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# A Consumer's Guide to Sentencing Reform: Reflections on Zimring's Cautionary Tale

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# A Consumers' Guide to Sentencing Reform: Reflections on Zimring's Cautionary Tale

Richard S. Fraser<sup>†</sup>

In 1976, Frank Zimring published a short essay<sup>1</sup> warning that several major sentencing reform proposals of the mid-1970s, if adopted, might actually make matters worse.<sup>2</sup> Zimring focused primarily on two reforms: abolition of parole release discretion, and substantial reduction of judicial sentencing discretion by means of legislatively prescribed presumptive sentences for each crime. He argued that parole abolition proposals were ignoring some important covert functions of parole discretion, and that both parole abolition and sharply reduced sentencing discretion would confront major challenges and negative unintended consequences. At the same time, Zimring's essay begins by acknowledging the "current crisis [of] the American system of criminal justice," and ends by conceding that "no matter what the problems with particular reforms, the present system is intolerable."<sup>3</sup> In this essay I will review the major sentencing reforms that have been enacted since the 1970s, and assess the accuracy of Zimring's predictions about the impacts

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<sup>1</sup> Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform*, 12 U. CHI. L. SCH. OCCASIONAL PAPERS 1 (1977).

<sup>2</sup> The reform proposals cited by Zimring included the following: NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975); ERNST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); ANDREW VON HIRSCH, *DOING JUSTICE – THE CHOICE OF PUNISHMENTS*, *THE REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* (1976); DAVID FOGEL, *WE ARE THE LIVING PROOF: THE JUSTICE MODEL OF CORRECTIONS* (1975); and TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT – REPORT OF THE TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING* (1976).

<sup>3</sup> Zimring, *supra* note 1, at 3, 15.

of these reforms. I will also suggest some lessons we can learn from the study of past reform efforts and about the processes of implementing and assessing such reforms. Some of the lessons are discouraging; on the other hand, some reforms have turned out better than could have been predicted.

Like his earlier critique of pretrial diversion programs<sup>4</sup> and some of his later writings,<sup>5</sup> Zimring brought a valuable “system” perspective to his critique of sentencing reform proposals. In particular, he emphasized the “multiple discretions” and multiple forms of “sentencing” that exist within American criminal justice systems, the ways in which these discretions interact, and the strong likelihood that reductions in one form of discretion will simply increase the discretionary power of other actors and institutions.<sup>6</sup> Zimring’s skepticism of major structural reforms in sentencing discretion served as a valuable cautionary tale. It may very well have helped the designers of some of the reforms implemented in later years lessen the adverse consequences Zimring warned us about.

But Zimring and others’ writing in the mid-1970s could not foresee the most serious challenge all American sentencing regimes would face in later years: mass incarceration.<sup>7</sup> Equally unforeseeable were the solutions that some jurisdictions found to deal with the reform challenges Zimring identified. Those solutions included a wider range of sentencing reform options and tools other than the ones that were being

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<sup>4</sup> Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224 (1974).

<sup>5</sup> See, e.g., FRANKLIN E. ZIMRING & RICHARD S. FRASE, *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* (1980).

<sup>6</sup> Zimring, *supra* note 1, at 4.

<sup>7</sup> Although the steady rise in prison rates per capita was already well underway by the mid-1970s, it was not until the end of the decade that the trend was clearly evident. 1976 was the first year in which the national prison rate exceeded 120 inmates per 100,000 population (the upper end of the range within which the rate had varied during the previous 45 years), and final data for that year were not published until February of 1979. See Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-first Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1227 (2010), Figure 1 (reporting U.S. prison rates from 1930 to 1970); U.S. Dept.; U.S. Dept. of Justice, *Prisoners in State and Federal Institutions on December 31, 1976* (1979) and similar reports for 1971 to 1975 and 1977; E. ANN CARSON, *IMPRISONMENT RATE OF SENTENCED PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES*, BUREAU OF JUSTICE STATISTICS (Oct. 2017), <https://www.bjs.gov/index.cfm?ty=nps> (listing annual federal and state prison rates from 1978 through 2016) (select: “Quick Tables”, then “Imprisonment Rates”). Indeed, as late as 1979 highly-respected scholars such as Alfred Blumstein were still publishing works that assumed long-term stability in incarceration rates. See Zimring, *supra*, at 1227.

proposed in the mid-1970s, and the evolution of a novel institution that was first proposed at the start of that decade but had not yet been implemented anywhere: the sentencing guidelines commission.<sup>8</sup> Indeed, the *Consumer's Guide* warned that “[p]redicting the impact of any of the current crop of reform proposals with any degree of certainty is a hazardous if not foolhardy occupation”<sup>9</sup>—or, as Yogi Berra supposedly said: “It’s tough to make predictions, especially about the future.”<sup>10</sup> And yet, as Zimring also seemed to recognize, we must not allow ourselves to be paralyzed by doubt and uncertainty— we must try to find ways to limit the lawless systems of unfettered sentencing and parole discretion that still exist in most American states, while also doing what we can to avoid the worst adverse consequences of reform.<sup>11</sup>

The remainder of this essay is organized as follows. Part A summarizes the key points in Zimring’s *Consumer’s Guide*, and shows why they provided then, and still provide today, important reasons for skepticism and caution when designing major structural sentencing reforms. Part B examines reforms adopted in the years after Zimring wrote his essay, to see which of them have encountered the problems he identified. The first section in this part focuses on parole abolition (with or without sentencing reform), while the remaining sections examine three examples of structured sentencing reform: legislative presumptive sentencing rules, which were first adopted in California, and two very different types of sentencing guidelines reform—in the federal courts (pre-*Booker*),<sup>12</sup> and in states such as Minnesota—that were combined

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<sup>8</sup> The idea of using a permanent, independent commission to draft and monitor sentencing guidelines is generally credited to Judge Marvin Frankel, who proposed it in his book. See CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973). The first commission-drafted guidelines were placed into effect in Minnesota in 1980. See RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 122-25 (2013).

<sup>9</sup> Zimring, *supra* note 1, at 15.

<sup>10</sup> Yogi Berra Quotes, <https://www.goodreads.com/quotes/261863-it-s-tough-to-make-predictions-especially-about-the-future>. Yogi Berra Quotes, <https://www.goodreads.com/quotes/261863-it-s-tough-to-make-predictions-especially-about-the-future>.

<sup>11</sup> See *supra* notes 1-3.

<sup>12</sup> In *Booker v. United States*, the Supreme Court held that the federal sentencing guidelines as written were subject to the same constitutional defects (violation of the rights to jury trial and proof beyond a reasonable doubt) as the Court had previously found in the Washington state guidelines. See *Booker v. United States*, 543 U.S. 220, 244, 248 (2005); *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004). To remedy those defects, the Court in *Booker* held that the federal guidelines must be deemed only advisory, not

with parole abolition. Even this limited sample of reforms shows considerable variation: some reforms amply confirmed Zimring's dire predictions, while in other jurisdictions reformers found ways to avoid those predictions and, at least modestly, improve sentencing practices (or at least, avoid even worse outcomes). Part C briefly addresses the future. If we conclude, as Part B suggests, that some reforms do improve matters while others do not, how can we tell the difference *in advance*? What kinds of reforms, in what kinds of systems and time periods, are likely to improve matters? When should reformers in a given jurisdiction conclude that it is better to do nothing, even if that means retaining highly discretionary sentencing and/or parole systems that guarantee substantial sentencing disparity?

### **A. Zimring's Warning: Major Structural Sentencing Reforms Could Make Matters Worse**

Zimring's critique of major structural sentencing reforms focused on proposals to abolish parole release discretion and/or to limit judicial sentencing decisions. But he began by setting sentencing and parole decisions in the broader context of criminal justice systems that traditionally contain "multiple discretions in sentencing."<sup>13</sup> In addition to judges and parole boards, legislatures and prosecutors make critical decisions that determine or limit criminal sentences. Legislatures set penalty ranges, with maxima and sometimes mandatory minima. Prosecutors decide which crimes to initially charge and which crimes to settle on in plea bargaining, thereby determining the actual sentencing range within which the judge and parole board can exercise their respective discretions. Since judges usually defer not only to the charge and resulting sentence range selected by the prosecutor, but also to any specific sentence or sentence cap recommended in the plea bargain, the prosecution is "the most important institutional determinant of a criminal sentence."<sup>14</sup> That is particularly true when the offense is subject to a mandatory minimum, since prosecutors have complete discretion to invoke the minimum or to avoid it by charging crime(s) not subject to the minimum.<sup>15</sup>

Except where constrained by plea bargaining or a mandatory

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legally binding (however, federal sentences remain subject to appellate review under a standard of overall "reasonableness"). *Booker*, 543 U.S. at 222.

<sup>13</sup> Zimring, *supra* note 1, at 4.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> FRASE, *supra* note 8, at 38.

minimum, judges traditionally had—and still have, in most cases in most states—unfettered discretion to pick any sentence within the very broad range typically authorized by statute for the conviction offense; there are no sentencing rules or even guiding principles, no requirements to state reasons, and almost no provisions for appellate review.<sup>16</sup> When an executed prison term is imposed, the parole board traditionally had—and still has, in most parole-retention systems—unfettered discretion to decide how much of the maximum term the offender has to serve before release on parole; there are minimal parole hearing requirements, no guidelines or decision principles, and no possibilities for appellate review.<sup>17</sup> Zimring concluded: “[o]ther societies, less committed to the rule of law, or less infested with crime, might suffer such a system [of unguided discretion]. Powerful voices are beginning to tell us we cannot.”<sup>18</sup>

### ***1. Abolition of Parole Release Discretion***

In Zimring's view, parole discretion had become “the most vulnerable” criminal justice institution, given the collapse of the rehabilitative ideal of in-prison treatment and highly- individualized predictions of future dangerousness.<sup>19</sup> But he argued that this system served two valuable covert functions unrelated to rehabilitation or risk prediction. The first covert function is to broadly mitigate sentence severity: parole release decisions, because of their low visibility and delayed timing, allow a system to “bark louder than it really wants to bite”;<sup>20</sup> judges can impose severe sentences knowing that in most cases the sentence will later be quietly and substantially reduced. The second covert function of parole release is disparity reduction: since parole is usually a state-level responsibility controlled by a single agency, it has the potential to reduce disparities in the lengths of sentences imposed, for the same offense, by judges and prosecutors in different localities (or even within a single local jurisdiction).<sup>21</sup> Thus, Zimring argued, “three

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<sup>16</sup> See Zimring, *supra* note 1, at 5-6; Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard S. Frase eds., 2001), at 223-24, 231; MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025 (2016), at 50-62.

<sup>17</sup> Zimring, *supra* note 1, at 6; Reitz, *supra* note 16, at 223-24; TONRY, *supra* note 16, at 50-62.

<sup>18</sup> Zimring, *supra* note 1, at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 7.

<sup>21</sup> In later writings, Zimring noted another pathology of America's highly localized

discretions [prosecutor, judge, and parole board] may be better than two!”<sup>22</sup>

## 2. *Presumptive-sentence Reforms*

A number of writers and reform groups in the mid-1970s proposed to deal with the problems of unfettered judicial sentencing discretion by creating a system of legislatively-defined presumptive sentences for each crime, along with lists of aggravating and mitigating circumstances that judges could consider as grounds for departing from the presumption.<sup>23</sup> Although sympathetic to the goal of structuring sentencing discretion, Zimring identified four major challenges confronting such reforms, each of which could cause the reform to do more harm than good.<sup>24</sup>

(i) *The incoherence of the criminal law.* Current criminal codes define crimes in broad terms, lumping together offenses of very different degrees of seriousness. As an example, Zimring cites burglary statutes that cover everything from armed home invasion to stealing from the locked glove compartment of an unlocked car.<sup>25</sup> Moreover, the oddities and inconsistencies Zimring found in one of the more sophisticated presumptive-sentence proposals<sup>26</sup> led him to conclude that it is difficult if not impossible to subdivide existing crimes into meaningful sub-categories with specific presumptive sentences attached to each; in his view, “we lack the capacity to define into formal law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts.”<sup>27</sup>

(ii) *The paradox of prosecutorial power.* Given the multiple “sentencing” discretions Zimring noted at the outset, reforms that abolish parole release discretion and substantially limit sentencing discretion,

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sentencing system: the “correctional free lunch,” which allows local judges and prosecutors to consume state prison resources without fiscal or political accountability. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211-15 (1991).

<sup>22</sup> Zimring, *supra* note 1, at 8.

<sup>23</sup> *Id.* at 1-2, 8-9. See also Reitz, *supra* note 16, at 224-25 (describing reforms implementing such proposals).

<sup>24</sup> Zimring, *supra* note 1, at 10-15.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> For example, Zimring notes that under the Twentieth Century Task Force proposals, the recommended penalty for rape with bodily harm is one year longer than the penalty for intentional homicide. *Id.* at 11.

<sup>27</sup> *Id.* at 10.

while doing nothing to restrict or even structure prosecutorial charging discretion, will simply mean that prosecutors dominate sentencing with no check by any other branch of government.<sup>28</sup> In such a system many disparities (especially plea-versus-trial disparities) will remain – “[l]ogically, three discretions [prosecutor, judge, and parole board] may be better than one.”<sup>29</sup>

(iii) *The legislative law-and-order syndrome.* Even if presumptive sentences are devised by an independent commission or other non-political body, it is all too easy for some or all penalties to be increased when the proposals are reviewed by the legislature: “it takes no more than an eraser to make a one-year ‘presumptive sentence’ into a six-year sentence.”<sup>30</sup> Such penalty escalations are particularly likely, Zimring argued, given not only the highly politicized nature of criminal justice policymaking in the U.S., but also the level of abstraction and symbolic denunciation at which legislators operate.<sup>31</sup> Moreover, when exercising its traditional role of setting maximum penalties the legislature necessarily focuses on the worst forms of each offense, not the typical ways of committing that offense.<sup>32</sup> Zimring predicted that such “penal inflation” would be restrained by “[t]he same prosecutorial discretions that limit the legislature’s ability to work reform.”<sup>33</sup> But some offenders would receive the higher penalties (thus increasing disparity). And even if the higher penalties were consistently enforced, Zimring suggested that treating all offenders with unjust severity is arguably worse than retaining a high-disparity regime in which only some offenders are treated with unjust severity.<sup>34</sup>

(iv) *The lack of consensus and principle.* Zimring criticized 1970s sentencing reformers for asking, but never attempting to answer, the fundamental normative and policy questions of: “How long [in prison] is too long? How short is too short?”<sup>35</sup> Yet Zimring also argued that, at least under existing circumstances, those questions cannot be answered because “[w]e lack coherent principles on which to base judgments of relative social harm. . . [H]ow can we mete out fair punishment without

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<sup>28</sup> Zimring, *supra* note 1, at 11-13.

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 13-14.

<sup>32</sup> TONRY, *supra* note 16, at 233-34.

<sup>33</sup> Zimring, *supra* note 1, at 14.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 14-15.



agreeing on what is fair? How can we do justice before we define it?”<sup>36</sup> “Not the least of the vices of our present lawless structures of criminal sentencing,” Zimring concluded, “is that they mask a deeper moral and intellectual bankruptcy in the criminal law and the society it is supposed to serve.”<sup>37</sup>

## **B. Subsequent Sentencing Reforms: Some Confirm Zimring’s Predictions, Some Do Not**

Despite his deep skepticism about the net benefits of the structural reforms that were being proposed and sometimes implemented in the mid-1970s,<sup>38</sup> Zimring acknowledged the possibility that these reforms “may do more good than harm.”<sup>39</sup> As noted above, he also acknowledged the difficulty of predicting reform impacts.

So, 42 years after the *Consumer’s Guide* was written, what have we learned? Which reforms suffered from one or more of the problems Zimring identified? Which reforms avoided those problems, or at least most of them? This essay cannot examine all of the major sentencing reforms enacted in the past four decades (and much is still unknown about the actual impacts of many of them), but the outlines of such an assessment can be sketched. The examples discussed below suggest that Zimring’s skepticism was well founded in some cases, but was not borne out in other cases, confirming the difficulty of predicting reform impacts. To a great extent, the success of some major structural sentencing reforms implemented in later years was due to features of those reforms that had not yet been envisioned in the mid-1970s. It is also possible that Zimring’s warnings helped some reformers, either directly or indirectly, to avoid his predictions.

### ***1. Parole Abolition (With and Without Sentencing Reform)***

#### ***a. The “Bark-Louder-Than-Bite” Function of Parole.***

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<sup>36</sup> *Id.* An example of the lack of consensus on the meanings of “fairness” and “justice” is the sharp debate between Norval Morris and Andrew von Hirsch about the extent to which the severity of punishment should strictly conform to the offender’s degree of blameworthiness. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363 (1997).

<sup>37</sup> Zimring, *supra* note 1, at 15.

<sup>38</sup> In 1976, California enacted its Determinate Sentencing Law, and Maine abolished parole release discretion. See Kevin R. Reitz, *Appendix B, Reporter’s Study: The Question of Parole-Release Authority*, Am. Law Ins., MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 2 151 (2011).

<sup>39</sup> Zimring, *supra* note 1, at 15.

Zimring's theory of the covert sentence-discounting function of parole discretion implies that the abolition of such discretion will raise imprisonment rates, at least in the absence of reforms that require or encourage judges to reduce sentence lengths. Of course, we know that imprisonment rates have gone up substantially in all jurisdictions since the 1970s.<sup>40</sup> So the real question is: did prison rates rise *faster* in parole-abolition systems than in systems that retained parole release discretion? My colleague Kevin Reitz has sought to answer that question by comparing prison growth in each of fourteen parole-abolition states with the all-states prison growth rate during the same time period (i.e., in the years following parole abolition in that state).<sup>41</sup> Reitz reports that prison rates grew faster than the all-states average in 4 of the 15 abolition states, while growth was below average in the other 11 states.<sup>42</sup> The latter figure rises to 12 if we add in the Federal system, which also abolished parole discretion.<sup>43</sup> This comparison suggests that, if anything, parole abolition has contributed to *slower* growth in prison populations!

Of course, this was not a controlled experiment; state and federal jurisdictions were not randomly assigned to the parole-abolition and parole-retention groups. As Zimring has pointed out, there may have been other features of many abolition systems—including the same good-government concerns leading to parole abolition—that contributed to slower prison growth in those systems.<sup>44</sup>

Another potential problem with the conclusion reported above is that it is based on comparison of increases in the number of prisoners-per-capita units. For example, Illinois's prison growth is deemed to have been less than all-states prison growth from 1978 to 2009, because the Illinois per capita incarceration rate went up by 256 per capita units (from 94 to 350), while in the same time period the all-states rate went up by 324 units (from 119 to 443).<sup>45</sup> But in many other contexts, and especially when making comparisons between jurisdictions, "growth" over time is often expressed in relative or percentage terms. For example, we say that the murder rate (murders per capita) in state X increased or decreased by 10 percent over the previous year, while the murder rate increased or

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<sup>40</sup> See CARSON, *supra* note 7.

<sup>41</sup> See Reitz, *supra* note 16.

<sup>42</sup> *Id.* at 151, Figure 1, and 153, Figure 2.

<sup>43</sup> See CARSON, *supra* note 7.

<sup>44</sup> See Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 336–77 (2005).

<sup>45</sup> CARSON, *supra* note 7 (reporting national and state-specific prison rates per capita).

decreased by 5 percent in state Y; we do not usually say that the rate changed by 2 murders per 100,000 residents in state X, and 3 murders per 100,000 residents in state Y.<sup>46</sup> Similarly, cross-jurisdictional comparisons of imprisonment growth rates are often expressed in percentage terms.<sup>47</sup>

And the choice of measure matters: comparing prison growth in percentage terms yields quite different results for some systems. Continuing with the example of Illinois, that state's prison rate increased by 272 percent (i.e., its 2009 rate was 3.72 times its 1978 rate: 350 divided by 94).; rather than being slower than average, Illinois's percentage growth was exactly equal to the all-states rate of percentage growth during these years (443 divided by 119 equals 3.72).<sup>48</sup>

Granted, measuring prison growth in absolute terms (per capita units, or even the sheer numbers of inmates) is useful for some purposes. As Kevin Reitz points out in his article in this issue, absolute measures emphasize the fiscal and human costs of escalating prison populations, and also show which jurisdictions are making the largest contributions to nationwide prison growth.<sup>49</sup> But if the goal is to understand changes in prison populations, and the factors that make those populations grow faster or slower in different jurisdictions, growth needs to be examined in percentage terms, to see if some jurisdictions are growing faster or slower than we would expect. Equal percentage growth makes a more plausible baseline for comparison—whatever caused Minnesota to have a very low per capita incarceration rate at the outset, we would expect that those same factors would cause Minnesota to add a smaller number of per capita units than states that started out with much higher per capita rates. For example, if (as actually happened from the early 1980s to 2008) the all-states prison population increases by 300 per capita units, from 150 to 450, we would not expect Minnesota's prison population to increase from 50 to 350 (a 600 percent increase). And if it did increase by that much, we would immediately ask: What *changed* in Minnesota?<sup>50</sup>

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<sup>46</sup> See, e.g., FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2017 (2018), Table 4, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-4>.

<sup>47</sup> See, e.g., ZIMRING, *supra* note 7, at 1236–37; see also Adam Gelb & Jacob Denney, *National Prison Rate Continues to Decline Amid Sentencing, Re-Entry Reforms* (2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.

<sup>48</sup> See CARSON, *supra* note 7.

<sup>49</sup> See Kevin R. Reitz, *Measuring Changes in Incarceration Scale*, 23 BERKELEY J. CRIM. L. (forthcoming 2019).

<sup>50</sup> To take another example: the federal per capita prison rate increased from 10 in the

As the above figures for Illinois and Minnesota demonstrate, different ways of measuring prison growth can give very different results. Still, most of the parole-abolition systems analyzed by Professor Reitz come out the same under the absolute- and percentage-change measures. Besides Illinois and Minnesota, only two other systems come out differently: Kansas and the Federal system—like Minnesota, these two parole-abolition systems had slower-than-average growth when measured by the increased number of per-capita units, but *higher-than-average* growth when measured in percentage terms.<sup>51</sup> Overall, based on percentage growth, eight parole-abolition systems grew more slowly than the all-states average, seven (including the federal system) grew faster, and one (Illinois) grew at the same rate as the average.<sup>52</sup> By this measure parole abolition does not slow down prison growth, but it also doesn't always, or even usually, lead to above-average growth.

Of course, there are still potential selection bias problems, as noted above. So the question is: Can parole abolition actually *cause* slower prison growth, at least in some states? There are several plausible reasons to believe that it can, although further research is needed to confirm this. One problem with the sentence-discounting function of parole discretion is that it is subject to politically-motivated slowdowns or even temporary cessation of releases from prison, and indeed this has happened in some states.<sup>53</sup> Moreover, the very existence of parole discretion may encourage judges to impose unreasonably severe prison terms that are not discounted—judges can publicly appear tough on crime, while assuring themselves that such severe terms don't actually impose serious human and fiscal consequences; yet the sometimes illusory nature of parole release discretion means that offenders may serve much longer terms than judges expected. In addition, the variable nature of parole release probably makes it more difficult for legislators to predict—and take responsibility for—the prison-bed and fiscal impacts of severe

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early 1980s to 60 in 2008, an increase of 50 units. Compared to the 300-units increase for all states, the absolute-change measure would tell us that the federal system had much slower growth than the national average; in terms of relative growth, however, the 500 percent federal increase was far greater than the 200 percent all-states growth rate. The latter data should lead us to ask: what *changed* in the federal system? The simple answer is: very punitive federal sentencing statutes and guidelines were enacted and implemented in a system with few if any budget constraints on prison growth. The budget-constraint factor is further discussed in Section 5, *infra*.

<sup>51</sup> Reitz, *supra* note 38; Carson, *supra* note 7.

<sup>52</sup> CARSON, *supra* note 7.

<sup>53</sup> See Reitz, *supra* note 38, at 141.

sentencing laws and practices; conversely, parole abolition is likely to make impact predictions more accurate, especially when abolition is combined with reforms that increase the uniformity of sentences judges impose. Of course, more accurate impact predictions don't guarantee below-average prison growth. But this result seems more likely to occur in a system where sentencing guidelines are created by an independent sentencing commission that takes seriously the goals of avoiding prison overcrowding and setting priorities for prison use, and that drafts its guidelines with the help of prison bed-impact projections.<sup>54</sup> Such projections can be quite accurate and credible, making clear the substantial fiscal and bed impacts of severe sentences, and the tradeoffs that are often necessary to balance the budget and avoid prison overcrowding. Increased penalty severity for certain crimes requires legislatures to choose one or more of the following unpleasant options: raise taxes to construct new prison beds, take money from non-prison programs, or settle for less severity in the punishment of other crimes. (This policymaking process will be further examined below, in the discussions of federal and state guidelines.)

To summarize: the overall relationship between commission-drafted no-parole guidelines and prison growth is as follows: under Reitz's per-capita-units measure, all 10 state and federal parole-abolition guidelines systems have had slower-than-average rates of prison growth; using the alternative, percentage-growth measure, seven of the 10 have had slower growth.<sup>55</sup>

**b. State-wide sentencing disparity reduction.** I am not aware of any research addressing this second covert function of parole release discretion, so it is unknown to what extent parole abolition has increased punishment disparities. However, given what we know about how most parole boards function, there is reason to doubt their effectiveness in disparity reduction. Such a function probably works best when the board has, and follows, releasing guidelines. Yet in a recent survey, over half of

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<sup>54</sup> See FRASE, *supra* note 8, at 44 (examining the ways in which sentencing commissions have used prison bed impact projections to limit and prioritize prison growth).

<sup>55</sup> In addition to the federal system, the nine state parole-abolition guidelines systems are: Delaware, Florida, Kansas, Minnesota, North Carolina, Ohio, Oregon, Virginia, and Washington. Washington, D.C. has also adopted parole-abolition guidelines, but that jurisdiction is not separately reported here because it does not have its own prison system, relying instead on the Federal Bureau of Prisons. Per-capita-unit and percentage change measures for each system, and for all systems combined, are computed by the author based on data in CARSON, *supra* note 8 (reporting per capita incarceration rates by year, for each jurisdiction).

paroling agencies said they did not use guidelines; moreover, 80 percent of the agencies reported using multiple hearing panels, which increases the risk that similar cases will be treated differently.<sup>56</sup> Further evidence of uncontrolled disparity is evident in the factors these agencies claimed to be considering when making release decisions: the two criteria most likely to yield uniform results, conviction offense(s) and prior record, were said to be the least important release criteria, whereas factors that would increase disparity—input from the prosecution, the inmate's family, and the sentencing judge—were cited as the most important.<sup>57</sup>

## 2. *Legislative Presumptive Sentencing*

In 1976, California became the first state to enact a version of the legislative presumptive sentencing regime advocated by a number of the writers and committees Zimring cited.<sup>58</sup> Within three years, seven other states had followed suit: Arizona, Colorado, Illinois, Indiana, New Jersey, New Mexico, and North Carolina.<sup>59</sup> But Colorado and North Carolina later abandoned this approach, and no state has adopted it since 1979.<sup>60</sup> That history casts serious doubt on the desirability, or at least the practical viability, of this sentencing reform option. But it is difficult to say to what extent the failure of this model was due to any or all of the four objections Zimring raised, namely: the incoherence of the criminal law, the paradox of prosecutorial power, the legislative law-and-order syndrome, and the lack of consensus and principle. To my knowledge, there has never been a comprehensive assessment of this form of structured sentencing, and how it actually worked in practice across multiple systems.<sup>61</sup>

This research gap may have been due not only to the fact that legislatures seemed to have abandoned the legislative-presumptive approach, but also because it was replaced by commission-drafted

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<sup>56</sup> See Ebony L. Ruhland et al., *The Continuing Leverage of Releasing Authorities: Findings from a National Survey, Executive Summary*, ROBINA INST. OF CRIM. L. & CRIM. JUST. 4 (2016) at 4.

<sup>57</sup> *Id.* at 3-4. This source also reports that 36 of the 40 responding states use risk assessment instruments, *id.* at 3. However, the source provides no information about how frequently or consistently such tools are being applied.

<sup>58</sup> See FRASE, *supra* note 8, at 167.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Adoption of a comprehensive structured sentencing regime provides an opportunity to recodify and modernize criminal law, reducing the “incoherence” Zimring noted. However, New Jersey appears to be the only legislative-presumptive state that took advantage of this opportunity. See *id.*

sentencing guidelines and/or crime-specific mandatory-minimum sentencing statutes, both of which have received substantial scholarly attention.<sup>62</sup> Zimring's objections seem so manifestly correct, when applied to mandatory penalties, that I will not consider them further. In the remaining sections of this part I examine two very different versions of the sentencing guidelines model (both of which were combined with parole abolition). The first version displays most of the defects Zimring attributed to legislative presumptive sentencing, while the second version seems to have avoided most of those defects. In Sections 3 and 4 below I address Zimring's four challenges to structured sentencing, as they apply to the federal guidelines and to the guidelines model adopted in Minnesota and several other states. In Section 5, I return to the question of parole abolition and contrast the very different prison-growth patterns in the federal system compared to state guidelines systems.

### **3. The (pre-Booker) Federal Guidelines**

**a. The incoherence of the criminal law.** The federal system likely manifests this problem as much or more than any state system. Federal criminal law has long been in need of comprehensive recodification; the last recodification was in 1948, and an ambitious federal code reform of the early 1970s failed to win Congressional approval.<sup>63</sup> As a result, many federal crimes are defined in very broad terms, and it is also likely that many of these statutes fail to reflect offense and offender factors that are deemed important to contemporary lawyers and judges. To remedy these problems, Chapter Two of the Federal Guidelines Manual breaks down most federal crimes into numerous subcategories, but this solution surely confirms Zimring's prediction that such an exercise would "make our present [sentencing] statutes look like Readers Digest Condensed Books."<sup>64</sup> The widespread dissatisfaction with

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<sup>62</sup> See generally TONRY, *supra* note 16 (examining various sentencing reforms and research on those reforms since the 1970s).

<sup>63</sup> See generally John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L. J. 663 (1971) (summarizing federal code revisions up to and including the 1971 proposals of the National Commission on Reform of Federal Criminal Laws). See also TONRY, *supra* note 16, at 102, 162-63, 230 (discussing the Commission's unsuccessful federal law reform effort).

<sup>64</sup> UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (2018), §§ 2A1.1 to 2X7.2; Zimring, *supra* note 1, at 10. Theft and drug crimes provide good examples of the level of detail in Chapter Two of the Manual. The black letter and application notes for theft crimes take up 29 single-spaced pages in the Manual; drug crimes take up 50 pages. UNITED STATES SENTENCING COMMISSION, *supra*, §§ 2B1.1 to 2B2.1 and 2D1.1 to 2D3.2.

the overly-detailed federal guidelines also lends support to Zimring's conclusion that "we may simply lack the ability to comprehensively define in advance those elements of an offense that should be considered in fixing a criminal sentence."<sup>65</sup> Yet, as discussed in the next section, some state guidelines have succeeded in doing so.

**b. *The paradox of prosecutorial power.*** Zimring predicted that any reform abolishing parole release discretion and substantially limiting sentencing discretion, while doing nothing to restrict or even structure prosecutorial charging discretion, would allow prosecutors to dominate sentencing and would continue widespread disparity.<sup>66</sup> The Federal Guidelines sought to limit prosecutorial dominance by means of a limited form of "real-offense" sentencing—the much-criticized Relevant Conduct provisions which increase recommended sentence severity based on numerous factors that go beyond the elements of the conviction offense(s).<sup>67</sup> But studies of the actual operation of the federal guidelines suggest that, at least prior to the *Booker* decision rendering the federal guidelines advisory or at least less "mandatory," prosecutors retained and employed substantial discretionary charging power to select the desired sentence.<sup>68</sup> And because judicial departure power under the pre-*Booker* guidelines was quite limited, unlike departure powers in state systems, Zimring's prediction was generally correct: "the charge at conviction determines the sentence."<sup>69</sup>

**c. *The legislative law-and-order syndrome.*** Zimring predicted that legislatures would often be tempted to increase penalties recommended by a sentencing commission.<sup>70</sup> This does not seem to have occurred in the federal system, but that was not due to the absence of the underlying dynamics Zimring identified. Congress, like state legislatures, probably acts at a high level of abstraction, engaging in symbolic denunciation and erring on the side of severity to ensure adequate punishment for the worst forms of each offense. Moreover, federal sentencing policy would seem to be at least as politicized as state-level policy. Indeed, it may even be more politicized, given the unique nature of federal criminal justice policymaking. In the federal system, political

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<sup>65</sup> Zimring, *supra* note 1, at 11; TONRY, *supra* note 16, at 107–15 (noting detail of and negative reactions to the guidelines).

<sup>66</sup> Zimring, *supra* note 1, at 11–13.

<sup>67</sup> UNITED STATES SENTENCING COMMISSION, *supra* note 64, § 1B1.3.

<sup>68</sup> See MICHAEL TONRY, SENTENCING MATTERS 82–83 (1996).

<sup>69</sup> Zimring, *supra* note 1, at 11–12.

<sup>70</sup> *Id.* at 13–14.



urges to appear “tough on crime” are rarely constrained by concerns about fiscal impact and the possibility that taxes will have to be raised, or other popular programs cut back, to pay for severe new criminal penalties. Congress need not balance its budget, and even with massive increases, federal prison costs remain a tiny fraction of the total federal budget.<sup>71</sup>

The most likely reason why the federal commission’s initial set of proposed penalties were not escalated by Congress is that those penalties (developed by appointees of President Reagan) were already very severe.<sup>72</sup> Moreover, the commission continued to ratchet up penalties in the early years of the guidelines, sometimes in response to new federal legislation but often seemingly on the commission’s own motion.<sup>73</sup> As discussed more fully in Section 5 below, severe federal statutes and recommended guidelines sentences have caused federal prison populations to grow faster than the prison population in almost any state, including most states with parole-abolition guidelines.

**d. *The lack of consensus and principle.*** It does not appear that either Congress or the federal commission seriously tried to answer Zimring’s underlying policy questions, “How long [in prison] is too long? How short is too short?”<sup>74</sup> The only clear answer Congress seemed to give in the 1984 statute creating the commission was that in many cases existing federal sentences were too lenient.<sup>75</sup> As for the commission, it first experimented with several complex formulas supposedly based on offender culpability or crime control.<sup>76</sup> But the commission eventually settled upon a set of recommended penalties intended to achieve all traditional punishment purposes, and largely based on existing sentencing

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<sup>71</sup> See generally, Richard S. Frase, *Lessons of State Guideline Reforms*, 8 FED. SENT’G RPTR. 39 (1995) (discussing the failure to consider prison-bed impacts when drafting the federal guidelines). However, it is possible that fiscal impact has recently gotten more attention in the federal system, due to the Sequester budgeting laws that went into effect in 2011 and 2013. See, e.g., Budget Control Act of 2011, Pub. L. 112-25 (2011).

<sup>72</sup> See TONRY, *supra* note 68, at 72, 77–79.

<sup>73</sup> Numerous guidelines amendments were adopted in the first two years after the guidelines went into effect, and most of them increased recommended sentence severity. See U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, 1989 Edit., App. C (1989) (listing all amendments since October 1987), <https://www.ussc.gov/guidelines/archive/1989-federal-sentencing-guidelines-manual>.

<sup>74</sup> See Zimring, *supra* note 1, at 14–15.

<sup>75</sup> See generally Anthony N. Doob, *The United States Sentencing Commission Guidelines: If You Don’t Know Where You Are Going, You Might Not Get There*, in THE POLITICS OF SENTENCING REFORM (Chris Clarkson & Rod Morgan eds., 1995).

<sup>76</sup> See TONRY, *supra* note 68, at 86–88.

practices<sup>77</sup>— an approach that Zimring once likened to “adding up our last hundred mistakes, dividing by a hundred and achieving justice.”<sup>78</sup> Some writers interpret the federal guidelines as implicitly adopting a “limiting retributive” model, under which desert principles set outer limits on penalty severity within which crime control goals are pursued.<sup>79</sup> But other writers either find no coherent theory of punishment, implicit or explicit, in the federal guidelines,<sup>80</sup> or conclude that the dominant underlying theory is crime control.<sup>81</sup>

#### **4. The Minnesota Guidelines (and Similar Guidelines in Other States)**

In contrast to the federal system, Minnesota and similar state parole-abolition guidelines have avoided most of the problems with structured sentencing reform that Zimring identified.

**a. The incoherence of the criminal law.** Some state guidelines commissions began with a major advantage over the federal commission—a more coherent, or at least more recently re-codified, state criminal law.<sup>82</sup> In addition, state guidelines drafters have given much greater emphasis to the values of simplicity and case-level judicial discretion. State reformers have not tried to address and provide presumptive sentences for every variation of every crime, and as a result state guidelines are much less detailed.<sup>83</sup> State systems also frequently provide, in the guidelines and/or case law, a wide range of permissible grounds for departure.<sup>84</sup>

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<sup>77</sup> UNITED STATES SENTENCING COMMISSION, *supra* note 64, at 4–5.

<sup>78</sup> ZIMRING & FRASE, *supra* note 5, at 909.

<sup>79</sup> See, e.g., Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

<sup>80</sup> See, e.g., TONRY, *supra* note 68, at 86–88.

<sup>81</sup> See, e.g., Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

<sup>82</sup> For example, the Minnesota Criminal Code, MINN. STAT. Chapter 609, was substantially revised and renumbered in 1963, 15 years before the guidelines commission began its work. See Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417 (1963); McClellan, *supra* note 63, at 714.

<sup>83</sup> See TONRY, *supra* note 16, at 130; FRASE, *supra* note 8, at 46-47.

<sup>84</sup> See TONRY, *supra* note 68, at 77 (noting strict limits on departure powers under the federal guidelines); FRASE, *supra* note 8, at 121-67 (summarizing major features of state and federal guidelines systems, and noting the greater flexibility of state guidelines). See generally University of Minnesota, SENTENCING GUIDELINES RESOURCE CENTER, <https://sentencing.umn.edu> (providing further information on current guidelines grids and

**b. *The paradox of prosecutorial power.*** Only one guidelines state, Washington, has attempted to deal with prosecutorial discretion, and that state does so only to a very limited extent.<sup>85</sup> Nevertheless, there do not seem to have been frequent complaints in guidelines states about prosecutorial dominance of the sentencing process.<sup>86</sup> If that perception accurately reflects actual practice, it is probably not because state prosecutors are less political (almost all chief prosecutors are elected officials), or play less adversary roles in state systems, or have less potential to dominate sentencing through their unregulated charging powers.<sup>87</sup> If anything, state prosecutors have more potential sentencing power—every state guidelines system bases its recommended sentences on conviction offense(s), and rejects almost all forms of “real-offense” enhancement.<sup>88</sup>

Perhaps there are other explanatory factors (often unique to the particular state), but I believe there are two reasons why state guidelines do not seem to be excessively prosecution-dominated. First, state guidelines retain sufficient judicial discretion to mitigate unfairly-severe sentences produced by prosecutorial over-charging. Second, given the dynamics of the adversary system, unduly lenient punishment produced by prosecutorial under-charging is not a serious concern. The latter assertion is probably also true in federal courts, which means that the federal Relevant Conduct enhancements—designed to counteract prosecutorial charging leniency—are addressed to a non-existent problem.

**c. *The legislative law-and-order syndrome.*** Not all states with guidelines have had slower-than-average prison growth, but most states with parole-abolition guidelines have.<sup>89</sup> Many state guidelines reforms

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departure factors in state and federal guidelines systems).

<sup>85</sup> See FRASE, *supra* note 8, at 146.

<sup>86</sup> It’s difficult to document the absence of something. But in over 25 years of reading sentencing research papers and talking to sentencing policymakers and practitioners from around the country, I cannot recall anyone complaining about prosecutorial dominance of sentencing in a state guidelines system (except with regard to the application of mandatory-minimum statutes in some of these states).

<sup>87</sup> See TONRY, *supra* note 16, at 24-5, 160 (describing the elected status and adversary roles of American prosecutors).

<sup>88</sup> TONRY, *supra* note 68, at 77-78; FRASE, *supra* note 8, at 163.

<sup>89</sup> See *supra* note 55. In contrast, some parole-retention guidelines states have had much faster than average prison growth. For example, Pennsylvania’s prison rate rose from 88 to 407 (363 percent growth) from 1982 (the first year of that state’s guidelines) to 2009, whereas for all states the growth rate over that time period was 177 percent. CARSON, *supra* note 7.

were prompted at least in part by concerns about uncontrolled prison growth.<sup>90</sup> When the legislature wants to use guidelines for this purpose it is likely to succeed, especially where the guidelines are sufficiently binding or otherwise closely followed in practice to permit accurate prison bed-impact projections.<sup>91</sup> This resource management technique was pioneered in Minnesota in the late 1970s, and was later employed in many other guidelines states.<sup>92</sup> The technique had not yet been imagined in the mid-1970s, when the *Consumer's Guide* was written.

**d. The lack of consensus and principle.** State guidelines have found ways to address Zimring's unanswerable questions—"How long [in prison] is too long? How short is too short?"—as well as his concern that "[w]e lack coherent principles on which to base judgments of relative social harm" or to define "justice." As to the former, although no simple formula can tell us when a given penalty is too severe in absolute terms, the strong desire of some guidelines states to stay within existing or already-funded prison capacity and avoid overcrowding, placed an upper limit on aggregate penalty severity and also encouraged these states to set priorities for the use of limited and expensive prison resources.<sup>93</sup> As for setting minimum severity, state commissions seem to have managed to reach consensus on what crimes are so serious that prison should be recommended even for first offenders.<sup>94</sup> Given the desire to set prison-use priorities and/or increase sentencing proportionality, commissions also found ways to reach consensus on the rank-ordering of offense severity.<sup>95</sup>

Of course, without a coherent theory of the validity and priority of various punishment purposes it is difficult to defend important sentencing policy choices. Those choices include the rank-ordering of offenses according to their "severity," the definition of relevant prior record and other offender-based factors, and the identification of offense

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<sup>90</sup> See Frase, *supra* note 71, at 39; SENTENCING GUIDELINES RESOURCE CENTER, *supra* note 84.

<sup>91</sup> See Reitz, *supra* note 38, at 154–57.

<sup>92</sup> See FRASE, *supra* note 8, at 121–25.

<sup>93</sup> *Id.*

<sup>94</sup> All guidelines identify some offenders, convicted of very serious crimes, who are recommended for prison regardless of their prior record. See, e.g., SENTENCING GUIDELINES RESOURCE CENTER, *supra* note 84, "Repository" tab (containing guidelines grids for most systems, all of which recommend prison, even for first offenders, at or above a given level of offense severity).

<sup>95</sup> See, e.g., DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 55–62 (1988) (describing the procedures used to construct Minnesota's offense-severity rankings).

and offender factors that require a prison sentence rather than probation. Some state guidelines commissions just muddled through, without articulating a governing sentencing theory. Other states expressly based their guidelines on a limiting retributive (or “modified just deserts”) model.<sup>96</sup> Some of these systems developed a full-fledged hybrid model to guide decisions by the commission when setting presumptive sentences, and decisions by judges about whether to depart from guidelines recommendations. In Minnesota, for example, retributive principles regulate commission and judicial decisions about the duration of prison terms, while crime-control offender-based factors (prior record and, exceptionally, offender amenability to prison or to probation) determine questions of “disposition” (the latter relates to whether a given offender is recommended for prison or for probation, and whether it is appropriate for the judge to depart from that recommendation).<sup>97</sup>

It remains true, as Zimring argued, that sentencing grids and specific presumptive-sentences imply a false precision.<sup>98</sup> But presumptive sentences under state guidelines are only a starting point for judges, based on perceptions of appropriate penalties for “typical” crimes of each type. These starting points are almost always defined as a range, not a specific number.<sup>99</sup> Surely judges should be given at least that much guidance; otherwise, they will often have very different starting points, and probably even more different end points. Moreover, the false precision problem is much attenuated if, as all state guidelines (as well as the post-*Booker* federal guidelines) provide, judges have substantial departure power, and if judges are also given underlying sentencing principles and standards to guide the choice and extent of departure.

### ***5. Parole Abolition in Federal and State Guidelines Systems***

As noted previously, all 10 parole-abolition guidelines systems have had slower rates of prison population growth, when measured by change in prisoners-per-capita units, than the growth rates for all states combined, and seven of the 10 systems had slower growth in percentage

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<sup>96</sup> See FRASE, *supra* note 8, 121–67.

<sup>97</sup> *Id.* at 128.

<sup>98</sup> See Franklin E. Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 NW U. L. REV. 73, 78 (1987).

<sup>99</sup> See, e.g., SENTENCING GUIDELINES RESOURCE CENTER, *supra* note 84, “Repository” tab (containing guidelines grids for most systems, almost all of which provide sentencing ranges — sometimes quite broad ranges — for each combination of offense severity and prior record).

terms.<sup>100</sup> The three exceptions are Kansas, Minnesota, and the federal system. Prison growth in Kansas, from adoption of its guidelines through 2009, was only slightly higher than the national growth rate in that time period—Kansas's prison rate was 37 percent higher in 2009, while for all states the prison rate was 34 percent higher.<sup>101</sup>

As for Minnesota, its somewhat higher than average prison growth rate from 1980 to 2009 (288 percent, versus 243 percent for all states) is largely explained by the fact that the number of felons sentenced each year grew much faster in Minnesota than the average for all states.<sup>102</sup> Moreover, there were several other reasons to predict above-average growth in Minnesota prison populations after 1980. First, there was a general tendency in these years for states with the lowest incarceration rates to grow faster than states with the highest rates.<sup>103</sup> Indeed, this is what one would expect. Low-rate states are likely to have more marginal offenders who can be shifted from probation to prison (in high-rate states, those offenders are already in prison). Low-rate states are also likely to have more room, budget-wise to increase their penalties. And in an era of universally-rising sentence severity, low-rate states may feel pressure to catch up to what other states are doing. Second, Minnesota is a relatively prosperous state, and could have afforded even greater penalty increases than it enacted. Third, to the extent that racial hostility and lack of empathy produce more punitive penalties, Minnesota sentencing might be expected to become more severe—the proportions of non-whites among

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<sup>100</sup> See *supra* note 55. In contrast, the six states (California, Maine, Indiana, Illinois, Arizona, and, for most years, Wisconsin) that abolished parole discretion without enacting guidelines for judges tended to have faster-than-average prison growth in percentage terms. Only one of these states (Maine) had slower than average growth; four were faster; and one (Illinois) had average growth.; See Reitz, *supra* note 38, at 151, Figure 1 (identifying parole-abolition states); Carson, *supra* note 7 (reporting per capita rates for each state, by year, and for all states combined).

<sup>101</sup> CARSON, *supra* note 7.

<sup>102</sup> See Richard S. Frase, *Sentencing Policies and Practices in Minnesota* (2016). <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-148?print=pdf>, Section III.B.4 (Explaining that for the years with comparable caseload data, 1988 through 2006, annual felony convictions increased by 117 percent in Minnesota, and by an estimated 70 percent for all states. From 1981 to 1988, Minnesota's moderate prison growth was exactly equal to its caseload increase. *Id.* From 2001 to 2015, Minnesota's prison population (including inmates held in local jails with sentences of over one year) increased by 63 percent, while the sentenced felony caseload increased by 55 percent.) See Richard S. Frase & Kelly Lyn Mitchell, *Why Are Minnesota's Prison Populations Continuing to Rise in an Era of Decarceration?*, 30 *FED. SENT'G REP.* 114 (2017).

<sup>103</sup> See ZIMRING & HAWKINS, *supra* note 21, at 221.

Minnesota residents and convicted offenders increased substantially in the 1980s and 90s.<sup>104</sup>

The federal system is an entirely different matter: its 281 percent prison growth rate from inception of the guidelines in 1987 to 2009 was over two and half times greater than the all-states growth rate in those years (107 percent).<sup>105</sup> Yet the annual number of sentenced cases grew only modestly faster in federal than in state courts.<sup>106</sup> As noted previously, a major difference between the federal system and almost all state guidelines systems is the lack of budget constraints on federal prison growth. Perhaps for this reason, the federal commission has never used prison-impact assessments to restrain the severity of recommended sentences.<sup>107</sup> The commission apparently did not view dramatic growth in prison populations and serious prison overcrowding as major problems, or at least not as problems to be addressed by the commission.

As for Zimring's other covert function of parole release—statewide sentence-disparity reduction—this function is not needed under a regime of statewide sentencing guidelines that judges follow in most cases (because the guidelines are legally binding or for other reasons, such as peer pressure or single-court-house collegiality and consensus). Still, there may be a need, at least in some parole-abolition systems, for the kind of “second look” sentence-reduction powers (beyond executive clemency) that are recommended under the revised Model Penal Code.<sup>108</sup>

### C. The Future of Sentencing Reform in the United States

“Reform, Sir, Reform, don't speak to me of Reform, things are bad enough as they are.”<sup>109</sup>

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<sup>104</sup> For example, Minnesota's Black population more than quadrupled from 1980 to 2005, and from 1981 to 2005 the percentage of Whites among sentenced felons fell from 82 to 62 percent, while the percentage of Blacks rose from 11 percent to 24 percent. See Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUSTICE 201–280 (2009).

<sup>105</sup> See CARSON, *supra* note 7.

<sup>106</sup> See Hindelang Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics, Criminal defendants sentenced in U.S. District Courts, by type and length of sentence 1945-2010, Table 5.23.2010* (showing sentenced federal offenders increased by 86 percent from 1988 to 2006; as noted previously, the all-states sentenced felony caseload increased by 70 percent).

<sup>107</sup> See Frase, *supra* note 71.

<sup>108</sup> See American Law Institute, MODEL PENAL CODE: SENTENCING, PROPOSED FINAL DRAFT, §§ 305.6, 305.7, 305.8 (2017).

<sup>109</sup> ZIMRING & FRASE, *supra* note 5, at xxxi (quoting Maudsley).

The majority of American states retain broad parole release discretion for most offenders, and a majority of states also place few limits on judicial sentencing discretion. Such unrestrained discretion in deciding criminal punishments is intolerable in any system committed to the rule of law. That was true when Frank Zimring said it in 1976,<sup>110</sup> and it remains true today.

But what exactly should we do about these problems, especially if predicting particular reform impacts is at best “hazardous?”<sup>111</sup> Indeed, can we even untangle the effects of different sentencing laws and structures *after* those effects have occurred? Does anything we do actually matter, and if so, how can we tell given the intractable problems of selection bias when we attempt to compare reform and non-reform jurisdictions?<sup>112</sup> To take a concrete example from my home state: would Minnesota’s legal and political “culture” have caused it to retain its ranking as one of the very lowest prison-rate states, even without the adoption of parole-abolition sentencing guidelines designed to stay within prison capacity? It is difficult to know for sure even though, as noted above, there were several reasons to expect greater prison growth in Minnesota than actually occurred. And even if we conclude that adoption of a sentencing guidelines system such as Minnesota’s tends to produce slower growth in state prison populations, these effects seem to be highly contingent on the particular jurisdiction.<sup>113</sup>

Finally, apart from “how we got here,” to the current levels of mass incarceration that exist in all American states,<sup>114</sup> how can we predict which sentencing laws and structures are most likely to help us substantially reverse course? From the peak mass incarceration year, 2008, to 2016, the rate of state imprisonment in the U.S. declined by 11 percent, and 22 states had greater-than-average declines in their imprisonment rates (ranging from a 13 percent decline in Indiana to a 35 percent decline in Alaska).<sup>115</sup> But an examination of those 22 states reveals no consistent patterns: above-average declines in prison rates have

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<sup>110</sup> Zimring, *supra* note 1, at 6, 15.

<sup>111</sup> *Id.* at 15.

<sup>112</sup> See Zimring, *supra* note 44 for further discussion.

<sup>113</sup> See, e.g., ZIMRING & HAWKINS, *supra* note 21, at 160–62, 201–04.

<sup>114</sup> See generally AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT (Kevin R. Reitz ed., 2018); see also Richard S. Frase, *Learning from European Punishment Practices – and from Similar American Practices, Now and In the Past*, 27 FED. SENT’G REP. 19, 22 (2014) (describing converging factors that created “a perfect storm of punitiveness” in late 20<sup>th</sup> Century America).

<sup>115</sup> See Gelb and Denney, *supra* note 47.



occurred in all regions of the country, in large as well as small states, in states that previously had very high and very low incarceration rates, and in states with and without major sentencing and parole reforms.

Given these reform uncertainties, it is likely that some systems are better off with the devils they know – or, to adapt the popular adage: “If it ain’t broke *too bad*, don’t fix it.” On the other hand, some systems are clearly very “broke,” often suffering from *both* the excesses of mass incarceration *and* the corrosive unfairness of manifest disparities in the sentences imposed on comparable offenders.

Zimring’s *Consumers’ Guide* warns us that, in sentencing reform, there are no simple answers. But as he insisted, we must still try to improve our sentencing systems. Moreover, there is much we can learn from our past efforts. The lessons of over 40 years of sentencing reform, and of Zimring’s persistent critiques of those efforts,<sup>116</sup> are that reform impacts are highly contingent: system context and reform details *matter— a lot*. That was, and remains, Zimring’s essential message.

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<sup>116</sup> See, e.g., ZIMRING & HAWKINS, *supra* note 21, and Zimring, *supra* note 44.