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Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines

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PANEL REMARKS

IS GUIDED DISCRETION SUFFICIENT? OVERVIEW OF STATE SENTENCING GUIDELINES

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The purpose of these remarks is to provide a brief overview of state sentencing guideline systems—where they are, how they have evolved, and how they differ from each other and from the Federal Guidelines.[1]

The idea of sentencing guidelines overseen by a permanent sentencing commission was originally proposed by federal judge Marvin Frankel in the early 1970s. Several bills to accomplish this were introduced in Congress, but Minnesota was the first jurisdiction in the United States to place such a system in operation. There is some irony that a federal judge first proposed this idea – not only were sentencing guidelines first adopted in the states, but many people

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1. The principal sources for this summary are: Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUSTICE 137 (1993); Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173 (1995); Kevin R. Reitz, *The Statute of Sentencing Guidelines Reforms in the U.S.*, 10(6) OVERCROWDED TIMES 1 (1999); and various state-specific reports and evaluations too numerous to cite, collected by the author. (Many of the latter have been published either in the FEDERAL SENTENCING REPORTER, or in OVERCROWDED TIMES. Additional information about particular state guidelines systems may be obtained from the contact persons listed on the web page of the National Association of Sentencing Commissions — http://www.ussc.gov/states/nascaddr.htm. The Association's newsletter, also available on this web page, reports recent state guidelines developments. Questions, comments, and factual corrections are very welcome, and should be addressed to Professor Frase at: frase001@maroon.tc.umn.edu.

believe that state guidelines have been much more successful than the federal version.

As of late 1999, about one-third of the states had sentencing guidelines in effect, and guidelines reforms were being considered in a number of other states. But, state guidelines systems are not all alike; some states have attempted to go farther than Minnesota, while many others have done much less.

One of the themes I want to stress at the outset is that although state guidelines systems are very different from each in a number of the ways, they have a couple of things in common that distinguish them from the Federal Guidelines. Across the board, I believe that state systems are more flexible than the Federal Guidelines. There is a range among the state guideline systems. Some state systems are so flexible that they are hardly "guidelines" at all, others are rather restrictive. But anyone who thinks that sentencing guidelines are inherently inflexible and take away all discretion would be wrong.

Another thing that distinguishes state guidelines is that they are relatively simple to apply. The Federal Guidelines are quite ambitious; they try to structure and define every single decision. This is related to the flexibility point, but it goes beyond that. State guidelines are generally relatively short documents; sometimes very short. The Minnesota guidelines commission, for one, has been explicit about the value of simplicity. No matter how much we would like to regulate everything and no matter how many different goals we want to achieve, it is important to keep the guidelines relatively easy to apply and easy for courts, defendants, and the public to understand. This is an important point that was lost in the federal system.

In the remainder of these comments, I will examine the evolution, successes, and failures of guidelines reforms in Minnesota and other jurisdictions, and the lessons we can draw from twenty years of experience with state guidelines. First, I will briefly describe the state guidelines reforms that have been proposed, adopted, and in some cases, repealed. Next, I will examine the purposes which sentencing guidelines are intended to serve, how those purposes have evolved over time, and the extent to which state and Federal Guidelines reforms have achieved their various purposes. Then, I will discuss several major limitations of guidelines reforms in all jurisdictions: the lack of effective controls over prosecutorial discretion and plea bargaining practices and the very limited attempts to regulate or encourage the use of intermediate sanctions. In spite of these limitations, however, I argue that state sentencing guidelines have proven to be much better than any other sentencing system which has been tried or proposed.

I. WHERE, WHEN, AND WHAT KINDS OF GUIDELINES?

A. Jurisdictions that have, once had, are considering, or have rejected "guidelines"

As shown in the table accompanying these remarks, some form of sentencing guidelines is currently being used in seventeen states and in the federal courts.[2] In addition, at least eight other jurisdictions (listed at the bottom of the table) are considering the adoption of guidelines. Another important development was the adoption, in 1993, of the American Bar Association's revised standards for sentencing (Third Edition). These standards strongly endorse the adoption of sentencing guidelines incorporating all six of the key structural features listed in the table.

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

B. Not all Guidelines are Alike — Major variations

The accompanying table indicates some of most important structural differences among guidelines systems, but there are actually many more variations. For instance, Delaware, Florida, and Ohio do not use a grid (although their "narrative" or "point-system" guidelines could be translated into a grid). State and federal grids vary considerably in such things as: whether certain offenses have a separate grid; the number of grid cells; the breadth of cell ranges; and whether the ranges of adjoining cells overlap. Guidelines systems also differ in other ways, including: (1) the number of disposition options permitted for a given case (e.g., prison, jail, restrictive intermediate sanctions, etc.); (2) whether any guidance is offered as to the choice among sentencing purposes; (3) how criminal history is defined; (4) how multiple offenses are sentenced; and (5) the extent to which the

2. *See* Table 1.

sentencing commission has made independent judgments about appropriate sentences (so-called "prescriptive" rules), rather than simply compiling guidelines which are descriptive of past judicial and paroling practices.

As shown in the table, three states' guidelines lack a permanent sentencing commission. Alaska's guidelines were created by statute, and have been greatly expanded by appellate caselaw. As was noted previously, guidelines in Florida and Tennessee were written by commissions that were later abolished. Utah and three other states initially did not have a permanent sentencing commission. State sentencing commissions vary considerably in their makeup, but most of them are larger and more widely representative than the federal commission (e.g., including attorneys and probation officers). The duties, staffing, and budget of sentencing commissions varies a great deal. An essential component of guidelines, however, is the idea of a commission that can do research on past sentencing practices, evaluate the use of resources, and prioritize the use of those resources. Perhaps most importantly, the commission can predict and seek to avoid prison overcrowding (a function that I address below). In short, a permanent sentencing commission is now generally seen as an essential component of a sentencing guideline system.

Guidelines systems also differ greatly in their scope. The most important differences relate to parole: six states (Utah, Pennsylvania, and the other states with "blanks" in the parole column of the accompanying table) retain parole release discretion for all offenses, and have only adopted guidelines to structure judges' sentencing decisions. Two states (Alaska and Michigan) retain parole for a substantial number of crimes. A number of state guideline systems use parole only for a few, very serious offenses, usually those subject to life imprisonment. Ohio retains a judicial releasing option. Thus, abolition of parole release is apparently not seen as an essential feature of state guidelines, although it has become more common in recent years.

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

The next column shown in the table indicates which jurisdictions have required their sentencing commission or some other state agency to assess the resource-impact of proposed sentencing guidelines and statutes, in particular,

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

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

The far right-hand column in the table shows the systems that have guidelines to regulate misdemeanors as well as felonies. Only five jurisdictions (and the ABA Standards) propose guidelines for misdemeanors (or at least, the more serious ones). Perhaps surprisingly, there does not seem to be a strong correlation between the attempt to regulate intermediate

sanctions and the decision to promulgate misdemeanor guidelines — even though intermediate sanctions would seem to be especially appropriate for less serious cases. Of course, there are also many inmates in state prison who are appropriate candidates for intermediate sanctions. The judicial sentencing seminars conducted by Bob Levy at the University of Minnesota and by Mike Wolf at St. Louis University have been helping us explore these issues; the cases discussed in these seminars suggest that there are a lot of people in state prisons who really do not need to be there.

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

II. THE CHANGING PURPOSES OF SENTENCING GUIDELINES

What were the original goals of guidelines reforms, and how have these goals evolved over time? The initial goals provide familiar but important background — we have to know where we have been, and how we got here, in order to evaluate the present situation and our options for the future. In particular, we need to recognize when supposedly new sentencing reforms are actually just "re-runs" of old ideas — we do not want to make the same mistakes all over again. At the same time, we also need to recognize that the goals of sentencing reform have evolved over time. These changes show how guidelines have responded to new as well as old policy concerns, all of which must be accommodated in any successful sentencing system.

A. Initial goals: Reduced sentencing disparity, and more rational sentencing policy

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

The goal of disparity reduction was closely tied to a debate about the purposes that criminal penalties should be designed to serve. Prior to adoption of sentencing guidelines, the dominant purposes of punishment were rehabilitation (seeking to change the underlying causes of the defendant's criminal behavior) and incapacitation (preventing crime by confining dangerous offenders). To achieve these goals, judges and parole boards were given extremely broad discretion to assess individually the rehabilitation potential and dangerousness of each offender. Under this "indeterminate" sentencing system, judges could impose any sentence from probation to the maximum prison term authorized by law (e.g., twenty years for unarmed robbery). Most systems required offenders to serve some fraction of their prison term before becoming eligible for parole; after that point, the parole board had unreviewable discretion to decide how much of the remaining sentence would have to be served.

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

The goal of achieving more rational sentencing policy has two facets. First, the use of an independent, appointed commission was designed to insulate sentencing policy decisions from short-term political pressures (and the tendency of elected politicians to prefer more punitive policies, so as not to

appear "soft on crime"). Second, the commission, like other administrative agencies, was expected to collect data and develop expertise that would contribute to more informed sentencing policy. The commissions' database and expertise (and in Minnesota, its mandate to avoid prison overcrowding), was also expected to promote a more comprehensive, long-term, and fiscally responsible view. By setting sentencing policy for all crimes (or at least, all felonies), guidelines systems could (1) avoid piecemeal reforms in response to the current "crime of the week," (2) help manage more effectively the state's prison capacity, and (3) set priorities for the use of limited correctional resources.

B. Evolving goals

Since Minnesota's guidelines first became effective, sentencing goals and values in Minnesota and other guidelines jurisdictions have evolved considerably. Of the original guidelines goals summarized above, it appears that the goal of disparity reduction has become somewhat less important, while other goals have become more important. In order to achieve all of these goals, many state guidelines systems have, in effect, adopted a hybrid sentencing theory sometimes known as "limiting retributivism" (or as it is known in Minnesota, "modified just deserts"). Under this approach, retributive or "just deserts" values merely set upper and lower bounds—sentences must not be either excessively severe or unduly lenient. This theory thus defines a range of "deserved" punishments, within which courts may consider crime-prevention, resource limits, victim and community concerns, and other appropriate sentencing goals.[3]

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

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

Truth in Sentencing. Although this term has several meanings, the most common refers to the goal of ensuring that offenders serve a high percentage of

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

the prison sentence imposed by the court and are not released early by parole or prison officials. In one sense, truth in sentencing was always part of sentencing reforms that included the abolition of parole release discretion. But "truth in sentencing" has come to mean abolishing parole, period—whether or not judicial sentencing guidelines are enacted. Moreover, the emphasis has shifted from disparity-reduction to systemic "honesty" and increased sentence severity. Thus, whereas early guidelines combined with abolition of parole allowed offenders to receive a subsequent sentence reduction of up to thirty-three percent for good conduct in prison, the Federal Sentencing Guidelines—and an increasing number of state sentencing guideline systems—define "truth in sentencing" so that offenders receive a sentence reduction of no more than *fifteen percent* for good conduct. Adoption of this definition (and of guidelines which include abolition of parole) was strongly encouraged by a 1994 federal statute which provided substantial funds for prison construction to states that abolish parole and require inmates convicted of serious crimes to serve at least eighty-five percent of their sentences.[4] At the same time, this statute has also encouraged some states to consider adopting guidelines. The reason is that prisoners in their states were previously serving a very low proportion of their sentences (sometimes less than twenty percent). With prisoners now required to serve at least eighty-five percent of their sentences, states are facing the prospect of massive increases in prison populations unless judges can be persuaded (via guidelines) to lower their sentence lengths.

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

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

These limited forms of risk assessment and risk management were not enough, however, to satisfy judges, legislators, and the public. In Minnesota and most other guidelines systems, public safety has become an increasingly important goal. Thus, in 1989 the Minnesota Legislature amended the guidelines enabling statute to specify that public safety should be the Commission's "primary" consideration, in enacting or modifying Guidelines provisions. The Legislature has also enacted a series of laws authorizing or mandating increased penalties for certain dangerous or repeat offenders. As for other states'guidelines systems, some explicitly included public safety as a goal (e.g., Ohio), and newer guidelines systems are likely to incorporate recidivist and "dangerous offender" provisions, especially for sex crimes.

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

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

Rewarding guilty pleas and other forms of cooperation. All sentencing guidelines systems appear to recognize the importance of encouraging

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

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

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

To summarize, early guidelines reforms attempted to narrow the focus of sentencing to strongly emphasize uniformity and "just deserts," and to promote

more rational sentencing policy. The much broader range of contemporary sentencing goals demonstrates an important underlying truth, which early guidelines reforms (and some recent proposals) seem to have overlooked: sentencing policy is very complex, requiring compromise and careful balancing of numerous, often-competing goals. Yet the basic concepts and rules must remain fairly easy for the public and system actors to understand and apply. Designing a workable system to achieve all of these goals and values is NOT a simple task!

III. WHAT HAVE GUIDELINES ACCOMPLISHED?

Now that we have a better idea of the goals which guidelines systems are supposed to serve, we can turn to an evaluation of their accomplishments. I have to preface these remarks, however, by admitting to you that no "expert" on sentencing guidelines can tell you very much about how most state guidelines systems have worked in practice. In some cases, this is because a state's system is too new to have generated enough data for evaluation. In other cases, the reason is simply that the guidelines commission has not published or commissioned any evaluations, nor is there some professor or other outside researcher who takes a special interest in that state's guidelines. So keep in mind that much of what I put forth in this section is based on a few, well-documented systems, and some "educated guesswork" about the rest.

Disparity reduction. Since most guidelines systems have abolished parole, they have eliminated that form of disparity. Judicial sentencing disparities have also been reduced, at least in the few states that have been evaluated. Minnesota is the only system to have been subjected to extensive outside evaluation, but data reported by sentencing commissions or their staffs suggest that disparity has also been reduced in Delaware, Oregon, Pennsylvania, and Washington.[5] It is possible, of course, that judicial sentencing disparities were simply replaced by prosecutorial disparities. Most evaluations of state sentencing guidelines have only examined disparity on the basis of the conviction offense, since that is what state guideline rules are based on, but evaluation of prosecutorial disparity requires analysis of "real offense" data.[6]

You will note that two of these five data-reporting jurisdictions do not have legally-binding guidelines (Delaware's are formally voluntary, and Pennsylvania's lack effective appellate review). Although much more research is needed on this point, it may be that voluntary judicial guidelines can still be effective to reduce disparity, at least if certain other factors are present:

5. Tonry, *supra* note 1, at 153-54.

6. For some examples of such analysis, *see* Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota,* 2 CORNELL J. L. & PUB. POL. 279, 299-303, 318 n.93, 321 (1993). For further discussion of prosecutorial discretion and plea bargaining, see part IV, *infra*.

Delaware is a very small state, with substantial informal "peer" pressure on judges to conform to the guidelines; Pennsylvania has had a very strong and active sentencing commission.

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

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

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

Another goal of rational sentencing policy is the development of effective appellate review, including a sufficient body of caselaw to enforce guidelines rules, clarify ambiguities, and develop sentencing policy through the time-honored, "common law" method. Many guidelines systems (Alaska, Minnesota, Washington, Oregon, Kansas, and the Federal courts) have achieved a substantial body of appellate case law. Some observers believe that

appellate review in the federal courts has gone too far, however, unduly limiting trial court flexibility.[7]

Truth in Sentencing. Any system that has abolished parole release discretion — as the majority of guidelines systems have done — has achieved a greater degree of "truth in sentencing." Of course, this goal has also been achieved in a number of states that abolished parole without adopting judicial sentencing guidelines. There are three reasons to believe, however, that the abolition of parole works much better in a system with such guidelines. First, systems with judicial guidelines have less need to rely on state-wide parole standards as a means of reducing disparity in the sentences imposed by local judges. Second, judicial guidelines can be used to encourage judges to lower their sentence lengths, to reflect the much higher proportion of the prison term that will be served after parole is abolished (and thus avoid massive increases in prison populations). Third, systems with guidelines and a permanent sentencing commission are in a better position to predict the effects abolition of parole will have on prison populations; such systems can then either build more prisons, modify the guidelines to lower prison commitment or duration rates, or pursue a combination of these strategies. In contrast, the abolition of parole, in a system without judicial guidelines, eliminates a means of counteracting judicial disparity and prison overcrowding at the back end of the sentencing process, without providing any means of controlling these problems from the front end.

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

Other goals. As for the other goals of guidelines reforms described previously (that is, rehabilitation and reintegration, restorative and community justice, rewarding defendant cooperation, shared sentencing power, and simplicity), some guidelines systems have been particularly successful. The Minnesota Guidelines have achieved greater uniformity, proportionality, and truth in sentencing, while retaining enough flexibility to take account of unusual offender characteristics and rehabilitation potential, local values and resource limits, and emerging punishment theories such as restorative justice.[8]

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

8. *See generally* Frase, *supra* note 3.

By giving strong priority to the use of state prison space for violent and repeat offenders, while emphasizing jail and other community-based sanctions for less serious cases, the Guidelines promote public safety while avoiding prison overcrowding and unnecessary incarceration. Finally, the Minnesota Guidelines allow sentencing policy to be significantly influenced by each of the major actors and stakeholders: the legislature, the Commission, trial and appellate courts, the prosecution and defense, crime victims and community groups, probation officers, and prison officials. At the same time, the Minnesota Guidelines remain fairly simple to understand and to apply.

Other state guidelines systems have not been as thoroughly evaluated as Minnesota's, but what we do know about them suggests that many of them have also achieved a good balance in the areas described above. Unfortunately, the same cannot be said about the Federal Guidelines. There have been a number of problems, some of which have already been noted. First, federal appellate review has been very active, depriving trials courts of needed flexibility. Second, the U.S. Sentencing Commission did not adopt resource management as a goal; thus, federal prisons have remained seriously overcrowded, and federal prison population growth has been higher than the national average—and much higher than in jurisdictions with guidelines systems that emphasize resource management. Third, the Federal Guidelines provide only limited scope for and encouragement of the use of intermediate sanctions, and only specifically incorporate options that are alternative forms of custody (community and intermittent confinement, and home detention). Fourth, the Federal Guidelines not only permit, but often require, judges to enhance sentences based on conduct that was not charged, or for which charges led to dismissal or even acquittal; although some state guidelines systems include occasional elements of "real-offense" sentencing, no state guidelines system permits non-conviction-offense factors to play a substantial a role. A fifth problem in the federal system results from severe mandatory minimum penalties and related guidelines provisions which, in the view of many federal judges, often result in unreasonably severe sentences. Finally, the Federal Guidelines are NOT "simple" — the Federal Guidelines Manual currently runs to over 400 pages in the West version (not counting appendices); the length of the Minnesota Guidelines, at about sixty-five pages, is typical of most state systems. To summarize: the Federal Guidelines are not well-balanced; they contain a number of very problematic rules, lack desirable features found in many state systems, and have sparked far more criticism than most state guidelines systems.

IV. TWO PERSISTENT CHALLENGES

Despite the accomplishments of many state guidelines, there are a number of legitimate criticisms, which can be leveled at even the best of these systems. In this section, I would like to address two of the most important problems: (1)

the failure to effectively regulate prosecutorial discretion and plea bargaining; and (2) the limited efforts to regulate the use of non-custodial ("intermediate") sanctions.[9] I will concede that each of these "gaps" in guidelines coverage is a problem, especially in some guidelines systems. I argue, however, that these limitations are not a major problem in a well-designed system, and indeed may even be strengths, helping these systems accommodate important contemporary sentencing goals and values.

A. Prosecutorial Discretion and Plea Bargaining

Prosecutors in every American jurisdiction wield enormous "sentencing" power because they have virtually unreviewable discretion to select the initial charges and decide which charges to drop as part of plea bargaining. Since guidelines limit the range of sentences available for a given offense, the power to drop or not drop charges is the power to select the sentence range available to the court (that is, what "box" on the grid the case ends up in). Thus, any disparity in charging translates into disparity in sentencing. Unregulated charging also makes it more difficult for the sentencing commission to predict future resource needs. Yet no guidelines system has come up with an effective way of structuring prosecutorial sentencing power, and its potential for disparity and unpredictability. The Federal Guidelines tried to mitigate this problem by requiring trial courts to consider certain alleged criminal acts (so-called "relevant conduct") whether or not such acts were included in any conviction offense.[10] But this essentially lawless approach goes too far in the opposite direction—allowing sentences to be based on weak charges which were properly dismissed, resulted in acquittal, or were never even filed.

What should be done? Clearly efforts to structure prosecutorial discretion and plea bargaining should continue, especially by means of internal, administrative measures within prosecutor's offices, such as written policies and review of decisions by supervising staff. But we should not expect any major "breakthroughs" in the near future. The absence, in all state guidelines systems, of any serious attempt to externally regulate prosecutorial decisions reflects the extraordinary difficulty of enforcing such controls in an adversary system. This may yet be possible, but it will be very difficult—especially to impose lower limits on charge and recommended-sentence severity (since, in

9. Other common criticisms of guidelines are that they do not give judges enough discretion (or give them too much); that guidelines give too much weight to retributive sentencing goals (or not enough); and that they promote undue sentencing severity (or undue leniency). For a refutation of these opposing criticisms, as applied to the Minnesota Guidelines, *see* Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQUALITY 1, 10-33 (1993).

10. For a discussion of relevant conduct and its role in sentencing guidelines systems, see *Panel Remarks* 44 ST. LOUIS U. L.J. 409, in this issue.

most cases, neither prosecutors nor defendants will appeal cases of prosecution leniency).

I believe, however, that most state guidelines systems are valuable and workable reforms even if prosecutorial decisions remain substantially unregulated. I have two reasons for this belief. First, the absence of widespread complaints about prosecutorial dominance in state guidelines systems is an important sign, suggesting that closer regulation may not be needed. Specifically, I am suggesting that, in a properly balanced guidelines system—that is, one with reasonable sentence severity levels and few mandatory minimum statutes, in which courts retain substantial sentencing discretion for any given offense (e.g., broad guidelines ranges, limited appellate scrutiny, and/or flexible departure powers), it is rare that prosecutorial decisions will produce sentences which judges strongly disapprove, yet are powerless to prevent (as often seems to occur in federal courts). Second, prosecutorial charging and plea bargaining are valuable sources of flexibility and moderation in sentencing. These discretionary powers permit systems to consider individual offense and offender factors which may not fit squarely within formal statutory and guidelines rules. And of course, prosecutorial discretion also allows systems to tailor sentencing severity to the available resources and evidence.

B. Intermediate Sanctions

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

This approach encourages judges to think about alternatives to custody, and discourages them from imposing severe intermediate sanctions in very minor cases. But the Pennsylvania and North Carolina Guidelines provide no guidance as to the choice to be made when more than one sanction type is allowed in a given cell, nor (when a non-custodial option is chosen), how much of that option to impose (for instance, what length of home detention or

community service). These two systems also provide little guidance for the use of intermediate sanctions in response to violations of the conditions of probation or post-prison release. Revocations of conditional release account for a high proportion of state prison admissions in many states; judges and correctional authorities need a range of structured sanctions at the "back end" of the sentencing process, as well as at the "front end."

Thus, an appropriate question is "Should all guidelines systems develop detailed rules to regulate and encourage the use of intermediate sanctions?" Perhaps, but only if certain conditions are met (and thus, probably only in certain jurisdictions). The following factors need to be considered:

1. Are various intermediate sanctions available in most parts of the state, and are they adequately funded? A number of state guidelines systems (Pennsylvania, North Carolina, and Ohio) have sought to encourage broader use of intermediate sanctions through increased state funding for community corrections.

2. Is there fairly broad field support for such guidelines? In Minnesota, proposals to add any type of intermediate sanction guidelines have been met with widespread resistance from attorneys, judges, and probation officers. And Minnesota's experience has shown that, where field resistance is high, guidelines rules have been widely evaded.

3. Assuming sufficient funding and field support, what is the probable impact of wider use of intermediate sanctions on prison and jail populations? Prior experience with other "middle options" such as pretrial diversion and boot camp suggests that broader use of restrictive intermediate sanctions might not greatly reduce custody populations, and could even increase them. Many of the offenders who receive these new sanctions would previously have received less onerousness release conditions. Any increase in the number or intensity of release conditions inevitably means an increase in the frequency of probation violations, and thus at least some increase in prison or jail commitment rates.

4. Are this jurisdiction's guidelines already fairly detailed? Rules governing the use of intermediate sanctions make guidelines more complex, yet a major goal of most state guidelines reforms has been simplicity of application. As I suggested previously, simplicity promotes better public and offender understanding and acceptance of the rules, and reduces errors of application. At some point, the cost of further complexity outweighs any added benefits. This is particularly likely to be true in the sentencing of less serious offenses.

5. How much importance does this jurisdiction place on non-retributive sentencing goals? Flexibility in the imposition of probation conditions permits greater individualization (to achieve crime-preventive goals), and a greater degree of "local control" (so that sentencing policy and the use of local resources may reflect important variations in local values and traditions). Such

flexibility also allows sentences to more easily incorporate restorative and community justice goals.

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

CONCLUSION

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

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

officials. And yet, most state guidelines systems remain relatively simple to understand and apply.

Second: the best state guidelines work better, in all of the ways described above, than any other sentencing system which has yet been tried or even proposed. Quite simply, there is no realistic alternative as a means of accommodating all of the many important values and principles we want sentences to serve. The prior indeterminate sentencing system permitted extremes of disparity that cannot be tolerated in a modern system of justice governed by the rule of law. The unpredictable nature of indeterminate sentencing also prevented effective resource-management, and violated the public's desire for truth in sentencing. Similar problems of disparity and unpredictability would arise if any jurisdiction were to base its sentencing system entirely on a theory of restorative or community justice. On the other hand, highly "determinate" sentencing regimes—narrow, legislatively fixed sentence ranges for all crimes, or mandatory-minimum terms for selected offenses—go too far in the opposite direction. Mandatory penalties deny courts needed flexibility, and invite wide-spread (but inconsistent) evasion, thus making sentencing even more disparate, and greatly limiting the hoped-for crime-control benefits. Systems of legislatively fixed penalty ranges for all crimes have also proved undesirable, and no such law has been enacted since the early 1980s. Legislators have realized that it is very difficult to specify precise sentence ranges in advance and carefully monitor their implementation, nor does the legislature have the time or expertise to do this—that is what a sentencing commission is for. Finally, as was noted earlier, the current trend to abolish parole-release discretion without enacting judicial sentencing guidelines is arguably the worst combination of all, because it eliminates a means of reducing judicial disparities and prison overcrowding, without providing any replacement for these important functions.

Third: state sentencing guidelines systems are politically viable. They have been successfully implemented in many states, and have survived—in some cases for almost twenty years, which is a very long time, given the extreme political salience and volatility of sentencing issues in recent years. These systems have survived because they work, and in particular, because they have managed to incorporate, and strike an acceptable balance between, the diverse values and goals of late-twentieth century American sentencing policy. Of course, there are no guarantees of success; a number of state systems have been abandoned, and others have been substantially weakened. The success of sentencing guidelines is spectacularly "contingent" as to both place and time.[11] Looking at the history of state guidelines adoptions, rejections, expansions, contractions, and abolitions, it is difficult to find a

11. Franklin E. Zimring & Gordon Hawkins, THE SCALE OF IMPRISONMENT 160-62 (1991).

simple pattern, although several factors seem important: a "weak" system to begin with (Louisiana, Wisconsin), and ballot-box policy making (Oregon).

Fourth: state guidelines continue to evolve and improve. Newer systems are more likely to take advantage of the potential which guidelines provide for resource-management and the promotion and structuring of intermediate sanctions. Older systems are better today than when they began, because they now openly recognize and incorporate the many, conflicting goals and values in sentencing. Although early systems such as Minnesota's were designed to implement a theory of "Just Deserts," we have learned that sentencing is more complex than that. To achieve the goals of simplicity and rationality, it is tempting to limit our sentencing purposes to retributive uniformity and proportionality. But no American system has ever adopted and retained such a narrow approach, and it probably never will. Nor should it.

Fifth: sentencing guideline reform remains an area of state, not federal leadership. This reform began in the states; state guidelines systems have improved over time more than the federal version; and most state systems have avoided the strong opposition that the Federal Guidelines have evoked among judges and sentencing scholars. Indeed, the federal contribution has largely been negative; states have adopted guidelines despite the federal example, not because of it (and have even felt the need to avoid the term "guidelines," because it seemed too closely associated with the federal version).

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

Summary of Sentencing Guidelines Systems (Fall 1999)
Major Structural Features

Jurisdiction	Initial Effective Date	Permanent Sentencing Commission	Parole Release Abolished	Effective Appellate Review	Resource-Impact Assessments	Incorporates Intermediate Sanctions	Covers Misdemeanor Offenses
Utah	Jan. 1979	Since 1983			Since 1993		Some
Alaska	Jan. 1980		Mostly	√			
Minnesota	May 1980	√	√	√	√		
Pennsylvania	July 1982	√				Since 1994	√
Maryland	July 1983	Since 1996					
Florida	Oct. 1983	Until 1998	√	Some	1994-98		
Michigan	Jan 1984	Since 1995	Some, 1999	Since 1999	Since 1999		
Washington	July 1984	√	√	√	√	Some	
Delaware	Oct. 1987	√	Since 1990		√	√	√
FEDERAL	Nov. 1987	√	√	√	√	Some	Some
Oregon	Nov. 1989	√	√	√	√	√	
Tennessee	Nov. 1989	Until 1995		Some	Until 1995		
Virginia	Jan. 1991	Since 1994	Since 1995		Since 1995		
ABA Sentencing Standards (Third)	Feb. 1993	√	√	√	√	√	√
Kansas	July 1993	√	√	√			
Arkansas	Jan. 1994	√			√	√	
North Carolina	Oct. 1994	√	√	Some	√	√	√
Ohio	July 1996	√	Mostly	Some	√		
Missouri	Mar. 1997	√			√	√	

Guidelines Under Consideration:	Alabama Georgia Iowa Massachusetts Oklahoma South Carolina Washington, D.C. Wisconsin
Guidelines Considered and Rejected:	Connecticut Maine Texas Colorado New York Montana
Guidelines Implemented, then Repealed	Louisiana (1992-95) Wisconsin (1985-95)