

DAVID RAYBIN'S REPORT ON THE TENNESSEE *BLAKELY* COMMISSION RECOMMENDATIONS.

Here is the way the paper reported our meeting:

SENTENCING PLAN PROPOSED : JUDGES WOULD HAVE POWER TO METE TIME UNDER IDEA TO BE PRESENTED TO GOVERNOR

By JAMIE SATTERFIELD, satterfield@knews.com
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NASHVILLE - Judges - not juries - will have sentencing power under a proposal expected to be presented to Gov. Phil Bredesen. A task force appointed by Bredesen last year after a U.S. Supreme Court ruling rendered much of Tennessee's criminal sentencing scheme unconstitutional met Friday to hammer out a final proposed fix. The panel rejected a solution favored by the state's District Public Defenders Conference that would have created a system where juries decide factors that could be used to increase a defendant's sentence. Instead, the group favored a plan that would give judges greater freedom to decide what punishment a defendant deserves. That plan is popular among prosecutors and judges.

The state's method of sentencing criminals was deemed unconstitutional after the U.S. Supreme Court struck down last June a similar system used in Washington state. That ruling, known as the Blakely decision, said Washington's sentencing scheme violated the 6th Amendment right to a jury trial by allowing judges to jack up criminals' sentences based on factors a jury had not decided.

Tennessee's system mirrors the one used in Washington. Tennessee's appellate courts have since opined that the Blakely decision applies to our state's sentencing method. Here's how the state's system currently works: A rapist, for instance, faces a penalty range of 8-12 years. Current state law requires a judge to sentence the rapist to eight years unless prosecutors can convince the judge there are "enhancement factors," listed in state law, that justify a greater punishment.

In Blakely, the nation's high court stated that a jury must decide those factors, not a judge. The only way, under Blakely, Tennessee judges can boost a sentence is if the defendant has prior convictions.

Knox County District Attorney General Randy Nichols has long contended the easiest fix would be to excise from state law the requirement that judges impose the lowest sentence in the penalty range. Fellow prosecutors across the state have agreed.

On Friday, the governor's task force concurred, voting to approve that would give judges authority to choose any sentence within the narrow a proposal four-year ranges set for crimes in Tennessee.

But it was not a decision that sat well with all members of the task force, made up of lawyers, professors, prosecutors, judges and state officials. Professor Donald Hall made it clear he preferred to let juries rule on enhancement factors, as did a few others on the panel.

There were other concerns voiced by task force members. The proposal still requires judges to decide various sentencing factors. "That requires findings by the judge," Appellate Judge Gary Wade noted. Others worried about a "hanging judge mentality," in which judges, for years confined to doling out minimum sentences, would routinely impose the harshest penalties possible.

There also remains the thorny issue of appellate court review. What standard would an appeals court use to decide if a judge was too harsh? Task force members spent several hours Friday debating the exact language to put into a proposed bill. After some expected tweaking to take place in the coming days, the proposal will be sent to Bredesen for approval. If the governor gives his stamp of approval to the proposal, it will then be included in a bill. State legislators, though, will have final say over whether the proposed fix will be enacted into law

This represents the first major change to the state's sentencing scheme since 1989, when legislators made sweeping reforms that reduced penalty ranges for most crimes and built in restraints on judges' sentencing powers.

Judge Barbara Haynes, who presides over the Blakely task force, also headed the panel that drafted 1989's sentencing reform act. Nashville attorney David Raybin, who helped craft the 1989 law, is the chief architect of the proposal approved Friday.

This Knoxville newspaper story certainly captured the flavor of the debates but somehow failed to mention the CRITICAL point that we adopted an advisory minimum sentence as a starting point for all sentencing determinations. This was an important compromise which made a significant improvement in the prosecutor's proposals.

To understand our final recommendation it is important to realize that there were THREE, not two proposals on the table. The first (Raybin4) was the bifurcated proposal that let the jury find the enhancers. Although this would solve the *Blakely* problem, the judges were against this because it created an extra time factor in the trial. There was huge opposition to the bifurcated jury trial proposal and I firmly believed it would never pass the legislature.

As we know we changed things in 1989 to a presumptive mandatory minimum as a starting point. That is clearly unconstitutional since it is mandatory. To fix this, the prosecutors came up with a draft by Gordon Smith (Smith4) that did away with the statutory presumptive minimum and let the judge sentence based on his or her discretion with consideration given to the enhancement and mitigating factors. While this would also solve the *Blakely* problem I was very much against this. If we did not have a "base level" or "starting point" then we were, quite literally, in "free fall."

Tennessee experimented with a "free fall" system in 1982 which proved that a totally discretionary sentencing system, even with enhancement and mitigating factors, produced longer sentences and prison overcrowding. The 1982 sentencing law had ranges, had enhancement factors, and was similar in many respects to what the prosecutors were initially proposing in 2005. Things got so bad in 1982 that we soon had riots in the prisons, our system was taken over by the federal court, and the legislature was called into special session! We had been down that road before. I did not want to travel that same path again.

I had long suggested a "base" level for our state criminal offenses which is the statutory minimum. Under the 1989 law we called it a presumptive minimum. Under my 2005 draft (a renumbered Raybin7) it is the "starting point" for sentencing determinations. It is the same basic idea as the 1989 law albeit "advisory.". The judge can then go up based on enhancement factors albeit that our factors are not given exact numerical values such as in federal

court. The point is, of course, that we have to have a base level to start with otherwise everybody starts wherever they want to and you encounter a world of problems as we did in 1982. As I have always said, if everyone starts out at the same point then there is a greater chance that everyone may end up at a similar point. THAT is what my 2005 proposal contemplated and is what I fought so hard to achieve. The problem was that *Blakely* would not allow this but *Booker* would.

Thus, I proposed an alternative (Raybin7) that was an advisory minimum sentence system. After considerable debate we started negotiating and eventually agreed not to have a bifurcated system BUT that we would not have a totally discretionary system either. The compromise was to adopt a base level or minimum which would be advisory like the post-*Booker* federal system but without the math. That compromise was critical.

The central provision which we approved was the language that “in imposing a specific sentence within the range of punishment the court shall consider, but is not bound by the following advisory sentencing guidelines.” That came right out of *Booker*. The proposal then lists a number of factors which the court should consider, the most important of which is that the “minimum sentence within the range of punishment is the sanction which should be imposed since the legislature set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony class.” For all intents and purposes this is the starting point for the sentencing determination and is similar to the “presumptive minimum” under the 1989 law albeit without the offending mandatory language . So long as the ultimate determination is still advisory we can still have a “minimum” sentence starting point. This is crucial and is something the prosecutors finally accepted.

The statute still allows for enhancement and mitigating factors and other sentencing considerations but the point is that you START at the minimum for ALL classes of felonies EVEN the Class A felonies. The balance of the statute is very similar to our current law.

We will now have a system that will continue to use the basic structure that we have had since 1989 but which is “advisory.” We will still have appellate review which will continue to be “de novo with a presumption of correctness.” This was a compromise which departed from my proposal but which allowed the prosecutors to agree to my “minimum” base level.

A few other points. Eligibility for probation is up from the old 8 years to a new 10 years. We also want to fund a more sophisticated data base to keep track of sentencing patterns so problems can be spotted before things get out of hand.

I am happy with the result given the alternatives. Everybody pitched in and, to their credit the prosecutors and the attorney general compromised on critical points. So there will be some tweaking but the republic is safe again.
David Raybin

Appendix

Tennessee Association of Criminal Defense Lawyers Legislative Committee Position Paper on Smith 4, Raybin 4, and Raybin 7

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“the Sixth Amendment was not written for the benefit of those who choose to forgo its protection.” Blakely v. Washington, Slip op. p. 18

Complying with Federal and State Constitutions Are the Underlying Motivation

First, and most importantly, the Governor’s Task Force must determine what Tennessee needs to do uphold the Sixth Amendment rights of defendants sentenced in Tennessee, and in so doing, comply with the mandate of Blakely v. Washington, 124 S.Ct. 2531 (2004). The more recent decision of U.S. Supreme Court Booker/Fanfan 2005 U.S. Lexis 628, 2005 WL 50108 (U.S. Jan. 12, 2005) was limited to the application of Blakely to the US Sentencing Guidelines; consequently, to the extent that there is a constitutional problem with Tennessee’s 1989 Sentencing Reform Act, only as much as there are similarities between the federal Sentencing Guidelines and Tennessee’s scheme should this Task Force feel compelled to adopt the identical remedy. Complying with the federal Sixth Amendment and Tennessee’s Article I, § 9 and Article XI, § 16, in what ever version ultimately proposed to the Legislature, is going to cost some money. Nevertheless, it must be done.

Booker/Fanfan: Resolution or Meaningless?

The similarities between Tennessee’s current plan and the now advisory federal sentencing guidelines make the superimposition of the Booker/Fanfan remedy on Tennessee a tempting remedy. The extant differences between the two sentencing schemes make it imperative that the remedy for one not be adopted in cookie-cutter fashion. Only if Tennessee were to scrap the entire system and adopt the federal sentencing calculations verbatim would the Booker

solution have a chance to comport with the needs of a far reaching and comprehensive system. The federal system is much more detailed and requires a better understanding to operate correctly, but does provide a degree of consistency that eliminates unwarranted sentencing discrepancies.

That being said, however, it remains critical that the similarities between the two systems be recognized and to the extent possible, reconciled, to allow goals of the sentencing legislation to be adopted. One of the most critical goals recognized by the U.S. Supreme Court in Booker was to end sentencing disparity manifested by similarly situated offenders committing similar offenses receiving unreconcilably divergent sentences. The federal plan addressed that ill by devising a means of considering the individual characteristics of each offense and offender by a measurable and objective means. Based on the perceived severity of the offense, a numeric value (i.e. the “base offense level”) was assigned to it. That number corresponded to a range of punishment (the majority of which mandated incarceration) which increased with a more pronounced criminal history. The offense level numeric value could be increased by designated enhancement factors which has specifically designated numeric values, enabling an objective calculation of the increased severity of the offense measured by a predetermined formula. Once the offense level was adjusted (either up or down by the presence of enhancers or mitigators), that value was cross referenced against the criminal history score and the potential sentencing range was determined. Since each one level increase in the offense level only translated into a small percentage increase measured in months of incarceration of the total statutory range of years¹, the potential for a widely varying sentences was limited, and any reviewing court was able to consider the specific criteria each sentencing judge used in reaching the sentence. Its genius and demise was the mechanical calculation AND the control which was taken from juries. With Booker, federal judges are still obligated to look to the guidelines in determining the appropriate sentence. Now, however, the judges have greater leeway in determining the sentence. The Guidelines guide and no longer control. The appellate court’s will then review the sentence determination on the basis of “reasonableness.” It is predictable that the projected Guidelines sentence will be a factor in determining how reasonable a sentence was and whether any deviation from that too greatly deviates from the anti-disparity calculation. Already, at least one federal judge has opined that the Guidelines should be given “great weight.” U.S. v. Wilson, Case No. 2:03-CR-00882 PGC (D. Utah Feb. 2, 2005).

Nothing, however, in Booker ended the federal sentencing court’s obligation to look to the Guidelines or enabling legislation’s list of criteria that the court is required to consider before imposing a sentence. See criteria at 18 U.S.C. § 3553. Moreover, the Supreme Court found that both Mr. Booker’s and Mr. Fanfan’s Sixth Amendment rights were violated per a Blakely analysis by the

¹ For example, going from a Level 25 offense level to a Level 26, (Criminal History I) changes from 57-71 months to 63-78 months.

judge relying on sentencing enhancements that the jury neither considered nor found. The Supreme Court's remedy was to remand each case for further proceedings consistent with Booker/Fanfan opinion. In essence, the U.S. Supreme Court avoided the thornier issue of *how* to deal with the sentencing enhancements other than saying the Sixth Amendment rights were violated.

In Tennessee and across the country, sentencing was often subject to regional peculiarities. In 1985, the legislature created the Tennessee Sentencing Commission which helped produce the Tennessee Sentencing Reform Act. That Act became effective on November 1, 1989 and still governs Tennessee sentencing. What was punished severely in one part of a jurisdiction, was often punished less severely in another. This disparity was and still is the anathema to equal protection and thus has been the focus of many schemes to prevent unfair and dissimilar treatment for similarly situated offenders. Schemes such as the federal Sentencing Guidelines and the Tennessee's Sentencing Reform Act were efforts to impose a more uniform (and fair) treatment of such offenders. Unfortunately, there have been instances where the means have superseded the goal: sentencing guidelines became more important than defendant's constitutional rights in recent years. Both the Sixth Amendment and Article I, § 9 and Article XI, § 16 of the Tennessee Constitution provide a defendant the right to be sentenced while limiting the power of the judge and the government.

Different Options

After reviewing the three proposals listed below, depending on whether the decision is to adopt a Blakely-style remedy or a Booker-style remedy, either Raybin 4 or Raybin 7 is favored for the reasons set forth below.

Raybin 4

This pre-Booker proposal is the most true to the literal Blakely language and implication of the significance of jury sentencing.² As such, it is most likely to best guarantee that the federal Sixth Amendment jury sentencing right is enforced. It is also the most radical in that it would cause the greatest change from the present sentencing scheme employed in Tennessee. The potential for delay and costs predicted by some trial judges likely overstates the number of defendants who will demand jury trials. It discounts the number of plea bargains and the defendants who would seek judge sentencing. In short, it will cost more, but this would comply with the mandate of Blakely.

Because of the change it envisions, this proposal would likely result in a corresponding increase in appellate reviews on jury instructions for the enhancing factors, and later more concentrated on the jury's application of any

² Having been pre-Booker, it did not have the benefit of knowing that a sentencing scheme could be made constitutional merely by declaring it discretionary while still requiring that the judges be guided by it.

enhancement. Although the substantive law construing the application of the sentencing would not change that drastically to the extent that the enhancement factors were based on those currently used, any change. Many of the appeals would probably focus on jury instructions on how the jury should consider and apply the various sentencing factors.

The allure of this proposal is that it recognizes and guarantees that the constitutional right to have a jury determine the application of sentencing factors remains a protected right. As explained in Blakely,

There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely, Slip op. at 19.

Smith 4

This model offers the least protection to the criminal defendant as a class, while relying the most heavily on the reasonableness of judges. While it derives its legitimacy on a footnote in Blakely, it does little to assure the Tennesseans that sentencing considerations can or will be uniform applied. It relies on each judge to use his or her individual discretion to determine the most appropriate sentence. It requires the judge to make an individual assessment of how much weight should be given any enhancement and whether to apply it. There is no uniform starting point to determine if the reasons assigned by the judge (as required by proposed 40-35-210(d)) are given appropriate weight. Although the sentencing judge is to be guided by the enhancing and mitigating factors, and there is no proposed presumption of correctness, a *de novo* appeal without a starting point renders appellate result almost as arbitrary as the original sentence. In short, the standards for determining a sentence would be as numerable as the number of judges imposing sentences. Under such circumstances, the potential for a return to the sentencing disparity that plagued Tennessee before the adoption of judge sentencing and the 1989 Sentence Reform Act is very real.

Should the Task Force actually adopt this some version of this model, it is strongly urged that it be conditioned upon the sentencing ranges being shortened substantially. The only conceivable means to address the explosive increase in sentences would be some sort of advisory supergrid where the potential range for each offense was more narrowly defined, more along the lines of the now-advisory Federal Sentencing Guidelines. Where Tennessee has such a large potential sentence range for each offense, only smaller ranges would limit the tendency to impose sentences beyond that required by having objective guidance for criteria and a uniform starting point..

While some trial judges cautioned against the anticipated increase in local costs in a jury sentencing scheme, the very real potential for an increase in prison costs associated with a growing prison population generated by a judge sentencing scheme without any uniform starting point had not been addressed. Should there be no advisory starting point to determine the sentence, there is nothing to assure that sentences will not increase. There is nothing to assure that during plea negotiations that prosecutors will not offer settlements higher than the present presumptive minimum sentences.

Concern exists when considering what happens when one judge leaves the bench through election or retirement. Do the standards change because a new judge will give a different weight to enhancing factors? Will the new judge start his calculation at the same point as the judge in the neighboring county? Will the same judge have different starting points for the same class offense based on personal preferences or dislikes?

Tennessee should not become a jurisdiction that says its permissible to have a discretionary sentencing system based on the chance that relief will be granted on appeal. If a three judge panel finds that the sentencing judge has imposed an excessive sentence, the precedential value of that decision would be limited. Without similarly situated facts and criteria to assess and weigh the facts, each appellate review will reinvent the wheel.

Raybin 7

This model is more inline with a purer Booker/Fanfan resolution, including the favorably recognized goal of ending and preventing sentencing disparity. It underscores that having a standard by which a sentence is measured permits a reviewing court an objective means to determine if the sentencing court's determination was "reasonable" in the truer intended sense: Was it fair based on what the jury decided?

If Tennessee's sentencing scheme is "advisory" in the same sense as the federal scheme, the sentencing court will be able to rely on a well established body of law generated since the enactment of the Sentencing Reform Act concerning how the enhancements should be construed and applied. Adopting statutory language closely modeled on what the Supreme Court crafted in Booker/Fanfan addresses the obvious concern that this sentencing scheme would run afoul of the Supreme Court or Sixth Amendment jurisprudence in the immediate future. It also provides for a more discretionary sentencing consideration while still retaining a means to measure reasonableness.

Although Raybin 7 also envisions a *de novo* review without a presumption of correctness, there is a significant difference. [[[THIS WAS ALTERED IN THE FINAL DRAFT]]] Since the reviewing court will be reconsidering the sentence

under the provisions of an advisory starting part, it is critically different in being able to determine how much any weight an enhancement was afforded by the increase in the sentence from the starting point. That will permit the reviewing court to retrace the analysis and sentencing calculus. If the sentence is appropriate, it should be repeatable on a *de novo* review. If it is excessive, relying on the same starting point will permit the reviewing appellate court to calculate a lesser sentence. If the starting point varies from judge to judge and offense to offense, both at the trial court level and at the appellate level, determining excessiveness of sentence is more happenstance.

Conclusion

At stake here is what Tennessee is willing to do to comply with federal and state constitutional rights required for defendants convicted of crimes. Prosecutors and judges want more power to impose the sentence they want. Defense lawyers and defendants fear this does not mean sentences that are fairer; they fear it means sentences that are simply longer. They fear that similarly situated defendants will be sentenced to disparate sentences based on criteria that are arbitrary or undefined. Raybin 7 is not perfect. It is, however, a compromise that provides a means by which reasonableness can be measured without being mandatory, and draws upon the wisdom and experience gained over the last fifteen years of practice under the Sentencing Reform Act, and judge sentencing. It represents the least offensive and most compelling Booker resolution to the Blakely issue now present in Tennessee. A guided use of discretionary sentencing has the potential to lead Tennessee to a more consistent, fair and reasonable sentencing system. It will allow the guilty to be punished, but punished fairly and without the sentencing disparity so common in the pre-reform era. Should rationale sentencing occur, all Tennesseans will ultimately benefit.

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To: Members of the Tennessee Blakely Task Force
From: Professor Nancy King (Vanderbilt University)
Date: Revised, February 1
Re: Assessing the costs of our options

My primary concern in this memo is to present to the Task Force additional information I have recently collected about predicting and controlling the added corrections costs that may accompany various proposals. On Jan 21 – 22, I attended a nationwide conference on sentencing in the states, held in New York. [see <http://www.columbialawreview.org/symposium> for more information on the conference.] Several papers contained useful discussions for us. This past Friday, I was able to obtain drafts of those papers, and secure permission from various authors to reproduce for you portions of the drafts, which appear at the end of this document.

The memo is divided into four parts. Part I is an overview of what I consider to be the basic alternatives after Blakely, with a summary of how each alternative is likely to raise costs over the pre-Blakely status quo. The second part is devoted to what information is available about controlling costs under an advisory guidelines system. The third section raises particular questions about the proposals for advisory systems before us. The fourth section of the memo is a compilation of excerpts from the very latest scholarship on sentencing in the states after Booker, with an emphasis on evaluating advisory guidelines systems.

I. Basic choices

A. Blakely-izing Tennessee's Existing Presumptive Guidelines

The first option – keeping the substantive choices, changing procedure – requires that courts to insist on either

- 1) proof by a reasonable doubt before a jury of any factual allegation (other than prior conviction) necessary to raise a defendant's sentence above the presumptive sentence OR
- 2) a defendant's waiver of this right – by express waiver of any right to contest the sentence, a stipulation to the alleged fact, or an agreement to adjudicate the alleged facts before a judge by a preponderance standard.

This option seems to be the leading contender in several states (see Reitz, attached), and also served as a stop gap for more than six months in the 7th and 9th Circuits, as well as in dozens of districts in other circuits, prior to the *Booker* decision. (For details, see Stevens's dissenting opinion in *Booker*). Most importantly, this option is presently being followed in Tennessee (as well as nearly a half-a-dozen other presumptive states) as courts await new legislation responding to the Blakely decision. As Reitz points out, this option is easiest to administer in those jurisdictions where the vast majority of cases do not require proof of enhancing facts. Its primary costs seems to be the administration of proving these enhancements in the trial courts, in the proportion of cases that do not fall with (2) above.

In those cases – the ones not settled or sentenced the pre-Blakely way by consent -- added costs include new jury instructions, additional rulings on evidence and argument, revising verdict forms, and the potential for some net increase in the time for the average felony trial. No systematic information is available about how much more time or difficulty this has caused. In the federal courts, there is no consensus on just how easy this is. Many judges shrug it off as no big deal; others curse it as an abomination. At least some federal judges have found it easy to administer, other cases have posed more complexity. No systematic summary or compilation seems to exist, but anecdotes abound on www.sentencing.typepad.com. Another helpful source is the compiled testimony

to the United States Sentencing Commission, where several witnesses argued that Blakelyizing even the complex federal guidelines was manageable. In Minnesota and Washington, as well as several other states, it does not seem to have created a huge crisis, primarily because so few cases require proof of enhancements. In Kansas, reports are that prosecutors and judges have, in serious cases where they would have formerly sought enhancement, decided not to seek those enhancements, instead choosing to charge multiple crimes and seek consecutive sentences. As in the federal courts, a few of the existing enhancements in Tennessee may be more difficult to prove up at trial along with the other elements of the offense, and may require that the jury deliver separate verdicts, one for the former crime, another for the aggravating fact or facts. It is also possible that enhancing facts would have to be limited to those that could be alleged as part of the charge.

If our goal is to control corrections growth and preserve the policy choices made by the legislature in adopting the existing sentence structure, preserving existing restraints on sentence severity at the trial court level and modifying procedure would most closely replicate the status quo. Corrections costs seem likely to be unaffected by this proposal, but the added costs to the court system in those cases where enhancements facts must be proved should be carefully assessed.

B. Advisory Guidelines

Under an advisory guidelines proposal, judges could not be required to give the presumptive sentence where enhancing factors are not proven beyond a reasonable doubt. The advantages of the advisory guidelines system are summarized in Hunt & Connelly, attached. The approach avoids *Blakely*, and allows more judicial discretion with the statutory range for the given offense.

Depending on the extent of appellate review required, an advisory system may require additional costs at the trial level (in creating an adequate record for review of some or all sentences), and at the appellate level. The major cost of a completely advisory system compared to the other options, however, is the potential for an upward creep in average sentences, due to the lifting of the guidelines' limitation on sentence severity.

Professor Kevin Reitz recently compiled information on the rate at which incarceration/sentences *increased* under both mandatory and advisory guidelines sentencing systems. Advisory systems present a very mixed picture. (see Reitz, attached) Arkansas, Missouri, and Pennsylvania – all voluntary guidelines states – have experienced prison growth much higher than the national average, while incarceration in Virginia and Delaware and Maryland, also states with voluntary guidelines, has grown much more slowly than the national average. See Reitz tables, below. Fortunately, researchers have attempted to identify what features

might help control prison growth in advisory systems, information summarized below in Part II.

Part II. Recent Research on Advisory Systems

A. The latest from other states.

One question we must address for an advisory system is what we might expect in terms of additional correctional costs once the ceilings on sentences within the statutory range are all lifted. The projections provided are based on speculation about the extent to which sentences will increase, only as reliable as the assumptions on which they are based.

Fortunately, researchers are beginning to compile information about state guidelines systems and the extent to which each has been able to slow the rate at which prison populations are growing. Authors of some of the latest research have agreed to allow me to distribute their forthcoming findings with you. It appears that there is a consensus about what features have allowed some states to be more successful at controlling corrections costs than others. Advisory systems that have managed to slow down growth have had the following attributes.³

1) A sophisticated sentencing data system, with cooperation from the trial bench, for reporting and projecting sentences, including frequency, type, and reason for departures. This permits the evaluation in cost terms of proposed changes in sentencing policy and allows for planning for increases in incarceration of selected offenders as well as the alternative sentencing of selected non-violent offenders. Anecdotal statements from the state sentencing people I've talked to over the past year or so suggest that advisory states with the lowest growth rates are those with the strongest sentencing commissions, with good political relationship with the legislature. Virginia is one example. Arkansas has a relatively "weak" commission, and growth there is less controlled. As Hunt & Connelly recently concluded:

"[T]he apparent success of guidelines in constraining prison costs may not be due to the guidelines themselves, but to the development of an independent agency, the sentencing commission, which produces good time-series data and develops expertise in population forecasting. For example, although it does not have any sentencing guidelines, Oklahoma's sentencing commission has a good sentencing data collection and reporting system that has allowed analysts to inform sentencing policymaking there concerning prison population projections for almost a decade. The advisory guideline jurisdictions of Delaware and Virginia, as well as most of the presumptive

• 3 The following list of essential features of a system of advisory guidelines is similar to that of Hunt and Connelly, but not identical.

guideline jurisdictions mentioned in the Reitz study, also maintain sentencing commissions that focus on data collection and prison population projection.”

2) Some incentive or reason for judges to resist pressure for upward dispositional and durational departures, other than appellate review. The pressure from victims and the public for stiff sentences can be difficult to resist when a less severe sentence is preferred by the judge or suggested by the state-wide guidelines. In the states where prison growth has been kept in check even with advisory guidelines, judges have some reason to comply with the guidelines, *other than appellate review*.

In Virginia, judges feel obliged to comply with the guidelines because they are “reelected” by the legislature, and are apprehensive that the legislature looks unkindly upon a judge who repeatedly departs upward from the guidelines due to the increase cost that creates for the state. (This was first reported to me in a set of about twenty interviews about sentencing in Virginia that I conducted a couple of years ago, and has been verified by others familiar with Virginia practice since.)

In Delaware, reports are that the small overall numbers of judges make cohesive practice and sentencing norms easier to achieve. Most importantly, Delaware trial judges are appointed, not elected. Finally, in Maryland, according to those I’ve interviewed there, trial judges are appointed by the governor, and run in the next general election, often unopposed, for a fifteen year term.

Notice that none of the advisory guidelines states demonstrating low growth rates – Virginia, Maryland, Wisconsin, or Delaware – accomplished growth control with appellate review of sentencing. (The Wisconsin advisory guidelines were successful in controlling growth from 1985 to 1995 (see chart), but without appellate review. The appellate review standard adopted in Wisconsin and described in Hunt & Connelly was not declared until 2004, so something else must have been suppressing prison growth in that state prior to 1995.).

Some mention is made of judge-specific reporting as a means of controlling sentencing under an advisory system. That may help a little, and some believe it has made a difference in compliance Pennsylvania, but it may have been more useful in reining in judges/prosecutors who may be sentencing *below* the guidelines repeatedly, the Santa Clauses, than in reining in the Scrooges. Frankly, I am not sure that publicity about being an unusually tough sentencer will be considered by judges/prosecutors as something they wish to avoid. In other words, judge specific reporting may help control sentences that exceed guidelines ranges, but more research is needed. Judge specific reporting is relatively new in Pennsylvania and Washington. Report Hunt & Connelly:

“All things being equal, advisory guidelines can probably expect greatest success where all judges operate within a single court culture (District of Columbia) or a small geographic area with substantial consolidation of court functions (Delaware). This is true because face-to-face contacts are greatest, and informal social controls are probably greatest. This is also true in individual court districts in which judges formalize regular discussions of sentencing activity, such as in Wisconsin's District IV. However, we do not believe that advisory guidelines covering large geographic areas will fail. We simply think that they face greater challenges.

All things being equal, advisory guidelines can probably expect success where other mechanisms serve as a strong incentive to judicial compliance. One mechanism is improving the transparency of sentencing decisions. As previously mentioned, Pennsylvania and Virginia report individual compliance rates by judge. No doubt most judges will be more inclined to follow the guideline recommendation, or take care to have a strong rationale for a departure, when they know their departures will be publicly available. Similarly, to the extent that judicial selection is tied at least in part to compliance, judges are more likely to comply. In Virginia, judicial “elections” are held by the legislature, and the legislative committees review compliance for judge retention elections as a routine part of the election process. The legislative review provides a strong incentive to comply.”

In sum, appellate review may help, but it is no panacea. It has not controlled expansion of the use of incarceration in *most* voluntary guidelines states. Two of the three voluntary guidelines states with appellate review (PA and MO) have high growth records, three of four of the states with no appellate review (MD, VA, DE, and WI (during period commission collected stats 1985-1995)) are the lowest growth states. More on appellate review in Part III, below.

3) Internal legislative restraints on corrections spending. In Virginia, any corrections-related legislation must be paid for at the time of passage. (See Barkow, attached). That is, legislators must agree upon *and designate* funding for every bill that impacts sentencing. This mechanism requires legislators to exercise fiscal responsibility in sentencing policy, and also provides an easily understood means of resisting pressure for continually escalating sentence severity. Minnesota also has a rigorous system that has helped legislators in prioritizing among costly proposals. Insiders report this has been very effective, politically, permitting legislators to prioritize which criminal justice spending is most important.

4) A range of effective alternative sentencing options to incarceration, regularly evaluated. Alternatives to incarceration are reportedly essential to controlling the growth in incarceration in the states that have had some success at controlling growth. The states that have limited prison growth most successfully (both voluntary states like Virginia and Maryland and mandatory

guidelines states like Minnesota and Washington) have also developed more alternatives to incarceration, prompted in part by the fiscal responsibility requirements that force legislators to consider cheaper non-incarceration alternatives for lesser offenders in order to reserve and/or increase the use of high cost prison alternatives for the most serious offenders. To quote again from Hunt and Connelly:

“Some established advisory guideline systems appear to have achieved many of their purposes. For example, Delaware’s advisory guidelines were designed to reflect “a comprehensive focus on offender management” and include “structural and programmatic options designed to punish offenders while addressing the underlying behavioral problems associated with their criminal activity.” Delaware’s guidelines have become a centerpiece for a punishment structure that includes an aggressive emphasis on graduated sanctions and rehabilitative efforts. The breadth of these programs in Delaware, as well as the post-guideline shift in non-violent offenders from the state’s prison beds to alternative programs, is evidence of success. Virginia represents another advisory guidelines system that appears to have achieved many of its purposes. Virginia’s guidelines appear to be unique in using risk assessment analysis to redirect low risk non-violent offenders, who would otherwise be recommended for a prison sentence, to alternatives.”

5) Adequate training of prosecutors and judges in guidelines sentencing and sentencing alternatives. Voluntary guidelines only work if they are adopted by not only the legislature but the judges and prosecutors as well. Judges and prosecutors need training and need the opportunity to share their experiences working under voluntary guidelines. Virginia and Maryland have extensive judicial training coordinated with the sentencing commission. Arkansas does not. I’m not sure about the other states.

B. Lessons for Tennessee

My reading of this research is that if control of corrections costs is a priority for the state’s sentencing system, it should include, at a minimum⁴:

- 1) A sentencing commission to provide the information needed for rational policy choices
- 2) An effective fiscal note/advance funding system for any legislation that impacts sentencing
- 3) Adequate provision and commitment to alternative sentencing options;

⁴ Ideally, I believe that Tennessee should also work toward: 1) merit selection of trial judges and 2) truth in sentencing - the substitution of set terms of supervised release and certain sentences for the uncertainties of parole; 3) charge and sentencing-related guidelines written by prosecutors, for prosecutors. I know these are not on the table now, but I’m a law professor – so I can’t resist dreaming a bit.

4) Adequate opportunities for the exchange of experience and training for judges and prosecutors using voluntary guideline sentencing.

Without these features, given all we know now about advisory systems, we are more likely to run up corrections costs than not. With these features, we have a chance to slow the cost of criminal justice to the state and perhaps shrink it.⁵**Part III. Comments on both Advisory proposals**

A. Overlooking best practices from advisory guidelines states.

Considered in light of the information in Part II, above, the proposals for an advisory system seem more likely than not to be accompanied by an acceleration of the growth in corrections costs.

First, no ongoing body to collect and evaluate sentencing data is established, although at least one of the proposals does require judges be provided statistics on sentence length. States with the best record of controlling corrections costs collect and evaluate much more complete information about sentencing practices in their states, and are able to adjust guidelines to account for changed circumstances. It may be helpful to consult with other states on this topic to see what minimal information is considered essential to corrections cost control.

Others on the Task Force would be more familiar than me with whether the state's existing fiscal note system provides an effective control on legislation that affects corrections spending, so I have no comment on that.

Neither advisory guideline proposal assures the development and evaluation of existing and new alternatives to incarceration, also an essential ingredient of controlling corrections costs in several states. Finally, no provision is made for assisting judges and prosecutors administer and develop the new system, usually a key function of most state sentencing commissions.

I would urge the Task Force to consider carefully the possibility of incorporating what we can learn from the experience of other states while we have the chance. If eventually an advisory system is preferred, it would be prudent to provide the means for its success by establishing a strong sentencing commission charged with adequate data collection and analysis, alternative sentencing development, and ongoing training, as part of the proposal.

⁵ I do recognize that there is no information about NET savings in the states that use these techniques – that is: Savings in prison bed/months (including income from renting out freed-up space) LESS the Cost of Commission, alternative sentencing options, training, etc. But again, most of the best minds in state sentencing (Reitz, drafting the MPC for the ALI, Barb Tombs, who has chaired two state's commissions and is familiar with a dozen others, Hunt & Connelly, etc.) all are adamant on these points.

B. Some other miscellaneous ideas

If the Task Force eventually decides to pursue an advisory approach, I have several other suggestions for consideration.

1. Be careful about language triggering Blakely in any advisory system.

There are several places where the proposals for advisory guidelines might not succeed in avoiding the Blakely problem altogether. First, preserving § 40-35-102(6) could be a Blakely problem: "A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." This provision cannot be read literally and enforced on appeal without triggering Blakely.

Second, the statutory provisions defining whether an offender is standard, career, etc, contain some language that falls outside the prior conviction exception, so that if these provisions determined the mandatory range, they would probably raise a Blakely problem if left unamended.

Third, the multiple convictions section that mandates concurrent sentences absent certain findings may also be a problem, although I understand that so far case law disagrees.

3. The empty promise of de novo review.

Both advisory proposals say relief is available if the sentence is inconsistent with the purposes of sentencing. Appellate judges cannot review sentences de novo unless they watch a videotape of the trial and/or plea, and the sentencing hearing. De novo review should be limited to questions that appellate courts can decide just as well as trial judges. There are a few legal decisions that go into sentencing (Is this an offense class A or B, or does this penalty apply retroactively, for example). Those issues of procedure and law would have been reviewed de novo even without the proposed provision.

Appellate judges could review the *factual findings* that a judge bothers to record, but review could have only limited effect, or else it would trigger *Blakely*. If the appellate court believed the judge relied on a finding of an *aggravated* fact (other than prior conviction) that was unsupported in the record, the court could only remand for resentencing given an amended factual record, since no sentence can turn after *Blakely* on the presence of an aggravating facts. With a voluntary system and no consequence for a sentence outside the recommended range, a judge on remand could always impose the very same sentence he did the first time around.

The hope that appellate review would control outlier sentences seems particularly thin when one considers the lack of adequate basis for disturbing a sentence. A sentence outside the guidelines cannot be presumptively unreasonable or inconsistent with the statute, or we are back to our Blakely problem (that would mean the defendant is *entitled* to that guidelines sentence, absent an adequate reason for departure, the same system that was struck down in Washington) . If a sentence outside the guidelines is not presumptively unreasonable, what *is* unreasonable (or, to use the language of the proposals before us: “inconsistent” with the statutory provisions)? What standards will appellate judges use to determine this, if they can’t point to the presence or absence of aggravating facts?

On possibility is proportionality, to say this is so out of proportion with other sentences for similar offenses it must be “inconsistent with the purposes of sentencing.” But proportionality review requires accurate and up to date information about sentencing in other cases, which we don’t have.

Finally, even if sentence review became quite rigorous, say the appellate judges decided to evaluate each sentence for proportionality and remand for even serious, not only extraordinarily extreme, variations, it is very likely that both sides would end up bargaining around appellate review in negotiated cases. In the only jurisdiction with truly intrusive appellate review – the former federal system – this became routine.

I am convinced that without the review of factual findings as part of mandatory guidelines, sentencing is essentially an exercise of discretion, and cannot be reviewed on anything but an abuse of discretion standard. Inserting the words “de novo” is not likely to achieve anything different.

Moreover, there are no effective *incentives* for appellate judges to apply anything but the most minimal scrutiny – de novo review will be whatever they say it is. Finally, trial judges lack any incentive to reject a prosecutor’s recommendation for a sentence “outside the advisory range” in a negotiated case, or to create anything other than appeal proof sentencing opinions. Consider a sentencing opinion that intones: “I have taken the following facts and consideration into account . . . I have examined the purposes of sentencing in the statute . . . I have considered all of the other like cases . . . based on this complete evaluation, in the totality of circumstances, I believe the following sentence is appropriate [something way over the advisory sentence, near the top of the range].” That will stand up every single time, right, how is that inconsistent with the purposes of sentencing?

Wisconsin seems to be the only voluntary guidelines system where appellate review is credited with any sort of success. The forthcoming Hunt and Connelly article describes the appellate review there:

“The state Supreme Court has consistently ruled that judges must demonstrate at sentencing the reasons for the sentence and how the sentence relates to goals and outcomes. These reasons cannot simply be incanted as “magic words” or “boilerplate generalities.” As the court restated from *McCleary* in *Gallion*, sentencing requires considered judicial discretion, which “contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” As *Gallion* showed, when defendants in Wisconsin believe that the judge has failed in the exercise of this discretion, they may appeal. And, regarding the role of guidelines in informing judicial discretion, in *Gallion*, the state supreme court stated that it did “not quarrel with the proposition that comparative data or sentencing guidelines provide helpful information to sentencing courts.”¹ Since Mr. Gallion did not bring up the issue of a constitutional requirement to consider comparative data or sentencing guidelines, however, the court did not rule on that issue. Nevertheless, the end result of *Gallion* was a state system of advisory guidelines with comparative data and of appellate review of sentences for reasonableness that can serve as proof that such systems can effectively operate.”

First, it is important to understand that this standard is brand new and we don't know if it will restrain judges and prosecutors or not, this has just come out. Notice also that the key point to the Wisconsin court was “comparative data,” data neither proposal mandates.

In sum, I am not confident that appellate review can control corrections cost creep under either of the advisory guidelines systems proposed. The best chance to control corrections growth would be to systematically collect *and use* information about sentencing practices in sentencing policy, and to think of other innovative ways to provide incentives for prosecutors and judges to adhere to state-wide sentencing norms.

Part IV. Attachments (within this document)

From Barkow (forthcoming Columbia 2005)

From Frase (forthcoming Columbia 2005)

From Reitz (forthcoming Columbia 2005) with bar graphs

From Hunt & Connelly (forthcoming FSR 2005)

Also sent with this memo, but in Wordperfect: Frase, breakdown of state guidelines

Note: IF there are additional sources referenced in the footnotes that you would like me to provide, please let me know. Some are published, some are

accessible from sentencing.typepad.com, and others may be in draft form but I could ask the author for permission to share the draft with you.

FROM: FEDERALISM AND THE POLITICS OF SENTENCING -- RACHEL E. BARKOW*
(FORTHCOMING COLUMBIA LAW REVIEW)

...

One factor figures predominantly in the shift in many states toward less punitive alternatives: costs. In the 1990s, get-tough policies spurred spending on corrections to double from \$17.2 billion to almost \$35 billion.⁶ Indeed, corrections expenditures grew faster than any other state budget item.⁷ As corrections spending continued to increase in the 21st century, states found themselves in a fiscal crisis.⁸ The recent sentencing reforms curbing some of those tough-on-crime measures correlate with state efforts to cope with their budget woes.⁹

Examples abound of legislators emphasizing fiscal concerns in their shift to sentencing reform. A Michigan legislator noted that when he first introduced bills to reduce mandatory minimum sentences, he received little support. But after a conference on the state budget, the governor called him “to see how we can make these bills happen.”¹⁰ Kansas’ decision to require treatment instead of incarceration for first-time nonviolent drug offenders rested in part on the fact that “those people who favor being tough on crime don’t want to find the money to build more prisons.”¹¹ Washington passed its drug treatment diversion

* Assistant Professor, NYU School of Law. I thank Clay Gillette, David Golove, Jim Jacobs, Cristina Rodriguez, Steve Schulhofer, Katrina Wyman.

6 Sidra Lea Gifford, Bureau of Justice Statistics, US Department of Justice, *Justice Expenditure and Employment Extracts*, 1999 9 (Jan. 8, 2002).

7 Panel Discussion, *Crime, Recidivism, Public Perception and the Media*, 23 S. ILL. UNIV. L.J. 297, 297 (1999); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720-726 (1996) (noting that between 1970 and 1990, spending on corrections outpaced spending in any other area). Correction costs include prison construction, housing and feeding inmates, and hidden costs such as health care. As sentences grow longer and the prison population ages, health care costs will increase. See Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935 (2001) (estimating that health care costs in Florida for prisoners over the age of 50 are triple the health care costs of younger inmates).

8 Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes?, Sentencing and Corrections Reforms in 2003* 2 (March 2004) (Vera Institute of Justice) (on file with author).

9 Robin Campbell, *Legislators’ Views on Prisons, Punishment, and the Budget Crisis*, DOLLARS & SENTENCES 3 (July 2003). See also Michael M. O’Hear, *The New Politics of Sentencing*, 15 FED. SENTENCING REP. 3, 3 (2002) (pointing out that sentencing reforms throughout the country have focused on cost-savings).

10 Campbell, *supra* note __, at 11.

11 Butterfield, *supra* note __, at A15. Similarly, Louisiana’s amendments to its mandatory minimum and three-strikes laws responded to the legislature’s question of whether “there are more cost-effective ways to deal” with these crimes. Wilhelm & Turner, *supra* note __, at 5. The chair of the Louisiana House’s Criminal Justice Committee stated bluntly that “we’ve come to a point where we just can’t afford” to “lock everybody up and throw away the key.” *Id.* at 5.

programs, according to one expert, because “[t]he fiscal crisis has brought together the folks who think sentences are too long with the folks who are perfectly happy with the sentences but think prison is costing too much.”¹² A representative from Texas supported treatment options for drug offenders because it was cost-effective and would free prison space for more violent offenders.¹³ Several governors have ordered the early release of prisoners with the explicit goal of reducing correctional costs and addressing budget crises.¹⁴

The importance of costs in the political process is particularly evident in those states that have established sentencing commissions. Many states established commissions in the hopes that they would insulate sentencing decisions from rash political impulse.¹⁵ The interest group pressures discussed in Part I make political insulation of these commissions unrealistic, and the actual experience of the commissions bears this out.¹⁶ But some of the commissions have nevertheless been successful in tempering immediate political pressures for increased sentences by providing data on the costs of the proposals. Indeed, most state sentencing commissions are required to produce resource impact statements or notes that alert the legislature to how a particular sentencing proposal will affect corrections resources.¹⁷

Many states have employed strong pre-commitment strategies to strengthen the effect of these statements. Virginia, for instance, requires its sentencing commission to prepare fiscal impact statements on proposed legislation, and the legislation cannot go to the floor of the legislature until the bill’s sponsor finds a revenue source for the proposal.¹⁸ Other states have employed weaker versions of the impact statement, and although the influence might not be as strong as it is in Virginia,¹⁹ it nevertheless has an effect on the political debate. For instance, based on the Alabama Sentencing Commission’s data-driven forecasts, the Alabama legislature recently raised its misdemeanor

Alabama’s sentencing reforms were, according to a 30-year veteran in the state’s attorney general’s office, in response to a fiscal crisis in which the state “cut spending on prisons so far that [its] prison system now looks like a third world country.” Butterfield, *supra* note __, at A15.

¹² *Id.* at A15.

¹³ “Every 19-year-old first-time offender who sleeps in a prison bed in a prison that’s full denies me an opportunity to put an armed robber in a bed.” Campbell, *supra* note __, at 8 (quoting Texas Representative Ray Allen).

¹⁴ See Greene, *supra* note __, at 10, 16 (observing that Utah released more than 200 prisoners in 2001 to cut costs; Arkansas released 521 prisoners in November 2002 to reduce crowding; Oklahoma ordered sentence commutations for over 1,000 prisoners; Kentucky commuted the terms of 567 prisoners).

¹⁵ Barkow, *supra* note __, at __ (describing the conditions under which jurisdictions established sentencing commissions).

¹⁶ *Id.* at __.

¹⁷ Hunt, *supra* note __, at 470 (describing the fiscal impact statements provided by commissions in Virginia and North Carolina); Barkow, *supra* note __, at __.

¹⁸ Wilhelm & Turner, *supra* note __, at 10-11.

¹⁹ See Hunt, *supra* note __, at 483 (describing legislation changes made in light of fiscal impact statements in Virginia).

and felony thresholds for theft to free more prison space for violent offenders.²⁰ And the Alabama legislature keeps coming back to the Commission for similar projections on proposed legislation.²¹ Many other state legislatures have reduced proposed increases in sentences or otherwise altered legislation in light of commission-produced impact statements.²² Faced with the economic effects of a particular “tough-on-crime” proposal, some legislators opt for alternative measures.

States without commissions have also required fiscal notes to accompany legislation that would increase incarceration rates.²³ For example, in Iowa, correctional impact statements must be “attached to any bill, joint resolution, or amendment which proposes a change in the law which creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures.”²⁴

To be sure, legislators in favor of reforms discuss other factors in addition to costs as spurring reform, including lower or stable crime rates²⁵ and the high social costs of tough-on-crime policies.²⁶ But these factors combine with cost

20 Wool & Stemen, *supra* note __, at 9.

21 *Id.* at 10.

22 Barkow, *supra* note __, at __.

23 These resource impact statements are particularly valuable because they facilitate control of prison population at the state as opposed to local level. Local prosecutors and local judges are unlikely to look beyond the particular case before them and therefore fail to see the systemic effect of longer sentences on state correctional budgets. JOSEPH DILLON DAVEY, *THE POLITICS OF PRISON EXPANSION* 83 (1998) (noting that states pay prison costs but that prison populations are determined by the decisions of local officials). A sentencing commission can therefore regulate the behavior of these local actors to make state-level budgeting more predictable. For a proposal aimed at forcing local prosecutors to internalize state costs of sentencing, see Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720-722 (1996).

Although states with and without commissions have used these resource impact statements, states with commissions have some additional advantages. The commission typically produces sentencing guidelines as well, which makes sentencing more predictable and the resource forecasts more accurate. In addition, the state commission, as an expert agency responsible for sentencing, can suggest policy alternatives. A legislative committee that considers only budget impact may lack the resources and expertise to suggest reforms that would lead to lower costs. See Barkow, *supra* note __, at __.

24 IOWA CODE ANN. § 2.56.

25 See, e.g., Mauer, *supra* note __, at 51 (discussing the importance of declining crime rates and the loss of political saliency of crime as factors in the recent trend away from “get tough” sentencing legislation and noting that “[w]ere a perceived new ‘crime wave’ to emerge, it is far from clear that the fiscal constraints would be sufficient to prevent a new round of ‘get tough’ sentencing initiatives”); Campbell, *supra* note __, at 11 (identifying the fact that crime has become less of a wedge issue as a factor in the shift in sentencing practices).

26 See, e.g., Michael Lawlor, *Reforming Mandatory Minimum Sentences in Connecticut*, 15 FED. SENTENCING REP. 10, 11 (2002) (discussing the racial disparities in the state’s inmate population as one of the concerns that led to changes in the mandatory minimum drug laws); Wilhelm & Turner, *supra* note __, at 5 (quoting Louisiana governor’s statement that one reason for sentencing reform is that “‘We have locked up a lot of people who are redeemable’”). Kansas, for example,

concerns to bring about change. Many legislators agree “that the budget crisis – aided by the waning politicization of corrections policies – had created a unique climate in which rehabilitative and fiscal agendas appeared to be coalescing within the same proposals.”²⁷ The fiscal limits “forc[e] the conversation.”²⁸

Costs are a primary driver at the state level because corrections expenditures make up a significant proportion of state budgets.²⁹ The biggest items on state budgets are corrections, education, transportation, and health care.³⁰ Rising corrections costs therefore have a significant impact on state fiscal health.

States cannot print money to make up for a shortfall, but instead must look to increased revenues or loans from investors for additional funding.³¹ In addition, forty-nine states must balance their budgets as a matter of state law.³² These financial constraints mean that states are forced to pay close attention to corrections costs. They have to consider the consequences of new sentencing laws on their budgets. If there is not enough prison space,³³ they must determine whether to alter other sentencing laws to make room for new offenders. Alternatively, if they want to construct additional prison space, they must raise additional revenue.³⁴

started to look for ways to reduce its prison population even before the state’s budget hit a crisis point. Wool & Stemen, *supra* note __, at 11. Thus, even to the extent that costs are a driving force for change, in the face of rising crime rates or a perception of rising crime rates, costs might not hold the same sway in political debates.

²⁷ Campbell, *supra* note __, at 5 (describing views of various legislators attending a roundtable on sentencing reform and the budget crisis).

²⁸ *Id.*

²⁹ Mauer, *supra* note __, at 51 (stating that one out of every six dollars in Michigan is spent on corrections); Lawlor, *supra* note __, at 10 (noting that Connecticut spent more on corrections than higher education in 2001); Mascharka, *supra* note __, at 952 (observing that Florida, along with many states, spends more on corrections than on higher education). See also Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 688 (1992) (noting that states pay more attention to the costs of substantive sentencing decisions than the federal government).

³⁰ Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW & POLICY 465, 468 (1998).

³¹ PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 3 (1995) (“Any debt acquired by state and local governments must be borrowed from investors; if a state borrows too much money, financiers may simply refuse to lend more”).

³² David Lubecky, *The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. CIN. L. REV. 563, 564 (1986). See also Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1226-1228 (2004) (describing the balanced budget requirements in various states).

³³ The federal courts are often responsible for setting the limits on prison space in suits alleging overcrowding as cruel and unusual punishment. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (book review of Feeley & Rubin).

³⁴ For example, when Arizona recently decided not to cut its corrections budget by more than four percent, the difference came from bigger cuts to the state university system budget.

...

Mauer, *supra* note __, at 11.

From: Varieties of Guidelines: Consensus, Diversity, and Unresolved Policy Issues”

by Richard S. Frase*

(forthcoming Columbia law Review)

... Another important structural feature has to do with whether guidelines rules are legally binding and enforced by appellate review or otherwise. In seven states (Utah, Maryland, Delaware, Virginia, Arkansas, Missouri, and Wisconsin), and in the District of Columbia, guidelines are “voluntary” and not subject to appeal. But there are several varieties of “voluntary” guidelines. In some of these states judges are required to give reasons for departure from the guidelines.³⁵ Moreover, “compliance rates” in some voluntary-guidelines jurisdictions are quite high,³⁶ which suggests that in some jurisdictions peer pressure or other informal processes may effectively substitute for appellate review. For example, in Virginia trial court judges must be periodically reappointed by the legislature, and many judges apparently fear that a high departure rate will jeopardize their reappointment.³⁷

There are also several varieties of “legally binding” guidelines. In Pennsylvania, although the guidelines are not “voluntary” and sentence appeal is available, appeals have little impact due to a very lax standard of review.³⁸ But Pennsylvania may have found another way to encourage judicial compliance with guidelines recommendations: since 1999, judges’ departure rates have been made public, and this change appears to have slightly increased compliance rates.³⁹ In North Carolina, the guidelines are very strict as to some sentencing issues but very loose as to others, and sentences are rarely reversed on appeal.⁴⁰ In Florida and Ohio, some decisions applying the guidelines are

³⁵ Wool & Stemen, *supra* note –, at 5 (identifying Arkansas, Delaware, Maryland, Utah, and Virginia as voluntary guidelines states requiring judges to state reasons for departure).

³⁶ Barkow, *supra* note –, at 80 n391 (citing 79% compliance rate in Virginia in 2003).

³⁷ See Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 *Vanderbilt L Rev.* 885, 916-18 (2004).

³⁸ Kevin R. Reitz, *Sentencing Guidelines Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 *Northwestern University Law Review* 1441, 1471-80 (1997). However, recent cases suggest that the Pennsylvania Superior Court (which hears first-level appeals) may be shifting to a less deferential approach. See Chanenson, *supra* note –, notes 280-87.

³⁹ Penn. Comm. On Sentencing, 2000 Annual Data Report 47 (2002) (chart showing that overall rates of guidelines “conformity” were slightly higher in 1999 and 2000 than in 1998). Since 1996, Washington state has also published judge-specific sentencing data. Boerner & Lieb, *supra* note –, at 107.

⁴⁰ Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 *Crime and Justice: A Review of Research* 39, 94 (2002). Due to lax appellate review judges have very broad discretion to sentence within the presumptive, aggravated, or mitigated sentencing ranges; however, they cannot go outside these ranges (so extreme durational departures are not permitted), and dispositional

appealable, and some are not.⁴¹ Tennessee sentencing caselaw is quite limited, due in part to very broad guidelines ranges and retention of parole. The other states listed in the table have more active appellate review which, particularly in Kansas, Minnesota, and Washington has generated a substantial body of substantive appellate caselaw. But trial courts in these states still retain considerable discretion, as to both the type and the severity of sanctions; appellate review in these states does not appear to have limited trial court discretion as severely as in the federal system.⁴² It is unclear which, if any, of the varying state appellate review standards corresponds to the “reasonableness” standard approved in Justice Breyer’s *Booker* opinion.

...

departures from recommended custodial sentences are rarely allowed.

⁴¹ Frase, *Retrospective*, *supra* note –, at 70 (Florida); David Diroll, *Ohio Adopts Determinate Sentencing*, 6(4) *Overcrowded Times* 1, 10 (1995).

⁴² See Reitz, *Sentence Appeals*, *supra* note –, at 1458-71 (discussing appellate review in the federal system).

**From Kevin R. Reitz,
The New Sentencing Conundrum: Policy and Constitutional Law at
Cross-Purposes,
(pre-publication draft; revised version forthcoming Columbia Law
Review)**

...

1. *The Kansas Fix*. If *Blakely* is held to apply to all existing presumptive sentencing systems (whether the presumptions are statutory or otherwise), these systems may be maintained largely intact provided state policymakers conclude it is good policy to recommend jury determination of aggravating penalty factors during trial or at a bifurcated sentence proceeding. This approach was adopted by the Kansas legislature in 2002 when confronted with a state court decision under the state's sentencing guidelines that was uncannily similar to *Blakely*.⁴³ To date, the Kansas sentencing system has suffered little disruption from the new procedure. Only a small minority of all criminal cases are affected, most of these are resolved in the plea bargaining process, and the few cases that have actually used the new procedures have been resolved with little added time and effort.⁴⁴ As of this writing, the "Kansas fix" is a favored option of many states in their early discussions of responses to *Blakely*.⁴⁵

The attraction of the Kansas fix is greatest in those jurisdictions that anticipate they will not have to make use of jury sentencing proceedings very often. In most sentencing guidelines states, aggravated departures are comparatively infrequent events—and cases in which aggravated departures are *contested* are rarer still. In Washington State, for example, there were only 628 aggravated departures among the 27,000 felony cases sentenced in the most recent reporting year prior to *Blakely*. A mere 101 of those were contested cases.⁴⁶ Similarly, the Minnesota Sentencing Guidelines Commission has

43 See KANSAS STATUTES § 21-4718 (2004). The case prompting the legislation was *State v. Gould*, 23 P.3d 801(Kan. 2001).

44 See Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, NEW YORK TIMES, July 13, 2004. The author and Judge Richard Walker, a Kansas trial court judge, and former Chair of the Kansas Sentencing Commission, have undertaken an investigation of the Kansas experience since *Gould*. In interviews with judges, prosecutors, and defense counsel across the state, we have not found anyone who believes that the post-*Gould* statutory changes have had any appreciable effect on the operation of the Kansas sentencing process.

45 See, e.g., MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF *BLAKELY V. WASHINGTON* ON SENTENCING IN MINNESOTA: LONG TERM RECOMMENDATIONS (Saint Paul: MSGC, September 30, 2004), available at <www.msgc.state.mn.us>. [Update with information from AZ, IN, NC, WA.]

46 These figures were provided by David Boerner, Chair of the Washington State Sentencing Commission, see Laurie Cohen P. Cohen and Gary Fields, *Court Ruling Causes Tumult In Sentencings*, WALL STREET JOURNAL, June 28, 2004, at p. B1.

issued a report on the impacts of the *Blakely* decision estimating that only two to three percent of felony sentences each year will be affected.⁴⁷

Provided the costs of the Kansas fix are not high, it should be the preferred option in all states that were reasonably happy with their pre-*Blakely* sentencing structures. Most states with presumptive guidelines fall into this category. In these jurisdictions, a critical mass of legislators, judges, prosecutors, and defense lawyers can agree that guideline reform, while not perfect, has proven superior to available alternatives. There is a particularly widespread view in the states that guideline reform has been an essential tool in the management of prison population growth—and we have seen that this conclusion is bolstered by the historical evidence.⁴⁸ In states like Kansas, Minnesota, North Carolina, Ohio, Oregon, and Washington, there is a growing consensus that the hard-won benefits of sentencing reform, sometimes achieved over many years, outweigh the incremental procedural costs of responding directly to *Blakely*'s Sixth Amendment mandate.⁴⁹

The Kansas fix is much less attractive to policymakers in the federal system for two important reasons. First, there is little consensus among federal judges, practitioners, and observers that the federal sentencing guidelines have been an improvement over prior law.⁵⁰ On the fundamental policy question of whether the federal guidelines are worth preserving, the federal experience has been dramatically opposed to the experience in many guideline states. Second, even among those who would wish to salvage the pre-Booker federal system, one serious impediment is that the federal guidelines require far more judicial factfinding at sentencing than any of the state guideline systems. This is no small distinction. Indeed, the degree of reliance upon legally-required judicial factfinding in federal law is far greater than in any other sentencing system in the history of the planet. The detailed, mechanical, fact-driven federal guidelines, including their controversial “relevant conduct” provision requiring the determination at sentencing of uncharged and unproven offenses, foreclose the chief pragmatic advantage of the Kansas fix to the states: that it will not have to be used often.

Among state legislatures, some variation upon the Kansas fix should be seen as the leading contender to bring their sentencing systems into compliance with *Blakely*.

47 These estimates were based on the number of cases with contested aggravating factors in 2002 and 2003, see MINNESOTA SENTENCING GUIDELINES COMMISSION, *THE IMPACT OF BLAKELY V. WASHINGTON ON SENTENCING IN MINNESOTA: LONG TERM RECOMMENDATIONS*, at 8-9. The commission concluded that the provision of jury factfinding procedures to accommodate *Blakely* “should not create a severe crisis within the state’s criminal justice system.”

48 See *supra* TAN.

49 Exactly this cost-benefit analysis was proposed by Rachel Barkow, NASC 2004.

50 See TONRY, *SENTENCING MATTERS* (federal sentencing guidelines are the most-hated reform in the history of U.S. criminal justice).

2. *Voluntary Guidelines*. On legal grounds, Booker establishes that judicial factfinding under a voluntary guideline system will slip past *Blakely*'s Sixth Amendment rule. . . .

On policy grounds, substantial costs may attend the switch from presumptive to voluntary sentencing principles—especially from the perspective of state government. Voluntary provisions are by definition unenforceable, and thus allow for the reemergence of sentencing disparities that motivated many American sentencing reforms in the first instance. Even if most judges give credence to advisory guidance, there is no systemic remedy for outlier sentences. Closely related to this point, no jurisdiction with voluntary guidelines has yet succeeded in building up a meaningful practice of appellate sentence review. This longtime goal of the criminal justice reform community has been realized only in states with presumptive sentencing guidelines, or other statutory sentencing presumptions, including Alaska, Kansas, Minnesota, Ohio, Oregon, Tennessee, and Washington.⁵¹

Perhaps more importantly, most states that have worked with presumptive sentencing guidelines have come to see them as essential tools in the deliberate management of prison population growth, prioritization in how prison bedspaces are allocated, and informed planning for the greater use of intermediate sanctions (including drug treatment, home confinement, halfway houses, restorative justice alternatives, and the like). In contrast, states that have employed voluntary sentencing guidelines have had a mixed record in these “resource management” arenas. Half of the states using voluntary guidelines have experienced rates of prison growth that outstrip national trends (not always an easy task, particularly in the 1990s).⁵²

It may be true that a system of advisory sentencing guidelines will remain the best available option for post-*Blakely* reform in the federal system.⁵³ The politically feasible alternatives to voluntary guidelines, most relying on the expanded use of mandatory minimum rules, would likely be worse. Although the issue of voluntary guidelines will no doubt be raised in some states, as well, it will be important to remember that state officials survey the landscape of sentencing reform from a wholly different vantage point than federal officials. The states’ investment in presumptive guidelines is deeper and more broadly based than has ever been true within the federal system. Moreover, the states face relentless budgetary pressures in the correctional domain, while Congress barely blinks an eye at the prospect of expanding prison costs.

51 [Cite representative case from each state. On the reform history working toward appellate sentence review, see Reitz 1997, first section.]

52 This is not to say that voluntary guidelines can never assist states in their pursuit of resource-management functions. The track record merely suggests that these efforts have failed as often than they have succeeded.

53 See Stith and Stuntz, New York Times Op-ed; Alschuler proposal, Fed. Sent. Rptr.

3. *Parole Eligibility Guidelines*. A final “avoidance technique” worthy of discussion would conjoin the release authority of parole boards with the legal presumptions of sentencing guidelines in order to render *Blakely* inapplicable. There have been early suggestions that guidelines speaking only to the date of parole release *eligibility* may fall into one of the blindspots in the Supreme Court’s Sixth Amendment caselaw. If so, such systems may gain a comparative constitutional advantage in the post-*Blakely* world that they did not possess beforehand.

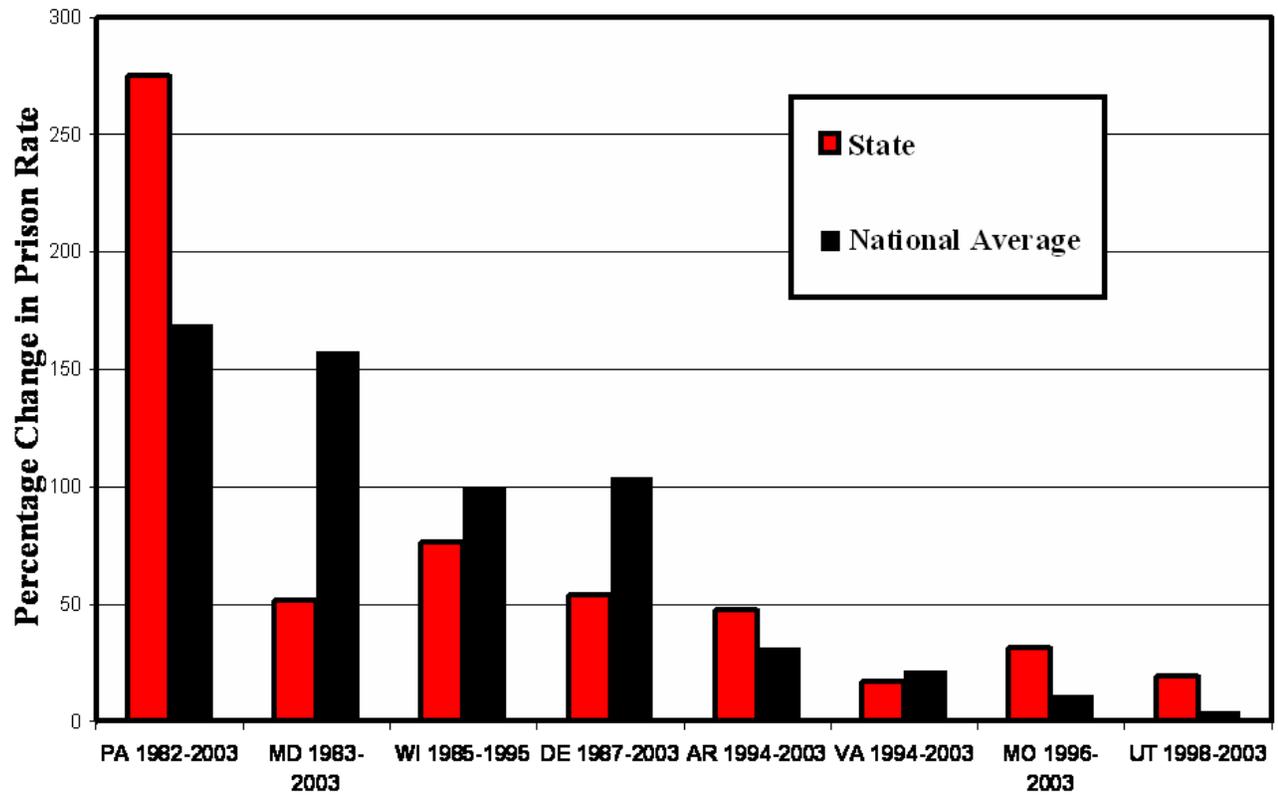
Presumptive sentencing guidelines coexist with parole release discretion in the states of Michigan and Pennsylvania. Shortly after *Blakely* was decided, the Michigan Supreme Court ruled that its state’s guidelines were unaffected by *Blakely* because they fix only parole eligibility dates and do not address the maximum prison term an inmate may serve if parole is never granted.⁵⁴ (Recall that, under *Harris* and *McMillan*, the Supreme Court has approved of judicial factfinding at sentencing, and perceives no necessity for jury trial, when the severity of a minimum punishment is enhanced below an unchanging maximum.) On similar reasoning, the Pennsylvania Sentencing Commission has reached the same conclusion internally, and one member of the commission has authored a thoughtful law review article recommending the guideline-plus-parole-release approach to other jurisdictions caught in *Blakely*’s net.⁵⁵

⁵⁴ *People v. Claypool*, 684 N.W.2d 278 (Mich. 2004).

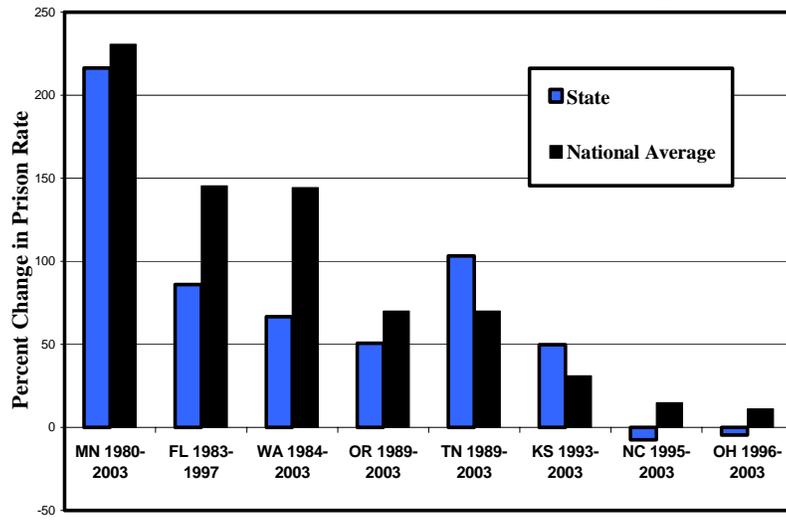
⁵⁵ Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. ____ (forthcoming, 2005). One Pennsylvania intermediate appellate court has upheld the state’s guidelines against *Blakely* attack on the alternative rationale that they are advisory rather than presumptive. *See* (Pa. Super. 2004).

NK: Tables below are from from Reitz’s article, supra, The graphs reflect the growth in the rate of prison population compared to state population. The first bar is the change in this rate for the individual state over the period of time reflected on the bottom axis, the second bar is the change in the rate nationwide, all states combined (not including the federal courts).

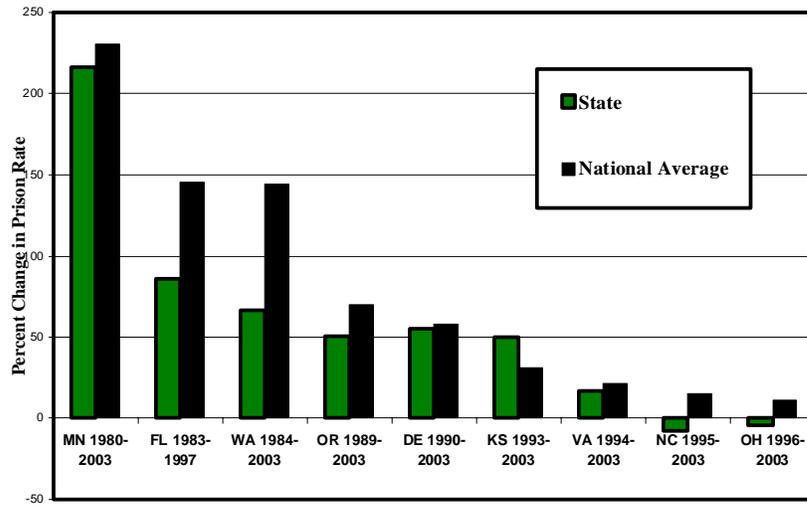
Prison Growth in Voluntary Guideline States through 2003



Prison Growth in Presumptive Guideline States through 2003



Prison Rate Change in Guideline States with No Parole through 2003



From: Advisory Guidelines in the Post-*Blakely* Era
FORTHCOMING 17 *Federal Sentencing Reporter* ____ (2005)

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*The views of this article are those of the authors and do not necessarily reflect the policy of their respective Commissions. The authors expressly thank Sarah Maguire of the La Follette School of Public Affairs, University of Wisconsin, for her assistance on this article.

...

Another advantage often touted for presumptive guidelines systems is the ability to project prison bedspace requirements and, thus, future funding needs. Some states explicitly tied their presumptive guidelines to management of correctional resources and bedspace. Nicholson-Crotty (2004) notes that mandatory guidelines are, in fact, associated over time with restraint of prison growth, but if and only if mandatory guidelines are accompanied by an explicit linkage to capacity and resources, whereas advisory guidelines have been essentially resource neutral. It is not clear whether Nicholson-Crotty examined advisory guidelines for linkages to capacity and resources.⁵⁶ Sorenson and Stamen have also recently linked presumptive guidelines to lower incarceration and admission rates in states.⁵⁷

Reitz (2003) examined prison growth under state guideline systems to national average prison growth rates.⁵⁸ He found that eight out of nine states that had sentencing guidelines and abolished parole release had prison growth rates lower than the national average over the period in which their guidelines were in effect. The presumptive guideline states with lower prison growth included Minnesota, Washington, Oregon, North Carolina and Ohio.⁵⁹ However, advisory guideline systems in Delaware and Virginia had lower prison rates also.

Again, Minnesota's guidelines have received specific study for their success in linking prison capacity to available resources and in limiting the growth of its prisons well below national averages. As with reducing disparity, however, evidence indicates that the resource-linked effect may also wane as time goes on. For example, in 2003, Minnesota ranked second nationally in

⁵⁶ Sean Nicholson-Crotty, "The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time," *Crime & Delinquency* 50 (2004): 395-411.

⁵⁷ Jon Sorenson and Don Stemen, "The Effect of State Sentencing Policies on Incarceration Rates," *Crime & Delinquency* 48 (2002): 456-475.

⁵⁸ Kevin R. Reitz, Plenary Session, *Sentencing at the Crossroads: An Exploration of the Journey; Past, Present, and Future*, Annual Meeting of the National Association of Sentencing Commissions, Seattle Washington, August 11, 2003.

⁵⁹ Kansas, another presumptive guideline state, had a higher than average prison growth rate.

percentage increase in prison population (up 10.3%).⁶⁰ It had ranked third the prior year.⁶¹ In fact, Minnesota, while still low in incarceration rate nationally, has been battling prison population increase concerns for almost a decade, despite its guidelines. According to Priesmeyer, much of the jump can be attributed to more aggressive sentencing of drug offenders, who rose as a percentage of the state's prison population from 16% in 2000 to 25% in July 2004. Other factors included an increase of twelve months in the average prison term from 2001 to 2004 and a decrease in the use of probation instead of prison in the period.⁶² Data also indicate that the increased incarceration has fallen more greatly on blacks⁶³ and women,⁶⁴ calling into question the guidelines' reported effectiveness against unwarranted disparity.

These data do not disprove the validity of assertions of Minnesota's guidelines effectiveness compared to other states, but they do note concerns that states considering types of guidelines systems in light of *Apprendi etc.* should be aware of. As a Bureau of Justice Assistance (BJA) overview of structured sentencing concluded in 1996, "Minnesota's success in avoiding prison overcrowding, then, is not linked solely to guidelines" and ". . . guidelines themselves are not a sufficient condition for controlling prison crowding Clearly, prison crowding can be controlled with or without guidelines" (1996, 106).⁶⁵ Or, perhaps, with advisory guidelines.

In fact, Minnesota and other presumptive guidelines states may face a future problem not faced by states with advisory guidelines. Their early success in diverting lesser offenders to alternative sanctions while imprisoning for longer periods more serious offenders may now be "backing up" the latter offenders more intensely in their prisons, as that BJA report warned (1996). Because states with presumptive systems may not have the political flexibility to adjust sentences "under the radar" to meet new resource needs that advisory and non-guidelines states will still possess, in the long term presumptive states may prove less able to deal with growing prison populations through their guidelines.

Advisory and Presumptive Systems Compared

⁶⁰ Paige M. Harrison and Allen J. Beck, *Prisoners in 2003*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, Washington, DC, 2004.

⁶¹ Ruben Rosario, "State Hits Top 5 in Growth of Inmate Populace," *Pioneer Press*, July 28, 2003.

⁶² Molly Priesmeyer, "Land of 10,000 Felons," *City Pages*, November 17, 2004. See also Laura McCallum, http://news.minnesota.publicradio.org/features/2004/02/02_mccallum1_prisonbonding/.

⁶³ Dianne Haulcy, "Homeless Ex-Offenders 'Hardest to Serve'," *Minnesota Spokesman-Recorder*, October 30, 2002.

⁶⁴ *One Less Bed: Report on Alternatives to Incarceration—Female Offenders*, Minnesota Correctional Facility-Shakopee, Alternative to Incarceration—Female Offenders Committee, State Advisory Task Force on Prison Offenders, February 2004.

⁶⁵ Bureau of Justice Assistance, *National Assessment of Structured Sentencing*, Office of Justice Programs, U.S. Department of Justice, Washington, DC, 1996.

Admittedly, advisory guidelines have not been studied with this degree of independence and rigor. Michael Tonry has written brief analyses of advisory systems in his many works on sentencing. On the whole, he has not been impressed”, relying on research from the early 1980s. He did, however, cite reports from Delaware indicating success in meeting the state’s expressed guidelines goals, while noting that no formal independent evaluations had been conducted (1996: 27-28). This latter point has been true for all advisory systems, as he also indicates, despite the changes in both presumptive and advisory systems and their results since the earlier research.⁶⁶ Virginia found evidence of disparity reduction after the introduction of advisory sentencing guidelines in six pilot sites.⁶⁷

As previously noted, perhaps part of the concern regarding advisory guidelines concerns the lack of a formal enforcement mechanism. In other words, perhaps advisory guidelines are being disregarded by the practitioners when an option exists to reject the guidelines in part or in total. If this were a well-grounded concern, we would expect to see that guideline compliance is starkly lower in advisory guideline states than in presumptive guideline states. However, there is little evidence that compliance rates differ greatly or differ in ways that favor presumptive guidelines. A 1996 National Center for State Courts report on sentencing issues found no obvious pattern of compliance.⁶⁸ The study found that Delaware, an advisory state, had a compliance rate of 90%, almost identical to that of Washington, a presumptive state (91.9%). In another comparison of advisory and presumptive states, Virginia’s compliance rate of 75.2% compared closely to Minnesota’s rate of 77%.⁶⁹

More recently, a spot comparison of guideline compliance rates between presumptive and voluntary systems continues to reflect a mixed picture. Regarding presumptive guideline systems, compliance is generally relatively high, if Minnesota, Oregon and Washington can be taken as representative. In Minnesota, 73% of felony offenders sentenced in 2002 received the sentence recommended under the Guidelines. The remaining 27% received a sentence that was some type of departure from the Guidelines.⁷⁰ In Oregon, 81% of all

66 Michael Tonry, “The Politics and Processes of Sentencing Commissions,” *Crime & Delinquency* 37 (1991): 307-329; *Sentencing Matters, op.cit.*; “Punishment Policies and Patterns in Western Countries,” in Michael Tonry and Richard S. Frase, *op. cit.*, pp. 3-28. The Bureau of Justice Assistance’s *National Assessment of Structured Sentencing* similarly rejected the effectiveness of advisory systems based on no studies after 1985, *op cit.*

67 See Judicial Sentencing Guidelines Oversight Committee on the Sentencing Guidelines Pilot Program, *Voluntary Sentencing Guidelines Pilot Program Evaluation* (Richmond, Va: September 1989).

68 Brian J. Ostrom, Neal B. Kauder, David Rottman, and Meredith Peterson, *Sentencing Digest: Examining Current Sentencing Issues and Policies*, National Center for State Courts, Williamsburg, VA, 1998.

69 A rigorous comparative study of compliance rates is beyond the scope of this paper, and these comparisons are by no means “apples-to-apples” comparisons. They are highly dependent on the unique structure of each guideline system and the width of its ranges, among other factors.

70 Minnesota Sentencing Guidelines Commission, *Sentencing Practices Annual Summary Statistics for Felony Offenders Sentenced in 2002* (January 2004); available from

sentences in 2001 were within the presumptive sentence range.⁷¹ In the state of Washington in FY 2003, 84.1% were sentenced within the standard range.⁷²

Several advisory systems also report high compliance figures. For example, Virginia reports a 79.4% compliance rate in FY 2003. In Maryland, compliance rates for its advisory guidelines, historically somewhat weak, are now relatively high -- 80% for 2002, down from 87% for 2001.⁷³ In Utah, the guideline agreement with the actual sentence imposed was 79% for sex offenses and 86% for all other offenses.⁷⁴ However, another advisory guideline state, Arkansas, reports substantially lower compliance rates, ranging from 64.5% for drug distribution to 20.2% for aggravated robbery and 0% for rape.⁷⁵ Again, while states with presumptive guidelines may have advantages in obtaining high judicial compliance, low compliance rates do not seem intrinsic to advisory guidelines states.

There is a reasonable expectation that high levels of compliance will reduce disparity in sentencing. For example, the Virginia recommended sentence ranges were developed around the middle 50% of historical sentences, with some adjustments for repeat violent crime. If, overall, 80% of judges are complying with guidelines, then by definition 80% of the current sentences are inside ranges that historically have included only 50% of sentences, reducing sentencing variation. Therefore, coupled with the findings of its pilot project, it is reasonable to conclude that Virginia is reducing unwarranted disparity. All else being equal, high compliance rates provide prima facie evidence of at least some disparity reduction, since they bring the majority of cases into a common sentencing range.⁷⁶

Previously, we noted that some advisory systems have also been successful in holding down prison costs. Both advisory systems in the Reitz

<http://www.msgc.state.mn.us/Data%20Reports/datasum2002.DOC>.

71 Oregon Criminal Justice Commission, *Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001* (January 2003); available from <http://www.ocjc.state.or.us/SG01v2.pdf>.

72 State of Washington Sentencing Guidelines Commission, *Statistical Summary Of Adult Felony Sentencing Fiscal Year 2003* (January 2004); available from http://www.sgc.wa.gov/PUBS/FY2003_Statistical_Summary.pdf.

73 State Commission on Criminal Sentencing Policy, *2003 Annual Report* (2003); available from <http://www.msccsp.org/publications/ar2003.html>. Maryland defines departures, however, in distinct ways. Earlier reports showed that much of the departure from its guidelines came from sentences on cocaine and heroin offenses, not consistently across all offenses, which had correspondingly lower departure rates. See the Maryland website, www.msccsp.org.

74 Utah Department of Corrections, *Report to the Utah Sentencing Commission* (April 2001).

75 See Arkansas Sentencing Commission, *Biennial Report 2001 – 2002*; available from http://www.arkansas.gov/asc/2002_biennial.pdf. It is important to note that Arkansas has a very narrow definition of compliance. A sentence is considered to be within the presumptive range if it is within 5% of the listed presumptive sentence. This definition is much more rigorous than the other systems mentioned above. This highlights the difficulty of making careful interstate comparisons across very different systems.

76 Of course, very wide ranges will afford less opportunity to narrow discretion than narrow ranges. Theoretically, it is possible to have ranges so wide as to have a negligible effect on disparity, though we know of no such system.

study [Virginia and Delaware] held the increase in prison growth below the national average for the time their guidelines were in effect. Nicholson-Crotty found that advisory guidelines were resource neutral, and it is not clear how many of these jurisdictions set out to create guideline systems to hold down prison costs.

Further, the apparent success of guidelines in constraining prison costs may not be due to the guidelines themselves, but to the development of an independent agency, the sentencing commission, which produces good time-series data and develops expertise in population forecasting. For example, although it does not have any sentencing guidelines, Oklahoma's sentencing commission has a good sentencing data collection and reporting system that has allowed analysts to inform sentencing policymaking there concerning prison population projections for almost a decade. The advisory guideline jurisdictions of Delaware and Virginia, as well as most of the presumptive guideline jurisdictions mentioned in the Reitz study, also maintain sentencing commissions that focus on data collection and prison population projection.

In short, we know that presumptive guideline systems have had some effectiveness in reducing unwarranted disparity and controlling prison costs, as have some advisory systems, but we do not know *why*. Is the enforcement mechanism, presumptive guidelines, the distinguishing feature of success, or something else? This opens the possibility that advisory guidelines can be effective in reducing unwarranted disparity and controlling prison costs, also.

We assert that the evidence for presumptive guidelines, while circumstantially appealing, is not sufficiently strong, nor the evidence for advisory guidelines sufficiently weak, to embrace one and reject the other. No controlled experiments or rigorous quasi-experiments have been done isolating the effects of presumptive guidelines from other variables that may have affected systemic outcomes.⁷⁷ The usual research design is a "before-after" model focusing on the state implementing the reform. Rarely has there been an attempt to control for the experience of other states, to see if they found similar results absent the intervention of the presumptive guidelines. This mirrors the tendency of states in the 1990s to attribute their crime reductions to their major efforts (more prisons, more "broken windows" enforcement, etc.) when similar or greater crime reductions occurred in states that had used other approaches (Blumstein and Wallman, 2000).⁷⁸ Furthermore, as Tonry has noted, comprehensive, independent evaluations of guidelines effectiveness, done by non-proponents, have been rare since the mid-1980s.⁷⁹ Could implementing good data collection and public reporting even in indeterminate sentencing systems reduce disparity?

⁷⁷ Given that advisory systems have rarely undergone rigorous independent review, it goes without saying that advisory guidelines have not been subjected to controlled experiments.

⁷⁸ Alfred Blumstein and Joel Wallman, *The Crime Drop in America*. (New York: Cambridge University Press, 2000).

⁷⁹ Tonry, 1996, pp. 70-71.

Could correctional costs be controlled if effective and adequately funded community sentencing options were available to judges even in advisory guidelines systems? How much do the attitudes of practitioners in presumptive states, by definition more determined to control sentencing and its consequences than those in advisory states, permeate practice and thus become subject to diminishment as their initial proponents and practitioners are replaced? Until sufficient comparative studies have been done, it may be wrong to conclude that only presumptive systems can achieve the benefits attributed to them.⁸⁰

It should be noted that advisory systems do contain weaknesses as compared to presumptive guidelines. Without an appellate enforcement mechanism, there is nothing but personal or institutional court restraints to stop a judge from giving a sentence that is clearly an exercise in unwarranted disparity, as long as that sentence does not represent an illegal sentence or can otherwise be appealed as an abuse of discretion. This weakness is difficult to contest. However, the Supreme Court in *Booker* and *Fanfan* made clear that appellate enforcement of reasonable sentences will be a part of the new federal system. Is that kind of system practical? Such a system currently exists in Wisconsin.

Appellate Review of Sentences in Wisconsin

Wisconsin, a state with advisory sentencing guidelines, has extensive case law (see *McCleary v. State* (1971) and *State v. Gallion* (2004))⁸¹ detailing requirements that judges issue reasoned sentences, very similar to the conclusion in *Booker* and *Fanfan*. The state Supreme Court has consistently ruled that judges must demonstrate at sentencing the reasons for the sentence and how the sentence relates to goals and outcomes. These reasons cannot simply be incanted as “magic words” or “boilerplate generalities.”⁸² As the court restated from *McCleary* in *Gallion*, sentencing requires considered judicial discretion, which “contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.”⁸³ As *Gallion* showed, when defendants in Wisconsin believe that the judge has failed in the exercise of this discretion, they may

⁸⁰ For example, if a state sees a decline in sentence disparity among races after the imposition of presumptive guidelines or in its use of prison beds for non-violent offenders, is that the result of the guidelines or of the attitudes among practitioners that led to the guidelines’ adoption? Or is it some of both? Will the same results hold in states with different demographics, social or political cultures, economic conditions, or mix of leadership? What is the effect on later success of having the effort to adopt the presumptive guidelines led by a distinguished state judge versus by a legislator or governor’s appointee? If other policies are implemented at the same time, such as effective community corrections, changes in parole criteria, or new law enforcement strategies, how do we know how much of the benefit seen from presumptive sentencing systems is not the result of those policies instead? Perhaps advisory guidelines would produce similar results if accompanied by the same efforts.

⁸¹ *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971); *State v. Gallion*, 678 N.W.2d 197 (2004), www.wisbar.org/res/capp/2002/01-0051.htm.

⁸² *Gallion*, op cit.

⁸³ *Ibid*.

appeal. And, regarding the role of guidelines in informing judicial discretion, in *Gallion*, the state supreme court stated that it did “not quarrel with the proposition that comparative data or sentencing guidelines provide helpful information to sentencing courts.”⁸⁴ Since Mr. Gallion did not bring up the issue of a constitutional requirement to consider comparative data or sentencing guidelines, however, the court did not rule on that issue. Nevertheless, the end result of *Gallion* was a state system of advisory guidelines with comparative data and of appellate review of sentences for reasonableness that can serve as proof that such systems can effectively operate.

Perceived Strengths of Advisory Systems

There are at least a few ways in which advisory guidelines appear to equal or exceed the value of presumptive guidelines. These strengths are judicial discretion, reduced resistance to change, and transparency of sentencing practice.

Judicial Discretion

In an advisory guidelines system, judicial discretion can be a remedy for other problems. In a presumptive guidelines system, dissimilar cases sometimes end up in the same box. Some critics have argued that this reflects a troubling trend toward aggregation of individual cases that contain legitimate differences, differences that may not be reflected in the scoring of the current offense and criminal history of the offender.⁸⁵ For example, two cases with the same quantity of drugs and same prior record may actually appear quite different to a sentencing judge, in ways that most neutral observers would agree reflects appropriate distinctions. Substantially different culpability and harm may cause us to conclude that the cases are in fact quite dissimilar and few if any judges would choose to sentence these two people similarly. Yet in a presumptive system, it may be very hard for a judge to get out of the box and select the “right” sentence.

In their detailed criticism of the federal sentencing guidelines, Stith and Cabranes devote an entire chapter to the ways in which the limited factors applied in the guidelines can end up giving the same sentence to offenders who are, in fact, fundamentally different in both person and circumstances.⁸⁶ They

⁸⁴ Ibid.

⁸⁵ For example, Smith and Dickey (1999) contend “gravity of offense and prior record, although relevant at sentencing, are hardly sufficient to define a category of offenders who are “alike” in culpability or in the threat they pose to public safety” (p. 3). They further contend that a presumptive guidelines grid exaggerates the importance of current offense and prior record (p. 5). In another example, Albert Alschuler (1991) argues that sentencing guidelines (especially the federal sentencing guidelines) reflect a trend toward greater aggregation, substituting punishment based on aggregations of similar cases for regimes that emphasized individual punishments (The Failure of Sentencing Guidelines: A Plea for Less Aggregation,” 58 U. Chi. L. Rev. 901 (1991)).

⁸⁶ Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*

"reject the premise that uniform treatment means equal treatment, and thus that judicial discretion -- insofar as it undermines uniformity -- necessarily denies justice."⁸⁷ They argue that uniformity "can itself be 'unwarranted': when unprincipled, blind uniformity promotes inequality."⁸⁸ Finally, they also note that, beyond judicial behavior, "the exercise of prosecutorial discretion is . . . inevitably a wellspring of disparate treatment." Therefore, maintaining judicial discretion through advisory guidelines may moderate prosecutorial discretion⁸⁹ and actually balance disparate treatment in an otherwise problematic situation. Of course, prosecutors in an advisory system continue to retain appreciable discretion, as prosecutors do in every sentencing system.

Sentencing different offenders differently is not a problem in an advisory system. The judge would explain why these two cases are different and make an appropriate departure. With appellate review, higher courts can create a body of case law, as in Wisconsin, to ensure and enforce standards for these determinations.

Reduced Resistance

Advisory guidelines may provide a level of security to judges who are otherwise skeptical that guidelines, especially matrix-based grids, can produce justice in individual cases. Therefore, another strength of advisory guidelines systems is the potential for judicial "buy-in" to the system, if judges are involved in their construction and allowed regular meaningful feedback.⁹⁰ This can lessen the "gaming" that may occur in presumptive systems. Some research suggests that "the greater the rigidity of legislative control, as in mandatory or determinate sentencing, the higher the degree of internal resistance to change" (Wicharaya, 1995).⁹¹ This can lead to efforts to shape the "reformed" system around pre-established "going rates" (Ulmer, 1997; Flemming, et al., 1992)⁹² that then lead to more attempts at control discretion, that then lead to more "gaming," and so on. This cycle could ultimately end in more *Blakely*-like challenges to constitutionality. A system perceived as responsive and legitimate by judges, reinforced by good communication from data agencies, might be more immune to these problems and actually more adaptable to agreed-upon change. Advisory

(Chicago: University of Chicago Press, 1998) 104-142.

⁸⁷ Ibid., 105.

⁸⁸ Ibid., 106.

⁸⁹ Specifically, a prosecutor's discretion to bring or not to bring particular charges that result in a particular guideline sentence recommendation that may lead to disparate recommendations for two similarly situated defendants.

⁹⁰ In our opinion, judicial involvement in presumptive system decisions is probably a prerequisite for their success, also. Judicial involvement in guideline systems in Minnesota, Washington, North Carolina, and Kansas has been substantial.

⁹¹ Tamasak Wicharaya, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms on Courts, Prisons, and Crime*. (Albany, NY: The State University of New York Press, 1995).

⁹² Roy B. Flemming, Peter F. Nardulli, and Eisenstein, *The Craft of Justice: Politics and Work in Criminal Court Communities* (Philadelphia: University of Pennsylvania Press, 1992); Jeffrey T. Ulmer, *The Social Worlds of Sentencing* (Albany, NY: The State University of New York Press, 1997).

guidelines are at least as likely to satisfy these requirements in the eyes of judges as presumptive guidelines.

Transparency of Sentencing Practice

Guidelines that have high compliance can provide transparency for policy makers, practitioners, defendants, victims, and citizens. Even greater transparency and openness can be achieved by making all sentences available to the public with the sentencing judge identified.⁹³ Pennsylvania, which until recently had no enforcement through appellate review although it is usually classified as a presumptive system, and Virginia have begun releasing the compliance rates for individual judges. One could argue that this transparency, more than presumptiveness, can reduce unwarranted disparity and sentencing variation. In addition to requiring a degree of introspection by judges before departing from advisory guidelines, open and available sentencing data allows, and perhaps requires, the legal community and the broader community to think through sentencing standards and practice.

Advisory Guidelines Can Work and Do Work.

Some established advisory guideline systems appear to have achieved many of their purposes. For example, Delaware's advisory guidelines were designed to reflect "a comprehensive focus on offender management" and include "structural and programmatic options designed to punish offenders while addressing the underlying behavioral problems associated with their criminal activity."⁹⁴ Delaware's guidelines have become a centerpiece for a punishment structure that includes an aggressive emphasis on graduated sanctions and rehabilitative efforts. The breadth of these programs in Delaware, as well as the post-guideline shift in non-violent offenders from the state's prison beds to alternative programs, is evidence of success.⁹⁵ Virginia represents another advisory guidelines system that appears to have achieved many of its purposes. Virginia's guidelines appear to be unique in using risk assessment analysis to redirect low risk non-violent offenders, who would otherwise be recommended for a prison sentence, to alternatives. A recent independent evaluation concluded:

The Risk Assessment Instrument developed by the Virginia Criminal Sentencing Commission (VCSC) has proven an effective tool for identifying, among nonviolent offenders, good candidates for diversion from incarceration. Higher "risk scores" on the instrument have been associated with a greater likelihood of recidivism, diversion through risk

⁹³ These thoughts owe much to the insights of Professor Charles Wellford. Personal communication with the authors (2004).

⁹⁴ Sentencing Accountability Commission of Delaware, *Sentencing Trends and Correctional Treatment in Delaware* (April 10, 2002): 22. Available from <http://www.state.de.us/budget/sac/publications/sentencing-trends.pdf>

⁹⁵ Sentencing Accountability Commission of Delaware, *Theft Offenders: Jail and Prison Populations* (August 1997).

*assessment has produced positive net benefits for the state, and judges and probation officers have found the instrument a useful addition to state sentencing guidelines.*⁹⁶

Undoubtedly, advisory guidelines, like presumptive guidelines, present a mixed picture of effectiveness and policy change. We have argued that advisory systems can have either strong or weak compliance, strong or weak support from key stakeholder groups, and strong or weak impact on key results measures such as disparity reduction or control of costs. A corollary to this argument is that some other features of the sentencing system, unrelated to the enforcement of guideline recommendations, can have as much or more impact on the sentencing of individual defendants and the fairness of that system.⁹⁷

All things being equal, advisory guidelines can probably expect greatest success where all judges operate within a single court culture (District of Columbia) or a small geographic area with substantial consolidation of court functions (Delaware). This is true because face-to-face contacts are greatest, and informal social controls are probably greatest. This is also true in individual court districts in which judges formalize regular discussions of sentencing activity, such as in Wisconsin's District IV.⁹⁸ However, we do not believe that advisory guidelines covering large geographic areas will fail. We simply that they face greater challenges.

All things being equal, advisory guidelines can probably expect success where other mechanisms serve as a strong incentive to judicial compliance. One mechanism is improving the transparency of sentencing decisions. As previously mentioned, Pennsylvania and Virginia report on individual compliance rates by judge. No doubt most judges will be more inclined to follow the guideline recommendation, or take care to have a strong rationale for a departure, when they know their departures will be publicly available. Similarly, to the extent that judicial selection is tied at least in part to compliance, judges are more likely to comply. In Virginia, judicial "elections" are held by the legislature, and the legislative committees review compliance for judge retention elections as a routine part of the election process. The legislative review provides a strong incentive to comply.

Another potential mechanism is effective appellate review of sentences. In Wisconsin, as recently affirmed in *Gallion*, judges must state at sentencing the reasons for the sentence and its linkage to the desired goals for the offender and the public. By setting criteria for "reasoned sentences" and applying them on

⁹⁶ The National Center for State Courts and the Virginia Criminal Sentencing Commission, *Offender Risk Assessment: A Three-Stage Evaluation* (2002). Available at http://www.vcsc.state.va.us/risk_off_rpt.pdf.

⁹⁷ Factors that may have more practical effect include the width of the guideline ranges, the sentence severity as a function of the defendant's criminal history, the departure standard in presumptive systems, and the relative influence of the Commission in the policy making process.

⁹⁸ L. Edward Stengel, Personal communication with author (2004).

appeal, as in *Gallion*, state supreme courts can enforce standards leading to greater compliance and uniformity with guidelines based on those standards.⁹⁹

While presumptive guidelines systems have attractions, it is possible that advisory guidelines systems can be part of a process that produces many of the same perceived positive results. For an advisory guidelines system to be effective, it should meet most of the criteria listed below:

- a good sentencing data system for reporting and projecting,
- transparency in the reporting of sentencing data and judicial departure,
- adequately funded and effective alternative sentencing options in which judges have confidence (including trained personnel and regular program evaluation),
- good pre-sentence information and assessment by specially trained correctional or court personnel,
- judicial buy-in based on an active Commission that maintains regular communication and feedback with practitioners,
- goals for sentencing clearly set by the sentencing commission and/or the state's highest court,
- meaningful appellate review and sanction of egregious sentences,
- use of sentencing data and reports in judicial training,
- acknowledgement that high departure rates for a few offenses do not necessarily mean failure of an entire advisory system if special circumstances accompany the departures (such as enormous drug caseloads pressuring lower plea-bargains),
- attention to and action against racial and/or other disparity in all points of the state criminal justice process, and
- an effective sentencing commission with strong representation from the state criminal justice community AND influential and supportive representatives from the legislature and executive branches.

Institution of these factors does not, of course, guarantee effective outcomes for advisory sentencing systems. But, where they have been present, at least in part, states have achieved many of the objectives generally seen in presumptive guidelines systems. The federal system, with the resources and experience of the United States Sentencing Commission, is perhaps better equipped than any other system to attain all these factors. That, in turn, would indicate that the decisions in *Booker* and *Fanfan* moving the federal system to an advisory function could result in an effective and valuable sentencing structure that could provide a model for state systems moving from prescriptive guidelines or interested in adopting guidelines in the future.

The Prospects for Advisory Guidelines Post-*Booker* and *Fanfan*

⁹⁹ *Gallion*, op. cit.

While it is uncertain which state guideline systems will be ruled unconstitutional in the aftermath of *Booker*, several practical political consequences seem fairly clear. First, jurisdictions that have sentencing guidelines that are regarded as successful by practitioners and the public will likely attempt to retain their systems to the maximum extent possible, and seek limited corrective action as needed. These states will see little reason to discard a system that most parties regard as successful.

For jurisdictions that have no guidelines today, some of these jurisdictions will consider guidelines in the near future, if history is any guide. Although states without guidelines have had three decades to move toward them, the number of new states adopting or expressing interest in guidelines continues to increase by one or two each year. *Booker* is likely to make these jurisdictions consider advisory guidelines if they believe advisory guidelines achieve other legitimate sentencing purposes such as reduction in unwarranted disparity, cost control, practitioner satisfaction, and improved transparency. The attractiveness of advisory systems in the eyes of judges may be a major consideration for those states, leading to a reasonable compromise that improves on the problems of their status quo.

The Federal Sentencing Guideline system represents a special case. In light of *Booker*, it is fair to say that there are powerful forces that may push to retain presumptive sentencing. It is equally clear that there are high levels of dissatisfaction with the current regime, especially among judges, defense attorneys, and other interested observers. This paper is written, in part, to educate these parties to advisory guidelines, who have been exposed to the arguments favoring mandatory guidelines for years.

Making predictions is a tricky business, especially before Congress and federal practitioners have weighed in with their responses to the recent decisions. We cannot cite an instance in which presumptive guidelines have been successfully converted to an advisory framework (or vice versa). However, we will speculate. In a jurisdiction that has had sentencing guidelines for almost twenty years, most federal judges have spent all or most of their careers consulting sentencing guidelines and sentencing within the guidelines range for most typical cases. We believe it is highly likely that these judges will continue to comply with guidelines recommendations, at least in the typical cases for which the guidelines are designed. If advisory guidelines are embraced with several of the other reforms mentioned earlier in this article (some of which already exist in the federal system), we predict that advisory guidelines can be a success in the federal system. Whether advisory guidelines will be given a chance to succeed is another question.

One final note is in order. It should be clear by this point that the authors view the paucity of reliable scientific evidence regarding the performance of all sentencing systems as a major obstacle to informed choice. It is incumbent on all

sentencing commissions, legislatures, and independent researchers to address this problem through joint efforts at data sharing, analysis, and performance monitoring.