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State sentencing guidelines: still going strong

State sentencing guidelines are more successful than their federal counterpart because they reflect a more balanced approach to critical issues of sentencing policy.

by Richard S. Frase



Sentencing guidelines reforms are thriving—in the states. While the federal guidelines remain highly unpopular among judges, defense attorneys, and scholars, state guidelines have achieved broader support, and their number has grown steadily.

As of November 1994, 17 states had placed guidelines into effect, and five more had appointed commissions to

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implement or study this approach. For sentencing reformers in other states, and at the federal level, there is much to be learned from the experiences of the guidelines states. These experiences show that sentencing guidelines can succeed in bringing greater fairness and rationality to sentencing.

Although state guidelines are diverse in their specific provisions, they have many common features. Some of these features are lacking in the federal guidelines, and these differences may explain the greater success of

guidelines in the states. State guidelines generally retain more judicial discretion than the federal version, and they permit consideration of a wider

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range of sentencing purposes and offender characteristics.

Most state sentencing guidelines also give greater emphasis to the goal

Table 1 State sentencing guidelines systems

Jurisdiction	Effective date	Scope and distinctive features
Utah	1979	Voluntary; retains parole board; no permanent commission until 1983; linked to correctional resources since 1993
Alaska	1-1-80	No permanent sentencing commission; statutory guidelines' scope expanded by caselaw
Minnesota	5-1-80	Designed not to exceed 95 percent of prison capacity; extensive database and research
Pennsylvania	7-22-82	Also covers misdemeanors; broad ranges and departure standards; retains parole board; encourages non-prison sanctions since 1994
Florida	10-1-83	Formerly voluntary
Maryland	1983	Voluntary; retains parole board
Michigan	1-17-84	Voluntary; retains parole board
Washington	7-1-84	Includes upper limits on non-prison sanctions, some defined exchange rates, and vague, voluntary charging standards; resource-impact assessment required
Wisconsin	11-1-85	Voluntary; descriptive (modelled on existing practices); retains parole board
Delaware	10-10-87	Voluntary; narrative (not grid) format; also covers misdemeanors and some non-prison sanctions; linked to resources; parole board retained until July 1990.
Oregon	11-1-89	Grid includes upper limits on custodial non-prison sanctions, with some defined exchange rates; linked to resources; many new mandatory minimums added in 1994
Tennessee	11-1-89	Also covers misdemeanors; retains parole board; sentences linked to resources
Virginia	1-1-91	Voluntary; judicially controlled, and parole board retained, until 1995; resource-impact assessments required since 1995
Louisiana	1-1-92	Includes intermediate sanction guidelines and exchange rates; linked to resources
Kansas	7-1-93	Sentences linked to resources
Arkansas	1-1-94	Voluntary; detailed enabling statute; resource-impact assessment required
North Carolina	10-1-94	Also covers most misdemeanors; sentences linked to resources
Massachusetts, Missouri, Ohio, Oklahoma, South Carolina	(in process)	All enabling statutes encourage resource-matching; Ohio commission rejected grid format; Massachusetts and Missouri statutes retain parole board

of predicting and avoiding prison overcrowding. To ensure sufficient prison space for violent offenders, as well as adequate punishment of less serious crimes, guidelines states have increasingly encouraged judges to employ "intermediate sanctions," or non-custodial penalties more intensive than simple probation. In contrast, the federal guidelines have done very little to promote the use of non-custodial penalties. In general, state guidelines reflect a more balanced approach to critical issues of sentencing policy.

Overview of state guidelines

The 22 states with existing or proposed sentencing guidelines are listed in Table 1, in the order of their implementation.¹ The most important similarities and differences are discussed below.²

Makeup and role of sentencing commissions. A distinctive feature of sentencing guidelines reforms is the use of an independent commission with

authority to study sentencing practices and recommend guidelines. Almost all of the guidelines states have established a permanent sentencing commission or similar body. These commissions have usually been created by statute, but some were initially formed by the judiciary and only later received legislative support. Most state sentencing commissions include judges, prosecuting and defense lawyers, corrections officials, public members, and sometimes legislators, making these panels much more broadly representative than the federal commission.

Sentencing commissions differ greatly in their roles relative to the legislature.³ In Minnesota, for instance, the legislature gave the commission very little specific direction either in the enabling statute or in the early years of implementation. Although the legislature later took back some of the authority it had delegated, the commission still retains primary control over the formulation of statewide sentencing policy. In contrast, other state legislatures have played a much more active role by carefully structuring the commission's mandate, as in

1. It should be noted that guidelines sometimes fail to obtain adoption. In Connecticut, Maine, and Texas, sentencing commissions recommended against adoption of guidelines. Sentencing commissions in Colorado, New York, South Carolina, and Washington, D.C., were unable to persuade the legislature to adopt them (although renewed efforts are underway in South Carolina). Guidelines were initially rejected by the Pennsylvania and Kansas legislatures, but each state later enacted a revised version. Finally, although no guidelines system has yet been repealed, a few have suffered major setbacks: in November 1994, Oregon voters approved Ballot Measure 11, overriding the guide-

lines and imposing mandatory minimum prison terms on certain violent offenders (constituting about 10 percent of all felony sentences).

2. The principal sources for this summary are: 6 FED. SENTENCING REP., no. 3 (1993) (essays on recent sentencing reform efforts in nine states); Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME AND JUST. 137-195 (1993); and various state-specific reports and evaluations, too numerous to cite, collected by the author and his colleague Michael Tonry.

3. See generally, *Symposium: A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181-461 (1993).

Arkansas, or by strictly controlling guidelines revisions, as in Washington.

Binding force of the guidelines. Most state guidelines recommend presumptively correct sentences judges are bound to follow unless they provide legally permissible reasons for departure, but several states have voluntary guidelines from which judges may depart for any reason (provided, in some states, that their reasons are stated on the record).

Even within the group of states with presumptively binding guidelines, standards for departure and appellate review vary widely. In Pennsylvania, for example, departures are rarely reversed except on procedural grounds (failure to state reasons), whereas reversal on substantive grounds (improper sentence) often occurs in Alaska, Washington, and Minnesota, each of which has a large body of substantive appellate caselaw. Nevertheless, trial courts in these states still retain substantial areas of discretion regarding both the type and severity of sanctions. In this respect, the federal guidelines appear to be uniquely and unnecessarily rigid.

Scope of guidelines coverage. Most state guidelines govern felony crimes only, but a few also cover misdemeanors. All state guidelines regulate decisions about prison commitment and prison duration, and some also limit the use of consecutive sentences.

Many of the guidelines states have not abolished parole release. In these states, the guidelines usually determine either the minimum or the maximum prison term to be served, but not both. Guidelines states also differ in the extent to which statutorily based mandatory-minimum prison terms determine, or override,

guidelines rules. Such statutes appear to play a much smaller role in the guidelines states than they do in the federal system. Much of the excessive rigidity of the federal guidelines is due to the number and severity of these "mandatories."

As for non-prison sentences, many guidelines states give greater emphasis than the federal guidelines to probation and other intermediate sanctions such as home detention, day-reporting

have assumed equal or greater importance in recent years. For instance, several states that have abolished parole release and substituted limited "good time" credits were responding to the desire for "truth in sentencing," meaning that the length of prison terms imposed by courts should closely correspond to the amount of time inmates actually serve.

A few states have largely "descriptive" guidelines designed to encourage judges to follow existing sentencing norms more consistently. But even these states usually seek to make some "prescriptive" changes in prior norms, such as to eliminate existing racial disparities. In other states, the most common prescriptive changes have involved increased sentence severity for violent and drug crimes.

Minnesota, Washington, and Kansas explicitly based their guidelines on a retributive, or "just deserts," theory of punishment, placing greater emphasis on the severity of the current offense and less on offender characteristics. However, even these states still leave substantial room for offender-based sentences and the pursuit of rehabilitative, incapacitative, special deterrent, and other non-retributive goals. This is particularly true in Minnesota.⁵ In comparison to the federal guidelines, state systems generally give more consideration to offender characteristics and to rehabilitation, which is achieved by community-based sanctions, not in prison.

Increasingly, states are turning to sentencing guidelines with a primary goal of using them to gain better control over rapidly escalating prison populations and correctional expenses. Such control is made possible by the greater uniformity and predictability of guidelines sentences, in comparison with prior indeterminate sentencing regimes. Minnesota pioneered this approach in 1980. The enabling statute directed the commission to take correctional resources into "substantial consideration." The Minnesota commission took this directive

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centers, residential treatment, intensive-supervision probation, community service, and day fines. Although this difference may be partly due to differences between state and federal caseloads, it also reflects a generally less punitive approach by the states and a greater emphasis on the goal of preventing prison overcrowding.

The states differ greatly in the degree to which they regulate the conditions of non-prison sentences and decisions to revoke probation or post-prison release. Yet for a variety of reasons, both practical and theoretical,⁴ state guidelines have generally done little more than simply authorize and encourage such penalties in lieu of prison. A few states have presumptive limits on the maximum aggregate severity of all intermediate sanctions or of certain components, such as jail. Minimum non-prison severity requirements are rarely imposed.

Sentencing reform goals and priorities. Sentencing guidelines were originally conceived as a means of making sentencing more uniform and eliminating unwarranted disparities. This is still an important goal of state guidelines reforms, but several other goals

4. See Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQUALITY 19-23 (1993); Tonry, *supra* n. 2, at 181-183.

5. See Frase, *Purposes of Punishment under the Minnesota Sentencing Guidelines*, 13 CRIM. JUST. ETHICS 11-20 (1994); Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. L. & PUB. POL. 279-337 (1993).

very seriously and adopted a goal of never exceeding 95 percent of available prison capacity. That goal was achieved throughout the first decade of guidelines sentencing. Minnesota prison populations did increase, but primarily in response to rising felony caseloads and at rates far lower than in other states.⁶ Prison construction was able to accommodate inmate population growth without overcrowding or multiple-bunking of high-security inmates. Minnesota has thus avoided the problems of court intervention and reduced prison security plaguing most states.⁷

In contrast to Minnesota's approach, other early guidelines states gave little or no priority to resource-matching. Starting in the mid-1980s, however, as prison overcrowding problems grew around the country, many other states adopted guidelines explicitly linked to available resources. In addition, most of the remaining guidelines states (and some non-guidelines states)⁸ have directed their commissions to file reports on the resource impact of the guidelines or of proposed crime legislation.

The trend described above received strong support in the recently revised American Bar Association sentencing standards.⁹ Resource matching, which was not mentioned in the 1979 version, is a central principle of the new standards. Meanwhile, the U.S. Sentencing Commission continues to ignore its statutory mandate to consider correctional resources and minimize prison overcrowding. As of 1992, federal prisons were operating at 158 percent of capacity.¹⁰

Principal determinants of guidelines sentences. All guidelines states base recommended sentences primarily on the most serious current conviction offense and the offender's prior conviction record. There is some role for details of unconvicted prior or current offenses, such as enhancements for weapon use, regardless of whether such use is an element of any current conviction offense. But the guidelines states are unanimous in rejecting the broader "real offense" approach of the federal guidelines, which permit frequent and substantial sentence enhancements based on uncharged "rel-

Minnesota Sentencing Guidelines Grid							
Presumptive Sentence Lengths in Months							
Severity levels of conviction offense	Criminal history score						
	0	1	2	3	4	5	6 or more
<i>Sale of a Simulated Controlled Substance</i> I	12*	12*	12*	13	15	17	19 18-20
<i>Theft Related Crimes (\$2500 or less)</i> <i>Check Forgery (\$200-\$2500)</i> II	12*	12*	13	15	17	19	21 20-22
<i>Theft Crimes (\$2500 or less)</i> III	12*	13	15	17	19 18-20	22 21-23	25 24-26
<i>Nonresidential Burglary</i> <i>Theft Crimes (over \$2500)</i> IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
<i>Residential Burglary</i> <i>Simple Robbery</i> V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
<i>Criminal Sexual Conduct 2nd Degree (a) & (b)</i> VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
<i>Aggravated Robbery</i> VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
<i>Criminal Sexual Conduct, 1st Degree</i> <i>Assault, 1st Degree</i> VIII	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree (felony murder)</i> IX	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231	240 234-246
<i>Murder, 2nd Degree (with intent)</i> X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433

*One year and one day

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Under state statutes, first degree murder has a mandatory life sentence.

evant conduct."

The federal approach was apparently designed to prevent prosecutors from granting undue or inconsistent leniency by means of selective charging and plea bargaining concessions.¹¹ Except for Washington, the guidelines states place no limits on prosecutorial discretion. Even Washington's limits are vague and not judicially enforceable. Nevertheless, this apparent loophole does not seem to have caused any widespread dissatisfaction with state guidelines.

Most states have promulgated guidelines in the form of a two-dimensional grid, but a few employ narrative rules for each offense or offense group. State grids vary widely in their layouts and "cell" ranges (wide or narrow, overlapping or not). No state guidelines grid has as many offense levels, and as complex a set of application rules, as the federal guidelines.

State guidelines also reveal major variations in severity ranking of offenses, formulas for computing prior record, good-time credit amounts, and

6. See Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, in Morgan and Clarkson, eds. *THE POLITICS OF SENTENCING REFORM* (forthcoming, Oxford University Press), fig. 6 (increases in total prison-plus-jail populations mirrored increases in felony caseloads, throughout the 1980s); *id.*, fig. 7 (Minnesota inmate populations relative to adult arrests remained fairly constant from the mid-1970s through 1991; similar measures for the nation as a whole began at about the same level in 1975, but were 80 percent higher by 1991).

7. See U.S. Gen. Accounting Office, *PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYS-*

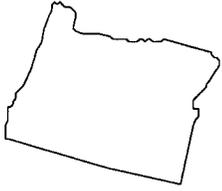
TEMS 4-5 (1989) (court orders or consent decrees related to overcrowding had been issued in 35 states, as of April 1989).

8. See, e.g., KY. REV. STAT. §196.081 (12-member State Corrections Commission shall prepare six-year projections of prison populations and help legislative staff prepare corrections impact statements for proposed legislation).

9. See Reitz and Reitz, *Building a sentencing reform agenda: the ABA's new sentencing standards*, 78 JUDICATURE 189 (1995).

10. See Tonry, *supra* n. 2, at 176-177, 179.

11. *Id.* at 184.



Oregon's sentencing guidelines

by Ellen F. Rosenblum

A recent informal survey of Multnomah County judges about Oregon's felony sentencing guidelines, which went into effect November 1, 1989, produced a wide range of opinions regarding their usefulness and impact. However, all generally agreed that they have provided for "truth-in-sentencing," which our judicial system previously lacked.

Before guidelines, a five-year prison sentence frequently meant that a felon would serve just long enough (sometimes as short as 36 days) to be processed in and out of prison and then returned to the community on parole. Under the guidelines, a five-year sentence means just that, with a minimal reduction for "good time." My own opinion is that, so long as judges have the discretion to impose a departure sentence upward or downward based on substantial and compelling aggravating or mitigating factors, judges retain an important discretionary sentencing function. The advantages of a uniform system that takes prison space availability into consideration outweighs the restriction on judicial discretion the guidelines impose.

Oregon is now faced with a likely need to modify its felony guidelines in light of a ballot measure approved last fall that requires substantially longer sentences for certain types of crimes as well as treatment of certain juvenile offenders as adults. The greatest challenge is in maintaining the integrity of the lower-level categories of the guidelines (frequently those imposed upon drug users and dealers, car thieves, and certain categories of burglars) while providing for substantially longer sentences for the most serious offenders. The Oregon legislature in its upcoming session will be considering a number of proposals. One is to reserve prison space for offenders sentenced to one year or more. Local jails and other community sanctions would be used for all felons sentenced to one year or less as well as all misdemeanants.

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the nature and extent of listed factors that permit (or do not permit) departure. Criminal history scoring is particularly diverse. These variations reflect differences in sentencing goals and traditions, as well as the relatively primitive state of case-level sentencing jurisprudence in this country. Under

prior indeterminate sentencing regimes, with little if any appellate review, case-level issues were rarely addressed in judicial opinions or academic scholarship.

Case monitoring, research, and evaluation. Most state guidelines commissions have been given a broad mandate to collect and analyze sentencing data, not only to facilitate develop-

ment of the initial guidelines, but also as a means of monitoring their implementation and proposing revisions. This empirical research component has become increasingly important, as states have begun to focus on the goal of predicting and preventing future prison overcrowding. Such predictions require detailed information on current sentencing practices and the development of sophisticated, computerized models combining data on expected caseloads, presumptive sentences, departure rates, and other factors affecting the size and growth of prison populations.

Despite these important applications of guidelines data, and the research mandates of most state commissions, there is still not enough published data and analysis, particularly evaluations by independent researchers. In some cases, this is because the guidelines are too new to have generated significant sentencing data. In older systems, complete data may not be collected due to inadequate commission budgets. When data is collected, it is not always known, or made fully available, to outside researchers. Finally, such data, even when available, is usually not collected and stored in a sufficiently consistent form to permit meaningful comparisons between guidelines states.

Nevertheless, much more is now known in the guidelines states about sentencing practices and systemic impacts than was known in those states prior to guidelines (or is known today in non-guidelines states). State guidelines reforms have clearly succeeded in their goal of encouraging more informed and rational sentencing policy decisions. Published evaluations also suggest that state guidelines have generally succeeded in achieving their goals of reducing sentencing disparity, lessening the impact of short-term political pressures on sentencing policy, and linking sentencing severity to available correctional resources.¹²

Future sentencing reform

The need for balance in sentencing policy. The most important fact about state guidelines is that they have survived and spread. Unlike the widely criticized federal version, state guide-

12. Frase, *supra* n. 6; Tonry, *supra* n. 2.

lines reforms have attracted relatively little sustained criticism, and guidelines continue to be adopted by other states.

State guidelines are more popular because they are, in many ways, more balanced than their federal counterpart. Sentencing issues are inherently very controversial, and sentencing goals and limitations often conflict with each other. The best that can be hoped for is to achieve a reasonably balanced and stable compromise on key policy issues. Such issues include (1) the relative weight given to different purposes of punishment and to offense versus offender characteristics; (2) the proper balance between uniformity and case-level flexibility; (3) the degree of sanction severity (in particular, the frequency and duration of prison terms); and (4) the allocation of sentencing power among the principal actors involved—the legislature, the sentencing commission, prosecutors, defense attorneys, correctional officials, trial judges, and appellate courts.

In each of these four areas, state guidelines generally appear to be more balanced than the federal version. Offender characteristics receive more weight in most state systems, departures are more common, sentencing is less severe, and sentencing power, at both the policy-making and individual case level, is shared more broadly.

What factors might explain the better balance, and thus broader support, of state guidelines? A larger, more representative sentencing commission probably helps by ensuring that all policy and practical perspectives are considered. The legislative role may also be important: Legislators must support the sentencing commission's independence (and budget) and avoid micro-managing sentencing policy, but they must still exercise enough oversight to prevent the commission from being captured by any narrow interest or perspective. Finally, commitment to the goal of reducing prison overcrowding through sentencing mechanisms helps commissioners and politicians resist short-term political pressures to escalate penalties beyond what the public is willing to pay

for. This goal has received much greater priority in the states than it has at the federal level. This may be partly due to the fact that correctional expenses constitute a much greater proportion of state budgets. At the federal level, spiraling prison costs are still relatively "small change" and do not seriously interfere with other important funding priorities.

Prosecutorial discretion. No sentencing reform, state or federal, has yet resolved the problem of prosecutorial discretion. Since prosecutors have traditionally exercised nearly total control over the number and severity of charges filed and retained to conviction, the conviction-offense approach universally adopted in state guidelines risks giving prosecutors too much power to dictate sentences that are either too severe or too lenient. However, even the limited scheme of "real offense" enhancements permitted under the federal guidelines seems too lawless and does not prevent prosecutors from controlling which "real offense" facts are known to the court.

Subject to further research, two tentative conclusions based on state guidelines experiences can be reached. First, the absence of any serious attempt to regulate prosecutorial decisions reflects the extraordinary difficulty of judicially enforcing such controls in an adversary system. It is especially difficult to enforce effective lower (minimum severity) limits on prosecutorial decisions, since most cases of leniency have been negotiated and will not be appealed by either side. Internal controls (by supervising prosecutors) have more promise,¹³ but statewide rules are problematic since local authorities need to tailor their law enforcement resources to particular crime problems.

Second, the absence of widespread complaints about prosecutorial dominance in state guidelines systems may indicate that closer regulation is not needed. Specifically, in a properly balanced guidelines system—one with reasonable sentence severity levels, few mandatory minimum terms, and substantial discretion to depart—prosecutorial decisions will rarely produce sentences judges strongly disapprove but are powerless to prevent. In the fed-

eral system, judges often complain about the unreasonably harsh sentences they are forced to impose. Such sentences result from the frequent application of rigid and excessive mandatory minimum prison terms (especially in drug cases), the strict limitations on judicial departure powers, and the frequent use of "relevant conduct" enhancements beyond the conviction offense.

"Front-end" resource matching. Governments, like individuals, must live within their means. This simple precept is particularly important in sentencing. Politicians and the public are always willing to increase penalties, but rarely agree to lower them. They are even more reluctant to raise taxes to pay for higher penalties. The all-too-common results are serious prison overcrowding, court intervention, and resort to increasingly desperate prison releasing measures, such as accelerated parole and furloughs.

However, such "back-door" solutions only make problems worse, because they increase the disparity between the prison terms imposed by courts and the lengths of time inmates actually serve. At some point, this approach breaks down. Average time served becomes so small, compared to sentences imposed,¹⁴ that both the public and offenders lose respect for the sentencing process. Offenders feel they can beat the system, and politicians and the public, out of frustration, push for even harsher sanctions, making matters worse.

Sentencing guidelines implemented by a permanent sentencing commission can help break this vicious circle. Because guidelines sentences are more uniform, they permit more accurate predictions of the impact of current and proposed penalties on future inmate populations. A permanent commission, if adequately funded, can develop the expertise needed to maxi-

13. See Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246-330 (1980) (review of screening decisions by higher-level attorneys produced appropriate and consistent office prosecution policies in a large, urban federal district).

14. See essays in 6 FED. SENTENCING REP., *supra* n. 2, at 129, 138 (prior to guidelines in North Carolina, felons were serving an average of 18 percent of the maximum term imposed. In Texas, the average proportion of time served was 13 percent).

mize the accuracy of these predictions. Accurate resource-need predictions then allow the legislature to appropriate the funds needed to expand capacity in time to meet the demand, to reduce the demand through mechanisms such as lowering prison commitment rates or durations for certain offenders, or to pursue some combination of these approaches. Most important, if politicians, the media, and the public can be told in specific terms what various penalty increases will cost, proponents of "get tough" measures can be forced to take responsibility for the eventual costs and consequences of their proposals in terms of increased taxes, program cuts, or early release of other offenders.

Linking sentencing policy to resources allows the public and officials to take a comprehensive view of sentencing issues, to set priorities in the use of limited prison space, and to explore forms of punishment less costly than incarceration. Legislators are thus better able to resist knee-jerk, lock-em-up responses to short-term public hysteria over particular crimes. Such responses produce a progression of steadily escalating penalties. All crime is terrible, but limited resources (and competing social needs) require hard choices. Which crimes are relatively more serious? Which offenders require secure custody? What non-custodial sanctions are available to punish less serious offenders, facilitate their rehabilitation, and promote victim and community restitution?

"Front-end" resource matching is thus an essential component of future state and federal sentencing reforms. To make such a system work, some governmental body independent of the legislature must have the legal authority, budget, and will to collect detailed sentencing data, make resource-need predictions, and recommend guideline sentences that will not exceed

available resources. Accurate predictions are only possible if sentencing achieves a certain minimum degree of uniformity. Exactly what that degree is remains an important area for further research. Such research would compare guidelines states with and without various features such as broad versus narrower guidelines ranges, different degrees of appellate review, and presence or absence of parole release discretion.

Intermediate sanctions. One of the risks of reforms aimed at reducing sentencing disparity is that they tend to

be reached on specific exchange rates for fundamentally different sanction types, such as jail, home detention, fines, and community service? How should violations of release conditions be sanctioned to ensure consistency, maximize compliance, and minimize resort to custodial measures?

A successful approach

Sentencing guidelines developed by independent commissions have represented the dominant approach to sentencing reform in the states since the late 1970s, and more and more states are adopting them. A wide variety of approaches has been followed, and much has been learned. Newer systems, benefitting from the experience of earlier reforms, tend to be more sophisticated. Older systems continue to evolve, correcting their mistakes, incorporating new refinements, and responding to changing conditions and priorities.¹⁶

The experience of the states suggests that sentencing guidelines can reduce disparity without imposing excessive rigidity, can promote "truth in sentencing" by more closely matching time imposed to time served, can help states avoid prison overcrowding by linking sentencing policy to available resources, and can encourage wider use of intermediate sanctions. "Front-end" resource management has become one of the most important reasons for states to adopt guidelines. Parole and other "back door" release mechanisms can deal with prison overcrowding, but cannot achieve either "truth in sentencing" or the most efficient use of limited correctional resources.

The success of guidelines at the state level stands in marked contrast to the continuing controversy surrounding the federal guidelines. State guidelines appear to have proved more successful because they have achieved a better balance on the key issues of resource matching, sanction severity and type, allowable sentencing factors, and the degree of case-level discretion. ☞

The success of guidelines at the state level stands in marked contrast to the continuing controversy surrounding the federal guidelines.

perpetuate, and may even encourage, heavy reliance on custodial sentencing options. But sentencing guidelines, if linked to available resources, can also strongly encourage states to make increased use of intermediate sanctions. "Front-end" recognition of prison and jail limitations forces policy makers to consider alternative forms of punishment that are cheaper, and more rapidly expanded, than custodial facilities. Sentencing commissions can greatly increase the use and fairness of such sanctions by incorporating them into the scheme of presumptive sentences and by developing "exchange rates" that permit choices among a wide variety of sanctions deemed to have roughly equivalent punitive impact.¹⁵

The guidelines states have done a lot more with this than the federal commission, but important issues of policy and practice remain. How closely can intermediate sanctions be regulated without creating the excessive complexity that afflicts the federal guidelines? Should minimum as well as maximum severity limits be defined, and can they be enforced? Can consensus

15. See generally Morris and Tonry, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 37-81 (1990).

16. Tonry, *supra* n. 2, at 184-185.