in these states were previously serving a very low proportion of their sentences (sometimes less than twenty percent); with many prisoners now required to serve at least 85 percent, states are facing the prospect of massive increases in prison populations unless judges can be persuaded (via guidelines) to lower their sentence lengths.

Public Safety. The original guidelines emphasis on “Just Deserts” represented a rejection of the prior policy of allowing judges and parole boards to make individualized assessments of each defendant’s risk of re-offending. The goal of public safety was not completely abandoned, however. Judges and corrections officials in many guideline states were still allowed to consider offender dangerousness when setting the conditions of probation or post-prison supervised release. Moreover, recommended prison sentences under sentencing guidelines systems have always given substantial emphasis to the defendant’s prior record — a factor which has very little significance under a “Just Deserts” theory, which assumes that the defendant has already “paid” for his prior convictions. The extent of the defendant’s prior record is primarily important as an indicator of his probable degree of dangerousness and amenability to treatment or supervision. But guidelines systems prefer to make these assessments on the basis of group or actuarial risk, rather than individualized, case-by-case diagnoses.

However, these limited forms of risk assessment and risk management were not enough to satisfy judges, legislators, and the public. In Minnesota and most other guidelines systems, public safety has become an increasingly important goal. Thus, in 1989 the Minnesota Legislature amended the Guidelines enabling statute to specify that public safety should be

the Commission's "primary" consideration in enacting or modifying Guidelines provisions. The Legislature has also enacted a series of laws authorizing or mandating increased penalties for certain dangerous or repeat offenders. As for other guidelines jurisdictions, some explicitly included public safety as a goal (e.g., Ohio and Virginia), and newer guidelines systems are likely to incorporate recidivist and "dangerous offender" provisions, especially for sex crimes. (Of course, guidelines systems which retain parole release discretion allow case-specific dangerousness assessments of all imprisoned offenders.)

Rehabilitation and Reintegration. As with Public Safety concerns, rehabilitative goals were initially de-emphasized under most sentencing guidelines reforms, but they never went away entirely; in some systems they remained quite important, and may have become more so over time. In Minnesota, for example, rehabilitation is a very important goal — the state is sometimes called the "land of 10,000 treatment centers" rather than 10,000 lakes. Rehabilitation and reintegration (through community-based sentencing) are pursued by varying the conditions of probation; non-prison sentences are not regulated under the Minnesota guidelines, and account for almost 80 percent of felony sentences. In addition, the Minnesota Supreme Court has held that, when judges are deciding whether to depart from presumptive prison or probation sentences, they may consider the defendant's particular "amenability" to probation — a concept which at least implicitly includes assessments of rehabilitation potential (as well as public safety).⁶ Similar "amenability" concepts are found in the departure standards of other states' guidelines systems, for example, in Ohio and North Carolina. In 1993, the Minnesota Legislature also repealed the provision in the 1978 guidelines enabling act which had required prison treatment programs to be entirely voluntary; corrections officials are now authorized to withhold "good time" credits from offenders who refuse to participate in prison programs.

Restorative and Community Justice. The past twenty years have witnessed a substantial growth in programs designed to give greater attention to the needs and perspectives of crime victims, the local community, or both.⁷ Sentencing alternatives such as victim-offender mediation, restitution, and community service have become increasingly popular in Minnesota and other guidelines states. Guidelines systems have yet to formally recognize such programs and sentencing alternatives, but as I will explain later, most state systems readily accommodate these new ideas. Again — if you have a more flexible guideline system, it can incorporate a number of different theories.

Rewarding guilty pleas and other forms of cooperation. All sentencing guidelines systems appear to recognize the need to encourage defendants to cooper-

ate by pleading guilty, providing testimony against other offenders, obeying conditions of probation, and maintaining good conduct in prison. All of these forms of cooperation are "purchased" by giving defendants less than their authorized guidelines sentence. Here again, competing, practical goals require a flexible rather than a strict conception of "just deserts," that is, a theory of "limiting retributivism" which permits a range of penalties. Plea-bargaining practices have not changed much under the Minnesota guidelines⁸ or, I believe, under most other state guidelines. A guilty plea, including an agreement of the parties about the most appropriate sentence, is a basis in Minnesota, and in most if not all state guideline systems, to depart from the guidelines. Of course, allowing such agreed departures risks undercutting the guidelines. (For further discussion see Part IV, *infra*.)

Broadly-shared Sentencing Power. Public officials and sentencing scholars have increasingly viewed sentencing as an exercise in shared authority, seeking to achieve a workable and stable balance between the roles and influence of a wide variety of public and private parties.⁹ Lawmakers often view sentencing guidelines as a way to re-assert legislative control over sentencing (albeit indirectly, through the legislatively-appointed commission); under indeterminate sentencing regimes, the input of lawmakers is limited to deciding what should be criminal, the maximum penalty, and whether a mandatory minimum penalty should apply. Similarly, trial judges often support sentencing guidelines which include abolition of parole; under indeterminate sentencing, the judge's sentence has very little effect over how long offenders stay in prison. Well-designed sentencing guidelines can also provide appropriate policy-making and/or case-level roles for the sentencing commission, victims and community representatives, probation officers, and appellate courts. On the other hand, strict sentencing guidelines have the potential to upset the balance of sentencing power; legislators, judges, and scholars in some guidelines systems fear that charging and plea bargaining practices allow the parties, and particularly the prosecution, to have too much influence on the form or severity of the sentence — a problem to which I will return in a moment.

Simplicity. The number and variety of sentencing goals listed above naturally tends to make the drafting and implementation of guidelines more difficult. Yet Minnesota and most state guidelines drafters have recognized that effective guideline standards and procedures must remain relatively simple. The public and offenders must be able to understand the standards, and both the standards and sentencing procedures must remain fairly easy for courts and other officials to apply. Highly complex rules promote errors, and more disparity; they also waste scarce court and attorney time.

To summarize, early guidelines reforms attempted to narrow the focus of sentencing to strongly emphasize uniformity and “just deserts,” while seeking to promote more rational sentencing policy. The much broader range of contemporary sentencing goals demonstrates an important underlying truth which early guidelines reforms (and some recent proposals) seem to have overlooked: sentencing policy is very complex, requiring compromise and careful balancing of numerous, often-competing goals. Yet the basic principles and rules must remain fairly easy for the public and system actors to understand and apply. Designing a workable system to achieve all of these goals and values is *not* a simple task!

III. What have Guidelines accomplished?

How well have state guidelines achieved the goals identified above? Any such assessment must begin with a frank admission: no “expert” on sentencing guidelines can say very much about how most state guidelines systems have worked in practice. In some cases, this is because a state’s system is too new to have generated enough data for evaluation. In other cases, the guidelines commission has not published or commissioned any evaluations, nor is there some professor or other outside researcher who takes a special interest in that state’s guidelines. So much of what follows is based on a few, well-documented systems, and some “educated guesswork” about the rest.

Disparity reduction. Since most guidelines systems have abolished parole, they have eliminated that form of disparity. Judicial sentencing disparities have also been reduced, at least in the states which have been evaluated. Minnesota is the only system to have been subjected to extensive outside evaluation, but data reported by sentencing commissions or their staff suggest that disparity has also been reduced in Delaware, Oregon, Pennsylvania and Washington.¹⁰ Two of these five jurisdictions do not have legally-binding guidelines (Delaware’s are formally voluntary, and Pennsylvania’s lack effective appellate review). Although much more research is needed on this point, it may be that voluntary judicial guidelines can still be effective to reduce disparity — provided that certain other factors are present. Delaware is a very small state, with substantial informal “peer” pressure on judges to conform to the guidelines. Pennsylvania has had a very active sentencing commission.

More rational sentencing policy. As shown in the table, most guidelines systems include a permanent sentencing commission. Although some are more active than others, all of these commissions have begun to develop useful sentencing policy expertise, a comprehensive statewide view of punishment priorities, better management of resources, and a long-term perspective. Even in states with fairly weak guidelines, sentencing commissions can play an important role, not just in

drafting guidelines but also by advising the legislature as to various sentencing policy matters of current concern.

As for the increasingly important goal of resource-impact assessment, there is considerable evidence that sentencing guidelines can help to avoid prison overcrowding and the kinds of dramatic (and very expensive) escalation in prison populations which has occurred in many non-guidelines states in the past 20 years. Minnesota pioneered this concept, and has successfully avoided major prison overcrowding problems for almost two decades — a period in which most non-guidelines states experienced both overcrowding and court intervention. Although Minnesota’s prison population has increased substantially since 1979, the average annual rate of growth (about 5 percent per year) has only been about two-thirds the rate for the nation as a whole (8 percent per year). Other guidelines jurisdictions which emphasized resource-management goals have also had low average annual growth rates, comparable to Minnesota’s. But average growth rates in guidelines systems without these goals were higher (7 percent), and one of the highest average rates of prison population growth in any system, with or without guidelines, occurred in the federal system — about 9 percent per year.

Two other goals closely related to the goal of resource management are the development of detailed sentencing and correctional databases, and the promotion of greater use of intermediate sanctions. Improved data permits more accurate prison population forecasts, and more informed sentencing policy formulation. Guidelines jurisdictions now possess by far the best system-wide data on sentencing practices and correctional populations. When it comes to the promotion of intermediate sanctions, however, sentencing guidelines reforms have accomplished relatively little. This topic is discussed further in Part IV.

Another goal of rational sentencing policy is effective appellate review, including a sufficient body of caselaw to enforce guidelines rules, clarify ambiguities, and develop sentencing policy through the time-honored, “common law” method. Many guidelines systems (Alaska, Minnesota, Washington, the Federal courts, Oregon, and Kansas) have achieved a substantial body of appellate case law. However, some observers believe that appellate review in the federal courts has gone too far, unduly limiting trial court flexibility.¹¹

Truth in Sentencing. Any system which has abolished parole release discretion — as the majority of guidelines systems have done — has achieved a greater degree of “truth in sentencing.” Of course, this goal has also been achieved in a number of states which abolished parole without adopting judicial sentencing guidelines. However, there is reason to believe that the abolition of parole works much better in a system with such guidelines, for three reasons. First, systems with

judicial guidelines have less need to rely on state-wide parole standards as a means of reducing disparity in the sentences imposed by local judges. Second, judicial guidelines can be used to encourage judges to lower their sentence lengths, to reflect the much higher proportion of the prison term which will be served after parole is abolished (and thus avoid massive increases in prison populations). Third, systems with guidelines and a permanent sentencing commission are in a better position to predict the effects abolition of parole will have on prison populations; such systems can then either build more prisons, modify the guidelines to lower prison commitment or duration rates, or pursue a combination of these strategies. In contrast, the abolition of parole, in a system without judicial guidelines, eliminates a means of counteracting judicial disparity and prison overcrowding at the "back end" of the sentencing process, without providing any means of controlling these problems from the "front end."

Public Safety. States with sentencing guidelines have generally had stable or falling crime rates since their guidelines became effective. However, crime rates have recently been stable or falling in most states, with or without guidelines. And, of course, crime rates depend on many social and economic factors in addition to sentencing policy; a thorough examination of the relationship between guidelines and public safety would thus be very complex (and has not, to my knowledge, been attempted by quantitative criminologists). But the stable or falling pattern of crime rates, noted above, at least suggests that sentencing guidelines do not threaten public safety.

Other goals. As for the other goals of guidelines reforms described previously, some guidelines systems have been particularly successful. The Minnesota Guidelines have achieved greater uniformity, proportionality, and Truth-in-Sentencing, while retaining enough flexibility to take account of unusual offender characteristics and rehabilitation potential, local values and resource limits, and emerging punishment theories such as restorative justice.¹² By giving strong priority to the use of state prison space for violent and repeat offenders, while emphasizing jail and other community-based sanctions for less serious cases, the Guidelines promote public safety while avoiding prison overcrowding and unnecessary incarceration. Finally, the Minnesota Guidelines allow sentencing policy to be significantly influenced by each of the major actors and stakeholders: the legislature, the Commission, trial and appellate courts, the prosecution and defense, crime victims and community groups, probation officers, and prison officials. At the same time, the Minnesota Guidelines remain fairly simple to understand and to apply.

Other state guidelines systems have not been as thoroughly evaluated as Minnesota's, but what we do know about them suggests that many of them have also

achieved a good balance in the areas described above. Unfortunately, the same cannot be said about the Federal Guidelines. There have been a number of problems, some of which have already been noted.

First, federal appellate review has been very active, depriving trial courts of needed flexibility.

Second, the U.S. Sentencing Commission did not adopt resource management as a goal; thus, federal prisons have remained seriously overcrowded, and federal prison population growth has been higher than the national average — and much higher than in guidelines jurisdictions which emphasized resource management.

Third, the federal guidelines provide only limited scope for and encouragement of the use of intermediate sanctions, and only specifically incorporate options which are alternative forms of custody (community and intermittent confinement, and home detention).

Fourth, the Federal Guidelines not only permit, but often require, judges to enhance sentences based on conduct which was not charged, or for which charges led to dismissal or even acquittal; although some state guidelines systems include occasional elements of "real-offense" sentencing, no state system permits non-conviction-offense factors to play a substantial role.

Fifth, the federal system includes a number of severe mandatory minimum penalties and related guidelines provisions which, in the view of many federal judges, often result in unreasonably severe sentences.

Finally, the federal guidelines are NOT "simple" — the federal Guidelines Manual currently runs to over 400 pages in the West version (not counting appendices); the length of the Minnesota Guidelines, at about 65 pages, is typical of most state systems. These differences are not due simply to the greater number or diversity of federal crimes; the length and complexity of the federal guidelines result from the manner in which federal sentencing decisions are regulated.

To summarize: the federal guidelines are not well-balanced; they contain a number of very problematic rules, lack desirable features found in many state systems, and have sparked far more criticism than most state guidelines systems.

IV. Two Persistent challenges

Despite the accomplishments of many state guidelines, there are a number of legitimate criticisms which can be leveled at even the best of these systems. Two of the most important problems are the failure to effectively regulate prosecutorial discretion and plea bargaining; and the limited efforts to regulate and encourage the use of non-custodial ("intermediate") sanctions.¹³ Although each of these "gaps" in guidelines coverage is a problem, neither is a major problem in well-designed systems; indeed they may even be strengths, helping these systems accommodate important contemporary sentencing goals and values.

A. Prosecutorial Discretion and Plea Bargaining

Prosecutors in every American jurisdiction wield enormous "sentencing" power, because they have virtually unreviewable discretion to select the initial charges and decide which charges to drop as part of plea bargaining. Since guidelines limit the range of sentences available for a given offense, the power to drop or not drop charges is the power to select the sentence range available to the court (that is, what "box" on the grid the case ends up in). Thus, any disparity in charging translates into disparity in sentencing. Unregulated charging and plea bargaining also make it more difficult for the sentencing commission to predict future resource needs. Yet no guidelines system has come up with an effective way of structuring prosecutorial sentencing power, and its potential for disparity and unpredictability. Washington has state-wide charging guidelines, but they are not legally enforceable. The federal Guidelines tried to mitigate this problem by requiring trial courts to consider certain alleged criminal acts ("relevant conduct") whether or not such acts were included in any conviction offense. But this essentially lawless approach goes too far in the opposite direction — allowing sentences to be based on weak charges which were properly dismissed, resulted in acquittal, or were never even filed.

What should be done? Clearly efforts to structure prosecutorial discretion and plea bargaining should continue, especially by means of internal, administrative measures within prosecutor's offices, such as written policies and review of decisions by supervising staff. But we should not expect any major "break-throughs" in the near future. The absence, in all state guidelines systems, of any serious attempt to externally regulate prosecutorial decisions reflects the extraordinary difficulty of enforcing such controls in an adversary system. This may yet be possible, but it will be very difficult — especially to impose lower limits on charge and recommended-sentence severity (since, in most cases, neither prosecutors nor defendants will appeal cases of prosecution leniency).

However, I believe that most state guidelines systems are valuable reforms even if prosecutorial decisions remain substantially unregulated. I have two reasons for this belief. First, the absence of widespread complaints about prosecutorial dominance in state guidelines systems is an important sign, suggesting that closer regulation may not be needed. Specifically, I am suggesting that, in a properly balanced guidelines system — that is, one with reasonable sentence severity levels and few mandatory minimum statutes, in which courts retain substantial sentencing discretion for any given offense (due to broad guidelines ranges, limited appellate scrutiny, and/or flexible departure powers) — it is rare that prosecutorial decisions will produce sentences which judges strongly disapprove, yet are powerless to prevent (as often seems to occur in federal

courts). Second, prosecutorial charging and plea bargaining are valuable sources of flexibility and moderation in sentencing. These discretionary powers permit systems to consider individual offense and offender factors which may not fit squarely within formal statutory and guidelines rules. And of course, prosecutorial discretion also allows systems to tailor sentencing severity to the available resources and evidence.

B. Intermediate Sanctions

Only a few guidelines jurisdictions have attempted to regulate the conditions of non-custodial sanctions, or even to encourage broader use of such sanctions. Even the few jurisdictions which have attempted to address these issues have not gone very far. Several systems authorize judges, in certain cases, to substitute specified amounts of certain intermediate sanctions for custody; for example, sixteen hours of community service, or a day of home detention, might be substituted for a day of custody. Two states, Pennsylvania and North Carolina, have attempted to define large groups of offenders for whom various kinds of intermediate sanctions are appropriate. These guidelines first classify penalties into three types: incarceration (prison or jail), severe intermediate sanctions (such as residential treatment), and mild intermediate sanctions (such as community service). In some cells of the guidelines grid, only the most severe or the most lenient sanction type is authorized; in other cells, the sentencing judge is given the option of selecting among two (or even all three) of these sanction types.

The approach just described encourages judges to think about alternatives to custody, and discourages them from imposing severe intermediate sanctions in very minor cases. But the Pennsylvania and North Carolina Guidelines provide no guidance as to the choice to be made, when more than one sanction type is allowed in a given cell, or (when a non-custodial option is chosen), how much of that option to impose (for instance, what length of home detention or community service). These two systems also provide little guidance for the use of intermediate sanctions in response to violations of the conditions of probation or post-prison release. Revocations of conditional release account for a high proportion of state prison admissions in many states; judges and correctional authorities need a range of structured sanctions at the back end of the sentencing process, as well as at the front end.

Should all guidelines jurisdictions develop detailed rules to regulate and encourage the use of intermediate sanctions? Perhaps, but only if certain conditions are met. The following questions need to be asked:

1. Are various intermediate sanctions available in most parts of the state, and are they adequately funded? A number of guidelines states (Pennsylvania, North Carolina, and Ohio) have sought to encourage

- broader use of intermediate sanctions through increased state funding for community corrections.
2. Is there fairly broad field support for such guidelines? In Minnesota, proposals to add any type of intermediate sanction guidelines have been met with widespread resistance from attorneys, judges, and probation officers. And Minnesota's experience has shown that, where field resistance is high, Guidelines rules have been widely evaded.
 3. Assuming sufficient funding and field support, what is the probable impact of wider use of intermediate sanctions on prison and jail populations? Prior experience with other "middle options" such as pretrial diversion and boot camp suggests that broader use of restrictive intermediate sanctions might not greatly reduce custody populations, and could even increase them. Many of the offenders who receive these new sanctions would previously have received less onerous release conditions; any increase in the number or intensity of release conditions inevitably means an increase in the frequency of violations, and thus at least some increase in prison or jail commitment rates.
 4. Are this jurisdiction's guidelines already fairly detailed? Rules governing the use of intermediate sanctions make guidelines more complex, yet a major goal of most state guidelines reforms has been simplicity of application. As was suggested previously, simplicity promotes better public and offender understanding and acceptance of the rules, and reduces errors of application. At some point, the cost of further complexity outweighs any added benefits. This is particularly likely to be true in the sentencing of less serious offenses.
 5. How much importance does this jurisdiction place on non-retributive sentencing goals? Flexibility in the imposition of probation conditions permits greater individualization (to achieve crime-preventive goals), and a greater degree of "local control" (so that sentencing policy and the use of local resources may reflect important variations in local values and traditions). Such flexibility also allows sentences to more easily incorporate Restorative and Community Justice goals.

In light of the considerations listed above, detailed guidelines for intermediate sanctions may make more sense in some jurisdictions than in others; moreover, such guidelines inevitably make it more difficult to achieve a number of competing sentencing goals. Nevertheless, all guidelines systems can and should seek to develop standards — and resources — to promote increased and more effective use of intermediate sanctions. Even if detailed intermediate sanction guidelines are not deemed feasible or desirable, efforts should be made to develop general "equivalency scales" between

days of custody and various intermediate sanctions. Such scales preserve judicial discretion, while encouraging judges to substitute intermediate sanctions for custody, and guiding them in the choice of specific sanction amounts.

V. What's the Alternative? Comparing Guidelines to Other Systems, Past, Present and Future

While even the best state guidelines systems have their problems, and there is always room for improvement, supporters of guidelines sentencing should not be too defensive. This section briefly reviews the principal alternative ways of designing a sentencing system which have already been tried, or which have been recently proposed. Compared to each of these alternatives, state guidelines are better — sometimes much better. And the reason can be summed up in a single word — balance. This is also the main reason why state systems have achieved broader acceptance than the federal guidelines.⁴

A. Indeterminate Sentencing (and common variations)

Before there were guidelines, sentencing in all states was almost completely lawless — judges had broad, unregulated discretion to decide what sentence to impose, and parole boards had equally broad discretion to decide how much of an imposed prison sentence had to be served. This system is the one which is still being used in the majority of states (combined to a greater or lesser extent with mandatory penalties for selected crimes, discussed below).

Indeterminate sentencing is no better now than it was twenty-five years ago, when Minnesota and other guidelines states began to reject it. There is no reason to go back to it; we've "been there, and done that." Completely unregulated sentencing discretion cannot be justified in a modern system of justice governed by the rule of law; a defendant's sentence should not vary dramatically, depending on which judge happens to hear the case, or how a parole board predicts the defendant's future. A properly-designed and balanced guidelines system can structure discretion without eliminating it. Even voluntary or loosely-enforced guidelines give judges and attorneys a valuable "starting point" in each case, and also promote more rational, state-wide formulation of sentencing policy. Guidelines help to manage state correctional resources and avoid prison overcrowding at the "front end;" these effects are much harder to achieve under an indeterminate sentencing system, because sentences are less predictable. When overcrowding occurs in such a system, prisoners must be released early, thus undercutting truth in sentencing goals. And of course, no system of indeterminate sentencing regulates prosecutorial discretion, plea bargaining, and intermediate sanctions.

A recent monograph argues that indeterminate sentencing has several advantages over "structured sen-

tencing” (including guidelines).¹⁵ Those supposed advantages include: sentencing tailored to case-specific facts, by expert officials in direct contact with the case; recognition of the goals of rehabilitation, public safety, and community/restorative justice; insulation from public emotion; and facilitation of prison population management. As has been emphasized throughout this article, all of these goals can be substantially achieved in a well-designed guidelines system, while at the same time avoiding the gross disparities and other disadvantages of indeterminate sentencing. Again: sentencing guidelines are not all alike. Guidelines such as Minnesota’s permit substantial exercise of case-level discretion, while still allowing other system actors to play important roles both at the case level and in shaping overall sentencing policy. Such guidelines recognize all traditional and emerging sentencing goals, without allowing any one goal to dominate the others. They partially insulate sentencing policy formulation from politics, while allowing input from all stakeholders, as well as open decision-making. And they provide front-end resource management, thus preserving truth in sentencing values.

Two common “variants” of indeterminate sentencing merit only brief mention. First, a number of states have adopted “Truth in Sentencing laws” abolishing parole release discretion — but without adopting judicial guidelines. This approach is arguably the worst combination of all; as was noted previously, it retains all of the problems of unregulated judicial discretion, and eliminates one means of limiting judicial disparities. Such systems also run a much greater risk of sudden, massive increases in prison populations (if judges do not substantially reduce their sentence durations).

A second variation from the pure indeterminate sentencing model is much more common (indeed, it is probably found in every current indeterminate sentencing system, as well as in many guidelines systems) — the adoption of mandatory, or mandatory minimum, sentences for selected crimes. Although such statutes are designed to reduce sentencing disparity and more effectively prevent crime, in practice neither goal is reliably achieved; because such statutes are so inflexible and severe, they are widely (but inconsistently) evaded, thus making sentencing even more disparate, and greatly limiting any added crime-control effects.

B. “Legislative-Determinate” sentencing

For a time, in the mid- to late 1970s, states were experimenting with direct legislative formulation of case-level sentencing policy — so-called “determinate sentencing laws” in which the legislature specified a narrow sentencing range for each offense, with minor adjustments for aggravating and mitigating circumstances. No such law has been enacted since the early 1980s, presumably because legislators have realized that it is very difficult

to specify precise sentence ranges in advance and monitor their implementation, nor does the legislature have the time or expertise to do this — that is what a sentencing commission is for.

C. Emerging Sentencing Theories

As was noted previously, there has been much more attention in recent years to the needs and perspectives of crime victims and the local community. Restorative and Community Justice programs, such as victim-offender mediation and community service, are rapidly spreading around the country (and in many other nations). The approach of these new programs conflicts with the offense-based, Just Deserts model which provides at least the overall structure for most sentencing guidelines systems. Just Deserts looks backwards — at the defendant’s criminal behavior and its legal and moral significance. Restorative and Community Justice theories look forward; they focus on repairing the damage caused by the offense, and preventing its recurrence. In this sense, these new models are closer to utilitarian, crime-preventive theories of punishment (particularly rehabilitation), but with greater emphasis on the needs of the victim and the local community.

Could some combination of Restorative or Community Justice form the basis for an entire sentencing system and structure, to replace sentencing guidelines? At this point, it’s too early to tell; perhaps some day. But for now, these new theories suffer from the same drawbacks as indeterminate sentencing: without more structure than they now have, they would permit too much variation and unpredictability of sentences, thus resulting in unacceptable sentencing disparities and very little ability to manage correctional resources. However, it is important to note that well-designed guidelines systems such as Minnesota’s retain sufficient flexibility to allow courts to apply Restorative and Community Justice measures in many cases, especially less serious ones.

The “newest kid on the block,” in terms of sentencing theory, might best be labeled “risk-management.” The primary goal of sentencing is defined as public protection, and the task of judges and correctional authorities is to evaluate and manage the degree of risk which each offender poses to persons, property, and other important values. In December, 1996, a Governor’s Task Force in Wisconsin released a report, proposing a new state sentencing system based on this model, and pilot projects have been carried out in several Wisconsin counties.¹⁶

As with Restorative and Community Justice, it is too early to tell whether the Risk-Management model can form a workable basis for an entire sentencing system. The problem with this approach, of course, is that it requires judges and corrections officials to exercise broad discretion, in tailoring sentencing and supervision decisions to the needs of each offender. In this

sense, the new model is very similar to the former, indeterminate sentencing system; in other words, we've "been there, done that" too! The major difference would seem to be that indeterminate sentencing was based more on the goal of offender rehabilitation (especially in prison), whereas the Risk-Management model focuses more on containment rather than change of offenders' criminal tendencies (and on the risk which the offender poses in his particular community). Again, do we really want to let sentences vary completely by risk, unrelated to the offender's culpability and the seriousness of his conviction offense? Do we think judges and corrections officials are much better at making individualized assessments today than they were in the past? Can such a discretionary system still allow the state to predict future resource needs and manage the use of limited correctional resources, especially prison space? What about the value of Truth in Sentencing? Finally, is it wise to openly cater to the public's fear of dangerous criminals? To paraphrase Frank Zimring's criticism of supposedly-limited three-strikes laws — offering the public a "limited" or "controlled" program of offender risk management "is like trying to satisfy a grizzly bear by offering him half your lunch."⁷

Given these concerns, and the current consensus on sentencing purposes and values, there is reason to doubt that risk-management sentencing will completely replace sentencing guidelines any time soon. But again, it is important to note that a well-designed guidelines system can successfully incorporate elements of risk-management while maintaining an overall structure based on proportionality and predictability. The Delaware guidelines have long incorporated a series of sentencing "levels" which correspond in part to the predicted risk of offender groups, and officials retain substantial discretion to move offenders up and down the "ladder" of sanction levels, based on individual assessments or risk. In Virginia, the sentencing commission is working on two sets of risk-based proposals, to incorporate into that state's Guidelines: one would help trial judges identify low-risk, non-violent offenders who are suitable candidates for non-custodial sentencing alternatives; another set of rules would identify high-risk, sex offenders who should receive longer custody terms. In Minnesota, the concept of "amenability" to probation has long allowed trial courts to depart from Guidelines prison-commitment rules, based in part on the offender's risk of failing on probation. And almost all guidelines jurisdictions regularly permit probation and post-prison-release conditions to be designed, altered, or revoked, based on assessments of offender risk.

Conclusion

After two decades of guidelines reforms, what have we learned? Here is a short list of the most important lessons which a review of this experience teaches:

First: guidelines in a number of states have succeeded in improving sentencing policy and practice — reducing bias and disparity in sentencing; avoiding serious prison over-crowding; and ensuring that adequate prison space is available for the most serious offenders. State guidelines regulate but do not eliminate discretion; almost all of the existing systems leave plenty of room for the consideration of unique offense and offender characteristics, crime-preventive as well as retributive sentencing purposes, local community values and resources, and emerging sentencing theories such as Restorative and Community Justice. Most state guidelines systems have abolished parole release discretion, which serves to achieve Truth in Sentencing; offenders serve most of the sentence imposed by the trial court, and there is no pretense that sentences are longer than they really are. State guidelines have achieved more rational sentencing policy because they are developed and monitored by an independent, non-partisan agency charged with the responsibility of collecting detailed data on sentencing practices and resources, evaluating sentencing policy from a long-term perspective, setting priorities for use of limited resources, and developing a comprehensive approach to the sentencing of all crimes, thereby avoiding the problems of piecemeal reforms. Although state sentencing commissions play a critical role in guidelines systems, guidelines in Minnesota and most other states allow all of the other major public and private stakeholders to have significant input into the development and implementation of state sentencing policy. The Legislature maintains oversight and ultimate control over major policy issues, and important roles are also played by trial and appellate judges, the defense and prosecution, victims, community representatives, and correctional officials. And yet — most state guidelines systems remain relatively simple to understand and apply.

Second: the best state guidelines work better, in all of the ways described above, than any other sentencing system which has yet been tried or even proposed. Quite simply, there is no realistic alternative as a means of accommodating all of the many important values and principles which we want sentences to serve. The prior indeterminate sentencing system permitted intolerable extremes of disparity; the unpredictable nature of indeterminate sentencing also prevented effective resource-management, and violated the public's desire for Truth in Sentencing. Similar problems of disparity and unpredictability would arise if any jurisdiction were to base its sentencing system entirely on a theory of Restorative or Community Justice, or on a theory of offender Risk Management. On the other hand, highly "determinate"

sentencing regimes — narrow, legislatively-fixed sentence ranges for all crimes, or mandatory-minimum terms for selected offenses — go too far in the opposite direction, denying needed flexibility and inviting widespread (but inconsistent) evasion. The current trend to abolish parole release discretion without enacting judicial sentencing guidelines is arguably the worst combination of all, because it eliminates a means of reducing judicial disparities and prison overcrowding, without providing any other means of avoiding these problems.

Third: state sentencing guidelines are politically viable. They have been successfully implemented in many states, and have survived — in some cases for almost 20 years, which is a very long time, given the extreme political salience and volatility of sentencing issues in recent years. These systems have survived because they work, and in particular, because they have managed to incorporate, and strike an acceptable balance between, the diverse values and goals of late Twentieth Century American sentencing. Of course, there are no guarantees of success; a number of state systems have been abandoned, and others have been substantially weakened. The success of sentencing guidelines is highly “contingent” as to both place and time.¹⁸ Looking at the history of state guidelines adoptions, rejections, expansions, contractions, and abolitions, it is difficult to find a simple pattern (although several factors seem important: a “weak” system to begin with (Louisiana, Wisconsin), and ballot-box policy making (Oregon)).

Fourth: state guidelines continue to evolve and improve. Newer systems are more likely to take advantage of the potential which guidelines provide for resource-management and the promotion and structuring of intermediate sanctions. Most older systems are better today than when they began, not only because they have added desirable features (a permanent commission; resource-management; intermediate sanctions) which they originally lacked, but also because these system now openly recognize and incorporate a wide variety of sentencing goals and values. Early systems such as Minnesota’s were designed to strongly emphasize “Just Deserts,” but we have learned that sentencing is more complex than that. To achieve the goals of simplicity and rationality, it is tempting to limit our sentencing purposes to retributive uniformity and proportionality. But no American system has ever adopted and retained such a narrow approach, and it probably never will. Nor should it.

Fifth: the development of sentencing guidelines remains an area of state, not federal leadership. This reform began in the states; state guidelines have improved over time more than the federal version; and most state systems have avoided the strong opposition which the federal guidelines have evoked among judges and sentencing scholars. Indeed, the federal contribu-

tion has largely been negative; states have adopted guidelines despite the federal example, not because of it (and have even felt the need to avoid the term “guidelines,” because it seemed too closely associated with the federal version).

Finally: state sentencing guidelines are diverse. No two systems are alike, and there is no single “model” which can or even should be universally adopted. Again, it would nice if sentencing reform was simple — if we could just look at the past two decades and say to legislators in every state: “Do this.” But sentencing, perhaps more than any other field of law and public policy, is closely related to the unique traditions, politics, and culture of each jurisdiction. I continue to believe that Minnesota’s version is one of the best at balancing and achieving all of the competing goals and values of sentencing, and that other states should try to adopt it. But every system must ultimately find its own way. In any case, the great diversity of guidelines systems provides a rich menu of reform options and experience to guide sentencing reformers in other states — and in the federal system — in their efforts to design, implement, improve, and preserve guidelines systems.

Notes

¹ The principal sources for this summary are: Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUSTICE 137 (1993); Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173 (1995); Kevin R. Reitz, *The Status of Sentencing Guidelines Reforms in the U.S.*, 10(6) OVERCROWDED TIMES 1 (1999); and various state-specific reports and evaluations too numerous to cite, collected by the author. Many of the latter are published either in the FEDERAL SENTENCING REPORTER or in OVERCROWDED TIMES. See also 20 LAW & POLICY, issues 3 & 4 (1998) (articles on structured sentencing); Bureau of Justice Assistance, *National Assessment of Structured Sentencing* (1996); Bureau of Justice Assistance, *National Survey of State Sentencing Structures* (1998). Additional information about particular state guidelines systems may be obtained from the contact persons listed on the web page of the National Association of Sentencing Commissions—<http://www.ussc.gov/states/> The Association’s newsletter, also available on this web page, includes reports on recent state guidelines developments.

² MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

³ AMERICAN BAR ASSOCIATION, *STANDARDS FOR CRIMINAL JUSTICE: SENTENCING*, 3RD EDITION (1994). The standards themselves (without commentary) are published in 52 CRIM. L. REP. 2353 (1993).

⁴ The theory of “limiting retributivism” is most often associated with the writings of Professor Norval Morris. For a detailed analysis of the evolution of sentencing purposes in Minnesota, resulting in a system very similar to what Morris proposed, see Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUSTICE 363 (1997).

⁵ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

⁶ See Frase, *supra* note 4, at 399-403; see also Richard S. Frase, *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines*, 3 FED. SENT. R. 328 (1991) (discussing the

principal Minnesota cases, and contrasting the federal caselaw at that time).

⁷ See, e.g., Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections* (U.S. Dept. of Justice, Office of Justice Programs, 1999).

⁸ See Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. L. & PUB. POL. 279, 316–19 (1993).

⁹ See *infra* note 14, and accompanying text.

¹⁰ See Tonry, *supra* note 1, at 153–54. It is possible, of course, that judicial sentencing disparities were simply replaced by prosecutorial disparities. Most evaluations of state sentencing guidelines have only examined disparity on the basis of the conviction offense, since that is what state guideline rules are based on, but evaluation of prosecutorial disparity requires analysis of “real offense” data. For some examples of such analysis, see Frase, *supra* note 8, at 299–303, 318 n. 93, 321; see also further discussion of charging and plea bargaining in Part IV, *infra*.

¹¹ See Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1458–71, 1498 (1998).

¹² See generally Frase, *supra* note 4.

¹³ Other common criticisms of guidelines are that they do not give judges enough discretion (or give them too much); that guidelines give too much weight to retributive sentencing goals (or not enough); and that they promote undue sentencing severity (or undue leniency). For a refutation of these opposing criticisms, as applied to the Minnesota Guidelines,

see Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQUALITY 1, 10–33 (1993).

¹⁴ Richard S. Frase *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENT. R. 123, 125–26 (1993) (state guidelines achieve better balance in several areas: the weight given to different punishment purposes, and to offense versus offender characteristics; the tradeoff between uniformity and flexibility; degree of sanction severity; and the allocation of sentencing power between the legislature, the sentencing commission, prosecutors, the defense, correctional officers, and judges). For further discussion of the need to balance the influence of various decision makers, see Franklin E. Zimring, *A Consumer's Guide to Sentencing Reform: Making the Punishment Fit the Crime* (Hastings Center Report, 1976); Kevin R. Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POLICY 389 (1998).

¹⁵ Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing* (U.S. Dept. of Justice, Office of Justice Programs, 1999).

¹⁶ See (Wisconsin) Governor's Task Force on Sentencing and Corrections, *Final Report* (1996) [excerpts published in 7 OVERCROWDED TIMES 6–19 (1996)]; see also Michael E. Smith & Walter J. Dickey, *Reforming Sentencing and Corrections for Just Punishment and Public Safety* (U.S. Dept. of Justice, Office of Justice Programs, 1999).

¹⁷ Franklin E. Zimring, *Tough Crime Laws Are False Promises*, 7 FED. SENT. R. 61, 62 (1994).

¹⁸ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 160–62 (1991).