

2019

## Forty Years of American Sentencing Guidelines: What Have We Learned?

Richard Frase  
*University of Minnesota Law School, frase001@umn.edu*

Follow this and additional works at: [https://scholarship.law.umn.edu/faculty\\_articles](https://scholarship.law.umn.edu/faculty_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Richard Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME AND JUSTICE 79 (2019), available at [https://scholarship.law.umn.edu/faculty\\_articles/830](https://scholarship.law.umn.edu/faculty_articles/830).

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

*Richard S. Frase*

# Forty Years of American Sentencing Guidelines: What Have We Learned?

## ABSTRACT

Since 1980, 22 state and federal jurisdictions have adopted sentencing guidelines. Nineteen still have them. No two systems are alike. Experience suggests that any well-designed system requires five core features: a permanent, balanced, independent, and adequately funded sentencing commission; typical-case presumptive sentences and departure criteria; a hybrid sentencing theory that recognizes both retributive and crime control purposes; balance between the competing benefits of rules and discretion; and sentence recommendations informed by resource and demographic impact assessments. Balance is needed in terms of commission composition, between conflicting sentencing purposes, between rules and discretion, and between the influence of the commission, the legislature, and case-level actors. Guidelines proponents disagree about a number of important issues. Some relate to which crimes and sentencing issues should be regulated. Others concern the design details that determine how the system actually works. It is clear, however, that pre-guidelines regimes of unstructured, highly discretionary sentencing are unacceptable and that commission-drafted guidelines, endorsed by the American Bar Association and the American

Electronically published February 7, 2019

Richard S. Frase is Benjamin N. Berger Professor of Criminal Law at the University of Minnesota. He is grateful to the Robina Foundation for funding much of the research supporting this essay and to Michael Tonry and two anonymous reviewers for their very helpful comments and suggestions. He would also like to thank his colleagues at the Robina Institute of Criminal Law and Criminal Justice for their contributions to this essay and to our joint efforts to document and improve sentencing guidelines systems: Rhys Hester, Kelly Lyn Mitchell, Julian Roberts, and our numerous student research assistants over the years. Our projects have also greatly benefited from the advice of many present and former guidelines commission members and staff, whom we gratefully acknowledge.

© 2019 by The University of Chicago. All rights reserved.  
0192-3234/2019/0048-0001\$10.00

Law Institute, are the only successful sentencing reform model. In four decades, no competing model of comparable detail and scope has been seriously proposed.

Forty years ago, the Minnesota and Pennsylvania legislatures each created a commission tasked with proposing statewide sentencing guidelines.<sup>1</sup> In 1980, Minnesota became the first state to implement such a system. Pennsylvania's guidelines took effect 2 years later. Since then, 18 other states, the District of Columbia, and the federal courts have implemented commission-drafted guidelines,<sup>2</sup> although some guidelines, their parent commissions, or both were subsequently abolished.<sup>3</sup> In 2017 the American Law Institute gave final approval to the Model Penal Code–Sentencing (MPCS) rules, which strongly endorsed legally binding guidelines developed and monitored by a permanent commission. The American Bar Association's Sentencing Standards (ABA 1994) likewise strongly endorsed this approach. In the last four decades, no competing sentencing reform model of comparable detail and scope has been seriously proposed, let alone implemented.

But there is no single, or even clear, “consensus” model of sentencing guidelines and guidelines commissions. The Minnesota and Pennsylvania prototypes are quite different from each other in important respects.

<sup>1</sup> The idea of commission-drafted sentencing guidelines was first proposed in the early 1970s by federal judge Marvin Frankel (1973). The first commissions were established in Minnesota and Pennsylvania in 1978.

<sup>2</sup> Those 18 states are Alabama, Arkansas, Delaware, Florida, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, North Carolina, Ohio, Oregon, Tennessee, Utah, Virginia, Washington, and Wisconsin. In total (including Minnesota, Pennsylvania, Washington, DC, and the federal courts), 22 American state and federal jurisdictions have, or once had, some form of commission-drafted, jurisdiction-wide guidelines. For further details on how “guidelines” system is defined in this essay, see the text at nn. 4 and 5.

<sup>3</sup> Sentencing guidelines commissions were abolished, or left as nonguidelines commissions, in five states: the guidelines or successor laws are still in effect in Florida and Tennessee despite abolition of the sentencing commission; in Louisiana and Missouri guidelines were repealed but nonguidelines commissions remain; Wisconsin abolished both its guidelines and its commission. Massachusetts has a sentencing commission and proposed guidelines that the legislature has not approved but that many judges take into consideration. And, in addition to Louisiana and Missouri, there are sentencing or broader criminal justice commissions without a charge to develop guidelines in Alaska, Connecticut, Illinois, New Mexico, and New York. Finally, Nevada currently has a commission to consider writing guidelines (the Nevada Legislative Counsel Bureau: <https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2017/Committee/1391/Meetings>). For further information on the guidelines systems that are still operating, as well as on states with nonguidelines commissions, visit the University of Minnesota's Sentencing Guidelines Resource Center, Robina Institute of Criminal Law and Criminal Justice (Robina Institute 2018).

The state and federal guidelines and commissions that were created later are even more diverse in their goals, scope of coverage, and major structural features. In light of the new impetus given to guidelines reforms by completion of the MPCs project, and growing opposition to the excesses of mass incarceration, now seems like a good time to review the history and future of guidelines reforms. What have we learned about what works and what does not? What structural and other policy choices enjoy widespread support, and which continue to be vigorously debated? What are the most important issues requiring additional research to inform these policy debates? What is the likely future of this and competing sentencing structures?

Here are my main findings and conclusions:

- The diversity of guidelines structures and rules suggests a high degree of contingency in what American jurisdictions want in a sentencing system, or at least in what they can successfully implement and sustain.
- From a normative perspective, some guidelines structures are much more likely to produce good sentencing policy and practice. Five essential features characterize a well-designed sentencing system: first, a permanent, balanced, independent, and adequately funded sentencing commission; second, specified typical-case presumptive sentences and departure criteria; third, hybrid sentencing theory that recognizes both retributive and crime control purposes; fourth, balance between the competing benefits of rules and discretion: rules promote uniformity and predictability; discretion promotes efficiency, flexibility, and case-specific justice; and fifth, recommended sentences that are informed by resource and demographic impact assessments. In many jurisdictions it will not be possible to implement all of these features (although a few state systems have), but the more of them a system has, the better.
- A recurring theme is the need to maintain workable and reasonable balances, not only in terms of commission makeup, and between conflicting sentencing purposes and between rules and discretion, but also between the powers and influence of the sentencing commission relative to the legislature and to judges, attorneys, and correctional authorities.
- Guidelines reformers have disagreed about a number of important policy issues. Some relate to coverage—which crimes and sentencing

issues should be regulated. Other issues relate to design—the necessary details that determine how the system actually works. There are good arguments on both sides of each of these contested issues. On some, one approach seems clearly preferable; on others, more research is needed.

- The pre-guidelines regime of unstructured, highly discretionary sentencing is unacceptable. Guidelines offer the only proven sentencing reform model.

The remainder of this essay is organized as follows. Section I surveys the wide variety of guidelines systems that currently exist in American jurisdictions, showing their similarities and differences with respect to major structural features and operation, identifying features recommended by the MPC, and examining available data on the effects of guidelines on sentencing practices, inmate populations, and achievement of important reform and policy goals. Section II examines the most important policy issues raised by guidelines sentencing and seeks to identify issues on which there is, or should be, broad agreement and issues that are more contestable. Section III identifies priority issues for research, including development of better cross-jurisdictional measures and efforts to promote better understanding about how best to achieve widely shared sentencing reform goals. Section IV considers the future of guidelines sentencing.

### I. Where, When, and What Kinds of Guidelines?

Several types of “structured” sentencing systems seek to reduce sentencing discretion and disparities (US Department of Justice 1996, 1998), and not all true guidelines are referred to as “guidelines.”<sup>4</sup> For purposes of this essay a “sentencing guidelines” system is one with three features. First, judges are given a set of recommended sentences or sentence ranges for most types of crime or at least most felonies. Second, the guidelines are deemed to be appropriate in typical cases of that type (i.e., cases that do not present aggravating or mitigating factors that might permit departure from the recommendation). Third, they were developed by a legislatively created sentencing commission (regardless of whether the rules are embodied in

<sup>4</sup> For previous surveys of American guidelines systems, as of 2004 and 2012, see Frase (2005; 2013, chap. 3). See also Tonry (1988; 1996, esp. chaps. 2 and 3).

statutes, and even if the commission ceased to exist at some point after the guidelines went into effect).

This definition excludes legislatively drafted presumptive sentences set out in statutes like those that California and several other states adopted in the mid- to late 1970s.<sup>5</sup> Florida is a borderline case; its commission-drafted guidelines were replaced in 1998 with statutory presumptive minimum sentences (Griset 1999). I include it as a guidelines state because its current punishment code carries over elements of the former commission-drafted guidelines system. Massachusetts is another borderline case; it is included because, even though initial and revised commission-drafted guidelines have not received legislative approval (Robina Institute 2018), judges appear generally to follow the commission's recommended sentences. In effect, the commission's proposals are functioning like advisory guidelines (Massachusetts Sentencing Commission 2014, pp. 44–45). Finally, I include Ohio as a guidelines system since its entirely statutory recommended sentence system was developed by a sentencing commission, even though it lacks a feature found in all other systems that meet the definition: Ohio has nothing that could be called a criminal history score or scoring system (Griffin and Katz 2002; Robina Institute 2018).

#### *A. Where and When*

The 22 state and federal jurisdictions that have or once had sentencing guidelines under my definition are shown in table 1, listed in order of the initial effective dates of their commission-drafted guidelines, and also showing the years when the guidelines commission was in operation.<sup>6</sup>

<sup>5</sup> For further discussion of legislatively drafted presumptive sentence reforms, see Tonry (1988) and Frase (2013). Some researchers have classified Alaska as a “guidelines” system (National Center for State Courts 2008). I exclude Alaska because its statutory presumptive sentences were not developed by a commission (although they were later studied and endorsed by a short-lived sentencing commission); they were drafted by the legislature and supplemented with appellate case law that added additional presumptive sentences (Carnes 1993).

<sup>6</sup> Some of these states previously had guidelines drafted by courts or other agencies. Utah implemented statewide felony guidelines, written by judicial and correctional authorities, in 1979 (Oldroyd 1994), but in 1998 these were replaced with commission-drafted guidelines. Florida, Maryland, Michigan, and Virginia likewise had judicial guidelines that preceded their commission-drafted guidelines. Maryland considers its current guidelines system to have begun with the judicial guidelines that were implemented statewide, with legislative approval, in 1983. Florida had commission-drafted guidelines from 1983 to 1998, which were replaced with a statute that carried over some of the guidelines rules. Judicial guidelines in Michigan and Virginia were replaced by completely different commission-drafted guidelines. For further details on each of these systems, see Robina Institute (2018).

TABLE 1  
Sentencing Guidelines Systems, Guidelines Commissions, and Model  
Codes and Standards Recommending Guidelines.

Agency or Jurisdiction	Guidelines Commissions: Years in Operation	(Commission's) Guidelines Initial Effective Dates
ABA Sentencing Standards, 2nd ed.		Approved: Aug. 1979
Minnesota	1978–	May 1980–
Pennsylvania	1978–	July 1982–
Maryland	1996–	July 1983–
Florida	1982–97	1983–98, 1998–
Washington	1981–	July 1984–
Wisconsin	1984–95, 2001–7	1985–95, 2003–7
Delaware	1984–	Oct. 1987–
Federal	1984–	Nov. 1987–
Oregon	1985–	Nov. 1989–
Tennessee	1986–95	Nov. 1989–
Louisiana	1987–95	1992–95
ABA Sentencing Standards, 3rd ed.		Approved: Feb. 1993
Kansas	1989–	July 1993–
Arkansas	1993–	Jan. 1994–
North Carolina	1990–	Oct. 1994–
Virginia	1994–	Jan. 1995–
Massachusetts	1994–	April 1996–
Ohio	1990–	July 1996–
Missouri	1993–2012	1997–2012
Michigan	1994–2002, 2015–	Jan. 1999–
Washington, DC	1998–	June 2004–
Alabama	2006–	Oct. 2006–
ALI Revised Model Penal Code		Sections approved: 2007, 2011, 2014, 2016, and 2017

SOURCE.—Robina Institute (2018).

These systems vary considerably; moreover, several have made significant changes over time. Some have expanded the scope of their guidelines. Delaware in 1990 eliminated parole release discretion; its guidelines now determine prison duration and prison commitment. Alabama in 2013 made some of its guidelines rules—those that apply to nonviolent crimes—legally binding rather than purely advisory. Other jurisdictions have gone in the opposite direction. Florida replaced the tops of its guidelines ranges with the almost-always-higher applicable statutory maximums. Ohio and Tennessee in 2006 made their legally binding

guidelines mostly advisory, to avoid the increased constitutional requirements, under *Blakely v. Washington* (542 U.S. 296 [2004]), for proof of aggravating facts permitting upward departure from guidelines “typical-case” sentence recommendations. For the same reason, the US Supreme Court made the federal guidelines advisory, in *U.S. v. Booker* (543 U.S. 220 [2005]). Louisiana, Missouri, and Wisconsin completely abolished their guidelines; Wisconsin did it twice. Subtracting those three states leaves 19 state and federal jurisdictions that currently have a guidelines system meeting my definition.

Table 1 also shows when the American Bar Association (ABA) and the American Law Institute (ALI) adopted their recommendations in favor of commission-drafted guidelines. The second edition of the ABA’s (1979) sentencing standards provided the rough outlines of a system of guidelines drafted by an agency independent of the legislature and located in the judicial branch. The third edition (ABA 1994) provided greater detail on the duties and organization of such an agency (and also provided alternative standards for an agency located within the legislature to perform that function). Further details, and a strong endorsement of the independent agency concept, are contained in the ALI’s revised MPC provisions; these were approved in five stages, beginning in 2007 and ending in 2017 with approval of the proposed final draft containing all of the revised code sentencing provisions (ALI 2017).

### *B. Varieties of Guidelines*

State and federal guidelines systems display considerable structural variation on each of the dimensions discussed below. Except where otherwise noted, the sources for these summaries are jurisdiction-specific profiles and multijurisdiction overviews available from the University of Minnesota’s Sentencing Guidelines Resource Center (Robina Institute 2018) or my compilation and interpretation of materials posted on the center’s website.

1. *The Guidelines Commission.* These bodies vary in size, composition, duties, and policy-making powers relative to the legislature. The commissions currently in operation have between seven and 31 members, with an average of about 17 (Watts 2016). The membership always includes judges and usually includes defense and prosecution representatives. The federal commission is unusual in its small size (seven voting members) and composition: there is prosecution but not de-



fense representation. Other frequent membership categories include correctional officials, legislators, police officers, victim representatives, and other “public” members. A few commissions reserve a spot for an academic or other sentencing or correctional expert. In about a quarter of the systems, members are appointed solely by the executive (governor or president); the rest include judicial, legislative, or other appointing authorities. In addition to drafting, monitoring, and revising the guidelines, most commissions collect and analyze data on sentences imposed and use those data to project future prison populations (Frase 1995; Watts 2017). About half of the systems allow the commission’s initial or amended guidelines to go into effect subject only to initial or later legislative override. The remainder require affirmative legislative enactment before any proposal or modified version can go into effect or require such approval within a limited period after the initial effective date (Mitchell 2017).

2. *Reform and Punishment Goals.* All guidelines seek to reduce sentencing discretion and its resulting disparities, but only a few systems explicitly define an underlying normative framework—disparity relative to what criteria? In particular, what punishment purposes and factors render two offenders “similarly situated” so that “disparity” exists if they receive different penalties?

Minnesota adopted a theory of “modified just deserts.” Sentences are determined by a mix of retributive and crime control purposes. Both kinds of purposes determine typical-case recommendations on prison duration and whether the prison term will be immediately executed or suspended (the “disposition” decision).<sup>7</sup> Durational departures are governed solely by retributive values, while dispositional departures are based on crime control considerations (Frase 2013). Washington went further, giving greater emphasis to desert (Boerner and Lieb 2001, pp. 84–85).

Most guidelines systems pursue, and seek disparity reduction relative to, all traditional sentencing purposes. Sometimes they state that sentences should be uniform and proportionate relative to offense severity

<sup>7</sup> As noted below, Minnesota and a number of other guidelines systems deem an offender’s desert to be enhanced in proportion to not only the seriousness of the conviction offense(s) but also the offender’s prior conviction record. These systems thus allow the latter factor to increase the recommended prison duration (sometimes very substantially); prior record will also often make the difference between recommended prison and recommended probation.

and prior record, without specifying how each of those dimensions, and the particular scales employed, relates to punishment goals.<sup>8</sup> Minnesota and several other systems expressly endorse the principle of sentencing “parsimony”: a penalty should be no more severe than is necessary to achieve its purposes adequately (see, e.g., MSGC 2018, sec. 1.A.5).

Another closely related question is whether the guidelines seek to encourage judges more consistently to apply existing sentencing norms (“descriptive” or “historical” guidelines) or whether the guidelines are intended to change some of those norms (“prescriptive” guidelines). Even systems of the first type, however, may recognize goals such as reduced racial disparity or the implementation of legislative mandates (such as the numerous congressional directives in the 1984 Sentencing Reform Act).<sup>9</sup> Even prescriptive guidelines such as those in Minnesota (which, like many guidelines reforms, sought to send more violent offenders to prison and fewer property offenders) are often heavily based on prior practice (sometimes pursuant to legislative directive).<sup>10</sup>

Many guidelines reforms have recognized the goals of managing prison and other correctional resources and avoiding prison overcrowding. Minnesota pioneered this approach, taking advantage of the greater uniformity and predictability of sentencing under guidelines, and a sentencing commission’s capacity to collect and analyze detailed data on sentencing practices. The Minnesota legislature directed the new commission to “take into substantial consideration . . . existing correctional resources, including but not limited to the capacities of local and state correctional facilities.”<sup>11</sup> The commission took this directive seriously and developed a prison bed

<sup>8</sup> See, e.g., Or. Admin. R. 213-002-001(d): “the appropriate punishment for a felony conviction should depend on the seriousness of the crime of conviction when compared to all other crimes and the offender’s criminal history.”

<sup>9</sup> See, e.g., 28 U.S.C. § 994(m) (2018): “The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.” See also USSC (2016, sec. 5H1.10): race, sex, national origin, creed, religion, and socioeconomic status are “not relevant in the determination of a sentence.”

<sup>10</sup> See, e.g., Minn. Laws 1978, c. 723, art. 1, § 9: commission “shall take into substantial consideration current sentencing and release practices.”

<sup>11</sup> Minn. Laws 1978, c. 723, art. 1, § 9. However, in 1989 this provision was given reduced weight; the current version of the commission’s mandate states that “in establishing and modifying the Sentencing Guidelines, the primary consideration of the commission shall be public safety. The commission shall also consider current sentencing and release practices; correctional resources, including but not limited to the capacities of local and state correctional facilities; and the long-term negative impact of the crime on the community” (Minn. Stat. § 244.09, subdiv. 5 [MSGC 2018]).

impact model, which it used to ensure that predicted prison populations would stay within 95 percent of existing and expected (already-funded) prison capacity (Parent 1988). In contrast, the next-oldest guidelines system, Pennsylvania's, did not recognize correctional resource management as a reform goal; its guidelines were expected to increase the prison population (Tonry 1996, p. 50). But almost all subsequent guidelines reforms have recognized the value of guidelines as a means of controlling prison growth and avoiding overcrowding (Watts 2017); that has sometimes been the primary goal in adopting guidelines (Frase 1995). The federal guidelines remain a notable exception, probably for two reasons: first, in contrast to most states, the federal budget need not be balanced, and deficit spending is the norm; second, even dramatically increased prison costs constitute a tiny fraction of the massive federal budget.

Although a number of guidelines systems (e.g., Alabama, Arkansas, Kansas, Minnesota) have recognized the goal of reducing racial and ethnic disparities in sentencing, a few systems have gone further to ensure that this goal is given serious consideration when guidelines and other sentencing rules are written or revised (Porter 2014). These jurisdictions have adapted their prison bed impact projection model so that it shows the predicted effects of proposed new or revised sentencing rules on racial and ethnic disparities among prison inmate populations. If a rule is found to increase disparity, its policy goals are scrutinized further and the rule might then be rejected or modified.

3. *Sentencing Decisions Covered by the Guidelines.* Some of the most basic differences among American guidelines systems relate to their scope. Most apply only to felony-level offenses; others also cover some or all misdemeanors. The federal guidelines cover the most serious (class A) misdemeanors, and in six states all non-petty misdemeanors are covered (Delaware, Maryland, Massachusetts, North Carolina, Pennsylvania, and Utah). I discuss other major differences in coverage below (whether judges retain their traditional unfettered discretion to choose between consecutive and concurrent sentencing of multiple conviction offenses; whether the guidelines regulate conditions of probation or other non-prison sanctions; and whether, because of abolition of parole release discretion, the guidelines govern both the imposition of active prison sentences and the duration of prison terms).

4. *Grids and Other Formats.* Most American guidelines systems employ one or more two-dimensional grids to summarize and present guidelines recommendations, with offense severity represented on the

vertical axis (grid rows) and prior record on the horizontal axis (grid columns).<sup>12</sup> The federal system and several states have a single grid. Nine jurisdictions have multiple grids (usually a “main” or “standard” grid, with separate ones for sex, drug, or other offenses). Alabama, Florida, and Virginia use worksheets rather than grids. Delaware and Ohio use neither grids nor worksheets. The Delaware guidelines provide typical-case sentence ranges for each felony and misdemeanor crime class and type (violent, nonviolent), with specified mitigations and aggravations (e.g., for acceptance of responsibility and prior convictions). Ohio statutes contain general standards to help judges decide between prison and probation and select a prison duration.

Among systems using grids, the formats vary considerably:<sup>13</sup>

- number of offense severity levels: most have about 10, but Tennessee has only five and the federal grid has 43;
- number of criminal history categories: most have five to seven, but Kansas, Oregon, and Washington have nine or 10;
- widths of grid cells: on some grids the cell ranges are very wide and overlap substantially, but on other grids the ranges are narrow and hardly overlap at all;
- use of a “disposition” line or other demarcation separating grid cells with recommended executed prison sentences from cells recommending probation: most grids have this kind of disposition zone structure, but some have “border boxes” or entire grid zones in which judges may, without departure, select from two or more disposition options such as prison, more intensive probation, or less intensive probation; and
- display of separate aggravated or mitigated prison duration ranges: most grids do not have such separate ranges.

Another basic difference between grids relates to the meaning of the prison-duration numbers on the grid (almost always shown in months). In most systems these numbers, and any higher or lower numbers chosen

<sup>12</sup> Utah is the sole exception: on its grids, criminal history categories define the grid rows, and offense severity defines grid columns. For further details, see Watts (2018*a*).

<sup>13</sup> There are also purely visual differences in the order of offense severity levels and criminal history categories. On most grids the highest-severity offenses are on the top row of the grid and the highest criminal history category is the far-right column.

by judges in case of departure, are the maximum prison terms offenders will serve in prison, subject to reduction by good conduct credits, discretionary parole release if that was retained, or both. In Michigan, North Carolina, and Pennsylvania the numbers on the grid, or terms chosen by judges, represent minimum terms of imprisonment, which assume that offenders will receive all available good-conduct credits or be paroled at the earliest allowable time. In these systems, the maximum prison term is then determined by other rules or by a formula (e.g., in North Carolina the maximum term for less serious felonies is 120 percent of the minimum term).

The numbers shown on guidelines grids also vary in how recommended terms of imprisonment relate to statutory maximum and minimum prison terms. In most systems the longest recommended prison term for offenders in the highest criminal history category is lower than the statutory maximum for most or all of the applicable offenses;<sup>14</sup> longer prison terms may be imposed by means of an upward durational departure. In a few state systems, the tops of the ranges in each grid cell replace previous statutory maximums. In North Carolina the maximum for each grid cell is the number shown as the top of the “aggravated range.” In Kansas upward durational departures cannot exceed twice the top of the range for that cell. State systems sometimes take statutory minimum terms into account when setting guidelines sentences, but more often the guidelines were determined independently (and are overridden if a longer statutory minimum applies). In contrast, the federal commission took a consistently more punitive approach: recommended guidelines sentences are always equal to or greater than any applicable or related mandatory minimum (Tonry 1996, pp. 96–98; Hofer 2019).

5. *Uncharged and Unconvicted Offenses.* In all state guidelines systems, the recommended sentence and almost all recognized grounds for departure are based on the offense or offenses of which the offender was convicted (along with his or her criminal history). The federal guidelines are unique in permitting crimes that did not result in conviction (because they were dismissed, acquitted, or never charged) to enhance recommended sentences and justify upward departures.<sup>15</sup>

<sup>14</sup> However, in some systems (e.g., District of Columbia, Florida, and Tennessee) the tops of the ranges for highest-history offenders are equal to the statutory maximum.

<sup>15</sup> See USSC (2016, sec. 1B1.3): definition of “relevant conduct” that may be considered when calculating the recommended guidelines sentence, or when departing from that sen-

6. *Criminal History.* Some of the most important differences among guidelines systems concern prior convictions and other aspects of an offender's criminal history.<sup>16</sup> Most systems have a separate criminal history score that forms one axis of the guidelines grid or grids (almost always the horizontal axis defining grid columns); in nongrid systems, prior record factors add points on one or more worksheets that determine the form and severity of the recommended sentence. Some grid-based systems use a categorical rather than a points-based system. For example, Kansas places offenders with three or more prior violent felonies in the highest criminal history category (A); those with a single prior violent felony go in a midlevel category (D); category E is for offenders with three nonviolent prior felonies and no violent felonies; offenders with only misdemeanors or no prior convictions are placed in the lowest category (I).

Criminal history scores and worksheet point systems vary in the kinds of prior convictions and other components that are counted, how they are weighted, and how strongly they affect recommended sentences. These differences do not seem to be explained by differing views about punishment purposes. A few systems explicitly justify such enhancements on the basis of the assumed higher culpability or higher recidivism risk of repeat offenders. Most seem simply to have assumed that prior record is an "obviously" relevant sentencing factor (Roberts 2015*b*), basing criminal history scoring and weighting on rough, "back-of-the-envelope" calculations (Tonry 2010, p. 93) or on prior record factors that judges in the jurisdiction traditionally considered (see, e.g., Parent 1988). The culpability-based (retributive, just deserts) rationale is highly contested by punishment theorists (Roberts and von Hirsch 2010; Frase and Roberts, forthcoming, chap. 1). And although there are abundant data showing that, in general, an offender's risk of recidivism is correlated with the extent of his or her prior record, the strength of that relationship depends on many factors. Very few guidelines systems have attempted to validate the risk-predictive

---

tence. Although most state guidelines allow upward departures to be based on aggravating facts of the conviction offense(s) that were not proven or admitted by the defendant, such facts only occasionally (e.g., weapon use, victim injury) increase the ordinary-case recommended sentence. State systems rarely permit aggravating facts based on nonconviction offenses to serve as grounds for departure and almost never allow them to increase the recommended sentence.

<sup>16</sup> For a survey of 18 state and federal guidelines systems that use some form of overall criminal history score or point system, see Frase et al. (2015). For further discussion of the rationales for criminal history enhancements, their intended and unintended effects, and the most important needed reforms, see Hester et al. (2018) and Frase and Roberts (forthcoming).

accuracy of their criminal history scores and score components (Frase and Roberts, forthcoming, chap. 2).

All guidelines systems count prior adult felony convictions, and almost all include at least some prior misdemeanor convictions and juvenile court adjudications (Frase et al. 2015). The latter are often further limited in various ways (e.g., by counting only juvenile offenses committed after age 14 or that are felony-level or counting only qualifying adjudications if the current [adult] offense was committed prior to age 25). Prior adult misdemeanors usually exclude traffic offenses and may be limited only to designated crimes or the highest misdemeanor class. About two-thirds of the systems include “custody status” (the offender was on probation, parole, or certain other forms of criminal justice supervision, or was in jail or prison, when he or she committed the offense being sentenced).<sup>17</sup>

Almost all point-based systems use some sort of weighting formula that counts prior felonies more heavily than misdemeanors and juvenile adjudications (Hester et al. 2018). Many point systems further limit the weight of misdemeanor and juvenile priors by means of caps on the maximum number of points each can contribute to the total score (Mitchell 2015*a*, 2015*b*). Almost all systems weight prior felonies according to their seriousness (the federal system weights according to prior sentences imposed); the weights used are quite varied (Hester 2015). On average, a single prior felony moves the offender about one-third of the way across the sentencing grid. In some systems a single serious felony can move the offender two-thirds or even three-quarters of the way across. However, about half of the systems limit eligibility for the highest criminal history categories to offenders with one or several prior violent or high-severity felonies. In these systems, nonviolent or low-severity felonies, no matter how many, can move the offender only about halfway across the grid.

Many systems stop counting very old priors at some point; most such “look-back” limits are stricter (shorter) for prior misdemeanors and juvenile adjudications. Some systems employ unconditional look-back limits based solely on the passage of time, while other systems use “gap” rules requiring that the offender have remained crime-free for a specified pe-

<sup>17</sup> Several other states include custody status not as a criminal history score component, but as a recognized aggravating factor that courts may consider (Roberts 2015*a*). A few systems also count whether the offender has ever violated the terms of community release or has ever had release revoked (see, e.g., Maryland State Commission on Criminal Sentencing Policy 2018, p. 30).

riod.<sup>18</sup> However, more than half of systems count all or at least the most serious prior felonies for the remainder of the offender's life, despite evidence showing that very old convictions, and advancing age, are associated with lower recidivism risk (Frase and Roberts, forthcoming, chap. 3). Even when a prior conviction is subject to a look-back limit, the period is typically 10 or 15 years, and the "clock" usually does not begin to run until a date long after the prior conviction was entered (e.g., when the offender is discharged from probation, released from prison, or discharged from postprison supervision). Thus, a 15-year limit can easily count convictions 20 or 25 years old.

A high criminal history score, category, or point total can have a dramatic effect on the form and severity of an offender's recommended sentence. As to form, on most guidelines grids offenders convicted of medium- or low-severity offenses are recommended for community-based sanctions if they have little or no prior record; a more substantial record pushes them across the grid into cells that recommend an executed prison sentence. Since a high proportion of offenders are convicted at lower offense severity levels and often have substantial prior records, many prison commitments result from criminal history, not offense severity (in Washington, e.g., over one-third of convicted offenders have recommended prison sentences for this reason; Frase, Roberts, and Hester, forthcoming *c*).

Criminal history also dramatically increases the length of recommended custody sentences. On average, across American guidelines systems, the recommended custody sentence in the highest criminal history category is six times longer than in the lowest, and in some guidelines states the highest-history/lowest-history ratio is over 10. These substantial enhancements greatly increase the size and expense of prison populations (Frase, Roberts, and Hester, forthcoming *b*). They also have other undesirable consequences. They make sentences less proportional to the conviction offense. They distort prison use priorities by sending many nonviolent offenders to prison (since those offenders tend to have higher criminal history scores). They increase the number of aging, low-risk but high-cost prison inmates (since, especially with lax or no look-back limits, older offenders tend to have higher history scores). They increase racial disproportionality (since black and Native American offenders usually have

<sup>18</sup> Recent-gap rules require that there have been no convictions in the period immediately before the current offense, whereas any-gap rules give offenders credit for earlier crime-free periods. For further discussion of look-back rules, see Frase and Roberts (forthcoming, chap. 9).



higher history scores). All of these effects may increase over time as a result of rising criminal history scores.<sup>19</sup>

7. *Other Offense- or Offender-Based Guidelines Criteria.* Many systems enhance penalties for certain crimes because of similarity between the current and prior offenses, but no system applies such a “patterning” rule across the board (Roberts 2015c). Perhaps surprisingly, no system takes into account whether the offender’s past and current crimes show a trend toward increasing or decreasing severity. Perhaps most surprising of all, very few systems factor in the offender’s current age or other known risk and protective factors. The two systems that make the most use of such risk factors consider them only as an adjustment after the recommended sentence has been determined on the basis of current offense severity and prior record (Virginia Criminal Sentencing Commission 2018) or as a screening tool to identify offenders in need of additional offender-specific risk and needs assessment (Pennsylvania Commission on Sentencing 2018).<sup>20</sup>

8. *Multiple Current Offenses.* Sentencing theorists and policy makers have traditionally focused on individual offenders being sentenced for a single crime, but many offenders are sentenced for multiple crimes. Such crimes can be multiple counts in a single case or convictions entered in two or more cases sentenced at about the same time. Similar issues can arise when the offender about to be sentenced is already serving a sentence for a prior crime (Frase 2018a; see, generally, Ryberg, Roberts, and de Keijser [2018]). Traditionally, this problem was dealt with by giving judges total discretion to sentence multiple crimes fully concurrently, fully consecutively, or partially consecutively. About two-thirds of guidelines systems take this approach (Frase 2015a, table 10.2). The remaining systems make concurrent sentencing presumptive for many if not most cases; however, these systems also recognize “concurrent-plus” options, including the following (Frase 2018a, pp. 205–7):

- multiple crimes involving similar, “addable” harm amounts (dollar losses to victims; quantity of drugs or other contraband) are deemed to be “one big crime”;

<sup>19</sup> See, e.g., MSGC (2017, table 10), reporting substantial declines in the proportion of offenders with zero history and substantial increases for the highest scores.

<sup>20</sup> Some state systems, by either case law or guidelines provisions, allow courts to depart downward from a recommended prison sentence on the basis of a finding of the offender’s particular amenability to probation or unamenability to prison or to depart upward on the basis of the offender’s unamenability to probation (Frase and Roberts, forthcoming, chap. 3).

- multiple closely related crimes are treated as aggravating factors for the most serious of the crimes;
- multiple counts are included when computing the criminal history score applied to some or all current offenses; or
- additional counts increase recommended sentence severity according to other formulas (e.g., under the federal guidelines, multiple counts can cause offense severity to be increased by up to five levels).

9. *Suspended Sentences and Other Ways of Structuring Nonprison Sanctions.* Most American guidelines systems impose probation and other community-based felony sentences as conditions of a suspended prison sentence (Frase 2018*b*). Some require the court to first pronounce a prison sentence and then suspend its execution. In others, community-based sentences can be imposed only when the court suspends imposition of sentence (in effect, deferring completion of the sentencing process). In a third group, a community sentence can be a condition of either a suspended-execution prison sentence (SEPS) or an order suspending imposition of sentence (SIS). A few states (e.g., Oregon and Washington) often impose community sanctions as stand-alone penalties rather than as conditions of either kind of suspended sentence.<sup>21</sup>

Each approach employs a different set of procedures to sanction violations of the conditions of release.<sup>22</sup> Under the SEPS option, the suspended prison term may be executed as a sanction for violation, with minimal hearing and fact-finding safeguards. If a sentencing court invokes the SIS option and later wishes to use imprisonment to sanction violations of release conditions, it must hold a standard sentencing hearing, with all of the procedural requirements and sentencing alternatives that would apply if a hearing had been held when the community sanction was imposed. When probation or other nonprison penalties are imposed as stand-alone penalties, not as conditions of a SEPS or SIS suspended sentence, prison is usually not available as a sanction for violation of release conditions. Violations are sanctioned by short jail terms,

<sup>21</sup> Although Washington purported to abolish suspended sentences as part of its guidelines reform, formal SEPS or de facto SIS were retained for certain groups of offenders (Frase 2013, chap. 3).

<sup>22</sup> For further discussion of the advantages and disadvantages of the probation-structure approaches described in the text, see Frase (2018*b*).

home detention, increased release conditions, or other community-based alternatives.<sup>23</sup>

Regardless of the form in which community-based sanctions are imposed, however, judges in all guidelines systems retain broad or even total discretion when deciding whether to revoke release and in choosing among available sanctions for violations of release conditions.

10. *Conditions of Nonprison Sentences.* Most guidelines rules focus on prison commitment and prison duration and provide little or no guidance or structure concerning conditions of community-based sentences. Systems that attempt to regulate such sentences usually do so in one of two ways:<sup>24</sup> by defining two or more broad levels of sanction intensity that may be imposed for different groups of offenders or by providing a maximum or a permitted range of local jail custody, with rules translating nonjail community penalties into jail days. North Carolina and Pennsylvania use the first of these approaches: in grid cells in which prison is not the sole recommended sentence, judges may choose from one or more sanction types: intensive community sanctions, less restrictive sanctions, or in some grid cells, either.<sup>25</sup> Oregon and Washington use the second approach. Each nonprison cell on the Oregon grid contains two numbers: the maximum number of jail days allowed without departure and the maximum number of sanction units (including any jail days imposed, as well as units contributed by other community sanctions that the judge has imposed). The Washington grid provides a custody range in every cell, but some ranges call for durations (a year or less) that would be served in a local jail. In addition, “alternative conversion” formulas permit some or all of the required jail time to be converted into work release, part-time custody, home detention, community service, a fine, or a combination.

11. *Departures.* Some states (e.g., Pennsylvania, Utah, Virginia) have no stated standard that judges must meet before departing from recom-

<sup>23</sup> Five guidelines systems strongly discourage the use of prison as a sanction for probation violations. Oregon and Washington often impose stand-alone probation orders, with designated jail sanctions for violations and no option of revoking a suspended sentence. North Carolina, Utah, and the federal system retain the revocation option but discourage its use; probation is combined with a suspended sentence, which could be revoked, but courts are encouraged (and for some violations are required) to use shorter custodial backup sanctions.

<sup>24</sup> For further discussion, see Frase (2013, chap. 3) and Robina Institute (2018; North Carolina, Oregon, Pennsylvania, and Washington “profiles”).

<sup>25</sup> In some of these cells, judges also have the option of imposing a prison sentence.

mended guidelines sentences. When a standard is stated, it sometimes requires only that the case be “atypical” (Arkansas Sentencing Commission 2018, p. 1) or that there are “aggravating” or “mitigating” circumstances (Mass. Gen. Laws ch. 211E, § 3(a)(2) [2018]). However, a number of states adhere to a stricter standard, requiring the presence of “substantial and compelling” circumstances (e.g., Delaware, Minnesota, and Washington; Robina Institute 2018).

The departure standard under the federal guidelines requires that the case involve aggravating or mitigating circumstances “of a kind, or to a degree, not adequately taken into consideration by the sentencing commission in formulating the guidelines” (USSC 2016, § 5K2.0). Given the extremely detailed nature of the federal guidelines, this standard strongly discouraged departures in the pre-*Booker* period when the guidelines were legally binding. The pre-*Booker* guidelines were also very strict with respect to mitigation based on offender cooperation. Offenders who show “acceptance of responsibility” (almost always in the form of a guilty plea) may receive at most a three-level reduction in their offense severity level, on a grid that contains 43 levels (§ 3E). Offenders who provide “substantial assistance” to law enforcement can receive sentence mitigation only upon a motion by the government (§ 5K1). In all of these ways, the federal guidelines (especially pre-*Booker*) strike a balance too heavily weighted toward commission or prosecution power, at the expense of judges and defense attorneys.

The varying departure standards reflect differing views about how much discretion trial judges should have and about which sentencing purposes should be considered or given priority.

Most systems provide lists of allowed grounds for departure and sometimes lists of forbidden criteria (especially race, gender, and family or socioeconomic status). The allowed grounds tend to focus on factors that make the conviction offense more or less serious than a typical case, which implies a preference for retributive punishment goals. But in a number of states, the lists include offender factors such as amenability to supervision or treatment that are more relevant to risk-based, crime prevention goals.<sup>26</sup> And even in states that give strong emphasis to

<sup>26</sup> In North Carolina, listed mitigating factors include defendant supports his or her family; defendant has a support system in the community; defendant has a positive employment history or is gainfully employed; and defendant “has a good treatment prognosis and a workable treatment plan is available” (N.C. Gen. Stat. § 15A-1340.16(e) [2013]). In

retributive goals, both in general and in lists of departure factors, courts have sometimes recognized nonretributive, offender-based departure grounds such as “particular amenability to probation.”<sup>27</sup>

Only a few systems expressly give courts power to depart based on atypical aspects of the offender’s prior record.<sup>28</sup> This is surprising, given the universal endorsement of departures based on atypical aspects of the conviction offense (and the fact that offense and prior record are the two primary determinants of recommended sentences). Finally, some guidelines systems have special rules that expand departure powers (e.g., by providing that certain deviations are not deemed departures) or that limit departure powers (e.g., by providing that upward durational departures, except in very unusual cases, cannot exceed twice the recommended prison term for a typical case).

---

Utah, the listed aggravating circumstances include “previous willful inability to comply in less restrictive setting . . . willful failure to attend or to participate in appropriate educational, vocational, or treatment programs . . . willful failure to obtain and/or maintain verifiable lawful employment . . . [and] regular association with individuals engaged in criminal or unlawful behavior”; listed mitigating circumstances include that the offender “has demonstrated compliance with all pretrial conditions . . . is engaged in community based supervision and/or treatment services consistent with a validated risk and needs assessment . . . his current living environment is stable and supportive of offense specific interventions which do not enable continued criminal or unlawful conduct . . . is engaged in positive, supportive, pro-social relationships . . . is engaged in positive, supportive, pro-social community activities . . . [and] has implemented positive educational or employment plans” (Utah Sentencing Commission 2017, p. 31). See also Ohio Rev. Stat. § 2929.12 (D): list of factors “indicating that the offender is likely to commit future crimes” includes the following: that the offender “has not responded favorably” to prior juvenile court adjudications or adult court sanctions and that the offenders has shown “a pattern of drug or alcohol abuse that is related to the offense” and refuses to acknowledge the pattern, or refuses to accept treatment for it.

<sup>27</sup> The Minnesota case law allowing “amenability” and “unamenability” departures is summarized in Frase (2005). Such departures have also been recognized by courts in Kansas (Frase 2013, chap. 3).

<sup>28</sup> The federal guidelines’ “inadequacy of criminal history” provision permits departure up or down if the offender’s criminal history score “substantially” understates or overstates “the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes” (USSC 2016, secs. 4A1.3(a)(1) and 4A1.3(b)(1)). Three states authorize adjustments in one direction only. Washington permits upward departure if the omission of certain prior crimes from the offender’s criminal history score yields a recommended sentence that is “clearly too lenient” (Wash. Rev. Code §§ 9.94A.535(2)(b)–(d) 2013). A similar Pennsylvania provision, Adequacy of the Prior Record Score, permits the sentencing court to consider prior convictions and juvenile adjudications or dispositions that were not counted in the calculation of the score (204 Pa. Code § 303.5(d)). Minnesota permits downward departure where the offender’s prior convictions were all entered in a single court appearance (medium-low current offense severity) or in one or two court appearances (low offense severity; MSGC 2018, sec. 2.D.3.a(4)).

12. *Degree to Which the Guidelines Are Legally Binding and Available Enforcement Methods.* It is sometimes said that guidelines are either “mandatory” or “advisory” (see, e.g., *U.S. v. Booker* [543 U.S. at 233]), but these terms are misleading. Very few guidelines rules are “mandatory” in the way in which a mandatory minimum sentence statute is (judges can depart from guidelines), nor are there two homogeneous types of guidelines. The degree of binding force is best seen as a continuum, not a simple mandatory-advisory dichotomy. It is better to ask about the degree to which a given system’s typical-case recommendations and departure standards are formally or in practice legally binding on judges. Relevant factors include the extent to which they are enforced by active appellate review, procedural requirements to state reasons for departure, and other factors tending to encourage compliance.

Legally binding systems with active appellate review, generating a large body of appellate case law, are found in Kansas, Minnesota, Oregon, and Washington. The guidelines recommendations in these states, however, are only presumptive, not mandatory; trial courts retain considerable discretion as to both the type and the severity of sanctions. Appellate review does not appear to have unduly limited trial court discretion.<sup>29</sup>

At the other end of the continuum are systems in which the guidelines recommendations and departure standards are purely advisory (at least as a formal matter), allowing judges to ignore the recommendations and impose any sentence up to the statutory maximum for that offense (and at or above the statutory minimum, if any). Examples of jurisdictions following this model include Arkansas, Delaware, the District of Columbia, Maryland, Massachusetts, Utah, and Virginia. The guidelines in these systems are described as “voluntary” or “advisory,” and departures are not subject to appeal.

Numerous variations lie between these polar extremes (for further details, see Frase [2015*b*]). Some purely advisory systems have features that encourage judges to follow the guidelines. These include informal peer or political pressure generated by publication of judge-specific departure rates or by location in a small, geographically concentrated jurisdiction where judges are well known to each other (Ulmer 2019). Conversely, some legally binding guidelines leave judges with very broad or even

<sup>29</sup> Reitz (1997, pp. 1458–71) compares appellate review of sentences in the Minnesota, Pennsylvania, and federal guidelines systems.

complete discretion in certain respects, thus functioning, in those contexts, more like an advisory system.

13. *Prison Release and Postprison Supervision.* Eleven guidelines jurisdictions (Delaware, District of Columbia, Florida, Kansas, Minnesota, North Carolina, Ohio, Oregon, Virginia, US federal courts, and Washington) have abolished parole release discretion for all or most offenders (Robina Institute 2018). Inmates serve the entire executed prison term subject only to reduction for good conduct (which usually includes completion of in-prison programming and compliance with disciplinary rules). Eight guidelines states (Alabama, Arkansas, Maryland, Massachusetts, Michigan, Pennsylvania, Tennessee, and Utah) retain discretionary parole release for most offenders serving felony sentences. Five of those states (all but Arkansas, Massachusetts, and Tennessee) use or are in the process of developing parole release guidelines (Watts 2018*b*).

In parole abolition systems, good-time reductions vary from as little as 15 percent (e.g., the federal system and the District of Columbia) to as much as 50 percent for some offenders (e.g., Washington); in many states it is 33 percent. In these systems, most offenders spend some time under postrelease, parole-like supervision. Some abolition states (e.g., Minnesota) retain the traditional parole-based rule that both the period of supervision and the possible prison term if release is revoked are equal to the remaining unserved prison sentence (i.e., the amount of good-conduct credit). In the federal system and several states (e.g., Washington, Oregon, and Kansas) periods of postprison supervision and allowable custody terms in case of revocation are independent of the prison sentence and usually depend on the seriousness of the offense. In North Carolina, postprison supervision periods are quite short, in comparison to traditional parole terms: either 9 or 12 months, depending on the offense severity level (Robina Institute 2018).

As with probation, few guidelines rules limit the conditions of postprison supervision. Almost no rules regulate decisions to revoke release or impose other sanctions for violations of release conditions.

### *C. Summary: Major Similarities and Differences*

The preceding summary reveals a number of similarities and differences in guidelines systems. Some features (e.g., identifying management of prison resources as a goal) are found in almost all. However, state systems differ from each other in important ways (e.g., in the extent to which

prison bed or other resource-impact assessments are used to shape guidelines rules, not just to warn of overcrowding after the rules are written without regard to resource impact). The differences between the federal system and most state systems are even greater (e.g., enhancement of recommended sentence severity based on unconvicted offenses).

*D. Major Features of State Guidelines Reforms Embodied in Model Rules and Standards*

Several model codes and standards have endorsed the concept of sentencing guidelines drafted and monitored by an independent sentencing commission. The MPCs is the most detailed proposal (ALI 2017; Robina Institute 2018). The MPCs includes features found in well-developed state guidelines systems and some added features not found in any current system. Those modeled on state systems suggest a degree of consensus on some sentencing policy issues, at least among practitioners and scholars most interested in sentencing policy. The added features are worthy of serious consideration, debate, and further research.

1. *MPCS Features Found in Well-Developed State Guidelines Systems.* The sentencing commission proposed by MPCs is a permanent, broadly representative body charged with drafting and monitoring guidelines, conducting research, and maintaining data on sentencing. Impact assessments are required when drafting or modifying guidelines rules and to periodically assess operations of existing rules; these assessments include fiscal impacts and effects on racial and ethnic disproportionality in prison populations. The MPCs expressly adopts a hybrid, limiting retributive sentencing theory. The offender's deserved punishment sets upper and lower limits on penalty severity, within which crime control purposes are pursued "when reasonably feasible." A general principle of parsimony directs that the sentence be "no more severe than necessary to achieve the applicable purposes [of punishment]" (ALI 2017, sec. 1.02(2)(a)).

The proposed guidelines cover all crimes, including misdemeanors. Limits are placed on criminal history enhancements and consecutive sentencing of multiple current offenses. The use at sentencing of validated risk assessment instruments is encouraged. Probation, fines, and other nonprison sanctions can be imposed as stand-alone penalties, without being a condition of a suspended execution or suspended imposition sentence. Recommended sentences are legally binding, not purely advisory. Departure sentences are subject to a moderate degree of appellate review;



nondeparture sentences are subject to discretionary review. Parole release discretion is abolished, but inmates may reduce their prison terms by up to 15 percent for good conduct and another 15 percent for program participation. Most released inmates are subject to a period of postprison supervision; the period of supervision and the permissible revocation sanction for violation of release conditions do not depend on the remaining unserved prison term.

2. *MPCS Features Not Found in Existing Guidelines Systems.* Suggested guidelines rules or principles for legislation to authorize such rules are provided for a number of matters not regulated by any existing system: adult court sentencing of crimes committed when the offender was a juvenile; forfeitures, restitution, and other onerous economic sanctions; pretrial diversion (deferred prosecution or deferred adjudication); and collateral consequences of conviction. Appellate courts are authorized to reverse disproportionately severe sentences, even if the sentence does not exceed constitutional proportionality limits. Mandatory minimum sentences are strongly discouraged, and where they still apply, trial courts may depart below the minimum in exceptional cases. There are multiple “second-look” sentencing provisions, permitting release from prison or reduction of the term (including mandatory terms) based on age or infirmity, other changed circumstances, or overcrowding of prison, jail, or supervision populations. The commission is directed to conduct an omnibus review of how the guidelines are working; the suggested frequency is every 10 years.

#### *E. Effects of Guidelines Reforms*

How well have guidelines achieved their goals? In particular, have sentencing disparities—the original impetus for structured sentencing reforms—been reduced? And since almost all guidelines systems originally or eventually identified correctional resource management as a reform goal, have those systems had slower rates of growth in prison populations, with fewer problems of prison overcrowding?

1. *Disparity Reduction.* Answering this question is very difficult, for a variety of reasons. First, one would need to compare sentencing before and after implementation of the guidelines (while attempting to control for other changes in the system), but preguidelines data are usually not available. In the few cases in which they are, researchers have generally

concluded that disparities were reduced, at least in state guidelines systems (see, e.g., Miethe and Moore 1985; Tonry 1996). Second, most evaluations of pre- versus postguidelines sentencing have measured disparity by examining compliance and departure rates relative to the guidelines definitions of factors (primarily guidelines offense severity ranking and prior record score) that are deemed to render two offenders “similarly situated.” That baseline, however, biases the comparison in favor of finding “success” in disparity reduction; preguidelines sentencing might very well have been just as consistent relative to the accepted, highly offender-based criteria of that time (Doob 1995; Tonry 1996). Third, almost all pre- and postguidelines comparisons are based on the offense of conviction, even though it might be expected—and in many systems has been clearly documented—that prosecution charging and plea bargaining practices changed under the guidelines (Frase 1993; Tonry 1996). Where “real offense” data are available, they tend to show a lesser degree of “improvement” in disparity reduction (again, measured relative to guidelines criteria) than appears when pre- and postguidelines disparity are examined relative to conviction offenses (Frase 1993).

Finally, measures of disparity and disparity reduction based on rates of compliance with the guidelines are very difficult to compare across jurisdictions, because of substantial variations in what crimes are covered by the guidelines and, even more importantly, what qualifies as a “departure” (Tonry 1996). Guidelines grids and worksheets vary substantially in how wide a range is provided, for each grid cell or other offense/offender group, within which judges may sentence without departing. Moreover, some guidelines use border boxes and other special rules that either give judges multiple dispositional options (prison, intensive probation, regular probation) or define certain deviations from guidelines recommendation as nondepartures. For example, Washington has a “first-offender waiver” provision and several other options for mitigation without formally departing; if those mitigations were treated as departures, departure rates would be higher. A further problem with cross-jurisdictional comparisons results from the very different approaches jurisdictions have taken when designing their guidelines. A system in which the guidelines seek to model prior sentencing and parole-release practices (descriptive or historical guidelines) would be expected to have higher compliance rates than a system in which the guidelines seek to change prior practice (prescriptive guidelines).

Subject to the major caveats just stated, here are some illustrative recent data on compliance rates (showing the year the cases were sentenced in brackets):<sup>30</sup>

- District of Columbia [2017] (District of Columbia Sentencing Commission 2018, pp. 40–52): 97.2 percent of sentenced felony counts were “compliant” (including 2.4 percent that were plea-agreed sentences, some of which would otherwise have been departures, 0.7 percent that were deemed compliant because sentenced concurrently with another count receiving an equal or longer sentence, and 1.5 percent that were deemed “compliant departures” because the court stated listed aggravating or mitigating factors).
- Federal courts [fiscal year (FY) 2017] (USSC 2018, table N): 49.1 percent of sentences were “within” the guidelines; that is, they were neither departures under guidelines rules nor “variances” permitted by the *Booker* decision rendering the guidelines “advisory.” However, some of the not-within sentences are required by statutory mandatory minimums that are higher than the top of the guidelines range (Hofer 2019); and more than one-sixth of the not-within sentences were entered under a special mitigation rule applicable to “early disposition” programs that are designed to expedite guilty pleas in nonserious immigration cases.
- Kansas [FY 2017] (Kansas Sentencing Commission 2018, p. 65): 79.1 percent of cases had no departure as to either prison disposition or prison duration, including 14.1 percent that were sentenced within a “border box” permitting either prison or a nonprison sentence.
- Minnesota [2016] (MSGC 2017, p. 23): 74 percent of cases had no departure as to either prison disposition or prison duration.
- Pennsylvania [2016] (Pennsylvania Commission on Sentencing 2017, p. 41): 89 percent of cases were deemed to be in “conformity” with the guidelines and not “departures,” including 6 percent sentenced in the “aggravated” sentencing range and 8 percent sentenced in the “mitigated” range; excluding the latter two groups, 75 percent of cases were sentenced within the “standard” sentencing ranges shown on the

<sup>30</sup> For an earlier review of compliance rates in several guidelines systems, see Tonry (1996, pp. 33–39).

- guidelines grids (all of these figures include misdemeanor crimes, which have higher compliance rates than felonies [Tonry 1996]).<sup>31</sup>
- Virginia [FY 2017] (Virginia Criminal Sentencing Commission 2017, p. 12): 81.2 percent of sentences were in compliance with the guidelines as to both prison disposition and duration (including, as compliant, variances based on the commission’s validated risk assessment tools or statutory diversion options, sentences within 5 percent of the recommended duration, and sentences to time served in pretrial detention where the guidelines call for probation).
  - Washington [FY 2017] (Washington State Caseload Forecast Council 2018, p. 33): 94.8 percent of sentences were within the standard range or were outside that range but not defined as “departures” (81 percent were within the standard range).

Note that adjusted compliance rates (excluding cases that would be counted as departures in other systems) are not consistently higher in the three jurisdictions with legally binding guidelines and frequent appellate review (Kansas, Minnesota, and Washington) than they are in the four systems with advisory or only loosely binding guidelines (District of Columbia, federal, Pennsylvania, and Virginia). The highest and lowest adjusted compliance rates are found in advisory guidelines systems. The District of Columbia, with the highest compliance rates, has descriptive guidelines (based on prior practice), very wide grid cell ranges, and a relatively small and geographically concentrated judiciary. The lowest compliance rate is in the federal system, whose guidelines have probably been more unpopular with judges than guidelines in any other jurisdiction.

2. *Prison Population Growth.* All US jurisdictions experienced substantial increases in prison populations and incarceration rates from the early 1970s until at least the mid-2000s. Several studies have found that states with sentencing guidelines, especially those that also abolished

<sup>31</sup> Although the Pennsylvania guidelines apply to most nontraffic misdemeanors, misdemeanors of the first and second class carry maximum penalties of more than 1 year, which would be considered a felony penalty in most other states. However, third-degree misdemeanors (maximum penalty: 1 year) are comparable to misdemeanors in other states; these crimes (ranked at the lowest severity level, Offense Gravity Score = 1) constituted 29 percent of cases sentenced under the guidelines in 2016, and they had a “conformity” rate of 97 percent (Pennsylvania Commission on Sentencing 2017, p. 83). Excluding these cases, the overall conformity rate falls from 89 percent to 86 percent (data on the use of the aggravated and mitigated sentencing ranges are not reported by offense severity level).

parole release discretion, had slower rates of growth (Reitz 2011, pp. 154–55). Reitz reports that from the year in which each state abolished parole discretion, through 2009, all nine states with parole-abolition guidelines had slower-than-average rates of prison growth than the average for all states during the same periods (p. 153);<sup>32</sup> if the federal system is included, all 10 parole-abolition guidelines systems had slower-than-average growth.<sup>33</sup>

Of course, this was not a controlled experiment. Jurisdictions were not randomly assigned to the parole-abolition-guidelines “treatment” group. Other features of many of those guidelines systems—including the same good-government concerns that led to adoption of parole-abolition guidelines—may have contributed to slower prison growth (Zimring 2005, pp. 336–37).

Another potential problem with the 10-out-of-10 finding reported above is that it is based on comparison of absolute increases in the number of prisoners per capita (per 100,000 population). On this basis prison growth in Minnesota, for example, is much less than all-states growth; from 1980 to 2009 Minnesota’s per capita rate rose by 141 (from 49 to 190), while the all-states rate grew by 314 (from 129 to 443; Carson 2018). But prison growth can also be measured in relative or percentage terms (see, e.g., Zimring 2010; Pew Charitable Trusts 2018). In other contexts, especially when comparing jurisdictions, growth over time is usually expressed in percentage terms. We usually say that the murder rate in city X increased by 10 percent, while the rate increased by 5 percent in city Y. We do not say that the rate increased by two murders per 100,000 residents in city X and three murders per 100,000 residents in city Y.

Comparing prison growth in percentage terms can yield quite different results. Minnesota’s prison rate increased by 288 percent: its 2009 rate was 3.88 times its 1980 rate. That percentage increase was a bit higher than the 243 percent growth in all states during these years.

For some purposes it makes sense to measure prison growth in per capita units, or even in absolute numbers of inmates. Such measures em-

<sup>32</sup> The nine state guidelines systems are Delaware, Florida, Kansas, Minnesota, North Carolina, Ohio, Oregon, Virginia, and Washington.

<sup>33</sup> For annual federal and state prison rates from 1978 through 2016, see Carson (2018). Another parole-abolition guidelines jurisdiction, the District of Columbia, is excluded from the analysis here since most of its custody-sentenced offenders are housed by the federal Bureau of Prisons, which provides no separate breakdown of DC and non-DC inmates.

phasize the fiscal and human costs of escalating prison populations and show which jurisdictions are making the largest contributions to nationwide prison growth (Reitz 2018). But if we want to understand changes in prison populations and the factors that make those populations grow faster or slower in different jurisdictions, we need to examine growth in percentage terms. Equal percentage growth provides a better baseline for comparison: whatever caused Minnesota to have a very low incarceration rate at the outset would likely also cause Minnesota to increase its rate less than states that started at much higher levels. If, as happened, the national rate increased by 300 units from 150 to 450 per 100,000, we would not expect Minnesota's rate to increase from 50 to 350 (a 600 percent increase). If it did, we would immediately want to know: What changed in Minnesota?

Most of the parole-abolition guidelines systems come out the same under the absolute and percentage change measures, but two systems besides Minnesota come out differently: Kansas and the federal system. Both had slower-than-average prison growth when measured by the increased number of per capita units but higher-than-average growth when measured in percentage terms (Carson 2018). Thus, in percentage terms, seven of the 10 parole-abolition guidelines systems had below-average rates of prison growth.<sup>34</sup>

Here is some further detail on the three parole abolition systems with above-average growth. Kansas was only slightly higher than the national average following implementation of that state's guidelines in 1993. Its rate had risen 37 percent by 2009, compared with the all-states rise of 34 percent (Carson 2018).

Minnesota's higher-than-average increase from 1980 to 2009 (288 percent compared with 243 percent for all states) appears largely to be

<sup>34</sup> This record was better than in the six states that abolished parole without adopting guidelines: Arizona, California, Indiana, Illinois, Maine, and Wisconsin (Reitz 2011, pp. 51–52). (As shown in table 1, Wisconsin had advisory guidelines for less than half of the period 1999–2009 after parole discretion was abolished.) Of these six states, only Maine experienced below-average percentage growth in its prison rate; three (Illinois, Arizona, and Wisconsin) had average or slightly above-average growth; the other two (California and Indiana) had much greater-than-average growth (Carson 2018). The eight states that adopted sentencing guidelines but retained parole release discretion provide another point of comparison: half of these states had above-average rates of prison growth after implementing guidelines (Alabama, Arkansas, Pennsylvania, and Tennessee); Utah had average growth; Maryland, Massachusetts, and Michigan had below-average growth (Carson 2018).

explained by higher-than-average increases in felony caseloads.<sup>35</sup> And there were several additional reasons to expect above-average growth in Minnesota after 1980. First, rates tend to grow faster in states with the lowest rates than in high-rate states (Zimring and Hawkins 1991, p. 221; Reitz 2018). There are plausible reasons for this. Low-rate states probably have more marginal offenders who can be shifted from probation to prison (in high-rate states, those offenders are mostly already in prison). Low-rate states are also likely to have more room in their budgets to increase prison costs. Another explanation is more speculative but seems plausible (and testable). In an era of rising sentence severity, low-rate states may feel pressure to “catch up,” if only to allay the public’s fear that “all the bad guys will come here to commit their crimes.”

Second, Minnesota is a relatively prosperous state and could have afforded even greater increases in its prison populations than those that occurred. Third, to the extent that racial hostility and lack of empathy with offenders and their families produce harsher punishments, Minnesota sentencing might be expected to become more severe. The proportions of blacks among the state’s residents and among convicted offenders increased substantially after 1980.<sup>36</sup>

In contrast, the federal system’s 281 percent prison growth rate (from 16 inmates per 100,000 US residents in 1987 to 61 in 2009) was far greater than the all-states growth rate (107 percent) in those years, even though the annual number of sentenced cases grew only modestly faster in federal than in state courts.<sup>37</sup> One plausible explanation is that the federal system lacks the budget constraints that limit state prison growth. Perhaps for this reason the federal commission has never used prison impact assessments to restrain the severity of recommended sentences. The commission appar-

<sup>35</sup> See Frase (2016, sec. III.B.4): from 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, but in later years prison growth exceeded caseload increases. From 2001 to 2015 Minnesota’s prison population, including inmates held in local jails with sentences of over 1 year, increased by 63 percent while the sentenced felony caseload increased by 55 percent (Frase and Mitchell 2017).

<sup>36</sup> Minnesota’s black population more than quadrupled from 1980 to 2005 (Frase 2009), and from 1981 to 2009 the percentage of blacks among sentenced felons rose from 11 percent to 28 percent (MSGC 2017, table 7).

<sup>37</sup> See Carson (2018; prison rates) and Hindelang Criminal Justice Research Center (2018, table 5.23.2010): Criminal Defendants Sentenced in US District Courts, by Type and Length of Sentence, 1945–2010. Sentenced federal offenders increased by 86 percent from 1988 to 2006; as noted previously, the all-states sentenced felony caseload increased by 70 percent during this period.

ently did not view dramatic growth in prison populations, or serious prison overcrowding, as problems it should address.

There are potential selection bias problems in these comparisons. Is it plausible to suppose that the adoption of parole abolition guidelines by itself causes slower prison growth? I believe the answer is yes. Discretionary parole release is subject to politically motivated slowdowns or even temporary cessation.<sup>38</sup> Moreover, the availability of parole encourages judges to impose unreasonably severe prison terms in reliance on the unreliable and often illusory possibility of early release. The variable nature of parole release policy also makes it much more difficult for legislators to predict and take political responsibility for the prison bed and fiscal impacts of severe sentencing laws.

Parole abolition makes these predictions more accurate, especially when combined with guidelines that increase the uniformity of sentences. Average or below-average prison growth is even more likely in a system in which sentencing guidelines are created by an independent commission that takes seriously the goals of avoiding prison overcrowding and setting priorities for prison use and that incorporates prison bed impact projections into its guidelines development process. Projections can be quite accurate and credible, making clear the fiscal and bed impacts of severe sentences and the trade-offs that are often necessary: unless taxes are raised or funds are taken away from nonprison budgets, more severity for crime X requires less severity for crime Y.

3. *Prison Overcrowding.* Guidelines are sometimes adopted as a tool to avoid uncontrolled prison population growth, overcrowding, and all of the dangers associated with overcrowding. These include reduced security for inmates and staff, insufficient prison space and resources for treatment programs, and court intervention. Overcrowding is thus another important outcome measure. It is not necessarily redundant with measures of prison growth. A low-growth jurisdiction can develop serious overcrowding problems if its prisons are already full and the legislature declines to fund new construction. A high-growth jurisdiction can avoid overcrowding by timely expansion of its prison capacity or contracting with private prisons or other states. Guidelines commissions can manage prison growth and avoid overcrowding. They can use their sentencing data to update projected population numbers. These predictions can

<sup>38</sup> For several examples, see Reitz (2011, n. 84).



be used to scale back proposals for severe penalty increases, reduce penalties for some offenses to free up beds for others, and warn the legislature of the need to fund new construction.

However, it is difficult to tell whether guidelines have helped avoid or reduce prison overcrowding. The federal government collects and reports data on state and federal prison populations relative to prison capacities, but these data are based on a single, year-end count that may not be representative of other days throughout the year. Moreover, there is reason to doubt whether these data are comparable across jurisdictions. Definitions of “capacity” vary; some prison systems have raised capacity simply by adding bunks to existing cells (Zimring 1992). Nor is there any reason to believe that all state and federal prison authorities have made equally heavy use of this strategy so that estimates of overcrowding are understated to approximately equal degree across jurisdictions. Finally, available data include only prison custody populations and do not take into account the extent to which jurisdictions have reduced prison overcrowding by placing inmates in overcrowded local jails.

Subject to these caveats, here is what the overcrowding data showed at year-end 2007, 2008, and 2009 (Bureau of Justice Statistics 2008, 2009, 2010). These were the years when, depending on the jurisdiction, prison rates stopped rising (Carson 2018). These data are reported in two ways: inmates as a percentage of the highest measure of capacity reported for that jurisdiction and inmates as a percentage of the lowest reported capacity measure.<sup>39</sup> In table 2, “overcrowding” is defined as exceeding 105 percent of the lowest reported capacity measure. The 105 percent cutoff is used to disregard minor, possibly temporary, overcrowding; use of the lowest-capacity measure recognizes that prison officials may have reasons to overstate true capacity.

Table 2 shows the overcrowding rates for these three years, broken down by sentencing system type (Alabama is treated as a nonguidelines state because its guidelines became effective only for crimes committed on or after October 1, 2006).

These data suggest that guidelines jurisdictions have been more successful in avoiding prison overcrowding than nonguidelines systems.

<sup>39</sup> For example, in 2008, New York reported that its “design” capacity was 57,403, its “rated” capacity was 59,830, and its “operational” capacity was 60,978, so the first of these represents the “lowest reported capacity measure.” Connecticut did not report capacity information in any of these years; Maine, Illinois, and Nevada did not report in 2007, and Oregon did not report in 2009.

TABLE 2  
Prison Overcrowding in States With and Without  
Guidelines and Discretionary Parole

System Type (No. of Systems in 2008)	Percent of Systems That Were Overcrowded in			3-Year Means
	2007	2008	2009	
Guidelines with parole abolition (10)	60	50	44	51
Guidelines with parole retention (7)	29	14	29	24
All guidelines systems (17)	47	35	38	40
No guidelines, parole abolition (6)	n.a.*	67	50	58
No guidelines, parole retention (27)	58	44	52	51
All nonguidelines systems (33)	57	48	52	52
All reporting jurisdictions (50)	53	44	47	48

SOURCE.—Bureau of Justice Statistics (2008, 2009, 2010).

\* Two of the six states in this category did not report capacity data.

Within each group, however, parole retention systems were more successful. The difference between parole abolition and retention was particularly strong for states with guidelines; perhaps guidelines states that retained parole did so precisely because they wanted to (and did) use parole release as a means of combating overcrowding. These findings suggest the need for parole abolition guidelines systems to include some sort of emergency release mechanism to relieve prison overcrowding, as the MPCs recommends (§ 305.8).

4. *Other Guidelines Impacts.* Little is known about differences among and between guidelines and nonguidelines jurisdictions concerning two subjects that suffuse writing about American sentencing: racial disparities in imprisonment and whether overall punishment severity becomes more proportionate to crime seriousness.

a. *Racial Disparity.* Sentencing guidelines reforms seek to reduce sentencing disparities among comparable offenders, particularly disparities related to race and ethnicity (King and Light 2019). Evaluations conducted by commissions and outside researchers have generally found that this goal was achieved: racial disparities were reduced (Tonry 1996). However, these studies have mostly viewed offense severity and offender prior record as control variables when defining groups of “similarly situated” offenders; and in some guidelines systems it is possible that the guidelines have changed these control variables in ways that actually increase racial disparities. The reasons are that guidelines reforms often seek to increase

penalties for violent crimes, criminal history scores may increase under guidelines, and some nonwhite offender groups are more likely to be convicted of violent crimes or have more extensive prior records.

There do not appear to have been any national-level studies comparing racial disparity in states with and without guidelines, controlling for relevant confounding variables. Overall, there is no indication that guidelines states have higher rates of disparity. As of 2014, the most recent year for which national data are available, the 17 states that currently have some form of sentencing guidelines were widely distributed across the racial disparity rankings, with about equal numbers in the top (higher disparity) and bottom halves of the rankings.<sup>40</sup>

*b. Offense Proportionality.* A number of sentencing guidelines reforms are meant to give increased weight to retributive punishment goals and thus to increase the proportionality of sentence severity relative to offense severity, thereby “making the punishment fit the crime.” However, as noted above, some guidelines systems give great weight to the offender’s prior record of convictions in making dispositional and durational decisions. There is an inherent trade-off: giving more weight to prior record means giving less weight to offense severity. Thus, in some guidelines jurisdictions, the adoption of guidelines may have reduced offense proportionality.

No studies have sought to examine whether prior record receives greater weight as a sentencing factor following implementation of guidelines. There is limited evidence that guidelines cause criminal history scores to increase over time (Frase and Mitchell 2017; MSGC 2017). Such increases may occur because prosecutors file and retain a larger number of separate charges in order to increase the severity of current and future recommended sentences (MSGC 1984). It is possible that criminal history records have become more extensive even in systems without guidelines because of improved data systems, the criminogenic effects of mass incarceration, or both.

## II. Major Sentencing Policy Issues

Section I summarized current knowledge about the nature, operation, and effects of guidelines systems. This section addresses questions for

<sup>40</sup> Nellis (2016, table C) reports ratios of black to white per capita prison rates, by state.

the future. What are the policy implications of experiences with guidelines sentencing in America? What are the essential features of a workable and worthwhile system? What additional features seem highly desirable, even if not essential? Can we reach consensus on what's good and what's not? What are the major arguments pro and con concerning issues lacking consensus? What additional research is needed to address these issues?

#### *A. Essential Features*

Here are features I believe are essential to well-designed guidelines systems and for which I believe there is widespread support. These features are present in most guideline systems and model codes or standards, or the arguments for them are in my view overwhelming. However, I do not mean to suggest that a system lacking one or more of these features should be rejected if proposed or abolished if it already exists. The success of sentencing reform is highly dependent on context (Zimring and Hawkins 1991, pp. 156–62, 201–4).

1. *A Permanent, Balanced, Independent, and Adequately Funded Sentencing Commission.* Every jurisdiction needs the kind of sentencing commission found in the best state systems and recommended by the ABA Standards and the MPCs. In theory, the same work could be done by a legislative committee or subcommittee. California and a half dozen other states tried that approach in the 1970s; but several of those abandoned it, and no state has adopted it since 1979. As Zimring (1976) long ago warned, legislatures are poorly equipped to develop well-considered rules to cover case-level sentencing and assess the effects of policies after they are implemented. Criminal codes are mostly too crude to use as a template. Legislators are subject to strong law-and-order political pressures. Legislative committees are unlikely to develop and maintain the necessary statistical databases and substantive policy expertise.

A sentencing commission can develop such data and expertise and is at least partly insulated from direct electoral pressures. To do its job well, a commission must be adequately funded, free of legislative or executive branch interference, balanced politically, and representative of the most important actors and perspectives within and outside the criminal justice system. The commission must also be permanent. Some states abolished their commissions after guidelines went into effect, but that is shortsighted and unwise. Guidelines need monitoring and updating on a reg-

ular basis or they will not achieve their purposes (and will eventually be ignored by judges and others). Given the huge costs and impacts of criminal punishment, creating and retaining a well-funded sentencing commission is money well spent.

2. *Presumptive Typical-Case Sentences with Specified Departure Criteria.* Judges must be given at least two kinds of guidance. First, there must be a common starting point for each kind of case, consisting of the sentence or sentence range deemed appropriate in that jurisdiction. Second, there must be standards and illustrative (but not exclusive) lists of permitted and forbidden factors to consider when deciding whether and by how much to depart from the applicable starting point. All guidelines systems have the first and most the second. These features are essential not only to guidelines but to any system governed by the rule of law. Judges need at least this much guidance when exercising their awesome powers over the liberty, property, and future life chances of offenders (and their potential victims).

3. *Hybrid Sentencing Theory.* Presumptive sentences and departure standards and factors must accommodate both retributive and crime control sentencing purposes. No guidelines system—indeed, no modern sentencing system of any type—has ever adopted a purely retributive or a purely crime control-focused punishment model, nor should they. Retributive values and the pursuit of crime control goals are both essential features of any workable and worthwhile sentencing system.

Fundamental fairness to offenders demands that they never be punished more severely than they deserve, even if greater severity would provide cost-effective crime control benefits. The importance of avoiding undeservedly severe punishment is something about which all proponents of retributive values agree, even when they strongly disagree about other aspects of deserved punishment. “Positive” desert theories assert that society has the right and the duty to impose exactly the deserved punishment, or at least a punishment falling within a very narrow range of severity (Moore 1997). Negative (or “limiting”) retributive theories posit a range of deserved punishment. Some negative retributive accounts emphasize the imprecision of desert assessments and envision a range of “not undeserved” punishment (see, e.g., Morris and Tonry 1990; ALI 2003). Other negative accounts (e.g., Armstrong 1969; Frase 2013) view desert assessments as reasonably precise, at least as to relative degrees of blameworthiness. These writers propose an asymmetric theory under which it is more

important to avoid punishment in excess of desert than punishment less than desert.<sup>41</sup>

Crime prevention is an essential government function, and governments must spend their limited funds efficiently. A purely retributive model would often require significant public expenditures, and significantly burden offenders and their families, with limited crime control benefits. Benefits may be outweighed by their costs and burdens or could be achieved more effectively or efficiently with nonpunitive measures. Hybrid guidelines models should specify that, within outer bounds set by retributive principles, custodial sanctions and conditions of community release should be no more onerous than is necessary to achieve their crime control purposes (the parsimony principle).

4. *Balance between Uniformity and Flexibility.* Guidelines must strike and preserve a workable balance between rule and discretion. Rules tend to make decisions more consistent and predictable. Discretion promotes flexibility and efficiency, allowing atypical case facts to be considered in order to do justice and avoid unnecessary burdens and expense. Mandatory minimum sentences statutes are rules that seek to impose excessive uniformity (in practice, they are only as uniform as prosecutors want them to be). Traditional indeterminate sentencing, with unfettered judicial and parole discretion, allows excessive flexibility.

Many guidelines systems are more or less “advisory,” with little or no appellate review even of departure sentences. I believe (and so did the drafters of the MPC) that advisory guidelines allow too much case-level flexibility. Legally binding guidelines with moderate appellate review provide a better balance between rule and discretion (Reitz 1997). Appel-

<sup>41</sup> Under the asymmetric conception of negative desert limits, undeservedly severe punishment is a serious abuse of government power, whereas failure to give offenders their full just deserts raises different issues (fairness to other equally culpable offenders who were punished more severely, fairness to victims and their families). For further discussion, see Frase (2013). Asymmetric desert limits may be appropriate even under a positive retributive account (Frase 2018*a*). Desert assessments can err in both directions—too much or too little. In assessing these inherent risks of error, a positive retributivist could decide that imposing punishment in excess of desert is normatively “worse” than imposing a less than fully deserved punishment. Such asymmetry is also a feature of utilitarian/consequentialist punishment models that incorporate the concept of parsimony—no greater severity than necessary to achieve crime control and other practical goals; in these models there is no corresponding directive to avoid penalties that are less severe than necessary. Asymmetry is a central feature of modern criminal justice systems: the requirement of proof beyond reasonable doubt and other procedural rules reflect deliberate choices to err on the side of too few criminal convictions rather than too many.

late review of sentences serves to clarify and enforce guidelines rules and to aid in development of sentencing policy as common-law courts have traditionally done, taking into account factual variations and patterns that a sentencing commission cannot foresee and regulate in advance.

A workable balance is also necessary in the degree to which guidelines rules are prescriptive (changing prior sentencing norms) or descriptive (encouraging judges to follow existing norms more consistently). Of course, when existing sentencing practices are demonstrably unfair or wasteful, an effort must be made to change them. But existing practice will often embody practical wisdom or, at least, strongly held views shared by judges and other practitioners. If guidelines rules are too prescriptive, they invite widespread evasion. When penalties seem too severe, judges are more likely to depart downward, and prosecutors are more likely to grant charging leniency. When guidelines recommendations seem too lenient, prosecutors can file and retain additional counts.

All of these processes occurred in Minnesota, where the guidelines commission took a relatively prescriptive approach (Frase 1993). The commission sought to increase use of imprisonment for people convicted of high-severity crimes who had low criminal histories. This goal was substantially undercut by charging leniency combined with high rates of downward departure. The commission sought to decrease imprisonment rates for people convicted of low-severity crimes who had sizable criminal histories. This was increasingly undermined by rising criminal history scores (due, at least in part, to prosecution decisions) that pushed many low-severity offenders across the guidelines grid to the recommended prison zone (MSGC 1984).<sup>42</sup>

5. *Resource and Demographic Impact Assessments.* Guidelines permit more accurate projections of the size and composition of future custody and supervision populations. This allows a jurisdiction to set priorities in the use of limited correctional resources and to avoid overcrowding by expanding capacity, adjusting recommended sentences for some crimes, or both. Such projections, especially when factored into drafting and revision processes, can help a system control the growth of its prison population and avoid serious overcrowding problems.

Similar projections are used in some guidelines states (e.g., Minnesota, Oregon) to predict the effects of current or proposed penalties on racial

<sup>42</sup> For an earlier summary of effects of prescriptive changes in several guidelines systems, see Tonry (1996, pp. 49–54).

and ethnic disparities. When a penalty is projected to cause or increase prison disparity, the commission and the legislature can examine it more closely to make sure it has a strong policy rationale and is narrowly tailored to minimize its disparate impact. There is room for debate as to how policy makers should respond to predicted new or increased racial disparate impacts.

*B. Contested Guidelines Policy Issues—How Should They Be Resolved?*

Substantial policy disagreements are raised by many aspects of guidelines sentencing. Here are some of the major disagreements and my thoughts about the underlying policy issues. Some relate to coverage—which crimes and sentencing issues should be regulated? Others relate to design details that determine how the system works.

1. *Coverage.* Guidelines systems vary considerably in terms of whether, and to what extent, they regulate each of the following sentencing matters.

*a. Sentencing of Misdemeanor Offenses.* Limiting guidelines to felonies, as a majority of guidelines systems do, makes sense in terms of reform priorities. The more severe penalties given in felony cases impose greater costs and create greater potentials for disparity. However, failure to regulate misdemeanor sentencing creates problems because of frequent overlap between penalties for more serious misdemeanors and less serious felonies. Using costly or scarce community-based sentences for misdemeanants means that fewer of those resources are available for felons. There are also issues of fairness, proportionality, and crime control when some misdemeanants are punished more severely than some felons; that is sure to occur if misdemeanor sentencing is unregulated. These problems will be worse if guidelines do not regulate conditions of nonprison felony sentences.

*b. Sentencing of Multiple Current Offenses.* One of the curious things about guidelines is their inconsistent treatment of repeat offenders. Guidelines closely regulate the ways in which judges take into account convictions entered before the date of the current sentencing, but sentencing of multiple current convictions is not regulated at all in the majority of systems. Judges retain unfettered discretion to sentence these multiple convictions concurrently, consecutively, or with a mix of concurrent and consecutive sentences.<sup>43</sup> One reason is the complexity of the subject. Multiple offenses may be closely related in time and place,

<sup>43</sup> For a variety of perspectives on sentencing of multiple current offenses, see Ryberg, Roberts, and de Keijser (2018).



loosely related, unrelated, similar, or dissimilar. They vary in their underlying circumstances and motivations (single or multiple objectives), similarity to prior offenses, and degree of police inducement (e.g., selling or buying drugs). Similar concurrent/consecutive choices arise when offenses are sentenced at the same time but in different courts or when the offender is serving a previously imposed sentence. Given this complexity, guidelines should provide only broad presumptive rules subject to departure (Frase 2018*a*). Most sentences for multiple offenses should be presumptively concurrent, with a few types being presumptively consecutive. Jurisdictions should also make use of “concurrent-plus” sentencing options that take account of additional convictions but recommend sentences shorter than under full consecutive sentencing. Each of these solutions has been implemented in a number of guidelines states.

*c. Conditions of Nonprison Sentences.* Most guidelines regulate only decisions about who goes to prison and for how long. This choice reflects in part the desire to give reform priority to the penalties imposing the highest costs and with the greatest potential for serious disparities. But nonprison sentences can also be onerous, especially when jail terms up to 1 year are combined with fines, other probation conditions, or both. The absence of detailed guidelines for community-based felony sentences reflects the complexity and case-specific nature of these decisions and a desire to retain some local control over sentences, particularly when they are paid for locally and must accommodate widely varying local resources.

Of course, state funding could be provided to expand and maintain adequate community-based sentencing options. Such funding should be provided, along with a charge-back formula, in order to eliminate the “correctional free lunch” problem (Zimring and Hawkins 1991, pp. 211–15). Local judges and prosecutors in almost all states are free to commit state prison resources, without fiscal or political accountability, by imposing prison terms on offenders who ought to be sanctioned in the community. At a minimum, guidelines should do as Oregon and Washington have done: place presumptive upper limits on the severity of nonprison sanctions (maximum jail days and “sanction unit” equivalents) for cases not ordinarily warranting state imprisonment.

*d. Decisions to Revoke Probation and Postprison Release.* Guidelines systems impose few limits on decisions to revoke conditional release, even when a substantial prison term may result. Revocations impose substantial public and private costs and in some states account for a high percentage of all prison admissions. Unregulated revocation decisions are

also another source of sentencing disparity. Decisions to revoke release can be difficult to regulate if they are primarily offender-based and focus on whether the offender is too high-risk to remain at liberty or not amenable to supervision. But to the extent that revocation is intended to sanction and deter violations of release conditions, it involves the kind of “punishment” decision that can and should be regulated, at least as to sanction severity. Jurisdictions wishing to limit revocations can also do so by eliminating unnecessary release conditions and lengthy periods of supervision (thereby reducing alleged violations) and by providing guidance, or presumptive rules, specifying kinds of release violations that justify revocation. Revocations to prison and their impacts on prison populations can be further limited by rules that limit the duration of prison or jail sanctions used to sanction violations.

*e. Discretionary Parole Release.* Some US guidelines systems have abolished discretionary parole release. A substantial minority have not. The MPCs recommends abolition; that in my view is the right choice. Unregulated parole release discretion is, *prima facie*, an affront to transparency and the rule of law; prison duration is a sentencing decision that should be made by a judge, in a public courtroom, with the full due process protections of sentencing proceedings. Proponents of retaining parole discretion have a heavy burden of proof. I do not believe they can satisfy it.

There is no reason to believe that parole boards can accurately and consistently assess whether individuals have been rehabilitated or for other reasons are less likely to reoffend. Prisoners know how to “act reformed,” and behavior in a prison environment is sometimes a poor predictor of behavior in the community. Of course, parole guidelines can make these decisions more consistent. They can also take into account dynamic high- or low-risk factors that cannot be known at the time of sentencing. One of the most reliable factors of this type is whether the offender completed assigned prison programming. But it is not necessary to retain parole discretion in order to take this into account; good-conduct credits can and should include credit for program completion. Parole discretion is likewise not needed to take advantage of two other important recidivism predictors: pre-prison offending and age at release; both can be known or estimated at the time of sentencing.

Some have argued that parole discretion is a necessary safety valve to relieve prison crowding or that parole abolition may cause prison populations to swell when it becomes public knowledge how long offenders actually spend in prison (Zimring 1976). It appears, however, that aboli-

tion is actually associated with slower prison growth—but only when combined with adoption of sentencing guidelines. On the other hand, available data suggest that, with or without guidelines, prison overcrowding is more often found in systems that have abolished parole release discretion than in states that retained it.

One solution to overcrowding is to adopt “control release” procedures as recommended by the MPCCS (§ 305.8). The code provides that when prison population exceeds operational capacity (which the code defines) for 30 days, the director of the department of corrections may declare “an overcrowding state of emergency” and advance inmate release dates by specified amounts, award additional good-time credits, or advance individuals’ release dates on the basis of reliable risk-assessment measures.<sup>44</sup>

Here are some other essential features of any system, with or without guidelines, that chooses to abolish parole release discretion:

- Offenders should receive substantial sentence reductions for good conduct and program participation. Any particular figure is arbitrary, but higher credits are needed in systems with relatively long prison terms. The credit should exceed the 15 percent granted in the federal system and should generally fall within the 30–35 percent range adopted by most guidelines states and the MPCCS (§ 305.1).
- There should be other grounds for exceptional early release. A “second-look” procedure, as recommended by the MPCCS (§ 305.6), would permit courts to reconsider and reduce very long sentences that no longer seem appropriate (and that in our time are rarely commuted). Other procedures should permit release for advanced age, serious illness or infirmity, exigent family circumstances, or other compelling reasons (§ 305.7).
- Periods of postprison supervision and sanctions for violations of release conditions should be independent of the remaining unserved prison term at the time of release. This is the approach in several guidelines systems and is endorsed by the MPCCS (§ 6.09[5]). Supervision periods and sanctions should be as short as possible and be selected in light of research on recidivism rates after varying periods of time on release. In systems retaining parole, and in some parole abolition systems, the supervision period, and the maximum sanction for

<sup>44</sup> The cited Model Penal Code provision also recommends procedures to deal with jail, probation, and postprison supervision populations that exceed operational capacity.

release violations, are each set equal to the remaining prison term. This provides both too much and too little control. Offenders who “max out” their original sentence before release (many of whom are high-risk) have little or no period on supervision and little or no threatened revocation sanction. Those released earliest (many are low-risk) have the longest supervision term and the most time in prison if they are revoked.

*f. Other Important Decisions That Are Rarely Regulated but May Need to Be.* Important decisions that affect sentencing occur before sentencing occurs. These decisions, which no guidelines system has adequately addressed, can fundamentally undercut guidelines rules and undermine guidelines goals.

Prosecutorial Charging and Bargaining: Prosecutors “sentence” large numbers of offenders every day. They effectively impose the most lenient possible sentence when they decline to file provable charges. They impose probation-like obligations as conditions of pretrial diversion. They use their charging powers to expand or contract the judge’s sentencing options when they decide whether to invoke a mandatory penalty or to select a conviction offense to trigger a recommended guidelines sentence they prefer. They decide whether to allow concurrent sentencing and shape the offender’s criminal record when they dismiss or retain provable counts. Washington is the only guidelines state that has attempted to deal with prosecutorial discretion, and it did so only to a very limited extent (Boerner and Lieb 2001). No guidelines jurisdiction has addressed pretrial diversion and deferred adjudication. The MPCs do (§§ 6.02A and 6.02B).

Failures to regulate prosecutorial discretion result from practical and political difficulties. Even so, the nature and scope of the problem need recognition. In any given case, the prosecution charging decision may be too severe or too lenient. Unreasonable severity is not a serious problem in well-designed guidelines systems that set reasonable penalty levels, avoid mandatory minimums, and retain substantial judicial discretion to depart downward from typical-case guidelines. In systems lacking these safeguards, prosecutorial discretion is more likely to undermine the guidelines’ goals. Thus one solution to excessive prosecutorial severity is to create well-designed sentencing rules.

Excessive prosecutorial leniency is unlikely to pose a systemic problem in any American jurisdiction. Nor is there any practical way to prevent

the occasional grant of excessive leniency. US prosecutors define their roles in “adversary” terms (Pizzi 1999) and face electoral pressure not to appear “soft on crime.” In most cases they are motivated to seek as severe a sentence as the evidence will support.<sup>45</sup> Unless victims are given broad rights of private prosecution, there is no practical way for courts to identify, let alone control, excessive leniency.

**Pretrial Release and Detention Decisions:** Offenders in pretrial detention receive a “custody sentence” in all but name. Their detention makes it more likely they will be convicted and receive a formal custody sentence. If released pending trial, conditions are often indistinguishable from probation conditions. No guidelines system has addressed these problems, in part because their solution would almost certainly require guideline rules governing nonprison sentences (now largely absent from existing systems). There is no reason in principle why guidelines could not set presumptive limits for pretrial detention and regulate conditions of pretrial release. Rules could provide that offenders normally may not be held in pretrial detention longer than the recommended maximum jail or prison sentence under applicable sentencing guidelines and that conditions of release in the aggregate may not be more onerous than could be imposed following conviction. However, without stricter standards on prosecutorial charging decisions, such limits might encourage (further) overcharging.

*2. Design and Details.* Numerous details need to be considered when designing a guidelines system about which little consensus has emerged favoring one approach over another. Here is a short, high-priority list.

*a. Use of a Grid, Multiple Grids, or No Grid.* Sentencing grids convey a lot of information in a simple form but tend to limit sentencing considerations to two dimensions. Multiple grids allow different formulas for different kinds of crimes but make inconsistency in degrees of severity or other treatment more likely. Worksheets allow more factors to be considered and permit criminal history to be given different definitions and weights for different offenses (Hester et al., forthcoming). However, worksheet calcula-

<sup>45</sup> Even when American prosecutors are appointed, as in the federal system, they do not seem predisposed to grant undue leniency (I base this conclusion on 35 years of supervising students in my law school’s federal prosecution and defense clinics). For that reason, the much-criticized “relevant conduct” enhancements under the federal guidelines (USSC 2016, sec. 1B1.3), designed to counteract prosecutorial leniency, appear to be addressing a nonexistent problem.

tions tend to be more complex, and their greater detail and seeming completeness may unduly discourage departures.

Another set of issues concerns relations between the range of recommended sentences and statutory minimums and maximums. Some guidelines systems use mandatory minimum penalties as a base and build up, while others set guidelines sentences independently, subject to override by a mandatory. The latter approach gives less weight to mandatorics and thus is preferable because mandatory penalties fail to provide a reasonable balance between rule and discretion. Some guidelines systems use statutory maximums to set the tops of the recommended ranges for offenders with the highest criminal history. That seems unwise; it occupies all of the statutory range, making sentence enhancements based on aggravated offense factors impossible. It also overpunishes high-history offenders whose crimes lack such factors.

*b. Criminal History Scoring and Impact on Recommended Sentences.* Existing guidelines rules on criminal history vary greatly. Differences include their stated rationales; the choice and weighting of score components; look-back limits (decay and gap rules); limits on eligibility for the highest score categories; validation of scores and score components as proxies for recidivism risk; magnitude of enhancements; and overall effects of enhancements on prison costs, prison-use priorities, racial disparities, and sentence proportionality relative to the conviction offense. Criminal history enhancements need closer scrutiny and curtailment in all of these areas (Frase 2013; Frase et al. 2015; Frase and Roberts, forthcoming). Rationales need to be clearly stated. If one rationale is that prior record is a proxy for recidivism risk, the predictive accuracy and efficiency of the score and its components must be validated. Problematic score components need especially close attention: juvenile record, misdemeanor convictions, custody status points, heavy weighting of higher-severity prior felonies, and formulaic enhancement based on prior and current offense similarity. Look-back periods need to be shorter (or added where they are currently missing), with more credit given for crime-free gap periods. Eligibility for inclusion in the highest history score categories should require one or more violent or very serious prior crimes. Finally, all of the potential adverse effects of each system's criminal history enhancements (prison costs, racial disparities, etc.) need to be measured and kept as low as possible.

*c. Use of Validated Risk Assessment Tools at Sentencing.* Very few guidelines systems use such tools, and those that do seem to use them only after the

recommended sentence has been decided, based solely or primarily on offense severity and prior record. This may reflect the continued influence on guidelines policy makers of just deserts sentencing theory or an assumption that such assessments should be based only on prior convictions that have been reliably determined by a court. However, most criminal history scores are not well designed to serve as proxies for recidivism risk. They typically include prior record factors of unknown or doubtful risk and ignore nonprior record factors that are known to be strongly associated with lower or higher risk.

The use of nonrecord factors must, however, overcome important normative concerns. Strong objections are made to such factors as marriage or other family circumstances, past and current employment, drug and alcohol use, current or end-of-sentence offender age, and gender. These factors are contested because they do not (or often do not) reflect culpable offender choices, and many have a disparate negative impact on nonwhite offenders (Starr 2015; Tonry 2019). The strength of normative objections to contested nonhistory factors may depend on how they are used (Frase 2014). For example, it may be appropriate to mitigate penalties for middle-aged and older offenders even if we conclude that fairness prohibits enhancing penalties for offenders in their late teens and early 20s (who cannot help being in high-risk age groups).

Another important variable concerns the kinds of future offending sought to be prevented. Many risk assessment instruments were validated using broad outcome measures such as arrest or conviction for any crime within  $X$  years. Granted, it is much more difficult to predict serious violent crimes, since they are relatively rare events. But if and when risk assessment tools are developed that predict such crimes with relatively few false positives, it can be argued that fairness to potential victims justifies using them (Frase 2011). That may be true even if they rely on socioeconomic or legal lifestyle choices, as long as sentence severity does not exceed the offender's deserved punishment for the current offense or offenses.

*d. What to Do about Racial Disparate Impacts.* Many sentencing rules have an adverse disparate impact on nonwhite offenders. These result from not only racial differences in the type and seriousness of conviction offenses (which may or may not reflect racial differences in behavior) but also racial differences in prior record. Black and Native American offenders tend to have higher criminal history scores than whites, especially non-Hispanic whites (Frase 2009, 2013; Frase, Roberts, and Hester,

forthcoming *a*). Some guidelines systems have taken advantage of improved data and increased sentence predictability to examine past and predicted future impacts of guidelines rules on racial disparity. Demographic impact assessments allow a commission to identify and measure foreseeable disparate impacts; they should be an essential feature of a guidelines system.

But how should the results of these assessments be used? Some (Mauer 2007; Tonry 2011) argue that any sentencing rule with a demonstrated or predicted disparate impact should be presumed invalid, with the burden being on proponents to provide data and convincing arguments to justify the rule. But we need much more debate on what justifications could overcome such a presumption. In short, when are demonstrated racial disparate impacts unacceptable? The easiest cases are those in which the rule lacks any convincing justification. Only a few rules meet this standard; the crack/powder distinction is a clear example. Strong objections can also be raised when the goals supposedly achieved could be equally well served by a more narrowly tailored rule with less disparate impact. An example is overbroad “school-zone” drug laws that, given residential patterns, are much more likely to apply to nonwhite offenders (such laws are often unnecessarily broad, e.g., enhancing penalties for crimes committed in the middle of the night; Mauer and Cole 2011).

A substantial argument can be made against penalty enhancements that reflect racial profiling or other systematic bias (e.g., black offenders have more drug priors than whites because of law enforcement targeting, not racial differences in drug offending). Many enhancements with disparate racial impact could also be attacked because the harms they cause (including worsening of disadvantage and exacerbating entrenched social inequalities) outweigh the value of retributive or crime control punishment (Frase 2009, 2013). Ruth and Reitz (2003, pp. 103, 116) argued that a penalty with disparate impact should be allowed only if it helps prevent serious crimes.

### III. Priority Issues for Research

Much is unknown about the effects of variations in guidelines systems on outcomes and inmate populations. Examples include the composition and permanence of the commission, use of grids versus worksheets, each system’s location on the mandatory-to-advisory continuum, and retention or abolition of parole release discretion.



Some research topics are primarily methodological; solving these puzzles will open up greater potential for comparative research across diverse guidelines systems:

- measures of “disparity” and disparity reduction that are comparable across jurisdictions;
- measurement of prison, probation, and postprison supervision population growth (e.g., per capita or percentage change), and how to relate those measures to variations in systems’ structure, design, or operation;
- measures of prison overcrowding and of the extent to which supervision populations exceed operational capacity that are comparable across jurisdictions.

Other priority research topics concern whether some kinds of guidelines are better able to achieve widely shared sentencing reform goals:

- How do different kinds of guidelines relate to variations in sentencing disparities, growth in prison and jail populations, correctional overcrowding, and levels of racial disproportionality?
- Do prior records receive more weight at sentencing in jurisdictions with guidelines than in those without guidelines? Do criminal history scores rise more under guidelines than under nonguidelines systems, and if so, why?
- How well do criminal history scores, score components, and non-record risk factors predict recidivism, especially for violent or other serious crime? This research has been done only for the federal system, Minnesota, Pennsylvania, and Virginia.
- How well have less commonly employed guidelines provisions worked in practice? Examples include coverage of misdemeanors, structuring of sentences for multiple current convictions, limits on severity of non-prison sentences, and limits on custodial sanctions for violations of probation and postprison release conditions.
- Are some kinds of guidelines more or less susceptible to being undermined by unregulated prosecutor charging and plea bargaining decisions?
- Should pretrial detention, pretrial release conditions, pretrial diversion, and deferred adjudication be regulated, and if so, how?
- What do judges, prosecutors, defense counsel, offenders, probation officers, and other correctional officers think about various guidelines

rules, and how do their opinions support or undermine guidelines reforms?<sup>46</sup>

- What is the public's opinion about guidelines rules, and how well do such attitudes reflect the content of the rules?<sup>47</sup> To what extent does public opinion support or undermine guidelines reforms?
- Why have guidelines been adopted, or survived, in some states but not in others?

#### IV. Conclusion

Although American guidelines systems share many common features, each is unique in some ways. This diversity is not surprising, given the distinctive histories and politics of each jurisdiction. In the end, sentencing reform is highly contingent as to both place and time (Zimring and Hawkins 1991). Nevertheless, it is useful to identify and seek to expand areas of consensus about what a well-designed sentencing guidelines system should look like. I have proposed a short list of essential features of such a system and have discussed policy arguments, practical considerations, and research that may help to resolve other, more contested issues. A number of guidelines states have adopted most of the essential features I identify and satisfactorily resolved many contested issues. Overall, and recognizing that any “best of” list is inherently imprecise and subjective, I believe that the guidelines systems in five states qualify, each in its own way, as models: Kansas, Minnesota, North Carolina, Oregon, and Washington (for further details, see Frase [2013, chap. 3]).

But even if we can eventually agree on what an ideal guidelines system should look like, some jurisdictions will be unable or unwilling to adopt all of its features. In some, an incomplete system may be “as good as it gets.” Such guidelines may be better than if there were no guidelines at all. This characterization fits the post-*Booker* advisory federal guidelines, but also the guidelines of some states. Pennsylvania, for example, retained parole release discretion, has minimal appellate review or interpretive case law, and has experienced much faster prison population growth than the

<sup>46</sup> The federal sentencing commission has conducted a series of surveys of judges' views about the operation of the guidelines (USSC 2003, 2010, 2015).

<sup>47</sup> For a survey of public attitudes about punishment of four federal crimes (drug trafficking, bank robbery, immigration offenses, and fraud), with comparisons to the corresponding federal guidelines sentencing range, see USSC (1997).

average state (Carson 2018). However, Pennsylvania's guidelines usefully structure nonprison sanctions and provide guidance on the choice of punishment purposes. Pennsylvania's commission has an active research program and has conducted cutting-edge work on risk assessment scales and use of criminal history as a predictor of recidivism.

Saying that an incomplete guidelines system is better than none poses the question, what alternative sentencing structures are possible? No other sentencing reform of comparable scope has been implemented in even a single US state or federal jurisdiction in the past four decades. The only competing model is the statutory presumptive sentence approach that California and several other states adopted beginning in 1976, but 1979 was the last year such a system was adopted. In theory it would be possible to design a sentencing system based on restorative justice principles, but no such effort has been made in any American jurisdiction. Nor, to my knowledge, has any other comprehensive sentencing reform model been proposed or widely discussed.<sup>48</sup> By contrast, 22 jurisdictions adopted guidelines, and 19 still use them.

There are two basic choices, each with two alternative versions: sentencing guidelines and traditional unfettered judicial sentencing, each with or without parole release discretion. Discretionary sentencing and parole, however, are no more defensible today than they were when they began to fall from favor in the 1970s (ALI 2003; Frase 2013). That is why both the ABA (1994) and the ALI (2017) favored parole-abolition sentencing guidelines. Parole-abolition guidelines strike a better balance between rule and discretion than discretionary sentencing and releasing and permit more rational, fiscally responsible, and transparent decisions to be made about who should go to prison and for how long. They have proved to be workable and sustainable in a variety of states, in some cases for decades.

<sup>48</sup> The Justice Reinvestment (JRI) programs sponsored in recent years by the Council on State Governments (2018) could perhaps be seen as promoting systemwide reforms comparable in scope to sentencing guidelines. But JRI programs focus on efficient achievement of crime control goals and do not give much attention to widely felt concerns about sentencing proportionality and disparity. It is also unclear what the long-term effects of JRI programs will be, especially where those programs have not created or strengthened state and local institutions involved in criminal justice operations and tasked with long-term planning (including, and especially, sentencing commissions).

Unstructured, highly discretionary punishment should be unacceptable in any state claiming to be governed by the rule of law. There is no better reform alternative than the parole-abolition guidelines model.

## REFERENCES

- ABA (American Bar Association). 1979. *Standards Relating to the Administration of Criminal Justice*. 2nd ed.: *Sentencing Alternatives and Procedures*. Washington, DC: American Bar Association.
- . 1994. *ABA Standards for Criminal Justice: Sentencing*. 3rd ed. Washington, DC: American Bar Association.
- ALI (American Law Institute). 2003. *Model Penal Code: Sentencing, Report*. Philadelphia: American Law Institute.
- . 2017. *Model Penal Code: Sentencing, Proposed Final Draft*. Philadelphia: American Law Institute.
- Arkansas Sentencing Commission. 2018. *Sentencing Standards Grid Offense Seriousness Rankings and Related Material*. <https://www.arsentencing.com/>.
- Armstrong, K. G. 1969. "The Retributivist Hits Back." In *The Philosophy of Punishment: A Collection of Papers*, edited by H. B. Acton. London: Macmillan.
- Boerner, David, and Roxanne Lieb. 2001. "Sentencing Reform in the Other Washington." In *Crime and Justice: A Review of Research*, vol. 28, edited by Michael Tonry. Chicago: University of Chicago Press.
- Bureau of Justice Statistics. 2008. *Prisoners in 2007*. Washington, DC: US Department of Justice.
- . 2009. *Prisoners in 2008*. Washington, DC: US Department of Justice.
- . 2010. *Prisoners in 2009*. Washington, DC: US Department of Justice.
- Carnes, Teresa. 1993. "Sentencing Reform in Alaska." *Federal Sentencing Reporter* 6:134–37.
- Carson, E. Ann. 2018. "Imprisonment Rate of Sentenced Prisoners under the Jurisdiction of State or Federal Correctional Authorities." <https://www.bjs.gov/index.cfm?ty=nps>.
- Council on State Governments. 2018. *Justice Reinvestment*. Washington, DC: CSG Justice Center. <https://csgjusticecenter.org/jr>.
- DC Sentencing Commission. 2018. *2017 Annual Report*. Washington, DC: DC Sentencing and Criminal Code Revision Commission. <https://scdc.dc.gov/node/1328161>.
- Doob, Anthony. 1995. "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*, edited by Chris Clarkson and Rod Morgan. New York: Oxford University Press.
- Frankel, Marvin. 1973. *Criminal Sentences: Law without Order*. New York: Hill & Wang.

- Frase, Richard S. 1993. "Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota." *Cornell Journal of Law and Public Policy* 2:279–337.
- . 1995. "Lessons of State Guideline Reforms." *Federal Sentencing Reporter* 8:39–41.
- . 2005. "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues." *Columbia Law Review* 105:1190–1232.
- . 2009. "What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?" In *Crime and Justice: A Review of Research*, vol. 38, edited by Michael Tonry. Chicago: University of Chicago Press.
- . 2011. "Can Above-Desert Penalties Be Justified by Competing Deontological Theories?" In *Retributivism Has a Past: Has It a Future?* edited by Michael Tonry. New York: Oxford University Press.
- . 2013. *Just Sentencing: Principles and Procedures for a Workable System*. New York: Oxford University Press.
- . 2014. "Recurring Policy Issues of Guidelines (and Non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions." *Federal Sentencing Reporter* 26:145–57.
- . 2015a. "The Treatment of Multiple Current Offenses." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- . 2015b. "Varying Binding Effects of Guidelines—the Mandatory-to-Advisory Continuum." Minneapolis: Sentencing Guidelines Resource Center, Robina Institute of Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/varying-binding-effects-guidelines-mandatory-advisory-continuum>.
- . 2016. "Sentencing Policies and Practices in Minnesota." In *Oxford Handbooks Online*. Oxford: Oxford University Press. <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-148?print=pdf>.
- . 2018a. "Principles and Procedures for Sentencing of Multiple Current Offenses." In *Sentencing Multiple Crimes*, edited by Jesper Ryberg, Julian V. Roberts, and Jan W. de Keijser. New York: Oxford University Press.
- . 2018b. "Suspended Sentences and Free-Standing Probation Orders in US Guidelines Systems: A Survey and Assessment." *Law and Contemporary Problems* 82(1).
- Frase, Richard S., and Kelly Lyn Mitchell. 2017. "Why Are Minnesota's Prison Populations Continuing to Rise in an Era of Decarceration?" *Federal Sentencing Reporter* 30:114–24.
- Frase, Richard S., and Julian V. Roberts, eds. Forthcoming. *Paying for the Past: Exploring the Intended and Unintended Consequences of Prior Record Sentencing Enhancements*. New York: Oxford University Press.
- Frase, Richard S., Julian V. Roberts, and Rhys Hester. Forthcoming a. "Disparate Impact on Minority Offenders." In *Paying for the Past: Exploring the*

- Intended and Unintended Consequences of Prior Record Sentencing Enhancements*, edited by Richard S. Frase and Julian V. Roberts. New York: Oxford University Press.
- . Forthcoming *b*. “Impact of Criminal History Enhancements on Prison Bed Needs and Costs.” In *Paying for the Past: Exploring the Intended and Unintended Consequences of Prior Record Sentencing Enhancements*, edited by Richard S. Frase and Julian V. Roberts. New York: Oxford University Press.
- . Forthcoming *c*. “Magnitude of Criminal History Impacts on Sentence Severity.” In *Paying for the Past: Exploring the Intended and Unintended Consequences of Prior Record Sentencing Enhancements*, edited by Richard S. Frase and Julian V. Roberts. New York: Oxford University Press.
- Frase, Richard S., Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. 2015. *Criminal History Enhancements Sourcebook*. Minneapolis: Robina Institute of Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/criminal-history-enhancement-sourcebook>.
- Griffin, Burt W., and Lewis R. Katz. 2002. “Sentencing Consistency: Basic Principles Instead of Numerical Grids.” *Case Western Reserve Law Review* 53:1–75.
- Griset, Pamela L. 1999. “Criminal Sentencing in Florida: Determinate Sentencing’s Hollow Shell.” *Crime and Delinquency* 45:316–33.
- Hester, Rhys. 2015. “Prior Offense Weighting and Special Eligibility Rules.” In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- Hester, Rhys, Richard S. Frase, Julia Laskorunsky, and Kelly Lyn Mitchell. Forthcoming. “Rethinking the Role of Criminal History in Sentencing.” In *Handbook on Corrections and Sentencing: Sentencing Policies and Practices in the 21st Century*. New York: Routledge.
- Hester, Rhys, Richard S. Frase, Julian V. Roberts, and Kelly Lyn Mitchell. 2018. “Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences.” In *Crime and Justice: A Review of Research*, vol. 47, edited by Michael Tonry. Chicago: University of Chicago Press.
- Hindelang Criminal Justice Research Center. 2018. *Sourcebook of Criminal Justice Statistics*. Albany: University at Albany, State University of New York. [https://www.albany.edu/sourcebook/tost\\_5.html#5\\_ab](https://www.albany.edu/sourcebook/tost_5.html#5_ab).
- Hofer, Paul. 2019. “Federal Sentencing after *Booker*.” In *American Sentencing*, edited by Michael Tonry. Vol. 48 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Kansas Sentencing Commission. 2018. *FY 2017 Annual Report*. Topeka: Kansas Sentencing Commission. <http://sentencing.ks.gov/document-center/annual-reports>.
- King, Ryan D., and Michael Light. 2019. “Have Racial and Ethnic Disparities in Sentencing Declined?” In *American Sentencing*, edited by Michael Tonry. Vol. 48 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.

- Maryland State Commission on Criminal Sentencing Policy. 2018. *Maryland Sentencing Guidelines Manual, Version 9.2*. College Park: University of Maryland. <http://www.msccsp.org/Guidelines/Default.aspx>.
- Massachusetts Sentencing Commission. 2014. *Survey of Sentencing Practices, FY 2013*. Boston: Massachusetts Sentencing Commission. <https://www.mass.gov/lists/surveys-of-massachusetts-sentencing-practices>.
- Mauer, Marc. 2007. "Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities." *Ohio State Journal of Criminal Law* 5:19–46.
- Mauer, Marc, and David Cole. 2011. "Five Myths about Americans in Prison." *Washington Post*, June 17.
- Miethe, Terrence, and Charles Moore. 1985. "Socio-economic Disparities under Determinate Sentencing Systems: A Comparison of Pre- and Post-guideline Practices in Minnesota." *Criminology* 23:337–63.
- Mitchell, Kelly Lyn. 2015a. "Prior Juvenile Adjudications." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- . 2015b. "Prior Misdemeanor Convictions." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- . 2017. *Sentencing Commissions and Guidelines by the Numbers*. Minneapolis: Robina Institute of Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/sentencing-commissions-and-guidelines-numbers>.
- Moore, Michael. 1997. *Placing Blame: A Theory of Criminal Law*. Oxford: Clarendon.
- Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University Press.
- MSGC (Minnesota Sentencing Guidelines Commission). 1984. *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation*. St. Paul: Minnesota Sentencing Guidelines Commission.
- . 2017. *2016 Sentencing Practices: Annual Summary Statistics for Felony Offenders*. St. Paul: Minnesota Sentencing Guidelines Commission.
- . 2018. *Minnesota Sentencing Guidelines and Commentary*. St. Paul: Minnesota Sentencing Guidelines Commission.
- National Center for State Courts. 2008. *State Sentencing Guidelines: Profiles and Continuum*. Williamsburg, VA: National Center for State Courts. <http://www.ncsc.org/Topics/Criminal/Sentencing/Resource-Guide.aspx>.
- Nellis, Ashley. 2016. *The Color of Justice: Racial and Ethnic Disparity in State Prisons*. Washington, DC: Sentencing Project.
- Oldroyd, Richard J. 1994. "Utah's Conjoint Guidelines for Sentencing and Parole." *Overcrowded Times* 5(1):1,8–10.
- Parent, Dale P. 1988. *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*. Stoneham, MA: Butterworth Legal.

- Pennsylvania Commission on Sentencing. 2017. *Annual Report 2016*. Harrisburg: Pennsylvania Commission on Sentencing. <http://pcs.la.psu.edu/publications-and-research/annual-reports>.
- . 2018. *Proposed Sentence Risk Assessment Instrument, April 28, 2018*. Harrisburg: Pennsylvania Commission on Sentencing. <http://pcs.la.psu.edu/news/guidelines/proposed-risk-assessment-instrument>.
- Pew Charitable Trusts. 2018. “National Prison Rate Continues to Decline Amid Sentencing, Re-entry Reforms.” Philadelphia: Pew Charitable Trusts. <http://www.pewtrusts.org/en/research-and-analysis/analysis/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.
- Pizzi, William T. 1999. *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*. New York: New York University Press.
- Porter, Nicole D. 2014. “Racial Impact Statements.” Washington, DC: Sentencing Project. <https://www.sentencingproject.org/publications/racial-impact-statements/>.
- Reitz, Kevin R. 1997. “Sentencing Guidelines Systems and Sentence Appeals: A Comparison of Federal and State Experiences.” *Northwestern University Law Review* 91:1441–1506.
- . 2011. “Reporter’s Study: The Question of Parole Release Authority.” In *Model Penal Code: Sentencing, Tentative Draft no. 2*. Philadelphia: American Law Institute.
- . 2018. “Measuring Change in Incarceration Scale.” *Berkeley Journal of Criminal Law* 23.
- Roberts, Julian V. 2015a. “Custody Status as a Criminal History Enhancement.” In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- . 2015b. “Justifying Criminal History Enhancements at Sentencing.” In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- . 2015c. “Severity Premium for Similar Prior Offending: Patterning Rules.” In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
- Roberts, Julian V., and Andrew von Hirsch, eds. 2010. *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. Oxford: Hart.
- Robina Institute of Criminal Law and Criminal Justice. 2018. Sentencing Guidelines Resource Center. Minneapolis: University of Minnesota. <https://sentencing.umn.edu/>.
- Ruth, Henry, and Kevin R. Reitz. 2003. *The Challenge of Crime: Rethinking Our Response*. Cambridge, MA: Harvard University Press.
- Ryberg, Jesper, Julian V. Roberts, and Jan W. de Keijser, eds. 2018. *Sentencing Multiple Crimes*. New York: Oxford University Press.



- Starr, Sonja B. 2015. "The New Profiling: Why Punishment Based on Poverty and Identity Is Unconstitutional and Wrong." *Federal Sentencing Reporter* 27:229–36.
- Tonry, Michael. 1988. "Structuring Sentencing." In *Crime and Justice: A Review of Research*, vol. 10, edited by Michael Tonry and Norval Morris. Chicago: University of Chicago Press.
- . 1996. *Sentencing Matters*. New York: Oxford University Press.
- . 2010. "The Questionable Relevance of Previous Convictions to Punishments for Later Crimes." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.
- . 2011. *Punishing Race: A Continuing American Dilemma*. New York: Oxford University Press.
- . 2019. "Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again." In *American Sentencing*, edited by Michael Tonry. Vol. 48 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Ulmer, Jeffery T. 2019. "Criminal Courts as Inhabited Institutions: Making Sense of Difference and Similarity in Sentencing." In *American Sentencing*, edited by Michael Tonry. Vol. 48 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- US Department of Justice. 1996. *National Assessment of Structured Sentencing*. Washington, DC: US Department of Justice.
- . 1998. *National Survey of State Sentencing Structures*. Washington, DC: US Department of Justice.
- USSC (US Sentencing Commission). 1997. *National Sample Survey: Public Opinion on Sentencing Federal Crimes*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/research/research-reports/survey-public-perceptions-and-federal-sentencing-guidelines>.
- . 2003. *Survey of Article III Judges on the Federal Sentencing Guidelines*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/research/topical-index-publications#surveys>.
- . 2010. *Results of Survey of United States District Judges January 2010 through March 2010*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/research/topical-index-publications#surveys>.
- . 2015. *Results of Survey of United States District Judges: Modification and Revocation of Probation and Supervised Release*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/research/research-reports/results-survey-united-states-district-judges-modification-and-revocation-probation-and-supervised>.
- . 2016. *Federal Sentencing Guidelines Manual*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/guidelines/2016-guidelines-manual>.
- . 2018. *2017 Sourcebook of Federal Sentencing Statistics*. Washington, DC: US Sentencing Commission. <https://www.ussc.gov/research/sourcebook-2017>.

- Utah Sentencing Commission. 2017. *2017 Adult Sentencing and Release Guidelines*. Salt Lake City: Utah Commission on Criminal and Juvenile Justice. <https://justice.utah.gov/Sentencing>.
- Virginia Criminal Sentencing Commission. 2017. *2017 Annual Report*. Richmond: Virginia Criminal Sentencing Commission. <http://www.vcsc.virginia.gov/reports.html>.
- . 2018. “Nonviolent Risk Assessment, Larceny.” Richmond: Virginia Criminal Sentencing Commission. <http://www.vcsc.virginia.gov/worksheets.html>.
- Washington State Caseload Forecast Council. 2018. *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2017*. Olympia: Washington State Caseload Forecast Council. <http://www.cfc.wa.gov/default.htm>.
- Watts, Alexis L. 2016. “The Composition of Sentencing Commissions.” Minneapolis: Robina Institute on Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/composition-sentencing-commissions>.
- . 2017. “Sentencing Guidelines and Correctional Resource Management.” Minneapolis: Robina Institute on Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/depth-sentencing-guidelines-and-correctional-resource-management>.
- . 2018*a*. “Sentencing Guideline Grids.” Minneapolis: Robina Institute on Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/depth-sentencing-guideline-grids>.
- . 2018*b*. “Sentencing Guidelines and Discretionary Parole Release.” Minneapolis: Robina Institute on Criminal Law and Criminal Justice. <https://sentencing.umn.edu/content/depth-sentencing-guidelines-and-discretionary-parole-release>.
- Zimring, Franklin E. 1976. “Making the Punishment Fit the Crime: A Consumer’s Guide to Sentencing Reform.” 1976 Hastings Center Report. [https://chicagounbound.uchicago.edu/occasional\\_papers/16/](https://chicagounbound.uchicago.edu/occasional_papers/16/).
- . 1992. “Are State Prisons *Undercrowded*?” *Federal Sentencing Reporter* 4:347–48.
- . 2005. “Penal Policy and Penal Legislation in Recent American Experience.” *Stanford Law Review* 58:323–38.
- . 2010. “The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects.” *Journal of Criminal Law and Criminology* 100:1225–46.
- Zimring, Franklin E., and Gordon Hawkins. 1991. *The Scale of Imprisonment*. Chicago: University of Chicago Press.