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Unlike the deeply troubled federal guidelines, state sentencing guidelines reforms are thriving. More and more states are adopting guidelines, and the American Bar Association has recently renewed and strengthened its support for this approach. As illustrated by the sampling of jurisdictions represented in this Issue,[1] state guidelines are incredibly diverse in their origins, purposes, and provisions. The state systems and the ABA Standards also reveal a number of important features not found in the federal guidelines. For readers whose primary concern is reform at the federal level, there is much to be learned from the state experiences related in these essays, and in the steadily growing literature on these and other state sentencing reforms. There is also much that the states can learn from each other.

State guidelines display at least five important features which distinguish them from the federal guidelines.

First, they have generally achieved broad acceptance once adopted.[2]

Second, all state guideline systems (as well as the ABA Standards) reject routine sentence enhancements based on unconvicted, "real offense" factors.

Third, state guideline reforms are increasingly motivated by a desire to gain better control over escalating prison populations; several states (and the ABA Standards) directly link recommended sentences to available correctional resources.

Fourth, the focus on prison capacity limits has encouraged state reformers to give increasing emphasis to the development and structuring of non-prison sanctions, especially for non-violent and first offenders.

Fifth, state reforms have generated much more published data and outside evaluations than has the federal version.

Part I of this essay provides a brief summary of state systems and their major variations. Part II returns to the five features noted above, explains why they are so important, and suggests the areas in which further research and debate are most needed.

I. Overview—Where, When & What Kinds of State Guidelines?

Presumptive sentencing rules have now been adopted in at least seventeen states.[3] Those states, and the dates on which their guidelines became (or will become) effective, are as follows: Alaska (1980); Minnesota (1980); Pennsylvania (1982); Florida (1983); Michigan (1984); Washington (1984); Utah (1985); Wisconsin (1985); Delaware (1987); Oregon (1989); Tennessee (1989); Virginia (1991); Louisiana (1992); Kansas (1993); Arkansas (1994); North Carolina (1995); and Ohio (1996). The seventeen guideline jurisdictions differ widely in their approaches. The most important variations are summarized below, along with some comparisons to the federal system.

A. Nature of the Sentencing Commission

All guideline states but one (Alaska) have established a permanent sentencing commission or a similar body with authority to study sentencing practices and recommend guidelines. All of these commissions have some degree of legislative support, but some (e.g., Virginia's) are located entirely within the judicial branch. Most sentencing commissions are broadly representative, including a mix of judges, prosecutors, defense attorneys, correctional officials, public members, and sometimes legislators.

Legislatively-created commissions differ greatly in their roles relative to the Legislature.[4] Minnesota's enabling statute gave the Commission relatively little guidance. In recent years, the Legislature has taken back some of the authority it delegated, but the Minnesota Commission still retains primary control over the formulation of state-wide sentencing policy. In contrast, other state legislatures have played a much more active role, either by carefully structuring the commission's mandate (e.g., Arkansas), or by dominating the guidelines revision process (Washington).

B. Binding Force of the Guidelines

Most state guidelines recommend presumptively-correct sentences which judges are bound to follow unless they depart, but several states (Delaware, Michigan, Utah, Virginia, and Wisconsin) have purely voluntary guidelines. Even within the group of states whose guidelines are not formally voluntary, standards for departure and for reversal on appeal vary widely: Pennsylvania guideline sentences are rarely reversed on appeal except for procedural reasons (e.g., failure to state any reasons), whereas reversal on substantive grounds (improper sentence) has often occurred in states such as Washington and Minnesota, each of which now has a large body of substantive appellate caselaw. But even in these states, trial courts retain substantial areas of discretion, as to both the type and the severity of sanctions. In this respect, the federal guidelines appear to be uniquely rigid.

C. Scope of Guideline Coverage

Most state guideline systems cover felony crimes only. All guidelines regulate aspects of both prison commitment and prison duration, and some also control the use of consecutive sentences. States differ in the extent to which statutorily-based mandatory-minimum prison terms determine or override guidelines rules. Such statutes play a smaller role in some states (e.g., Minnesota) than in the federal system.

Some guideline states (Pennsylvania, Michigan, Tennessee, Virginia, and Wisconsin) have not abolished parole release. In these states, the guidelines determine either the minimum or the maximum prison term to be served, but not both. The new ABA Standards recommend abolition of parole. This change from the 1979 edition may be related to the ABA's current focus on "front-end" resource-matching.

As for non-prison sentences, the guideline states (as well as the new ABA Standards) give greater emphasis than do the federal guidelines to probation and other intermediate sanctions. This difference is probably due in part to differences between state and federal caseloads, but it may also reflect a generally less punitive approach by the states, as well as 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 and post-prison release.

D. Nature and Priority of Sentencing Reform Goals

All state guideline reforms reflect a desire to make sentencing more uniform and to eliminate unwarranted disparities. Beyond this, however, the declared or apparent goals and priorities of these reforms are diverse. Those states which have abolished parole release and substituted limited "good time" credits, were often responding to the desire for "truth in sentencing": the length of prison sentences imposed by courts should correspond closely to the amount of time inmates actually serve.

A few states have largely "descriptive" guidelines, designed to help judges follow existing sentencing norms more consistently. But even these states usually seek to make some "prescriptive" changes in prior norms (especially to eliminate 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 retributive, or "just deserts" theories 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 designed to achieve rehabilitative, incapacitative, or special deterrent goals.[5]

Increasingly, states are turning to sentencing guidelines with a primary goal of gaining control over rapidly escalating prison populations. Such control is made possible by the greater uniformity and predictability of guideline sentences, in comparison with previous indeterminate sentencing regimes. Minnesota pioneered this approach in 1980, and explicitly adopted a goal of never exceeding 95 percent of available prison capacity. That goal was achieved throughout the first decade of guideline sentencing; prison populations did increase, but at rates much slower than in other states. Prison construction and expansion were thus able to accommodate inmate population increases without overcrowding or multiple-bunking of high-security inmates. In contrast, Pennsylvania did not recognize resource-matching as a goal until the start of its second decade of guideline sentencing; by that time, prisons and jails were operating at about 150 percent of capacity.

Starting in the mid-1980s, as prison overcrowding problems grew around the country, a number of states (North Carolina, Oregon, Tennessee, and Washington) adopted guidelines linked to available resources. This trend received substantial recognition and support in the new ABA Standards. Resource-matching is a central principle of these Standards, but was not even mentioned in the 1979 version. The ABA's major shift in emphasis, from uniformity to resource-matching, mirrors changes taking place in state guidelines during the 1980s.

A related and very important principle found in the prior and the current edition of the ABA Standards is the concept of "parsimony": sanctions should be the least severe necessary to achieve the purposes of the sentence.[6] This principle was adopted by Minnesota in 1980, and has been recognized in several other states. A similar principle is contained in Section 3553(a) of the Sentencing Reform Act, but it has largely been ignored by the Sentencing Commission and the federal courts.[7] The principle is grounded in reasons of economy and humane treatment of offenders, and also has implications for punishment theory: if sentences may be mitigated for reasons of parsimony, this implies that "just deserts" considerations do not, in many cases, narrowly limit the permissible range of sanction severity.

E. Principal Determinants of Guidelines Sentences

All guideline states base their recommended sentences primarily on the conviction offense and the offender's prior conviction record. Although non-conviction offense details play some role (e.g., enhancements for weapon-use, regardless of whether such use was an element of the charged offense), the guidelines states are unanimous in rejecting the broader "real offense" approach of the federal guidelines, which permit frequent and quite substantial enhancements based on uncharged "relevant 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. Except for Washington, the guideline states place no limits on prosecutorial discretion; even Washington's limits are vague, and

not judicially enforceable. Nevertheless, this seeming "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 (Alaska, Delaware, and Ohio) employ narrative rules for each offense or offender group. State grids vary widely in their layouts and "cell" ranges. There are also major variations in severity ranking of offenses, formulas for computing prior record, good-time credit amounts, and the nature and extent of factors which permit (or do not permit) departure. Criminal history scoring is particularly diverse. These variations reflect differences in sentencing goals and state traditions, as well as the relatively primitive state of sentencing jurisprudence (which, prior to determinate sentencing, was rarely addressed in reported opinions or scholarly articles).

F. Case Monitoring, Research, and Evaluation Processes

One of the most important features of sentencing guideline reforms is their empirical research component. Most permanent, legislatively-created guideline commissions have been given a mandate to collect and analyze sentencing data, not only as background for development of the initial guidelines, but also as a means of monitoring implementation and proposing later revisions. This empirical component has become more and more 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 development of sophisticated, computerized models which can combine data on current and expected caseloads, presumptive sentences, and other factors known to have an impact on inmate populations.

Despite these important applications of guideline data, and the research mandates of most state commissions, there is surprisingly little published data, and even fewer published evaluations by researchers independent of the commissions. In some cases, this is because the guidelines are too new to have generated significant sentencing data; in older systems, data may not be collected due to inadequate commission staffing and budget. When data is collected, it is not always known, or fully available, to outside researchers. Finally, such data, even when available, is usually not in a form which permits meaningful cross-jurisdictional comparisons. The need for better and more comparable data is discussed below.

II. Key Issues in Future State and Federal Guideline Reforms

A. The Need for Balance in Sentencing Policy

The most important fact about state guideline systems is that they have survived and multiplied. Unlike the federal guidelines, which have been widely attacked, state guidelines have attracted relatively little sustained criticism, and continue to be adopted by other states.

What accounts for this higher degree of acceptance at the state level? My own hypothesis is that state guidelines are more popular because they are, in a variety of ways, more balanced than the federal version. Sentencing issues are, by their nature, highly controversial, and sentencing goals and limitations are often in conflict with each other. The best that can be hoped for is to achieve a relatively balanced and stable compromise on key 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 flexibility; (3) the degree of sanction severity (overall, and among different offenses and offender groups); and (4) the proper allocation of sentencing power among the principal institutions and actors – the legislature, the sentencing commission, prosecutors, defense attorneys, correctional officers and judges.

In each of these four areas, I believe that state guidelines are generally more balanced than the federal version. Offender characteristics seem to receive more weight in state systems; departures are more common; sentencing is less severe (e.g., fewer mandatory minimum sentences; more frequent probation; explicit recognition of prison population management and "parsimony" goals); and sentencing power, at both policy-making and individual case levels, is shared more broadly.

Further research will be needed to test this theory, but assuming it is true,[8] what accounts for the better balance, and thus broader support, of state guidelines? A larger, more representative sentencing commission may help (although Alaska seems to have maintained broad support without any permanent commission). The legislative role may also be critical: legislators must support the sentencing commission's independence (and budget), and should avoid micro-managing sentencing policy, but they must exercise enough oversight to prevent the commission from being captured by any narrow interest or perspective.

Two issues of "balance" deserve particular emphasis in future research and debate. First, what is the proper mix of uniformity and flexibility? Are guidelines useful, and do judges tend to follow them, even if they are largely "voluntary"? Second, when (if ever) should parole release discretion be retained? Does such discretion defeat the central goals of uniformity, truth-in-sentencing, and front-end prison population management? Is parole discretion still a needed prison "safety valve," or is this function adequately served by accurate population forecasts (combined, if necessary, with the option of retroactively applying mitigating guideline amendments)?

B. The Conundrum of Prosecutorial Discretion

No sentencing reform, state or federal, has yet resolved the problem of prosecutorial charging and plea

bargaining discretion. The conviction-offense approach universally adopted in state guidelines risks giving prosecutors too much power to "dictate" a sentence which is, under the circumstances, too severe or too lenient. However, even the limited "real offense" approach of the federal guidelines seems too lawless—and does not, in fact, prevent prosecutors from dominating the court's view of the "real" facts, and thus dictating the sentence.

Subject to further research, I would offer two tentative conclusions based on state experiences. First, the absence of any serious attempt to regulate prosecutorial decisions reflects the extraordinary difficulty of enforcing such controls in an adversary system. This may yet be possible, but it will be very difficult—especially to impose lower limits on charge and recommended-sentence severity (since, in most cases, neither the prosecution nor the defense will appeal cases of leniency). Second, the absence of widespread complaints about prosecutorial dominance in state guidelines systems suggests that, perhaps, closer regulation is not needed. Specifically, my hypothesis would be that, in a properly balanced guideline system—one with reasonable sentence severity levels and few mandatory minimum statutes, and in which courts retain substantial discretion to depart—it is rare that prosecutorial decisions produce sentences which judges strongly disapprove, yet are powerless to prevent (as in federal courts).

C. The Critical Importance of "Front-End" Resource-Matching

Governments, like individuals, must learn to live within their means, and keep their promises. These simple moral precepts are particularly important in sentencing. Politicians are always quite willing to increase penalties, but rarely agree to lower them, and are even more reluctant to raise taxes to pay for higher penalties. The all-too-common result: serious prison overcrowding, court intervention, and resort to increasingly desperate prison releasing measures (accelerated parole, furloughs, etc.). However, such "back-door" solutions only make problems worse because they increase the disparity between the prison terms imposed by courts and the length of time actually served.

At some point, this approach breaks down; time-served becomes so small, in comparison to sentences imposed,[9] that both the public and offenders lose respect for the sentencing process. Offenders learn that they can "beat the system;" legislators and the public become even more frustrated, and push for harsher sanctions. Meanwhile, judges are encouraged to continue to overuse prison sentences for non-violent offenders who can and should receive community-based sanctions.

Because presumptive sentences are more uniform, they permit more accurate predictions of the impact of current or proposed penalties on future correctional populations. Such predictions may be especially accurate (and are even more vitally important) if parole, as well as judicial, discretion is curtailed. Accurate resource-need predictions allow legislators to either appropriate the funds to expand prison capacity in time to meet the demand, reduce the demand by lowering prison commitment rates or durations for certain offenders, or pursue a combination of these approaches.

Most important of all, in the current "get tough" climate: if politicians can be told in fairly specific terms what various penalty increases will cost, they will be forced to take responsibility for their proposals, in terms of increased taxes, cuts in popular programs, or early release of other offenders.

Linking sentencing policy to resources also allows the public and elected officials to take a comprehensive view of sentencing policy; to set priorities in the allocation of limited prison space; and to explore less costly and more effective alternatives to incarceration. Legislators are thus in a better position to resist knee-jerk, "lock-em-up" responses to short-term public hysteria over particular heinous crimes; such ad hoc responses generate a leap-frog progression of steadily escalating penalties.

All crimes are terrible, but limited resources (and equally pressing competing social needs) require hard choices. Which offenses are *relatively* more serious? Which offenders require secure detention? For other offenders, what non-custodial sanctions are available to deter and punish crime, facilitate rehabilitation, and promote victim and community restitution?

In light of this, front-end resource-matching should be seen as an essential component of state and federal sentencing systems. To make such a system work, however, some government body (probably independent of the legislature) must have the budget and the legal duty to collect detailed sentencing data, make resource-need predictions, and publish them. Accurate predictions will only be possible if sentencing achieves a certain minimum degree of uniformity. This *may* mean that guidelines must be more than "voluntary," and that parole release must be at least partially structured. As noted above, these are issues for further research, comparing guideline states with and without these features.

D. Increasing the Use of Intermediate Sanctions

One of the risks of giving greater emphasis to sentencing uniformity and proportionality may be the tendency to encourage, or at least perpetuate, heavy reliance on custodial sentencing options—days or months in custody provide a convenient "coin" of punishment severity. But as noted above, presumptive sentencing—if linked to available resources—can also promote increased use of intermediate sanctions (intensive supervision probation, day fines, community service, home detention, day-reporting centers, work release, treatment, etc). 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" permitting choice of a wide variety of sanctions deemed to have roughly equivalent punitive impact.[10]

The guideline states have done a lot more with this than has the federal commission, but much work remains to be done. Central questions of policy and practice remain unanswered: Can intermediate sanctions be regulated without creating the excessive complexity which afflicts the federal guidelines?[11] Should minimum as well as maximum severity limits be defined, and can they be enforced? Can consensus be reached on specific exchange rates for fundamentally different sanction types (e.g., jail, home detention, fines, and community service)? How should violations of release conditions be sanctioned, to assure consistency, maximize compliance, and minimize resort to custodial measures?

E. The Centrality of Empirical Research

As noted in Part I, case-monitoring amd research are major components of most state guideline reforms, but the data collected, and the extent of commission and outside evaluations, are still inadequate. Better data, and more research, are essential if sentencing guidelines are to achieve their full potential. Sentencing commissions and legislators need feedback on how current rules are working, and what future resources will be needed; state and federal reformers need to be able to learn from each others' experiences with different approaches.

There is a particularly strong need for measures permitting valid cross-jurisdictional comparisons. For example, published guideline compliance rates reflect major differences in legal definitions of what constitutes a "departure" (e.g., probationary sentences given to certain first offenders would be deemed departures in Minnesota, but not in Washington). Similarly, comparisons of prison overcrowding are hampered by variations in definitions of "capacity;" comparisons of sentencing severity levels are hazardous, given the absence of comparable, offense-specific data on sentences imposed and time actually served.

Until more uniform data becomes available, researchers and officials will have to rely on indirect or approximate measures. For example, the extent of substantive appellate caselaw in a state may provide a useful index of the degree to which its guidelines actually restrict trial court discretion. Approximate comparisons of sentencing severity between jurisdictions (or within a single jurisdiction at different time periods) can be based on the ratios of total prison and jail populations to the number of adult arrests, convictions, or some other meaningful base.[12]

Conclusion

The experience of the states suggests that presumptive sentencing laws can help to reduce sentencing disparities without imposing excessive rigidity, and can be based on conviction offense without allowing prosecutors to dominate sentencing.[13] Determinate sentencing laws do, however, increase the political visibility of "real time" sentences, and thus create a risk of escalating penalties and overcrowded prisons, with no parole "safety valve." The experience of states like Minnesota shows that these problems can be controlled if presumptive sentences are explicitly linked to, and limited by, available correctional resources. This is the central innovation of the revised ABA Standards, and should be considered an essential feature of future reforms. It is also becoming one of the most important reasons for states to adopt guidelines. Parole and other "back door" release mechanisms can deal with prison overcrowding, but they cannot achieve either "truth in sentencing" (matching time-imposed to time-served) or the most efficient use of limited prison capacity.

Sentencing guidelines seem likely to continue to thrive and spread in the states, whereas the future of the federal guidelines remains very much in doubt. But before this approach is abandoned in federal courts, more attention should be given to the lessons of state guideline experience. State reforms are, in important ways, quite different from the federal version, and those differences may very well prove to be the key to their greater success.

Notes

[1] *See infra* text at note 3 (17 states have adopted guidelines).

[2] However, as illustrated by the Texas essay in this Issue, guidelines sometimes fail to obtain initial adoption. Jurisdictions which considered but rejected guidelines include Connecticut, Maine, New York, South Carolina, the District of Columbia, and Colorado.

[3] The sources for this summary include the essays reprinted in 6 FSR No.3.

[4] *See generally Symposium: A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOR. L. REV. 181–461 (1993).

[5] *See, e.g.*, Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. LAW & PUB. POL. 279–337 (1993); Frase, *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guideline*, 3 FED. SENT. R. 328–33 (1991).

[6] *See* N. Morris, THE FUTURE OF IMPRISONMENT (1974), at 59–62.

[7] *See* Marc Miller, *Purposes At Sentencing*, 66 So. CAL. L. REV. 448–9, 458–63, 474–76 (1992).

[8] *See generally* Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQUALITY 601 (1993).

[9] See essays in this issue, describing the very low percentages of time served in Texas, and in North Carolina prior to guidelines.

[10] *See* generally N. Morris & M. Tonry, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM, 37–81 (1990).

[11] *See* Judge Rosenbaum's essay in 6 FSR No. 3 at p. 178.

[12] For an example of the use of such measures, see *Frase, supra* note 8, at 632.

[13] Indeed, by eliminating parole release, and replacing mandatory minimum statutes, sentencing guidelines can actually increase judicial control over sentencing.