Guidelines as Guidelines: Lessons from the History of Sentencing Reform

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INTRODUCTION

Most modern sentencing scholarship rests on a curious conundrum. Some scholars chronicle the remarkable success of state guidelines regimes,¹ whereas others decry the dismal failure of the federal sentencing guidelines.² And, for the most part, this disparate treatment is appropriate, as the federal guidelines are different from state guidelines systems in myriad ways.

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Take, for example, their differing structure: most states adopted voluntary or presumptive guidelines, whereas the federal sentencing commission elected for a hypertechnical scheme of real-offense sentencing. Or compare their success: while state efforts to reform criminal sentencing via guidelines have generally been lauded, the federal approach has been viewed widely as a catastrophe.

Accordingly, one might expect that while state guidelines systems are currently alive and well, the federal guidelines scheme is now a defunct and hollow relic of a forgotten era in corrections policy. But only one of these premises is true. While state guidelines have faced numerous existential threats – such as the punitive impulses of politicians and citizens hoping to appear, or be, “tough on crime” in the face of local and nationwide crime waves, the seemingly inevitable opposition of judges to a device designed to cabin their discretion, and the “constitutional crisis” presented by Blakely – state guidelines have survived and thrived, bringing with them high compliance and reduced imprisonment rates. At the same time, despite their myriad perceived flaws, the federal guidelines are still here, and regulate the outcome in

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4 Id. at 1105 (“[T]he pre-Booker federal scheme bore little resemblance to any state guidelines counterpart.”). Real-offense sentencing allows a judge to punish a convicted defendant for his or her actual conduct, rather than merely for his or her offense of conviction. Take, for example, a defendant who sells four hundred grams of cocaine to assorted individuals, but who is charged and convicted only of a ten-gram sale to an undercover officer. In an offense-of-conviction sentencing system, that defendant can only be sentenced for selling ten grams of cocaine. In the pre-Booker, real-offense federal guidelines system, the defendant’s ten-gram conviction is a gateway to punishment for his overall conduct – meaning that he can be punished for selling four hundred grams of cocaine if that quantity is proven by a preponderance of the evidence at the sentencing hearing. See STITH & CABRANES, supra note 2, at 66-71.
5 At least before the Supreme Court’s decision in United States v. Booker, 543 U.S. 220 (2005) (ruling the federal guidelines unconstitutional insofar as they required judges to impose enhanced sentences based on facts not found by the jury or admitted by the defendant). See, e.g., Michael Tonry, SENTENCING MATTERS 11 (1996) (“Few outside the federal commission would disagree that the federal guidelines have been a disaster.”); Jose Cabranes, Sentencing Guidelines: A Dismal Failure, 207 N.Y. L.J. 27 (1992) (“The [federal] sentencing guidelines system is a failure—a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal judicial system.”).
6 See infra Part I.
7 Id.
almost all federal criminal cases. Hence the conundrum: while most scholars assume that federal and state guidelines are qualitatively different, both systems have in common a curious and surprising resilience.

This Article begins to solve that conundrum. It starts from the proposition that sentencing guidelines are, at bottom, the “best possible sentencing scheme,” with salutary effects for prosecutors, defense attorneys, judges, and defendants alike. And then, by comparing the history of the federal sentencing guidelines with that of several representative state guidelines schemes, it offers an explanation for guidelines resilience. Put simply, sentencing guidelines promulgated by sentencing commissions generally succeed in meeting their stated goals, and in surviving all manner of challenges, when the guidelines are guidelines and the commissions operate as commissions. That is, when sentencing guidelines represent a diversely composed commission’s collaborative effort to administer and regulate criminal sentencing rather than revise substantive criminal law, guidelines tend to succeed in meeting their goals and survive judicial and legislative challenge. Conversely, when guidelines reform ambitiously attempts to do more – when the guidelines embody a new, draconian criminal code intended dramatically to alter sentencing practice, and the commission acts “legislatively” in defining and ranking crimes – such reform prompts eventual opposition and evasion.

To be sure, part of the reason that state guidelines regimes and the federal sentencing guidelines are still in effect today is simple institutional inertia; the process of promulgating guidelines often leaves alternative approaches permanently on the cutting room floor. Yet institutional factors alone cannot account for the fact that states adopting presumptive or voluntary guidelines have rarely (if ever) decided to scrap guidelines completely in the fact of

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10 Indeed, the much-maligned federal guidelines lasted in their pre-Booker form for some twenty-odd years.
seemingly intractable problems. Nor can they account for the persistence of the federal guidelines in the face of the existential challenge of *United States v. Booker*. Instead, guidelines are resilient because they are, in their purest form, an inherently moderate method of criminal sentencing reform. And ultimately, the degree of guidelines resilience is a product of the degree of compromise that goes into guidelines formation. When reformers work collaboratively to administer sentencing, guidelines certainly survive and often do more, such as helping regulate responses to moments of crisis. When sentencing reformers take an alternate approach – such as the federal example – survival is the ideal, not the baseline, and ultimately some form of external moderation is a necessary precondition for the continued viability of sentencing guidelines.

The rest of this Article sets out this abstract model for guidelines resilience. In Part 1, I offer a brief history of guidelines reform in several presumptive and voluntary states. Part 2 attempts to distill that history into a coherent narrative for guidelines resiliency, first by isolating common factors that correlate with resilience, and then by explaining how these common factors represent instantiations of true efforts by “commissions” to form “guidelines.” Part 3 discusses the federal example. It begins by explaining how federal sentencing reformers initially intended to create guidelines but ended up indirectly recodifying the federal criminal code in the form of “real-offense” sentencing. Next, it explains how this change in mission doomed the guidelines as guidelines. Part 3 concludes by arguing that *Booker* and its progeny (perhaps intentionally) served as an external and necessary moderating influence on the guidelines. Part 4 discusses the lessons that state and federal reformers can and should take away from this history. A brief conclusion makes some further observations about guidelines resilience and predictions for future development.

I. GUIDELINES REFORM IN THE STATES
In 1980, Minnesota became the first state to institute sentencing guidelines reform.\textsuperscript{11} Several other states followed suit soon after, and since then, more and more states have joined the fray in a steady trickle.\textsuperscript{12} While each system is different on the ground, state guidelines come in two broad structural varieties: presumptive and voluntary.\textsuperscript{13} Presumptive guidelines prescribe a recommended sentencing range based on a combination of offense and offender criminal history, but permit the judge some discretion to depart subject to appellate review. Voluntary guidelines, on the other hand, are purely advisory; sentences under such a regime are rarely overturned on appellate review.\textsuperscript{14}

Despite their differences, however, both systems have achieved a modicum of success in certain states. Of course, success in this arena is a slippery term to define, since guidelines are themselves often the product of compromise between multiple reformers with myriad goals. Nevertheless, there appears to be at least a scholarly consensus that guidelines reform has achieved its stated goals in Minnesota, Washington, North Carolina, and Virginia.\textsuperscript{15} North Carolina, a state that once facilitated some of the worst prison overcrowding in the country, recently achieved a combination of “Truth-in-Sentencing”\textsuperscript{16} and stability (and sometimes reduction) in the overall incarceration rate.\textsuperscript{17} Minnesota and Washington’s sentencing regimes have reduced sentencing disparity and shifted incarceration resources and capacity toward

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\item Frase, supra note 1, at 1194-96.
\item Weisberg, supra note 9, at 194, see also Reitz, supra note 3, at 1102-04.
\item Indeed, some voluntary guidelines states eschew appellate review entirely, save for review for unconstitutionality. \textit{See D.C. Sentencing and Criminal Code Revision Comm’n, Sentencing Guidelines Practice Manual}, 1-2 (2007) (“Sentences under the guidelines, just like sentences before the guidelines, are not appealable except when they are unlawful.”). Since the guidelines are not law, deviation from them does not give rise to an appeal.
\item Among other states. See Reitz, supra note 3, at 1103-05 & n.88.
\item Truth-in-Sentencing is a term of art used to describe the goal of having inmates serve as close to 100\% of their sentences as possible—that is, having an inmate serve fifteen years when the judge gives him or her a fifteen-year sentence. Weisberg, supra note 9, at 212. The obverse, which might be termed “Falsity-in-Sentencing,” would arise when a judge imposes a fifteen-year sentence, but the inmate is released after serving only five years because of good time credits or parole.
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violent offenders.\textsuperscript{18} In Virginia, a voluntary guidelines state, judges have shown an aptitude for guidelines compliance, and the state has seen a corresponding decrease in sentencing disparity.\textsuperscript{19}

Moreover, all four of the states mentioned above have relatively healthy sentencing systems, even though most have faced potentially crippling institutional, political, or judicial challenges.\textsuperscript{20} In this part, I offer a brief history of guidelines reform in these jurisdictions. I have chosen these states because their sentencing schemes are diverse and broadly representative; other state systems share many features with the examples I use here, albeit not necessarily in the same mix or proportions. While I will not offer a comprehensive history of reform in these states (others have done so already, and quite well), I hope to illuminate some of the primary factors that allowed the guidelines to prosper in sometimes hostile climes.

A. Early Returns

1. Presumptive guidelines in Minnesota, Washington, and North Carolina

Guidelines arrived in Minnesota, Washington, and North Carolina for different reasons, but ended up having a similar trajectory. Minnesota, the first state to implement legally binding guidelines promulgated by an independent sentencing commission, decided to transition to a guidelines system based on concerns that discretionary, rehabilitation-based sentencing was unreliable, ineffective, and potentially discriminatory.\textsuperscript{21} Washington made the transition contemporaneously, and for similar reasons, after Christopher T. Bayley, a King County prosecutor, brought to Washington the national debate over the continuing viability of


\textsuperscript{19} Weisberg, \textit{supra} note 9, at 218.

\textsuperscript{20} See infra Parts 1A-1C.

\textsuperscript{21} Frase, \textit{supra} note 11, at 131, 142. Discretionary sentencing permitted disparate sentences for similar crimes, often within the same courtroom, and potentially based on impermissible factors like race. \textit{Id.}
rehabilitation-based sentencing. North Carolina, on the other hand, transitioned to guidelines in response to a correctional near-catastrophe in the mid 1980’s. The state’s prisons were crowded almost to the point of unconstitutionality, such that the legislature had to restore parole authority in order to create some limits on the prison population.

In response to these concerns, each state established broadly diverse sentencing commissions. These commissions included members of the public and the state criminal justice system, from the judiciary to the public defender’s and district attorney’s offices. This diversity had numerous salutary effects, such as increasing the number of institutions invested in guidelines success, and ensuring that the guidelines won the approval of the actors charged with using them. Beyond that diversity, however, each commission was somewhat unique. Washington elected to ensure legislative primacy over the sentencing process by having a purely advisory commission. Its commission operated largely by consensus. Minnesota’s and North Carolina’s commissions, on the other hand, worked as traditional administrative agencies, and their guidelines were presumed effective absent a legislative veto. While Minnesota reached quick consensus with this model, North Carolina did not. Instead, relations among the members were somewhat strained, and minority reports grew increasingly common. Ultimately, though,

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22 Boerner & Lieb, supra note 18, at 75-76. Indeed, Bayley’s proposal looked broadly similar to the system Washington designed. See id; see also infra p. 8-9.
25 See WASH. REV. CODE. ANN. § 9.94A.860 (2008); Frase, supra note 1, at 346; Wright & Ellis, supra note 24, at 440.
26 See, e.g., Frase, supra note 11, at 150-51.
27 See David Boerner, The Role of the Legislature in Guidelines Sentencing in “The Other Washington”, 28 WAKE FOREST L. REV. 381, 381-82 (1993). At least at the start, this power structure may have contributed to the quick consensus reached by the commission; compromise was not only necessary to accommodate the competing viewpoints within the commission, but also to ensure that the commission’s product won legislative approval.
28 See Boerner & Lieb, supra note 18, at 85-86.
29 See Frase, supra note 1, at 355-56; Wright & Ellis, supra note 24, at 437 n.82. This moderate delegation of power to the sentencing commission persists even today.
30 See Frase, supra note 11, at 146-51.
31 Wright & Ellis, supra note 24, at 453.
through a long process of equilibration and consensus-building, the commission reached a
solution.\textsuperscript{33}

Despite their differences, all three states reached similar solutions. Each state adopted a
set of presumptive guideline ranges based on a two-by-two grid combining offense class and the
offender’s prior criminal record.\textsuperscript{34} Rather than utilize a complex system of real-offense
sentencing, the states elected to issue sentences based purely on the offense charged and proven
– reflecting their general agreement with the definition of offenses in the criminal code.\textsuperscript{35} Judges
retained some authority to depart from the guidelines, but that authority was limited and subject
to appellate review.\textsuperscript{36} And each guideline plan took prison capacity into account so as to avoid
(and often reduce) prison overcrowding and overincarceration. Thus Minnesota and
Washington’s commissions considered both capacity and cost in promulgating their guidelines,\textsuperscript{37}
and North Carolina devised a bed-neutral guidelines plan based on a legislative mandate.\textsuperscript{38} This
approach required the commissions to make difficult choices regarding the length of active
sentences, rather than merely increase sentences across the board.\textsuperscript{39}

The end product of these myriad decisions was universal early success for the guidelines.
In Minnesota and Washington, judges conscientiously complied with the guidelines, prison
populations stabilized, and incarceration rates for nonviolent offenses decreased.\textsuperscript{40} Both states
were so successful in reducing burdens on their prison systems that they were able to rent unused

\textsuperscript{33} Id. at 458.
\textsuperscript{34} Id. at 458-59.
\textsuperscript{35} Boerner, \textit{supra} note 27, at 390; Frase, \textit{supra} note 1, at 350; Ross & Katzenelson, \textit{supra} note 23, at 208.
\textsuperscript{36} Boerner, \textit{supra} note 27, at 390; Frase, \textit{supra} note 1, at 357; Ross & Katzenelson, \textit{supra} note 23, at 208.
\textsuperscript{37} In Washington, for example, “substantial and compelling circumstances” were necessary to justify a departure. \textit{See}
David L. Fallen, \textit{The Evolution of Good Intentions: A Summary of Washington State’s Sentencing Reform}, \textit{6 Fed. Sent’g Rep.} 147 (1993). \textit{See also} Wright & Ellis, \textit{supra} note 24, at 454 (“[T]he Commission gave only limit ed power to judges to ‘depart’ from the presumptive range in . . . unusual cases.”).
\textsuperscript{38} See Boerner & Lieb, \textit{supra} note 18, at 85; Frase, \textit{supra} note 1, at 346-47.
\textsuperscript{39} See Wright & Ellis, \textit{supra} n. 24, at 454.
\textsuperscript{40} Id. at 456.
prison cells to the federal government.\footnote{See Boerner, supra note 27, at 392; Dailey, supra note 40, at 144.} North Carolina’s use of structured sentencing helped predict accurately the size of the state’s correctional population, often within 1% of the actual prison population, mitigating the state’s severe overcrowding problem.\footnote{Ross & Katznelson, supra note 23, at 210.} Additionally, the guidelines reduced sentencing disparity and redistributed prison sanctions to violent offenders.\footnote{Ronald F. Wright, The Future of Responsive Sentencing in North Carolina, 18 Fed. Sent’g Rep. 215, 215 (1999).}

2. Virginia and voluntary guidelines

Virginia’s adoption of sentencing guidelines offers a unique historical and structural counterpoint to the Minnesota, Washington, and North Carolina experiences. Compared to those three states, Virginia’s peregrination towards guidelines was considerably more gradual. Its actual guidelines scheme looked dramatically different in several key ways, and came of age in the type of tough-on-crime climate that would later threaten guidelines reform.\footnote{See infra Part 1B.} Despite these differences, Virginia’s guidelines have proved similarly resilient; indeed, voluntary guidelines states are steadily growing in number, with Virginia as one of their lodestars.\footnote{See infra Parts 4B, 4C.}

The first phase of Virginia’s guidelines reform began in 1982, when the Governor appointed a Task Force on Sentencing to investigate complaints of sentencing inconsistency and disparity.\footnote{Brian Ostrom et al., Nat’l Ctr. for State Courts, Truth-in-Sentencing in Virginia: Evaluating the Process and Impact of Sentencing Reform 10 (1999).} Prior to the Governor’s call for reform, the Virginia sentencing system was the most unstructured and indeterminate system in use in the country; judges and parole boards had almost complete discretion over sentencing and release.\footnote{Tony Fabelo, Wendy Naro & James Austin, The JFA Inst., Exploring the Diminishing Effects of More Incarceration: Virginia’s Experiment in Sentencing Reform 1 (2005).} Perhaps unsurprisingly, the judiciary was reluctant to accept both the Task Force’s conclusion that disparity did exist and its
recommendation to create a system of sentencing guidelines.\textsuperscript{48} Afraid of losing their departure discretion, judges in Virginia initially opposed sentencing reform, rather than helping lead the move towards it. By 1987, however, the judiciary realized for itself that unwarranted sentencing disparity was persistent in Virginia.\textsuperscript{49} In order to address that disparity, circuit judges voted to create and implement a set of voluntary sentencing guidelines.\textsuperscript{50}

Over the next two years, the Judicial Sentencing Guidelines Committee established guidelines based on the middle 50\% of historical sentence lengths.\textsuperscript{51} The Virginia guidelines were unique in that they eschewed the traditional sentencing grid in favor of a worksheet featuring a list of legally relevant offense- and offender-related factors that had historically proven to have some significance in sentencing.\textsuperscript{52} These purely discretionary guidelines were quite successful, both in an initial pilot program and upon statewide release.\textsuperscript{53} By 1993, the guidelines had achieved a 76\% compliance rate.\textsuperscript{54}

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On the whole, then, guidelines reform in all four states experienced some degree of initial success. While different between states in promulgation and practice, guidelines helped reduce sentencing disparity and, in some instances, better manage the prison populations. At least in their early days, the guidelines helped administer and rationalize the practice of sentencing.

B. Mood Regulation

The initial successes of guidelines reform soon faced numerous challenges. In all four states, optimism about guidelines soon gave way to “tough on crime” political climates that

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\textsuperscript{48} Ostrom et al., supra note 46, at 10. \\
\textsuperscript{49} Id. at 12. \\
\textsuperscript{50} Id. \\
\textsuperscript{51} Id. at 13. This meant that the guidelines would serve as a rough standard-bearer for historical sentencing practice. \\
\textsuperscript{52} Id. \\
\textsuperscript{53} Fabelo, Naro & Austin, supra note 47, at 1. \\
\textsuperscript{54} Id. 
\end{footnotesize}
threatened the careful balancing so central to the initial promulgation of the guidelines. These threats, however, ended up being less insuperable than they seemed. In all four states, sentencing guidelines survived did not fold in the face of these challenges. Instead, they survived “tough on crime” impulses, and often helped regulate and direct them towards specific crimes and punishments rather than permit those impulses to collapse the system as a whole.

In Minnesota and Washington, for example, the increase in available prison capacity created by guidelines reform, coupled with crime waves in the late 1980s, prompted the legislatures in both states to propose new “tough on crime” bills. In Minnesota, legislators responded to a 1988 crime wave (consisting of several highly publicized sexual assaults on women and a general increase in violent and drug crime) by re-entering the sentencing fray.\textsuperscript{55} Criticizing Commission increases in Guidelines ranges as insufficient, the Minnesota legislature introduced an omnibus crime bill in 1989.\textsuperscript{56} This bill proposed increased statutory maximum penalties for some offenses, mandatory maximum sentences for recidivist murderers and sex offenders, and a series of mandatory minimum sentences for sex and drug offenders.\textsuperscript{57} The legislature also noted its dissatisfaction with the Commission’s unwillingness to set sufficiently severe presumptive sentences, and issued some specific directives, such as a mandatory increase of sentences at certain severity levels.\textsuperscript{58} This punitive trend continued over the next few years, which saw further increases in the presumptive terms, statutory maximum terms, and overall prison terms for sex offenders; as well as the surprising decision to \textit{raise} powder cocaine sentences to crack levels after the disparity between the two was ruled unconstitutional.\textsuperscript{59} These trends towards higher incarceration leveled off somewhat afterwards, but did not die out.\textsuperscript{60}

\textsuperscript{55} See Frase, \textit{supra} note 1, at 359-60.
\textsuperscript{56} See Frase, \textit{supra} note 11, at 160-62.
\textsuperscript{57} See Frase, \textit{supra} note 1, at 360-61.
\textsuperscript{58} Id. at 361.
\textsuperscript{59} Id. at 363.
\textsuperscript{60} Frase, \textit{supra} note 11, at 170.
Similarly, in Washington, officials grew concerned about spikes in the rates of certain offenses and began to tailor the respective guidelines (usually by increasing the guideline ranges). Thus the period from 1986 to 1995 saw Washington increase sentencing ranges for drug offenses,\(^{61}\) sex offenses,\(^{62}\) and crimes committed with a deadly weapon.\(^{63}\) The legislature also resurrected post-release supervision,\(^{64}\) established a “three-strikes” recidivist statute,\(^{65}\) and mandated publication of the sentencing decisions made by individual judges.\(^{66}\) Each of these reforms met their intended goals: the sentence increases at least correlated with increased punishment;\(^{67}\) the prison population grew;\(^{68}\) and elected judges began to depart downwards slightly less, perhaps for fear of appearing “soft on crime.”\(^{69}\)

These changes were extremely dangerous to guidelines reform. The use of mandatory minimum sentences’ “one-size-fits-all” justice\(^{70}\) threatened the fine calibration involved in setting guidelines sentences. The decision to increase statutory maximums rather than guidelines ranges suggested that the guidelines were themselves inadequate. And the specific directives to increase guidelines ranges for some offenses threatened the careful cost balancing embodied by the guidelines.\(^{71}\) Indeed, as time passed, the Minnesota and Washington legislatures appeared less

\(^{61}\) Boerner & Lieb, supra note 18, at 99-100.
\(^{62}\) Id. at 100-01.
\(^{63}\) Id. at 106-07.
\(^{64}\) Id. at 102-04.
\(^{65}\) Id. at 105-06.
\(^{66}\) Id. at 107-09.
\(^{67}\) Boerner, supra note 27, at 418; see generally id. at 392-417 (detailing in both text and table form the relative increases in sentences after particular legislative reforms). Boerner is careful to note that in many cases, there is only a correlation between a guideline range increase and increase in average sentence under that guideline. Id. at 418. However, the data “strongly suggest[] that sentencing guidelines are an effective means of translating the legislature’s policy choices into sentences which effectuate those choices.” Id.
\(^{68}\) Boerner & Lieb, supra note 18, at 116-17.
\(^{69}\) Id. at 107-09. Boerner & Lieb observe that overall, the percentage of exceptional sentences increased from 1990 to 1998, while the percentage of mitigated departures decreased. Id. at 108.
\(^{71}\) See Frase, supra note 1, at 366-67.
convinced that guidelines were the solution they initially seemed to be – or at least the whole solution.

Yet despite these challenges, sentencing guidelines proved resilient. In Minnesota, the guidelines actually helped structure the debate over how to respond to the crime wave and channel public impulses for more incarceration into specific, limited reforms in a manner that avoided a prison overcrowding crisis.\textsuperscript{72} That is, while legislators enacted reforms independent from the guidelines (such as mandatory minimums), they nevertheless used the guidelines as a point of departure, and supplemented rather than replaced them. This approach, in turn, ensured that such independent reforms were limited in scope. After all, despite the increases in sentencing ranges for a wide variety of offenses, Minnesota experienced only moderate overcrowding from 1991 to 1995, and has fallen slightly \textit{under} capacity since.\textsuperscript{73} While Minnesota’s reforms appeared severe, they were likely less so than they might have been in a non-guidelines regime.\textsuperscript{74} Similarly, in Washington, reformers used the guidelines to address the crime wave, rather than circumventing the guidelines with more punitive alternatives (such as mandatory minimums). While individual guidelines grew more severe, the overall system remained stable. The guidelines shifted to directly respond to public opinion, yet moderated that response into a series of narrow, specific changes.\textsuperscript{75}

Rather than fold in the face of a challenge, then, guidelines served as “mood regulators” in Minnesota and Washington. They helped channel the public’s “increasingly punitive” interests

\textsuperscript{72} Dailey, \textit{supra} note 40, at 144.
\textsuperscript{73} Frase, \textit{supra} note 11, at 198.
\textsuperscript{74} von Hirsch & Greene, \textit{supra} note 1, at 333.
\textsuperscript{75} As Boerner and Lieb note, the next few years saw Washington enact some changes that \textit{decreased} sentence severities and increased judicial discretion, such as a “boot camp” alternative to prison, alternate drug punishments for possession offenders, and increased local sentencing discretion. \textit{See id.} at 109-114. However, these changes had negligible overall impact on the prison population; while the average sentence length decreased, imprisonment rates increased. \textit{Id.} at 114.
“more narrowly than would otherwise have happened.”76 This regulation was more direct in Washington than in Minnesota, since Washington’s reform occurred almost exclusively within the guidelines.77 Nevertheless, in both jurisdictions, the guidelines not only survived the challenges of late-1980s crime waves, but also helped prevent those challenges from leading to effective drastic and draconian change. This “mood regulation” effect was also present (though less so) in North Carolina, where dialogue between the sentencing commission and the legislature helped prompt the latter to scale back proposals for new criminal laws and punishments in order to preserve the resource-balancing present in the initial guidelines.78

Virginia’s political climate rendered slightly different rationales for reform. Despite the guidelines’ success in reducing sentencing disparity, the parole board’s back-end leniency created a generally wide gap between the sentences imposed under the guidelines and the actual sentences served by most inmates.79 Responding to public criticism of the parole board, as well as the same type of record-high violent crime rates that plagued presumptive guideline states, gubernatorial candidate George Allen ran an successful campaign focused on eliminating parole and achieving Truth-in-Sentencing.80 Upon election, both Allen and the state legislature drafted parole and sentencing reform proposals, and ultimately compromised on a package abolishing discretionary release, curtailing good time, requiring inmates to serve at least 85% of their sentence, and increasing sentence lengths for some violent offenders.81 This tough-on-crime reform package also created the Virginia Criminal Sentencing Commission, tasked with administering and redesigning the guidelines to accommodate the new focus on truth-in-sentencing. The Commission was more broadly representative than the previous judicial

76 Id. at 116.
77 See Boerner & Lieb, supra note 18, at 99-107.
78 Wright, supra note 43, at 215-16.
79 OSTROM ET AL., supra note 46, at 17.
80 Id.
81 FABELO, NARO & AUSTIN, supra note 47, at 2.
commission; it was, and is, composed of judges, a representative from the state attorney
general’s office, members of the state House and Senate, and four public members, one of whom
must be a victim’s rights advocate. However, the Commission did not, and still need not,
include a member of the public defender’s office or defense bar, unless the governor decides to
appoint one.

Despite all these changes, the governor and legislature agreed that the voluntary
guidelines system should remain in effect. This retention may have been a product of mere
entrenchment, but more likely was related to the remarkable judicial compliance rate. The
guidelines thus survived the tough-on-crime climate, and indeed helped shape the legislative
response to those political conditions. In particular, the Commission elected to increase
guidelines sentencing ranges only for violent offenses. Otherwise, the tenor of Virginia’s
reform was very different from the other states discussed above. For one thing, Virginia decided
to increase some sentences based on normative, rather than purely historical, decisions about the
appropriate level of punishment. The combination of these sentence increases with other risk-
based “enhancements” meant that both projected and actual time-served amounts increased well
above past practice. And since Virginia’s guidelines were only loosely constrained by
capacity, these reforms were made with little eye towards cost or resource constraints. This

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82 VA. CODE ANN. § 17.1-802 (West 2008).
83 See id. The absence of defense membership is not particularly surprising, given the tough-on-crime genesis of the
new commission.
84 FABELO, NARO & AUSTIN, supra note 47, at 2.
85 Of course, given the climate, it is possible that a less remarkable compliance rate might have prompted a push to
presumptive guidelines, or perhaps even a system of mandatory minimums.
86 OSTROM ET AL., supra note 46, at 31. Virginia decided to retain a voluntary guideline system, both because of its
initial success and strong judicial support for such a model.
87 Id.
88 Id. at 32.
89 See id.
inattention meant that the “cost” of sentencing reform in Virginia would ultimately include a rapidly growing prison population and the need for new prison facilities.\footnote{Id. at 41.}

Overall, the guidelines have achieved their stated goals. The rate of judicial compliance with the guidelines has been extremely high – roughly 75 to 80 percent each year between 1995 and 2007.\footnote{Id. at 41.} Inmates serve roughly 91\% of their prescribed time, which suggests some measure of Truth-In-Sentencing.\footnote{VA. CRIMINAL SENTENCING COMP’N, 2007 ANNUAL REPORT 22 (2007), available at http://www.vcsc.virginia.gov/2007/VCSCReport.pdf.} The distribution of offenders in prison has shifted to favor violent and recidivist offenders, since sentences for violent offenses have increased, and prison sentences for nonviolent sentences have grown rarer.\footnote{FABELO, NARO & AUSTIN, supra note 47, at 5-7.} Of course, these developments have not come without a cost: between 1995 and 2005, Virginia spent $273 million on new prisons, and approved a $196 million prison capacity increase in 2004.\footnote{Id.} Yet the yearly increase in incarceration rate remains both lower than projected and lower than the national average, perhaps as a product of the voluntary nature of the guidelines and the reduction in use of prison sentences for nonviolent offenders.\footnote{Id. at 41.}

On the whole, then, Virginia’s guidelines experience is markedly different from those in Minnesota, North Carolina, and Washington. Even putting the voluntary – presumptive divide

\footnote{VA. CRIMINAL SENTENCING COMP’N, 2007 ANNUAL REPORT 22 (2007), available at http://www.vcsc.virginia.gov/2007/VCSCReport.pdf. One potential explanation for this compliance rate is that judges in Virginia are elected, and will want to comply with the guidelines for fear of appearing soft on crime. Yet this explanation only goes so far; while it may explain why judges do not depart downward very often, it does not explain why they do not depart upwards often, despite the fact that elected judges may be “particularly responsive to the demands of the electorate for longer—and therefore costlier—sentences.” Rachel E. Barkow & Kathleen M. O’Neill, Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation, 84 TEX. L. REV. 1973, 1976 (2006). The District of Columbia’s recent transition to voluntary guidelines may offer a different clue about why voluntary guidelines merit compliance – at least in DC, the guidelines were a product of compromise between local prosecutors, defense attorneys, and judges, meaning that all institutional actors in the D.C. criminal justice system were committed to using the guidelines. \textit{See} Part IVB infra. However, as I note in that part, the compliance rate in DC might also be related to the small size of the jurisdiction. \textit{Id.} At best, then, the conditions that lead to voluntary guidelines compliance are murkier than those leading to presumptive guidelines compliance.}
aside, Virginia is different in that its sentencing commission did not predate the tough-on-crime political climate; instead, the commission was created in response to that climate. Perhaps as a result, Virginia’s guidelines tend to mete out higher sentences than their presumptive state counterparts. Yet, ultimately, the same type of “mood regulation” effect is present, albeit in a somewhat diluted form – the guidelines provided a baseline for channeling punitive impulses, rather than succumbing to them entirely.

* * *

All told, then, the early history of presumptive guidelines reform in Minnesota, Washington, North Carolina, and Virginia suggested that such reform was both feasible and advisable. While each state’s system was somewhat different, and faced different challenges, all proved resilient. In Minnesota, Washington, and Virginia, public tough-on-crime impulses threatened the viability, and even existence of guidelines – yet the guidelines helped regulate and channel those impulses. In North Carolina, the guidelines themselves represented a necessary response to a correctional crisis, and after adoption, helped moderate legislators’ requests and desires for increased punishment. All four states thus achieved some degree of stability and success. Indeed, the relative success of these systems not only in the early stages of reform, but also in the face of existential challenges, prompted one scholar to label presumptive sentencing guidelines the “best possible sentencing scheme.” Then came Blakely – a decision that, at least in the view of some of the Justices, threatened to extinguish presumptive guidelines for good.

C. Blakely: From Apocalypse to Acceptance and Avoidance

In 2004, the Supreme Court held that Washington’s calibrated presumptive sentencing system violated the Sixth Amendment insofar as it allowed judges to increase a defendant’s

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96 Weisberg, supra note 9, at 186.
sentence above the presumptive guideline range based on facts not found by the jury or admitted by the defendant. In dissent, Justice O’Connor predicted catastrophe in Washington: “What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.” At first glance, it appeared that Justice O’Connor was right. Blakely’s ruling, while formally limited to Washington, struck down similar systems across the country, in Minnesota, North Carolina, and others. Virginia’s voluntary scheme, on the other hand, featured no Blakely infirmity – a fact that was not lost on future sentencing reformers.

The catastrophe never came. While Blakely certainly posed a serious threat to guidelines systems throughout the country, some of the factors that contributed to guidelines resiliency in the face of crime waves in Minnesota, Washington, and North Carolina helped ensure similar resiliency in response to Blakely. First, the success of the guidelines helped ensure their survival – the fact that guidelines had reduced disparity, increased predictability, and helped manage the prison population gave judges, prosecutors, defense attorneys, and legislators alike incentive to save them. Second, those actors had already collaborated on the guidelines, meaning they were somewhat predisposed to producing a quick, collaborative response to Blakely. Third, in formulating their guidelines, the Minnesota, Washington, and North Carolina sentencing commissions had hewed largely to the offense definitions in the code and had created few aggravators or mitigators. This fact, combined with these states’ decisions to eschew “real

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97 Blakely v. Washington, 542 U.S. 296, 303-05 (2004). In Blakely, the sentencing court sentenced Blakely to 90 months, instead of the standard 49-53 months, based on a finding that Blakely had acted with “deliberate cruelty” during a kidnapping. Id. at 301.
98 Id. at 326 (O’Connor, J., dissenting).
99 See Part IV, infra.
101 Id.; see also Richard S. Frase, Blakely in Minnesota, Two Years Out: Guidelines Sentencing Is Alive and Well, 4 OHIO ST. J. CRIM. L. 73, 76-77 (2007). I use Minnesota as an example throughout the rest of this section (except where noted otherwise).
102 See, e.g., Frase, supra note 101, at 73-74.
conductor” sentencing, meant that jury factfinding was not ubiquitous.\textsuperscript{103} Perhaps for that very reason, upwards departures were rare to being with, meaning that a \textit{Blakely} solution would not be too traumatic.\textsuperscript{104}

Ultimately, each state decided to recommend a combination of avoidance and acceptance strategies in response to \textit{Blakely}.\textsuperscript{105} With respect to avoidance, the state commissions generally broadened the cell ranges on the sentencing grid to give judges more upward discretion.\textsuperscript{106} With respect to acceptance, the state commissions recommended jury factfinding for any remaining upward departures based on a list of aggravating factors.\textsuperscript{107} In Minnesota and Washington, these changes were the result of quick consensus in both the commissions and legislatures. For example, though the Washington commission briefly discussed the idea of making the guidelines advisory, it almost immediately dismissed that idea given the “certainty and predictability” of the existing guidelines.\textsuperscript{108} The commission then aimed to change the overall statute as little as possible.\textsuperscript{109} Both states were able quickly to revise the sentencing statute and provide a clear, relatively simple, Sixth-Amendment compliant procedure for upwards departure.

In North Carolina, various contingents within the Commission initially fell into old tropes and promoted self-interested solutions. For example, prosecutors proposed collapsing the

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\textsuperscript{103} That is, \textit{Blakely} required the jury to find any facts increasing the defendant’s sentence beyond the presumptive guidelines range. The relative paucity of aggravating factors meant that juries would not have to engage in supplemental factfinding very often. Conversely, a real-offense system, which sought to sentence a defendant for his actual conduct rather than merely the conduct charted and proven, see supra note 4, would require extensive jury factfinding to discern that actual conduct. However, none of the states mentioned in this Note adopted such a system.

\textsuperscript{104} See, e.g., Frase, supra note 101, at 73-74.

\textsuperscript{105} Minnesota had a ready model in Kansas. See State v. Gould, 23 P.3d 801 (Kan. 2001) (invalidating the then-existing guidelines system permitting judge-found facts to increase a sentence beyond the appropriate guidelines range); see also KAN. STAT. ANN. § 21-4718(b) (West 2008) (incorporating a jury-factfinding requirement for an aggravated sentence).

\textsuperscript{106} Frase, supra note 101, at 77-78. In Minnesota, the commission also created a list of offenses eligible for consecutive sentencing. \textit{Id}. at 77.

\textsuperscript{107} Id.

\textsuperscript{108} See Nussbaum, supra note 100. The commission and legislature also rejected the proposal made by superior court judges to make the guidelines “topless” – that is, make the upper limiting on sentencing ranges the statutory maximum. \textit{Id}.

\textsuperscript{109} Id.
presumptive and aggravated ranges into one range to allow judges to exercise unfettered upwards discretion, while the Superior Court judges advocated for collapsing all three ranges into one expanded range in order to restore their complete discretion. Yet these proposals ultimately failed to gain traction outside their constituencies, largely because each threatened the predictability that had become a hallmark of the North Carolina system. That predictability had reduced disparity in sentencing and, perhaps more importantly given the state’s history, allowed for extremely precise projections of correctional resource use. Ultimately, North Carolina’s commission compromised on the same solution as Minnesota and Washington.

Rather than lapsing into disarray, each sentencing system recalibrated and reached a new equilibrium through a series of practical policies designed to preserve the best features of the pre-Blakely world while complying with the constitutional strictures of Blakely. In practice, Blakely’s effects have been quite minimal. In North Carolina, for example, the prison population has remained rather stable. Prison resources are still being devoted primarily to serious offenders – in 2007, 53.2% of prisoners were imprisoned for the four most serious classes, versus 20.2% for the two least serious classes. The upward departure rate has decreased slightly, from 7% in 2002-2004 to 3% in 2006-2007, which is a proportionally large but relatively small shift. The seemingly devastating charge of Blakely proved to be anything but in North Carolina.

II. MODELING RESILIENCY

A. Commonalities and Congruences

111 Id.
112 Id.
113 Id. at 19-21.
One way to attempt to explain the resilience of state sentencing guidelines is to isolate certain common factors that correlate with resilience. Collectively, those factors may create a comprehensive explanation for guidelines resilience, or at least suggest a common illuminating theme. It is crucial not to overstate the strength of such a model, as it necessarily proceeds by illustrating factors that correlate with but do not necessarily cause success. Moreover, since guidelines schemes are multifarious, it may not be possible to distill a model. Nevertheless, the history of reform in Minnesota, North Carolina, Washington, and Virginia offers a rich backdrop for making a first cut at explaining resiliency.

To begin with, three characteristics of these systems seem especially salient in explaining their survival over the past three decades. First, guidelines that consider prison capacity tend to have a good chance of survival. Without guidelines, predictions about capacity are difficult, since sentences may vary not only from courtroom to courtroom, but within a courtroom itself. Guidelines solve those problems and help manage prison costs and capacity by increasing the accuracy and feasibility of cost and capacity projections.\(^\text{116}\)

Once those projections are made, consideration of capacity in turn helps guidelines serve as “mood regulators.” When commissions consider capacity and cost, increases in sentence length for certain offenses must be met by hydraulic decreases in other sentence lengths. The experience of North Carolina bears out this observation – initially, in order to meet capacity constraints, the sentencing commission had to decrease the use of prison sanctions for nonviolent offenses in order to obtain desired increases in such sanctions for violent offenses.\(^\text{117}\) This “mood regulation” effect was also present in Minnesota and Washington in the face of the challenging crime waves of the late 1980’s; rather than simply increasing sentences across the board, the

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\(^\text{116}\) See supra p. 9.

\(^\text{117}\) See Wright & Ellis, supra note 24, at 456.
legislatures and commissions instituted targeted and less costly reforms.\textsuperscript{118} Even in Virginia, a state less concerned with criminal law budget-neutrality, a loose directive to consider cost in promulgating guidelines incentivized the use of nonprison sanctions and helped keep the rate of change in incarceration rate below the national average.\textsuperscript{119}

Second, a broadly representative sentencing commission promotes resilience. While the commission creates the guidelines, judges, defense attorneys, prosecutors, and defendants have to live with them. By involving guidelines users in guidelines creation, the sentencing commissions in Minnesota, Washington, and North Carolina gave guidelines users a vested interest in guidelines success.\textsuperscript{120} This interest arose not just from the sunk cost of time and effort put into guidelines promulgation, but also from the recognition that the guidelines represent a carefully calibrated compromise between the interests of judges, defendants, and prosecutors. In turn, that calibration ensured wide use and acceptance of the guidelines; they were viewed as a reasoned compromise rather than as a one-sided tool of prosecutorial or judicial oppression.\textsuperscript{121}

Third, guidelines that are descriptive rather than norm-changing have a greater chance of survival. Of the four states discussed in Part 1, only two – Minnesota and Virginia – attempted to assign sentence ranges based on the “ideal,” rather than historical, punishment for a given crime.\textsuperscript{122} The other states merely chose to codify past sentencing practice.\textsuperscript{123} For the most part, and despite some early success, Minnesota’s efforts have failed over the long run.\textsuperscript{124} One common-sense explanation for these results is simply that judges and parties are more likely to adhere to guidelines that prescribe what the judges already think is correct, and are more likely to

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\textsuperscript{118} See supra pp. 12-16.
\textsuperscript{119} Reitz, supra note 3, at 1104.
\textsuperscript{120} See, e.g., Frase, supra note 11, at 150-51.
\textsuperscript{121} See, e.g., supra note 100 and accompanying text.
\textsuperscript{122} See Frase, supra note 1, at 365.
\textsuperscript{123} See Boerner & Lieb, supra note 18, at 86 (“Ranges [in Washington] were set using the ‘typical’ crime as the standard.”); Wright & Ellis, supra note 24, at 449 (describing North Carolina’s decision to assign sentencing ranges based largely on past practice, with some upwards departures).
\textsuperscript{124} Frase, supra note 1, at 365.
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find ways to depart (even in a mandatory system) from guidelines that seem intuitively disproportionate. Another explanation is that tradition is generally a rough proxy for effectiveness over time, and that efforts to change ultimately regress to this historical mean. Virginia’s efforts at increasing guidelines sentence range to “ideal” amounts were more successful in that they persisted in form.125 However, since the guidelines are voluntary, judges are not bound to accept the new norm.

These three factors – capacity, commission diversity, and descriptiveness – appear to roughly correlate with guidelines resilience and mood regulation, both as a matter of common sense and historical experience.126 Yet this model is not perfect – Virginia’s experience at least mildly challenges each facet. First, in promulgating its guidelines, Virginia only loosely considered capacity. One response to this observation is simply that Virginia is a bit behind the curve; since 1990 Virginia has spent a billion dollars on prison construction, with incarceration rates still rising, and is not clear if the state can sustain that pace.127 But despite these increases, Virginia has still remained under the national average in terms of increase in incarceration rate.128 Second, Virginia’s commission is not as broadly representative as its brethren; the commission need not have any defense membership, and is dominated by judges and prosecutors. Third, Virginia’s commission has, somewhat successfully, sought to change incarceration norms in promulgating its guidelines.129

One response to this observation might just be that voluntary guidelines are different – that such guidelines need not pay as strict attention to cost, diversity, and history because the guidelines do not bind the outcome of the case. That is, one might argue that each factor is

125 See supra pp. 17-19.
126 For an interesting quasi-empirical analysis of which structural features correlate with the existence of sentencing guidelines and commissions, see Barkow & O’Neill, supra note 91.
128 FABELO, NARO & AUSTIN, supra note 47, at 7-8 & tbl.1.
129 OSTROM ET AL., supra note 46, at 31-33.
simply less consequential in a voluntary guidelines regime. If judges need not follow the
guidelines, then the guidelines lose some utility in terms of projecting and moderating prison
capacity. Similarly, the fact that defense attorneys have no institutional voice on the commission
might not undermine the guidelines since defense attorneys are free to encourage judges to
disregard the guidelines in a particular case.\textsuperscript{130} The same goes for the norm-changing nature of
the guidelines; again, since they are voluntary, judges can choose to issue a more historically
appropriate sentence based on the facts.

This response makes some intuitive sense; voluntary and presumptive guidelines are
different enough that it may be impossible to come up with a list of common factors explaining
the resilience of both. It also suggests that any attempt to offer such an explanation must operate
at a higher level of generality.

\textbf{B. Guidelines as Guidelines}

Rather than attempting to reverse-engineer a model for success by compiling factors
common to these four prosperous guidelines regimes, it might instead be helpful to take a step
back and look at the scope and purposes of guidelines reform in all four states. At this level of
greater generality, it might be easier to spot shared values and goals. In turn, these common
purposes might help explain the commonality of resilience. So what did all four states have in
common? One shared purpose was reducing sentencing disparity. Indeed, in Minnesota,
Washington, and Virginia, reducing disparity was a prime motivation for reform.\textsuperscript{131} North

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\textsuperscript{130} The 2008 compliance statistics are telling here. Judges in Virginia complied with the guidelines in most cases (79.8%), but departed upwards (9.9%) almost exactly as much as they departed downwards (10.3%). \textit{See VA. SENTENCING AND CRIMINAL CODE REVISION COMM’N, 2008 ANNUAL REPORT} 16 (2008).
\textsuperscript{131} \textit{See supra} p.7.
\end{footnotesize}
Carolina saw reduction of disparity as a key vehicle to obtaining a more manageable prison population.\textsuperscript{132}

At first, this shared goal might not seem to tell us much more than that each state hoped to make sentencing more predictable. Yet this goal is actually quite revealing, in that it helps illuminate what guidelines reform was \textit{not} intended to accomplish. In all four states, reformers did not start from the supposition that judges were simply too lenient or too harsh in every single case, and proceed to create guidelines that increased or decreased sentences across the board. Instead, reformers merely sought to create more regression to the mean – to bring most sentences for any given offense into the historical heartland range of punishment. Thus, in all four states, reformers began by looking at historical sentencing data, and often created guidelines ranges by bracketing the middle of historical punishment bell curves.\textsuperscript{133} Of course, to say that all sentencing reform was purely historical would belie many of the observations made above; reformers in all four states occasionally deviated from historical practice in order to change sentencing norms.\textsuperscript{134} Yet such efforts were at least moderately limited – Virginia’s commission, for example, increased sentencing ranges beyond historical practice only for certain violent offenses, not for all offenses, and nevertheless permitted judges to depart to that historical norm based on the facts of a given case.\textsuperscript{135}

Similarly, the shared attempt at reducing disparity suggests that reformers did not seek to redefine the substantive criminal law. Most notably, all four states eschewed “real-offense” sentencing in favor of sentencing based purely on the offense of conviction. This decision in turn reflected confidence in the code definitions of crimes – that the definitions and statutory

\textsuperscript{132} Id.
\textsuperscript{133} See, e.g., Boerner & Lieb, supra note 18, at 86; Ostrom \textit{et al.}, supra note 46, at 30-31.
\textsuperscript{134} See, e.g., Frase, \textit{supra} note 1, at 351-52; Ostrom \textit{et al.}, \textit{supra} note 46, at 31. North Carolina’s guidelines, interestingly enough, \textit{reduced} sentences from historical averages in order to meet capacity constraints. \textit{See} Wright & Ellis, \textit{supra} note 24, at 449-51.
\textsuperscript{135} Ostrom \textit{et al.}, \textit{supra} note 46, at 31-32.
punishment ranges were sufficiently calibrated to punish offenses – and confidence in prosecutors to meet the necessary proof. Reformers thus sought to guide the ways in which judges administered sentences for offenses rather than redefining the offense itself by focusing on real conduct.

Guidelines in the states thus were actually guidelines. They did not aim to change the criminal law or force judges to change sentencing practices in every case. Instead, sentencing guidelines represented an effort merely to make judges generally follow past practice in sentencing future offenders; to rationalize rather than revolutionize sentencing. While in some cases, guidelines attempted to change sentencing behavior, these changes were generally discrete and not absolutely binding. Similarly, the commissions in these states resembled administrative agencies more than legislative bodies. That is to say, the successful state sentencing commissions consisted of diverse experts assembled to regulate and rationalize the process of sentencing, not legislators formulating new criminal law by redefining criminal offenses.\footnote{See, e.g., Boerner & Lieb, supra note 18, at 88 (“The commission believed this policy would reinforce the goal that prosecutors charge and accept plea agreements that accurately reflected the crime or crimes that were committed. Crimes that prosecutors either could not or chose not to pursue could not justify an exceptional sentence.”).}

These two observations – that state guidelines were guidelines, and that state commissions were commissions, seem simple. But they do a great deal of work. For one, these observations help explain the initial success of guidelines. Simply put, guidelines were successful at the start precisely because of their modesty – they represented a codification of past practice more than a revolution. In this sense, we might look at the “success factors” of the previous section more as heuristics designed to ensure that the new guidelines roughly represented the old world. The consideration of cost stabilized the overall cost of the system and constrained reformers’ ability to change sentencing norms, commission diversity encouraged the

\footnote{See, e.g., Weisberg, supra note 9, at 189 (stating that successful state commissions and systems are “‘administrative,’ . . . in the sense of being legally residual or secondary to criminal law”).}
commission to compromise towards the historical mean, and the use of that historical mean ensured that sentences would merely regress to an average rather than shift across the board. Similarly, the idea of guidelines-as-guidelines helps explain guidelines success even in Virginia – promulgated by judges and practitioners, the guidelines embodied an effort to codify past practice and sometimes depart from it. But, as voluntary guidelines, they offered judges the flexibility to depart when necessary, or at least sentence towards the bottom of the prescribed range. While they did normatively increase some sentence ranges, they did so (necessarily) by suggestion rather than coercion.

Moreover, the idea of guidelines as guidelines helps explain why the guidelines were able to withstand the challenges they faced. Because guidelines represented a moderate effort at reform designed at least partly to codify historical practice, they featured strong early compliance. After all, most judges could simply keep doing what they were doing in the majority of cases, with some adjustment at the margins. With this increased compliance came early success, as the use of guidelines made sentencing more predictable and administrable. And this success in turn led to entrenchment – despite the threats posed by crime waves and constitutional infirmity, guidelines had enough defenders to ensure their survival.

This conception of guidelines as guidelines thus helps explain the phenomena of guidelines success and resilience in the states. Yet its usefulness is not so limited. Instead, the idea of guidelines as guidelines offers a coherent account of the failure of the federal guidelines system. Simply put, the federal guidelines failed because they were not Guidelines. Rather than representing a moderate attempt to regulate past sentencing practice, the federal guidelines were part of a concerted effort to change sentencing practice and indirectly recodify the federal criminal code. More a system of calibrated mandatory minimums than guidelines, the federal guidelines struggled to win scholarly or practitioner acclaim precisely because they lacked the
temperance of their state counterparts. However, as I note in the conclusion of the next Part, there may still be some hope. While initially decried, the Supreme Court’s *Booker* decision may end up being precisely the type of moderating influence needed to resuscitate the federal guidelines as guidelines.

III. THERE AND BACK AGAIN: THE FEDERAL SENTENCING GUIDELINES

   A. A History of Extremes

Other scholars have done a notable job assembling the bill of particulars against the federal sentencing guidelines. In fact, the federal guidelines have dominated recent scholarship on sentencing, despite being an outlier in terms of structure and experience. Yet a few notes on their history and development are particularly salient here, for they illustrate the ways in which federal reformers abandoned many of the practices that had made prior state reform so successful. This history also exposes the myriad ways in which the federal guidelines were not really guidelines, and explains why *Booker* was part of the solution, not part of the problem.

The federal guidelines arose from the same intellectual trends that culminated in successful guideline reform in Minnesota, Washington, and North Carolina. Inspired by Judge Frankel’s influential work regarding the bankruptcy of indeterminate sentencing, Senator Edward Kennedy decided to propose sentencing guidelines reform as one part of a comprehensive bill revising the federal criminal code. Both systems were badly in need of reform; federal sentencing involved almost completely boundless judicial discretion, and the federal criminal code was a “bizarre mélange” of vague, overlapping statutes with disparate

138 See, e.g., STITH & CABRANES, supra note 2.
139 Professor Reitz perhaps sums it up best: “One of the greatest misfortunes in the contemporary field of sentencing reform is that a single guidelines system – an outlier among the nineteen in current operation – has been so prominently in view while so grotesque in construction.” Reitz, supra note 3, at 1105-06.
140 See MARVIN E. FRANKEL, CRIMINAL SENTENCES; LAW WITHOUT ORDER (1973).
statutory sentencing maximums.\footnote{Weisberg, supra note 9, at 187.} Code reform efforts ultimately failed, however, leaving sentencing reform as a standalone proposition.\footnote{Stith & Koh, supra note 141, at 257.} This failure was one of the first flaws in guidelines reform, for the lack of a coherent criminal code undermined guidelines simplicity by requiring the guidelines to adapt to and rationalize that “bizarre mélange.”

Perhaps because of their shared intellectual origins, at first the federal guidelines represented precisely the type of reform that had been so successful in the states. While the federal guidelines never decided on a coherent theory of punishment,\footnote{Id. at 239-42.} they did aim to regulate rather than revolutionize current practice. First, early drafts of the Sentencing Reform Act contained a presumption against imprisonment as well as a strong directive to the guidelines framers to not exceed prison capacity.\footnote{Id. at 242-43.} These drafts attempted to render the guidelines presumptive rather than mandatory; judges were told to consider a wide range of factors (including the personal circumstances of the defendant), and sentences were to be affirmed on appellate review unless clearly unreasonable.\footnote{Id. at 243-48.} Guidelines were to be based on historical sentencing practice rather than normative decisions about what the proper sentence should be for a given offense.\footnote{Id. at 242-43.} And the Commission itself was to be somewhat diverse; in addition to the President’s appointees, it would contain several judges chosen by the President from a list furnished by the Judicial Conference.\footnote{Id. at 254-57.}

The early iterations of guidelines reform thus resembled the presumptive guidelines schemes discussed above – an effort to regulate current sentencing practice towards a historical heartland. And the federal sentencing commission appeared to be just that – a diverse body aimed at balancing different viewpoints and administering, rather than revolutionizing,
sentencing. Yet these roles soon changed. When the newly-constituted Sentencing Commission finally sat down to create guidelines in 1984, the criminal justice climate in the United States, and the scope and purposes of sentencing reform, had changed dramatically. Gone was Senator Kennedy’s vision of sentencing reform as a moderate device to reduce sentencing disparity. Instead, guidelines reform was viewed as part of a larger legislative and Presidential campaign to be tougher on crime. From imposing limits on federal habeas review, to enacting mandatory minimum penalties for certain drug offenses, the criminal legislation packages of the early 1980s were much more punitive and prosecution-favorable.

Unsurprisingly, this climate changed the scope and purpose of the guidelines. Rather than discourage imprisonment and encourage management capacity, the final version of the sentencing reform act sought to encourage the use of imprisonment and largely ignore capacity. Instead of developing guidelines tethered to past sentencing practice, the Commission was tasked with ensuring that new guidelines reflect the “real” seriousness of the given offense given that most “current sentences do not accurately reflect the seriousness of the offense.” The SRA also drastically reduced judicial discretion or ability to consider the individual characteristics of the defendant; in their place was a directive to impose a guidelines sentence unless the judge could find an aggravator or mitigator not already taken into consideration by the Sentencing Commission. Additionally, all departures were subject to de novo review, further limiting a trial judge’s discretion to depart. Finally, the Commission itself would be appointed

149 See, e.g., Weisberg, supra note 9, at 189 (defining “administrative” in this context as “in the sense of being legally residual or secondary to criminal law”).
150 Stith & Koh, supra note 141, at 258-260.
151 Id.
152 Id. at 266-69.
153 Id. at 268 & n.279.
154 Id. at 269-73. This directive might not have been so invidious had it not been coupled with real-offense sentencing (discussed below) which often dramatically increased an offender’s guidelines range above the range for the offense proven to the jury.
155 Id.
solely by the President; though the Commission was required to have three of its seven members come from the federal judiciary, the Judicial Conference had little say in who those judges actually were.\textsuperscript{156}

The Sentencing Reform Act thus set up conditions for guidelines reform that were different from those in every guidelines jurisdiction in the country, conditions that eschewed moderate, administrative guidelines in favor of guidelines that would increase sentences across the board to reflect revised norms about the “seriousness” of the underlying offenses. The actual guidelines made no effort to curb this tendency; if anything, they promoted it. The Commission itself was composed primarily of individuals who, for one reason or another, generally favored guidelines that were both harsher and more rigid than their state contemporaries.\textsuperscript{157} Rather than attempting to accommodate the interests of all actors in the judicial system, the Sentencing Commission created a system of guidelines harsher than any in effect that ceded a great deal of power to federal prosecutors. The guidelines were breathtakingly complex, with 43 different offense categories. They attempted to redefine the criminal law, by punishing an offender for his “real conduct” rather than merely his offense of conviction. In practice, rather than merely assigning a defendant a guidelines range based on his offense and criminal history, the federal guidelines required the judge to increase the defendant’s guidelines range based on any additional criminal behavior “related to the present offense.”\textsuperscript{158} This meant that the jury-found

\textsuperscript{156} Id. at 276-77.
\textsuperscript{157} The initial commission members were: Judge William Wilkins, a conservative judge who favored “tough and binding” guidelines; George MacKinnon, the “most conservative” judge on the D.C. Circuit; Ilene Nagel, a “tenacious advocate” of increasing federal sentence severity; Paul Robinson, a law professor who dissented from the final guidelines as “insufficiently detailed and rigid”; Michael Block, a professor who unsuccessfully sought to give greater consideration to cost-benefit analysis; Helen Corrothers, a former prison warden, and then-Judge Stephen Breyer. STITH & CABRANES, supra note 2, at 49-51.
\textsuperscript{158} Id. at 70.
offense of conviction was but a vehicle for a judge to determine the defendant’s true conduct and punish him or her for it.\textsuperscript{159}

Moreover, the guidelines skewed the balance of power between prosecutors and judges, by dramatically limiting a judge’s authority to depart downwards in favor of giving prosecutors the power to grant departures for substantial assistance.\textsuperscript{160} All of this, while ensuring that prison would be the only, and increasingly used, punishment option by effectively eliminating the use of probation and intermediate sanctions, and increasing drug offense sanctions across the board to the level of pertinent mandatory minimum sentences.\textsuperscript{161} In short, the Sentencing Commission ceased to be an administrative agency along the lines of its state counterparts and instead ended up as more of a legislative body redefining the criminal law.\textsuperscript{162}

Unsurprisingly, the federal sentencing guidelines were largely unpopular with judges, defense attorneys, and most members of the legal academy. While judges were perhaps too silent during the promulgation of guidelines legislation, they made their voices heard after the guidelines took effect. They, along with defense attorneys and even prosecutors, decried the

\textsuperscript{159} At least according to Justice Breyer, such “real-offense” sentencing actually was designed to reduce the power of prosecutors:

Prosecutors should find it more difficult than under preguideline practice to control the sentence by manipulating the charge, for, within broad limits, the offender's actual conduct, not the charge, will determine the sentence. For this same reason plea bargaining over charges should have diminished because, again within broad limits, a defendant's promise to plead guilty to a particular, perhaps less serious, charge will not likely affect the sentence. Nor can the prosecutor simply urge the judge to overlook certain aspects of the offender's conduct. The process is transparent; that conduct will appear in the presentence report and the judge must use it for sentencing.

Justice Stephen Breyer, \textit{Federal Sentencing Guidelines Revisited}, 11 FED. SENT. REP. 180, 183 (1999). However, the converse may well be true. That is, the pre-\textit{Booker} guidelines may have increased prosecutorial discretion by permitting prosecutors to charge and prove a minor offense and then punish the defendant for conduct not proved to a jury beyond a reasonable doubt. Or, prosecutors could obtain a plea to a minor offense, but bargain for a much higher sentence based on the defendant’s “real conduct.” \textit{See also} STITH & CABRANES, supra note 2, at 130-36 (discussing the problem of prosecutorial “fact bargaining”).

\textsuperscript{160} TONRY, supra note 5, at 72.

\textsuperscript{161} This approach stands in contrast to the approach of reformers in Minnesota, who created their own set of drug offense guidelines and allowed mandatory minimums to trump only where appropriate. TONRY, supra note 5, at 79.

\textsuperscript{162} Weisberg, \textit{supra} note 9, at 186.
guidelines’ rigidity and inflexibility.\textsuperscript{163} Prison sentences increased without a corresponding increase in sentence uniformity, prompting academic and judicial criticism.\textsuperscript{164} In the face of all of this criticism, the Commission took few steps to ameliorate the harshness of their design.\textsuperscript{165}

How to account for the resiliency of the guidelines, then? After all, they stayed in operation in their initial form for more than twenty years. One response is to observe that the federal guidelines actually ceased to be guidelines, thus allowing them to neither disprove nor prove the guidelines resiliency model. As some have noted, the federal guidelines’ extremely determinate and calibrated sentencing scheme operated more like a system of mandatory minimums than presumptive guidelines.\textsuperscript{166} By rigidly fixing sentence length with limited judicial opportunity for departure, and by treating all drug offenses effectively as mandatory minimum sentences, the federal guidelines bore little resemblance to their presumptive state counterparts. Even the Sentencing Commission seemed to recognize this development; in a study of mandatory minimum sentences commissioned by Congress, it listed many grievances with mandatory minimum sentences – that they impose harsh sentences, do not allow judges flexibility to tailor sentencing, and foster prosecutorial abuse – that sound equally against the guidelines themselves.\textsuperscript{167} The Commission concluded by, perhaps mistakenly, but later intentionally, referring to its guidelines as “mandatory.”\textsuperscript{168}

It is no answer, though, merely to state that the federal guidelines were not guidelines; the resilience model would be facile at best and incomplete at worst if it evaded challenges on definitional grounds. Instead, precisely because guidelines were not guidelines, they were not


\textsuperscript{164} TONRY, supra note 5, at 82-83.

\textsuperscript{165} See id. at 89-91 (“Many features of the current guidelines that judges find most objectionable result . . . from the commission’s policy decisions.”).

\textsuperscript{166} Weisberg, supra note 9, at 186.

\textsuperscript{167} TONRY, supra note 5, at 83.

\textsuperscript{168} Id. I note without comment the oxymoronic idea of “mandatory guidelines.”
actually resilient. Certainly, a fair amount of inertia surrounded the federal guidelines, at least partly because of the huge amount of time and energy spent on their creation and development. But inertia and resilience are not on all fours. As the state histories show, guidelines were resilient in the states because litigants and judges in state courts generally accepted their wisdom, and hoped to see them succeed. On the other hand, federal judges, defense attorneys, and sometimes prosecutors constantly attempted to find ways to circumvent the federal guidelines. Within two years of their inception, more than 200 judges attempted to invalidate the Sentencing Reform Act as unconstitutional on separation of powers grounds, only to be rebuffed by the Supreme Court in *Mistretta*. Next, judges attempted to depart downwards based on offender characteristics, only to be told by the commission that such characteristics were not relevant. Prosecutors, defense attorneys, and judges then engaged in more elaborate schemes of guidelines avoidance, all the while decrying the guidelines in scholarship. In short, federal practitioners seemed to spend more time on efforts to avoid or invalidate the guidelines than on efforts to accept them. The federal guidelines withstood blows, but less as a mood regulator and more as a marked target.

Finally, in 2005, one of the challenges to the federal guidelines hit home. After 20 years of opposition, the Supreme Court ruled in *United States v. Booker* that the federal guidelines were unconstitutional insofar as they allowed a defendant’s sentence to be increased based on facts not found by the jury. Such factfinding was ubiquitous in the federal system; it was a central requirement of the real-offense mechanism. Thus any solution to the *Booker* problem was bound to be more far-reaching than state responses to *Blakely*. Against that backdrop, the Supreme Court itself entered the sentencing fray.

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169 See Tonry, supra note 5, at 74.
170 See Stith & Cabranes, supra note 2, at, 75.
171 See Tonry, supra note 5, at 73.
173 See generally Stith & Cabranes, supra note 2, at, 66-77 (describing the process of real-offense sentencing).
B. Deus Ex Moderation

Most scholars had predicted the outcome of the *Booker I* decision; indeed, several Justices had done so in *Blakely*. Once Washington’s moderately flexible state guidelines were judged unconstitutional, the federal guidelines, with their liberal use of judicial factfinding, stood no constitutional chance. Less settled, however, was whether the Court would attempt to fashion a remedy to *Booker I*, and what shape that remedy might take. Unlike in *Blakely*, the Court was not constrained by federalism principles from issuing a remedial opinion, though there may have been pragmatic reasons to demur. Essentially, the Court was faced with three possibilities. One was to offer no remedy, and hope either that Congress would fill the void or that judges would still rely on the unconstitutional guidelines as a sentencing tool. Another was to *Blakely*-ize the guidelines, and require proof beyond a reasonable doubt of any factors that might increase a defendant’s sentence. The final option, and the one the Court adopted, was to render the guidelines advisory.

The first option would have put the impetus on Congress to step back into the sentencing ring. Yet this option was not entirely appealing. First, it was unclear whether Congress would do anything at all in a timely fashion. Given that over a decade elapsed between the proposal of guidelines reform in the 1970s and their inception in 1984, the Court had reason to believe that there would be a sentencing gap for several years. Second, any action that Congress might take appeared unfavorable. In 2005, the Republican Party controlled the Presidency and both houses of Congress. The federal sentencing guidelines were the product of a similarly politically

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175 See Stith & Koh, *supra* note 141, at 230, 266.
composed legislative and executive branch, so it was more than clear that any further reform would likely err on the side of being more punitive than the federal guidelines. Indeed, the proposal offered by the Department of Justice in response to *Booker* was to turn the guidelines into statutory mandatory minimums.\textsuperscript{177} As even conservative Justices Rehnquist and Kennedy disagreed with the use of mandatory minimum sentences,\textsuperscript{178} doing nothing was not an option the Court seemed willing to entertain.

*Blakely*-izing the Guidelines posed similar practical problems. As an attempt at redefining the federal criminal code, the guidelines relied heavily on judicial factfinding to isolate an offender’s “real conduct.” Thus, unlike in the states, where a *Blakely* fix was possible because judicial factfinding was rare, such a fix would have more drastic effects on the federal sentencing system.\textsuperscript{179} Additionally, giving prosecutors the additional discretion over which facts to charge in a given case would even further skew the imbalance of plea bargaining and charging power in the Guidelines.\textsuperscript{180} According to the Court, then, the *Blakely* fix would exacerbate, not ameliorate, the current problems with the Guidelines.


\textsuperscript{178} Chief Justice Rehnquist has observed that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences.” *Hearing Before the H. Gov’t Reform Subcomm. on Criminal Justice, Drug Policy and Human Res.*, 106th Cong. (2000) (statement of John R. Steer, Member and Vice-Chair of the U.S. Sentencing Comm.) (internal quotation marks omitted) (quoting William Rehnquist, Remarks at the Nat’l Symposium on Drugs and Violence in Am. (June 18, 1993)). Justice Kennedy has stated that he “can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.” Justice Anthony Kennedy, *Address to the American Bar Association* (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp-08-09-03.html.

\textsuperscript{179} At least, this is what the government argued. *See* Brief for the United States at 54, United States v. Booker, 543 U.S. 220 (2005) (No. 04-104) (“Severing judicial factfinding on sentence-enhancing facts would make the resulting system unfeasibly complex.”). However, it is unclear if requiring the prosecution to prove the “relevant conduct” – that is, putting the prosecution to its proof – would be particularly complex. Certainly, it would complicate proceedings, but only by requiring the prosecution to prove the conduct for which the defendant will be punished.

\textsuperscript{180} This argument was raised by the government at oral argument, *see* Transcript of Oral Argument at 109, United States v. Booker, 543 U.S. 220 (2005) (No. 04-104). Again, it is unclear if this argument has merit; while prosecutors would have discretion over which facts to charge, they would still have to prove those facts to obtain an enhanced sentence. Nevertheless, the Court accepted this argument, so I present it here. *See* United States v. Booker, 543 U.S. 220, 257 (2005).
That left rendering the guidelines advisory. This approach had several benefits. For one thing, it brought the guidelines more in line with Senator Kennedy’s initial proposal—an observation that was likely not lost on Justice Breyer, a former chief counsel to Kennedy’s judiciary committee. For another thing, this approach represented a chance to moderate the harshness of the guidelines—to finally engraft a safety valve onto the much-maligned guidelines. Faced with two options that might render the guidelines more harsh than they already were, and one option that might moderate their severity, the Court elected the latter. While judges would have to start by calculating the appropriate guidelines range, they would then have to determine whether that range was appropriate based on an “individualized assessment [of] the facts presented.”

Initially, both the Court and the legal academy saw the Court’s opinion as a placeholder. At the conclusion of his opinion, Justice Breyer declared that “the ball now lies in Congress’s court.” Most scholars assumed that reform was imminent—indeed, one particularly prominent law review dedicated its annual symposium to offering new legislative solutions to Congress. Yet that legislative response has not come. One reason might be political—shortly after Booker,

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181 STITH & CABRANES, supra note 2, at, 49-50.
182 Indeed, the Court’s recent decision in Oregon v. Ice, 129 S. Ct. 711 (2009) suggests that the Court’s decision in Booker was not motivated exclusively by a commitment to restoring the jury’s role as factfinder. In Ice, the Court held that states may assign to judges, rather than juries, the job of finding facts necessary to support the imposition of a consecutive rather than concurrent sentence. 129 S. Ct. at 714-15. As Justice Scalia noted in dissent, “Today’s opinion muddies the waters, and gives cause to doubt whether the Court is willing to stand by Apprendi’s interpretation of the Sixth Amendment’s jury-trial guarantee.” Id. at 723 (Scalia, J., dissenting). Of course, speculation about the Court’s motivations in Booker is just that, but the Court’s retreat from the underlying constitutional rationale for Booker may be somewhat telling.
183 Booker, 543 U.S. at 245-46.
the Republicans lost their majority in both houses, and along with it, their chances to enact a more stringent, tough-on-crime sentencing scheme. Given that the current state of affairs was at least palatable to some liberal reformers, the likelihood of reform was somewhat diminished.

Yet politics alone do not explain the current state of federal sentencing. In retrospect, the *Booker* remedial opinion has proved to be precisely the type of moderating influence necessary to make the guidelines guidelines. While judges still must begin by calculating the appropriate guidelines sentence, they may depart downwards or upwards subject only to appellate review for unreasonableness. The Court’s recent opinion in *Kimbrough* further moderated the federal guidelines by allowing judges to take account of the crack/powder sentencing disparity in reducing a defendant’s sentence for crack manufacturing below the applicable guidelines range, to the statutory minimum. In sum, the federal guidelines now guide judicial discretion instead of attempting to annihilate it.

*Booker* and its progeny have thus done what Congress and the Commission were unwilling to do – take a first step toward moderating the guidelines, and, whether intentionally or not, bringing them more in line with the states. This is not to say that the federal guidelines are free of all flaws. The guidelines are still extremely severe and extremely complex, and still rely on real-offense sentencing. Yet rather than serving merely as a stopgap, *Booker* has helped mitigate the federal guidelines’ severity and given sentencing reformers hope for the future.

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188 After all, the current state of the guidelines in 2006 quite closely resembled Senator Kennedy’s initial proposal. See *Gall*, 128 S. Ct. at 596-98. In *Gall*, the Court rejected the government’s proposal to tether the reasonableness of a departure to the extent of that departure (effectively requiring more, and better, reasons for a dramatic deviation from the guidelines). *Id.* at 594-96.
190 Nevertheless, the federal guidelines still govern the outcome in over 85% of federal criminal cases. See supra note 8.
191 See generally Berman, *supra* note 186 (discussing proposals to “tweak” the federal guidelines).
federal sentencing guidelines are not an ideal product of compromise, but they are actually becoming guidelines.

IV. THE FUTURE OF GUIDELINES

Part history and part theory, this Article has made one essential observation: sentencing guidelines can achieve remarkable success and stability when they seek merely to be guidelines. Such systems can serve an important role as a criminal justice “mood regulator.” They can help structure debates about incarceration and, in some cases, counteract or at least moderate potentially traumatic shifts in public opinion. Yet at the same time, when guidelines seek to do more – when they attempt to change the substantive criminal law or dramatically alter sentencing practice, they lose a great deal of their support, as well as the features that permit them to be successful. These observations are, perhaps, deceptively simple; it is not always easy for guidelines to remain true to their word. The history of the federal guidelines reveals that politics may get in the way of sensible reform, creating a system with few defenders that most hope to evade or invalidate. That history, however, may paradoxically have helped ensure the future of sentencing guidelines. In concluding this Article, I offer a brief description of recent guidelines innovations in the states and the federal system, along with some suggestions for further reform.

A. Reclaiming Guidelines

As some scholars have noted, perhaps the great tragedy of the federal experiment is that the federal guidelines came to be synonymous with the very idea of sentencing guidelines.\(^{193}\) That is, the public failure of the federal guidelines largely obscured the successful state efforts with real guidelines reform. Recently, however, the American Legal Institute has taken steps to

\(^{193}\) See Reitz, supra note 3, at 1105-06.
counteract that trend. In framing the Model Penal Code for Sentencing, the influential ALI explicitly decided to endorse state guidelines models.

Perhaps recognizing the success of state presumptive and voluntary guidelines, the MPC recommended not one ideal sentencing scheme, but several alternatives – one presumptive, one voluntary.\textsuperscript{194} Unsurprisingly, the mandatory or presumptive scheme closely resembles the systems in effect in Minnesota, North Carolina, and Washington, and the voluntary scheme looks like a hybrid of those systems and Virginia’s. Across the board, the MPC recommends broad institutional membership on the sentencing commission,\textsuperscript{195} consideration of capacity,\textsuperscript{196} and codification of historical sentencing practice.\textsuperscript{197} The reason for these recommendations seems clear – these factors can help ensure that guidelines remain healthy and well accepted by all of those who have to use them.

The ALI’s work might just be a reflection of good sentencing policy. Yet it may be more – an effort to recapture the terms “guidelines” and “commission” and make them more synonymous with real guidelines and real commissions. Notably, many of the scholars who decried the federal guidelines are advisors compiling the Model Penal Code on Sentencing.\textsuperscript{198} It remains to be seen how influential these efforts will be; the federal system is so encompassing and its initial failure so public that such reclamation efforts might prove fruitless. Yet as I discuss in the next part, the MPC’s efforts have at least caught the eye of some states hoping to institute sentencing reform. Perhaps these states represent a first, and important, step to reclaiming “guidelines.”

\textsuperscript{194} Model Penal Code: Sentencing 154-71 (2007).
\textsuperscript{195} Id. at 58-61.
\textsuperscript{196} Id. at 19, 168.
\textsuperscript{197} Id. at 195-200.
\textsuperscript{198} Id. at v-vi (listing Kevin Reitz as the Reporter for the Model Penal Code: Sentencing, and David Boerner, Kate Stith-Cabranes, and Michael Tonry as Advisers).
B. The New Trailblazers

While some state sentencing reformers were initially scared away from guidelines reform by the initially disastrous federal approach, that hesitation has given way to sensible, adaptive reform. Recent guidelines reformers in the District of Columbia and Alabama have made concerted efforts to blend the best features of voluntary and presumptive guidelines systems, often to great success.\(^\text{199}\) The District of Columbia provides an illustrative example.\(^\text{200}\) While its decision to adopt guidelines was not voluntary (its hand was forced when Congress decided to abolish parole in the District of Columbia and mandate some form of determinate sentencing),\(^\text{201}\) it quickly achieved a system built to last. In response to Congress’s mandate, the D.C. Council created a Sentencing Commission and solicited its recommendations regarding the best way to respond to Congress’ mandate.\(^\text{202}\) From the very start, the D.C. Sentencing Commission heeded the lessons of the federal system and made a concerted effort to create a system of moderate guidelines. First, the D.C. Commission was remarkably diverse, with representatives from every major local political and institutional actor involved in the D.C. criminal justice system.\(^\text{203}\) This diversity had the same salutary effects in D.C. as in other states – it increased institutional investment in the guidelines and helped ensure that future attempts at reform would go through the guidelines, rather than around them.

The Commission’s next decision was to adopt a system of voluntary guidelines. This decision was itself the product of two unique factors. One was the Commission’s observation

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\(^{201}\) Id. at 209.

\(^{202}\) Id.

\(^{203}\) Id. The commission’s initial membership consisted of three Superior Court judges, a member of the local legislature, the United States Attorney, the D.C. Attorney General, the Public Defender, two criminal defense practitioners, representatives of the District’s major criminal justice agencies, and two citizen members (one advocate against mandatory minimums and one victim’s rights advocate). Id.
that such a system would be insulated from Blakely challenge. Both prosecution and defense attorneys had extensive experience with the federal guidelines, and were chary of replicating such a system in the District.\footnote{Id. at 210.} The other was that both prosecutors and defense attorneys wanted to preserve their ability to convince sentencing judges to tailor sentences to serve their interests.\footnote{Id. at 210.} These two factors, plus the commission’s desire to operate by consensus, resulted in a system of voluntary guidelines with relatively wide ranges.\footnote{Id. at 210.} The fact that the guidelines were voluntary had the additional beneficial effect of eliminating the stress on the criminal justice system created by appellate litigation over sentences.\footnote{Id. at 210.}

Ultimately, the commission had “relatively modest” goals.\footnote{Weisberg & Hunt, supra note 200, at 210.} Once it decided that the guidelines should be descriptive, and aimed at reducing sentence variability rather than change sentencing norms, the commission quickly agreed upon a series of sentencing grids, with offenses ranked by severity on one axis and the offender’s criminal history on the other.\footnote{Weisberg & Hunt, supra note 200, at 210.} Unlike other jurisdictions, D.C. set up a special drug offense sentencing grid, both because of the difficulty of ranking drug offenses alongside other offenses, and the desire to combine sanctions and treatment for those offenders.\footnote{Weisberg & Hunt, supra note 200, at 210.} The ranges in these grids are somewhat broad, capturing the middle 50% of historical sentences.\footnote{Weisberg & Hunt, supra note 200, at 210.}
Early returns on the guidelines are quite positive. Of 5,454 sentences implemented between June 2004 and 2006, 88.8% were within the appropriate guidelines range.\textsuperscript{212} Between June of 2006 and December 2007, the compliance percentage increased to 89.5%.\textsuperscript{213} Judges have consistently applied the guidelines both for offenses that call for prison terms and for offenses allowing probationary terms.\textsuperscript{214} These compliance numbers would be notable in a mandatory guidelines system, but are even more striking in the voluntary D.C. regime.

There are several reasons for this extraordinary rate of compliance. The guidelines seek simply to normalize past sentencing practice, yet allow practitioners and judges flexibility to tailor a sentence when needed. As a result, the guidelines have won approval from both prosecutors and defense attorneys. This acceptance in turn leads to guidelines recommendations in most plea bargaining situations, which help dispose of close to 90\% of all felony cases in the District.\textsuperscript{215} Additionally, D.C. is a small jurisdiction; all of the judges are housed in the same building, and there is little geographic diversity in the area.\textsuperscript{216} These two principles help promote uniformity, the former by the potential for peer-pressure effects; the latter by reducing disparity between the various offenders sentenced under the Guidelines.

Other jurisdictions, such as Virginia, have seen similar success in the early years of voluntary guidelines reform, so it is not clear that D.C.’s initial success will be long-lasting. Still, the forecast seems optimistic. D.C.’s system is, in many ways, built to withstand many of the historical challenges to guidelines reform. Because the guidelines are voluntary, they are insulated from \textit{Blakely}. By paying attention to cost and capacity, the guidelines ensure correctional and budgetary stability over the long run. And by operating via consensus, the commission creates institutional stakes in the system that will help it to thrive in the face of

\textsuperscript{212} \textit{Id.} at 211.
\textsuperscript{213} \textit{D.C. Sentencing and Criminal Code Revision Comm’n, 2008 Annual Report 6-7 (2008).}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Weisberg & Hunt, supra note 200, at 212.}
\textsuperscript{216} \textit{Id.} at 209.
adversity. The District of Columbia’s experience thus presents cause for optimism; its experience shows that reformers are learning the lessons of sentencing guideline history and attempting to tailor their systems accordingly. More concretely, these reformers are learning the lessons both of state success and federal failure.

C. Guidelines Atavism

While the early returns on sentencing reform in the District of Columbia are promising, they also suggest the emergence of a new trend towards adopting voluntary rather than presumptive guidelines. For example, both Alabama and Utah recently adopted voluntary guidelines as well. Yet, as the pre- and post-Blakely experiences of Minnesota, Washington, and North Carolina prove, presumptive guidelines schemes can survive constitutional scrutiny and provide an effective method of implementing sentencing reform. One lesson to be learned from their experience, then, is that presumptive guidelines are still viable – so long as they are guidelines, and not something more.

Of course, voluntary guidelines have their merits, and have achieved some modicum of success in addition to an endorsement from the MPC. Yet over the long run, while Virginia’s guidelines have proved similarly effective to their presumptive brethren, they have not come without cost – most notably in the form of an increasing prison population and increased prison costs. While the District of Columbia has so far avoided these problems, it is unclear whether it will continue doing so. Moreover, the District of Columbia’s experience might not ultimately be

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218 See supra Parts IV A – IV B.

219 See supra pp. 18-19, 26-27.
that instructive, given the factors that make it unique – a small judiciary, and unelected prosecutors.\textsuperscript{220}

Presumptive guidelines, on the other hand, offer greater predictability in terms of resource projections and, at least in theory, a stronger promise of uniformity. Certainly, they are not without their flaws. But, experience can be a wise teacher, and their longstanding survival in many states suggests that presumptive guidelines should not be abandoned too lightly. If there is a lesson here, it is that future sentencing reformers should weigh the benefits of both voluntary and presumptive guidelines rather than merely equating the latter with the federal guidelines and summarily dismissing them as an option.\textsuperscript{221}

D. Federal Reform: The Return of Constructive Discourse?

The current jerry-rigged federal sentencing system represents a judicially-crafted first cut at a more moderate sentencing system, and it may continue to evolve in the courts. Yet the prospect of legislative reform is not out of the question (especially given the recent election of a Democratic President and Congress). If such reform happens, both Congress and the Sentencing Commission should of course carefully consider the choice between a presumptive and voluntary system. They should also consider a methodological shift.

The terms of that shift are nicely summarized in Justice Kennedy’s 2004 dissent in \textit{Blakely}.\textsuperscript{222} In his opinion, the Justice offered a short endorsement of state sentencing commission methodology.

\begin{quote}
[C]onstant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial
\end{quote}

\begin{footnotesize}
\textsuperscript{221} See \textit{Model Penal Code: Sentencing} 92-93 (2007) (suggesting future sentencing commissions should spend a minimum of two years framing the guidelines in order to best tailor their purpose and structure to the specific needs of their communities).
\end{footnotesize}
determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.\textsuperscript{223}

According to Justice Kennedy, this constructive discourse between the courts, legislatures, and sentencing commissions\textsuperscript{224} was one of the keys to guidelines success in the states. Of course, Justice Kennedy made this observation in the context of a brief opinion decrying the majority’s opinion in \textit{Blakely} as a fatal blow to state sentencing reform. In that respect, at least, his prediction missed the mark. Yet his central insight is still valid: one of the crucial factors contributing to guidelines resiliency – and a crucial aspect of sentencing moderation – is this constructive discourse between the various actors involved in determining sentencing policy.

For the most part, such discourse was notably absent from the federal guidelines. From an early stage, the federal Sentencing Commission went out of its way to ensure its primacy over the definition and interpretation of the guidelines.\textsuperscript{225} Indeed, the Commission “seldom explained its actions or its intentions.”\textsuperscript{226} This assertion of hegemony over the guidelines led two scholars to refer to the federal guidelines as “simply a compilation of administrative diktats.”\textsuperscript{227} Nor did the Commission permit judges to fill in gaps in the guidelines; when courts of appeals attempted to give district judges some authority to exercise their own judgment, the Commission would almost immediately issue a “clarifying” amendment to “bring the appellate courts back into

\textsuperscript{223} \textit{Id}. at 326-27.
\textsuperscript{224} As is clear from the quote, Justice Kennedy did not explicitly mention the sentencing commission as part of this discourse. Nevertheless, the commissions were integral to this process.
\textsuperscript{225} \textit{STITH \& CABRANES}, supra note 2, at 97-98 (“[T]he Commission has gone out of its way to make it clear that it alone will determine the scope and application of concepts enjoyed in the Sentencing Guidelines.”).
\textsuperscript{226} \textit{Id}. at 95.
\textsuperscript{227} \textit{Id}.
Such interpretative domination would be surprising, but not necessarily invidious, were the Commission diversely composed; at least then, various institutions would be assured of having their voice heard. Yet the Commission lacks this diversity. However, recent developments suggest that this opposition may have given way to détente. In the aftermath of *Booker*, the Sentencing Commission was roundly criticized for not attempting to reduce the disparity in guidelines sentences between powder and crack cocaine defendants. Congress took early steps to fill the void, with several senators proposing a legislative reduction in the statutory 100:1 ratio. But then something curious happened. Responding to these developments, the Commission itself reduced the guidelines disparity, while calling for Congress to take further action. Rather than working at odds with each other, the Sentencing Commission and Congress appear to be working together to coordinate their relative expertise into better sentencing policy.

This cooperation is not limited to vertical interactions between the Commission and Congress. More recently, and more encouragingly, the Sentencing Commission recently decided to conduct a series of regional public hearings on federal sentencing policy, with the goal of “gathering feedback on federal sentencing practices and the operation of the federal sentencing

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228 *Id.* at 98.
229 See supra p. 32.
232 Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at http://www.ussc.gov/PRESS/rel121107.htm (“The Commission’s actions today, as well as promulgation of the original amendment for crack cocaine offenses, are only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants. The Commission has continued to call on Congress to address the issue of the 100-to-1 statutory ratio that drives Federal cocaine sentencing policy. Only Congress can provide a comprehensive solution to a fundamental unfairness in Federal sentencing policy. The Commission has consistently expressed its readiness and willingness to work with Congress and others in the criminal justice community to address this very important issue.”).
guidelines.” In its announcement, the Commission noted that it “expects to hear from a wide range of witnesses from across the nation, including the judiciary, law enforcement, prosecutors, defense attorneys, community interest groups, sentencing experts, and others interested in federal sentencing.” It also called for “any suggestions regarding changes to the Sentencing Reform Act and other relevant statutes, the federal sentencing guidelines and policy statements, and the Federal Rules of Criminal Procedure that, in the view of the witness, will further the statutory purposes of sentencing.” Regardless of whether these hearings result in substantive changes, they represent a step forward in terms of the Commission’s willingness to consider voices other than those of its own members.

These two examples do not represent any change in the Commission’s views towards the judiciary. But they may emblematize a newfound readiness to rethink both the substance and the format of sentencing decisionmaking – and perhaps even to consider the lessons that can be learned from successful state reformers. As this Article has argued, federal reformers and the federal guidelines might well be more successful, and certainly more resilient, if they were to heed the results of state laboratory experimentation. For example, real-offense sentencing and the 43-level grid are not mandated by statute; the complexities of these tools may not be worth the hassle in an era of advisory guidelines. Now that the guidelines are creeping closer to

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234 Id.
235 Id.
236 Practitioners have suggested that the real lesson of Kimbrough is that the federal sentencing commission is “more influential than ever before.” Andrew George, Alexandra Walsh & Bridget Moore, Kimbrough, White Collar Sentencing, and the New Primacy of the Sentencing Commission, ABA CRIM. LITIG., Winter 2009, at 1. While this may be true, the fact that the commission has recently solicited new perspectives on the guidelines suggests that that “influence” may be more pluralist than before.
237 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
238 See TONRY, supra note 5, at 90-91.
becoming guidelines, it is possible to begin the long journey of helping them realize that path. To paraphrase Justice Breyer, the ball is now in the federal criminal justice system’s court.

CONCLUSION

One year ago, Professor Robert Weisberg declared the existence of an emerging contemporary consensus on sentencing law, one holding that the best possible sentencing scheme is a moderately flexible set of guidelines issued by a commission. Professor Weisberg’s piece focused primarily on state guidelines systems, viewing the federal example as an unfortunate outlier. Yet the development of the federal system post-

Booker, and recent reform efforts in the District of Columbia and Alabama, suggest that this consensus is growing beyond those parameters. Indeed, this consensus appears to have solidified in the Model Penal Code on Sentencing. Whether judicially- or legislatively-initiated, guidelines reform appears to be as viable as ever.

The future of the federal system is still unclear. The Gall-Rita-Kimbrough appellate construct offered a first, but not decisive, cut at defining the scope of appellate sentencing review. While the Sentencing Commission and Congress have made some initial forays into cooperation, they have not formalized that relationship. Nor is the Commission yet as broadly representative as it could be. Still, early experiences under the advisory federal guidelines suggest that they are becoming guidelines. Indeed, the federal guidelines are now somewhat similar to Virginia’s voluntary guidelines, which have achieved some modicum of success. If the federal system can continue along this path, it may offer hope for reformers in states like California; states where guidelines reform and sensible correctional policy are sorely needed.

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239 Weisberg, supra note 9, at 179.
241 Weisberg, supra note 9, at 222-30.
Moreover, federal guidelines success may provide the basis for a new sentencing scholarship – one that looks at the federal and state experiences less as qualitatively different and more as part of a unified history that future reformers would be wise to heed.