

State Sentencing Guidelines: A Garden Full of Variety

Kelly Lyn Mitchell¹

*Robina Institute of Criminal Law and Criminal Justice
University of Minnesota Law School*

OVER 40 YEARS AGO, sentencing in the U.S. was primarily “indeterminate.” Judges would pronounce long sentence terms consisting of minimum and maximum times to serve, and parole boards would exercise their discretion in reviewing individual cases for release from prison. But in the late 1970s a movement began towards the development of sentencing guidelines, which were standards put in place to establish rational and consistent sentencing practices with the goal of producing more uniformity and proportionality in sentencing. At the same time, there was a “truth in sentencing” movement, which sought to bring more certainty to actual time served by abolishing parole and establishing benchmarks for the minimum time to be served before release from prison. The Federal Sentencing Guidelines were enacted in 1987, so 2017 marks their 30th anniversary. But as others reflect on the strength and weaknesses of the federal system and the overall impact of the guidelines, it is important also to recognize that the federal guidelines are just one system among many.

Minnesota was the first state to enact sentencing guidelines, in 1980. Since then, multiple states, the federal government, and Washington, D.C., have followed suit. But no state went the route of the Federal Sentencing Guidelines. Just as no two states or jurisdictions are the same, no two sets of sentencing guidelines are the same. But neither is there another set of sentencing guidelines that is as

detailed and complex in construction as the federal guidelines. In order to achieve greater uniformity and proportionality in sentencing against a backdrop of overlapping and duplicative federal statutes, the U.S. Sentencing Commission chose to construct a guidelines system that started with the charged offense and then layered on real offense elements to arrive at the recommended sentence. This system has in turn drawn sharp criticism as being too rigid and formulaic and depriving the court of the exercise of discretion. In contrast, state systems were able to take advantage of more modern statutes and rely more heavily on the charged offense to differentiate between crimes and to assign appropriate sentences; they could also allocate more discretion to the court to make adjustments for atypical cases. Nevertheless, the states also managed to enact a wide variety of systems. Some are mandatory, requiring strict adherence, whereas others are advisory, representing a starting point for the court. Some are enforced by appeal; others are not. And the rules that make up the core of sentencing guidelines—e.g., how the criminal history score is calculated, availability of departures, whether consecutive sentencing is permitted—vary substantially from jurisdiction to jurisdiction. In this article, I will describe some of the major features of sentencing guidelines systems in the states and relate them, where possible, to the Federal Sentencing Guidelines.

The Robina Institute of Criminal Law and Criminal Justice has been cataloging the attributes of sentencing guidelines systems in the Sentencing Guidelines Resource Center

(sentencing.umn.edu), a website dedicated to providing information and analysis about sentencing guidelines systems in the United States (Figure 1). Though the Resource Center highlights information for 26 jurisdictions, including the federal government, not all of these jurisdictions have sentencing guidelines. Neither do all of the jurisdictions have sentencing commissions. And over time, jurisdictions have moved back and forth between classifications as sentencing commissions have been formed and sunsetted and as guidelines systems have developed and then been undercut by various factors, creating an even larger potential pool for study. In this article, I will focus on the 15 non-federal systems that we have found exhibit the strongest characteristics of sentencing guidelines: Alabama, Arkansas, Delaware, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington, and Washington, D.C.²

² Five systems that exhibit characteristics of sentencing guidelines but are not included in the analysis throughout this article are Alaska, Florida, Missouri, Ohio, and Tennessee. The guidelines in Missouri were considerably weakened in 2012 when the legislature stripped the commission of its power. The remaining jurisdictions have sentencing systems that were developed by a sentencing commission and enacted into law, but each might be more aptly described as a statutory determinate sentencing system than a guidelines system. Alaska and Ohio have active commissions that address criminal justice issues broadly; the commissions in Florida and Tennessee no longer exist. Four additional systems—Connecticut, Illinois, Louisiana, and New York—are not included in the analysis because they have sentencing commissions with

¹ Kelly Lyn Mitchell is Executive Director of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School.

FIGURE 1.
Categorizing Sentencing
Non-Federal Sentencing Systems

Sentencing Commissions						
AK	MO	AL	KS	MN	PA	FL
CT	NY	AR	MA	NC	UT	TN
IL	NM	DE	MD	OH	VA	
LA		DC	MI	OR	WA	
Sentencing Guidelines						

Source: *Sentencing Guidelines Resource Center, Key Elements of Guidelines Systems*, sentencing.umn.edu

How Sentencing Guidelines Work

Prior to the development of sentencing guidelines, judges were largely on their own in determining an appropriate sentence. A statute might define a crime as “punishable by up to 25 years in prison,” for example, and it was up to the judge to determine whether a prison or non-prison sanction was appropriate, and if prison, how much time to impose within the possible 25-year span. Guidelines presented an alternative by establishing a routinized process for deriving an appropriate sentence. Guidelines were enacted to bring uniformity and proportionality to sentencing, meaning that defendants with similar criminal histories who committed similar crimes would receive similar sentences.

The two primary determinants of the sentence under sentencing guidelines systems are offense severity and criminal history. Most systems arrange these attributes on a sentencing grid with offense severity representing one axis on the grid and criminal history the other.³ The grid cell at the intersection of these two points determines the recommended sentence under the guidelines. Two of the fifteen states highlighted in this article—Alabama and Virginia—do not use a grid format at all. Instead, presumptive sentences are determined by completing worksheets that take into account factors reflecting both offense severity and criminal history.⁴ The

no mandate to develop sentencing guidelines. And the final system—New Mexico—just established a commission with a mandate to develop sentencing guidelines in 2017.

³ See e.g., Wash. State Adult Sentencing Guidelines Manual 49 (2016).

⁴ See Alabama Sentencing Commission Worksheets, http://sentencingcommission.alacourt.gov/sent_standards.html; Virginia Sentencing Commission Worksheets, <http://www.vscsc.virginia.gov/worksheets.html>.

final state—Delaware—utilizes a more narrative structure to communicate recommended sentences.⁵

Nearly every state guidelines system conveys the choice of disposition, which is whether the imposed sentence should consist of confinement to prison, intermediate sanctions, probation, or other non-incarceration sanctions. For sentences that result in some sort of confinement (local jail or state prison), the guidelines will express the sentence as either a fixed term or a range of time from which a term must be selected. From there, every system permits the court to exercise some degree of discretion to adjust the recommended sentence. Sentencing guidelines generally recommend a sentence for the “typical” case. Thus, the sentence recommended by the guidelines should be appropriate in most instances; that is, for all similar offenses committed in the typical manner, and for all offenders with similar criminal histories. On the other hand, if the crime or the offender is truly “atypical,” meaning there is something about the way the crime was committed or about the particular offender that is different enough from a typical case of this type, then a departure may be more appropriate than the recommended sentence.

Sentencing Commissions by the Numbers

Before examining the sentencing guidelines themselves, it is important to recognize that the strength of sentencing guidelines systems comes from the existence of active sentencing commissions. Sentencing guidelines, like the laws that govern any sentencing system, need to be dynamic and responsive to the environment in which they operate. A sentencing commission can ensure that this happens by regularly revising and updating the guidelines and by monitoring actual sentencing practices. At the same time, a sentencing commission can serve the legislature as a source of sentencing and criminal justice expertise, and can work to ensure that the jurisdiction remains true to the principles that underpin the guidelines, or at the very least, that if the jurisdiction chooses to pursue different aims, it does so with full knowledge and understanding. In states like Tennessee and Florida where guidelines exist in statute, because a sentencing commission no longer

⁵ See generally, Del. Sentencing Comm’n Benchbook (2017).

exists, the guidelines are subject to erosion and amendment and lose their ability to achieve the purposes for which they were originally created.

Commission Composition

Sentencing commissions vary greatly in size and composition as illustrated in Table 1. The 15 commissions highlighted in this article range in size from 9 to 28 members, though the average size is 16 to 17 members. Nearly every commission includes members who are judges, prosecutors, and defense attorneys. A majority of commissions also have members who are legislators, victims or victims’ advocates, and members of the public. Just four commissions are specifically required to have a community supervision representative among their members. From there, commission membership varies a great deal, including members such as juvenile justice practitioners and advocates, court administrators, county commissioners, business leaders, and former inmates.

In comparison to the states, the U.S. Sentencing Commission is one of the smaller commissions, and the required membership is less representative of the criminal justice system. For most state systems, the required membership is detailed in statute. But at the federal level, the appointing authority (the President of the United States) has broad discretion to determine the ultimate composition of the commission. The only limitation is that at least three members must be federal judges and no more than four may be from the same political party.⁶ Only Oregon has taken a similar approach, granting broad discretion to the governor to determine the membership, limited only by the requirement of geographic and political diversity.⁷ Though the U.S. Sentencing Commission includes representation from the Attorney General’s Office, there is no similar requirement for defense representation. Only Virginia similarly omits the defense representation that could counterbalance the prosecutorial representation on the commission. Finally, the U.S. Sentencing Commission is just one of four sentencing commissions to include non-voting members. The other jurisdictions are Arkansas, Massachusetts, and Washington, D.C. In Arkansas, the nonvoting members are the legislative appointees. In Massachusetts and Washington, D.C., the nonvoting members

⁶ 28 U. S. C. § 991(a) (2016).

⁷ Or. Rev. Stat. § 137.654(1) (2017).

TABLE 1.
Commission Membership: State to Federal Comparison

	AL	AR	DC	DE	KS	MA	MD	MI	MN	NC	OR*	PA	UT	VA	WA	US
Judge(s)	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Defense Attorney	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Prosecutor	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Dept. of Corrections	•		•	•	•	•	•	•	•			•	•		•	
Legislators	•				•		•	•		•	•	•	•	•	•	
Victims/Advocates		•	•		•		•	•	•	•			•		•	
Public		•	•		•		•	•	•	•			•		•	
Law Enforcement	•		•			•	•	•	•	•			•		•	
Parole	•		•		•	•				•		•	•		•	•
Academics/Experts	•		•				•			•		•				
Comm. Sup.			•		•			•	•							
Other	•		•			•	•	•		•			•		•	•
Total Members	21	11	17	11	17	15	19	16	11	28	9	11	27	17	20	9

* Oregon law requires that the commission comprise 9 members, 2 of whom are non-voting and legislators, and 7 of whom are appointed by the Governor. The law does not specify the role or representation of the gubernatorial appointees. Or. Rev. Stat. § 137.654(1) (2017).

include officials, such as the commissioner of corrections and the parole board chair, who are generally appointed by virtue of their office.

Commission Purpose

Sentencing commissions are established for many different purposes. Some are established primarily to develop and maintain sentencing guidelines. For example, the Minnesota Sentencing Guidelines Commission's mandate is to monitor and update the sentencing guidelines, serve as a clearinghouse of information for sentencing issues and practices, conduct ongoing sentencing guidelines research, and make related recommendations to the legislature.⁸ In contrast, other sentencing commissions are established with broader mandates relative to the state's criminal justice system. The Oregon Criminal Justice Commission, for example, has a mandate "to improve the effectiveness and efficiency of state and local criminal justice systems by providing a centralized and impartial forum for statewide policy development and planning."⁹ Looking across jurisdictions, the top six purposes articulated for sentencing commissions in statute are:

1. Recommend or establish sentencing policies and practices (to uphold stated goals);

⁸ Minn. Stat. § 244.09, subs. 5-7 (2016).

⁹ Or. Rev. Stat. § 137.656(1) (2017).

TABLE 2.
Commission Placement in Government

Executive	AR, DE, DC, KS, MD, MN, OR, UT, WA
Judicial	AL, MA, NC, US, VA
Legislative	PA, MI

Source: Sentencing Guidelines Resource Center, Jurisdictions Profiles, Sentencing Commission Section, sentencing.umn.edu

2. Protect public safety;
3. Manage correctional resources;
4. Maintain judicial discretion in sentencing;
5. Avoid disparity/increase equity and fairness in sentencing; and
6. Achieve certainty in sentencing.

Place in Government

Sentencing commissions can be situated in any branch of government. The placement of a sentencing commission within a specific branch may be a function of administration, politics, or other concerns. For example, if the primary purpose of the sentencing commission is to change sentencing practice, then placement in the judicial branch may help facilitate buy-in from the court. Alternatively, placement in the executive branch may facilitate the provision of administrative support such as staffing, office space, and IT services. By far the most common placement is within the Executive Branch as an independent and separate agency (Table 2). But successful and independent commissions exist in every branch of government.

Authority to Modify the Sentencing Guidelines

Defining crimes and establishing punishments is a function of the legislature. But with few commissions residing in the legislative branch, the commission's authority to modify the guidelines raises potential separation of powers issues.¹⁰ To address this concern, the authority of most commissions is checked by some form of legislative oversight. Table 3 sets forth these variations.

In six jurisdictions, modifications must go through the legislative process, either because the guidelines are in statute and must be amended, or because legislative approval is required before the guidelines can take effect.

¹⁰ See *Mistretta v. United States*, 488 U.S. 361 (1989) (finding the federal sentencing guidelines constitutional, amounting to neither excessive delegation of legislative power nor violation of separation of powers principle); *State v. Davilla*, 230 P.3d 22 (2010) (finding the Oregon Legislature's delegation of authority to develop the guidelines was constitutional because the legislature reserved the power to disapprove the guidelines before they would go into effect and then in fact affirmatively approved them).

TABLE 3.
Authority to Modify the Sentencing Guidelines

Method	Jurisdiction				
Modifications subject to legislative override	AL*	MN	PA	US	VA
Modifications must be enacted into law	KS	MI	NC	OH	WA
Modifications subject to legislative approval	AL*	OR			
Modifications are made through the administrative rulemaking process	AR	MD			
Other or unclear	DC	DE	UT	MA	

Source: Sentencing Guidelines Resource Center, *Jurisdiction Profiles, Sentencing Guidelines Section*, sentencing.umn.edu.

* Alabama falls into two categories because it has two sets of guidelines: one set that is voluntary and subject to legislative override, and one set that is presumptive and subject to legislative approval.

Like the federal guidelines, in four state-level jurisdictions, the guidelines can be modified by the commission directly, subject to legislative override, which generally means that the legislature must enact a law or resolution to prevent the modifications from going into effect. It should be noted, however, that in each of these jurisdictions the commission is also required to comply with the notice and comment and public hearing requirements of administrative rulemaking. Alabama falls into two categories because it has two sets of guidelines: one set of voluntary guidelines subject to legislative override, and one set of presumptive guidelines, modifications of which must be approved by an act of the legislature.

The remaining six jurisdictions appear to have avoided the separation of powers issues altogether, likely because the guidelines are advisory. Two jurisdictions simply follow the administrative rulemaking process. The remaining four present unique variations. In the District of Columbia, the D.C. Council must be notified of changes to the guidelines, but there appears to be no process for the Council's approval or rejection. In Delaware, the guidelines were initially enacted by an administrative order of the Delaware Supreme Court. Though it is unclear how modifications are approved, the commission has confirmed that legislative approval is not required. The Utah statute is silent as to the requirements for modification, but many of the recent changes seem to have been initiated by legislative directive. Finally, the Massachusetts guidelines have never been formally adopted, so there is no process in place for modification; the commission has nevertheless updated certain portions of the guidelines such as the master crimes list (establishing offense severity).

Prison Population Control

All sentencing guidelines jurisdictions articulate correctional resource management as a goal, but the commissions implement this goal in different ways. Looking across the statutes governing the establishment of the sentencing commissions, two-thirds of the commissions highlighted in this article are tasked with taking existing correctional capacity into account and avoiding prison overcrowding when developing and modifying the guidelines. Just a few commissions are tasked with the more proactive role of setting correctional resource priorities: Kansas, Massachusetts, and Oregon. Only about half of the sentencing commissions are directly tasked with providing fiscal impact statements for pending legislation or proposed modifications to the sentencing guidelines; in practice, however, many commissions perform this function. In fact, the statutes governing the powers and duties of the commissions often bear little relation to the actual role that commissions perform with regard to correctional resource management. In Minnesota, for example, though the governing statute merely directs the commission to consider existing correctional capacity when developing the guidelines, the commission also works with the Department of Corrections to forecast the prison population and provides fiscal impact notes to the Legislature on all bills that create or amend crimes.

The key to effective correctional resource management is data. When sentencing is implemented uniformly, as under sentencing guidelines, the resulting sentences are fairly predictable, thereby presenting a starting point for analysis. But in order to forecast correctional populations accurately, a jurisdiction must also track actual sentencing data. This permits the jurisdiction to confirm sentencing

patterns, which may deviate from the recommended guidelines at a predictable rate. The combination of the expected guidelines sentence and the actual sentence provides the commission with a rich data set from which it can develop a long-term forecasting model or gauge the impact of pending legislation or guidelines modifications. In the states where the collection of such data has been made a priority, the commission is able to discern how many prison or jail beds will be needed for any given piece of legislation. Unlike the federal government, state legislatures must balance their budgets (most cannot carry a deficit), so for every bill that results in an increase in prison beds, the legislature must either fund the projected number of additional beds or alter sentencing policy elsewhere to offset the need. Kansas is the only state that is affirmatively tasked with reducing the prison population. When the prison population exceeds 90 percent of capacity, the commission must then propose modifications to the guidelines or other laws in order to lower the total prison population and avoid overcrowding. But this method of prison population control is only as strong as is the will of the legislature to enact such changes.

Structural Variations in Sentencing Guidelines

The development of sentencing guidelines involves multiple decisions that impact the jurisdiction's sentencing policy and its use of correctional resources. This section details several decisions relating to the structure and operation of sentencing guidelines.

Sentencing Grids

As mentioned in the overview, the two primary determinants of recommended sentences in guidelines systems are offense severity and criminal history, and most states (12 of 15) arrange these attributes into a grid format. Like the federal guidelines, three states use a single grid to cover all sentencing decisions.¹¹ Nine of the fifteen states use multiple grids so that they can differentiate the sentence ranges for different types of offenses. For example, Minnesota has a grid for drug offenses, a grid for sex offenses, and a grid for all other offenses,¹² and each grid is structured with slightly different rules. The statutory maximum sentence for any offense rarely appears

¹¹ Arkansas, Massachusetts, and Oregon.

¹² See Minn. Sentencing Guidelines §§ 4.A. – 4.C. (Aug. 1, 2016).

FIGURE 2.
Excerpt from Minnesota Sentencing Guidelines Grid

SEVERITY LEVEL OF CONVICTION OFFENSE <i>(Example offenses listed in italics)</i>	Criminal History Score							
	0	1	2	3	4	5	6 or more	
<i>Agg. Robbery; 1st Degree; Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI; Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84

on the standard grid, but the statutory maximums for all sex offenses are achieved for those with the highest criminal history scores on the sex offender grid. Other states that have multiple grids include Michigan, where each of the nine grids corresponds to one of the felony offense classifications in Michigan’s criminal code,¹³ and Pennsylvania, which has grids to handle specialized issues such as sentencing enhancements and differentiated sentencing for juvenile offenders.¹⁴

A key policy decision in constructing a grid is where to place the dispositional line or lines, which is the demarcation between non-incarceration sentences and prison. In some cases, the sentencing grid may simply mirror statutory eligibility for particular dispositions, such as the notations on the Pennsylvania grid that a defendant can be sentenced to “BC” or boot camp. In other cases, the differentiation in sentencing options is a policy

decision made by the sentencing commission, such as the dispositional line between probation and prison on the Minnesota grid.¹⁵ State guidelines systems communicate these dispositional options through the use of shading or acronyms on the sentencing grids, and this visualization may encourage greater use of non-prison sanctions. In contrast, at the federal level, although probation is permissible for offenses that fall into Zones A and B, one would have to read the applicable guideline to know this; the only information communicated on the grid directly is the length of incarceration.

To demonstrate how dispositional options are included on state grids, compare for example, the excerpts from the Minnesota Sentencing Guidelines Grid and Pennsylvania Basic Sentencing Matrix at Figures 2 and 3.

¹⁵ See Dale G. Parent, *Structuring Criminal Sentences* ch. 6 (Butterworth Legal Publishers 1988) (describing the process used by the Minnesota Sentencing Guidelines Commission to establish the dispositional line).

¹³ See Mich. Sentencing Guidelines Manual Sentencing Grids (May 1, 2017).

¹⁴ 204 Pa. Code §§ 303.16–.18 (2016).

FIGURE 3.
Excerpt from Pennsylvania Basic Sentencing Matrix

Level	OGS	Example Offenses	Prior Record Score							RFEL	REVOC	Agg/Mit
			0	1	2	3	4	5				
Level 5 State Incar	9	Sexual Exploitation of Children Robbery-Commit/Threat F1/F2 Burglary-Home/Person Present Arson-No Person in Building	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12	
Level 4 State Incar/ RIP Trade	8(F1)	Agg Assault-Cause BI w/DW Theft (Firearm) Identity theft (3rd/+ & Vic>60 yrs) Home by Veh-DUI or Work Zone Theft (>\$100,000) PWID Cocaine (10<50 g)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9	
Level 3 State/ Cnty Incar RIP trade	7	Robbery-Inflicts/Threatens BI Burglary-Home/No Person Present Statutory Sexual Assault Theft (>\$50,000-\$100,000) Identify Theft 3rd/subq) PWID Cocaine (5-<10 g)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	NA	+/- 6	

Note: Though shown here on a gray scale, the PA grid is actually multi-colored, making these dispositional options stand out even more clearly.

On the Minnesota grid, shaded cells indicate that probation is the appropriate disposition and non-shaded cells indicate that prison is the appropriate disposition. The dark bolded line around the shaded cells represents the dispositional line, and this runs through the rest of the grid, establishing the boundary between presumptive probation and presumptive prison sentences. In the non-shaded cells, the numbers indicate the length of the presumptive prison term (top number), and a range within which the judge can impose a sentence without it being considered a departure. Though intermediate sanctions are available in Minnesota, the sentencing guidelines do not provide any guidance as to their use. In contrast, Pennsylvania’s Basic Sentencing Matrix dives into the weeds to visually depict a variety of sentencing options, including prison (state incarceration), county level incarceration, restrictive intermediate punishments (RIP), restorative sanctions, and boot camp. The darkest shading indicates that incarceration in the state prison is appropriate. Starting at Offense Gravity Score (OGS) 9, all sentences fall into this region, but at OGS 8, only those who fall into the repeat felony 1 and felony 2 offender criminal history category (RFEL) are recommended for prison. The next darkest shading, which fills out the majority of OGS 8 and a good portion of OGS 7, indicates that either prison or restrictive intermediate punishment (RIP) may be appropriate. Finally, in this excerpt, the second lightest shade indicates that incarceration at the state or county level may be appropriate, as well as restrictive intermediate punishment.

The Offense Severity Dimension

The starting point for determining the sentence under any guidelines system is the offense of conviction. In 11 of the 15 jurisdictions highlighted in this article, offense severity is a static factor. The severity level might be referred to by many names—offense seriousness, offense gravity score—but regardless of what it is called, the concept simply refers to a ranking system that places each offense in context with all other offenses. In developing the ranking system, the sentencing commission generally places crimes with similar offense elements, levels of harm, and statutory maximum sentences at the same severity level.¹⁶ Unlike the federal system, which has over 40 categories, 10 state systems arrange all offenses into just 10 to 15 categories, and one additional state uses 18 categories.¹⁷ And unlike the federal system, where the offense level is a starting point (base offense level) from which the offense level can increase or decrease when other facts related to the offense are considered, in these eleven state systems, the severity level is fixed. For example, in Kansas, where each row on the grid represents a severity level, the crime determines which row is used to find the presumptive sentence. Once the severity level is established, the only further movement on the grid is along the opposite dimension in accord with the defendant's criminal history.

There are just four state sentencing guidelines systems where additional facts impact the offense severity dimension: Alabama, Maryland, Michigan, and Virginia. Alabama and Virginia use sentencing worksheets, and each worksheet takes into account a number of factors relating to the offense and the offender's criminal history. The combined scoring of these factors establishes the guidelines sentence. In Alabama, in addition to scoring the offense of conviction, the worksheets assess weapons use and victim injury. In Virginia, the worksheets assess weapons use, victim injury, victim age, drug quantity, and embezzlement amount. Maryland, which has three sentencing grids, has established fixed severity levels for use on the drug and property grids, but has also established a composite offense score for use on its person offense grid. The composite score starts with

the commission's seriousness category, and then adds to it additional points for victim injury, weapons use, and the particular vulnerability of certain victims. Michigan is the state that is likely closest to the federal system in approach. There, the guidelines include 20 separate offense variables; the guidelines direct which variables to score for different offense types. The offense variables take into account such factors as weapons use, the number of victims, psychological and physical harm to the victim, intent, the defendant's role in the offense, and pattern of criminal behavior. But scoring offense variables in this manner made the guidelines vulnerable to attack following the *Blakely* to *Alleyne* line of cases, and the Michigan Supreme Court was forced to render the once mandatory guidelines advisory in order to save them.¹⁸

Thus, for the majority of state jurisdictions, the offense of conviction is the primary determinant of the offense severity dimension in the guidelines. It is not a blend of the charged offense and relevant conduct, as in the federal system. That is not to say that factors such as weapons use, drug quantity, role in the offense, and victim injury are not considered in state jurisdictions. Instead, such facts may already be included in the elements of the charged offense or in a contemporaneously charged sentencing enhancement or may be considered as grounds for departure.

The Criminal History Dimension

Criminal history is the other main determinant of the recommended sentence. But criminal history is more than a simple accounting of prior convictions. It is instead a composite of multiple measures of prior offending. At its core, criminal history almost always accounts for prior felonies, misdemeanors, and juvenile adjudications. Felonies are typically weighted more heavily and result in a higher criminal history score or category than misdemeanors, and more serious felonies will result in a higher criminal history score or category than less serious felonies. In contrast, it may take several misdemeanors to reach the equivalent criminal history value of one less serious felony.¹⁹ Some jurisdictions also incorporate "patterning" rules wherein similar priors are weighted even more heavily, thereby

further enhancing the criminal history for repeat offenders.²⁰ Additionally, criminal history often includes other factors that are tangentially related to prior offending, such as custody status (whether the offender was under some type of supervision status such as probation when the offense was committed),²¹ prior probation violations,²² and prior incarcerations.²³ From there, additional rules may exist that further enhance or lessen the value of the offender's criminal history. For example, some jurisdictions broadly define prior offenses so that when multiple current offenses are sentenced, each is included in the criminal history on the next offense to be sentenced.²⁴ In contrast, some jurisdictions incorporate decay or gap rules which serve to wash out or eliminate prior offenses from the criminal history if they are very old or if the individual achieved a crime-free existence for a specified number of years.²⁵ All of the

²⁰ For example, in North Carolina, one point is added to the criminal history score if all of the elements of the present offense are included in any prior offense. North Carolina Structured Sentencing Training and Reference Manual 11 (2014), available at http://nccourts.org/Courts/CRS/Councils/spac/Documents/ssstrainingmanual_14.pdf.

²¹ See, e.g., Wash. Stat. Adult Sentencing Guidelines Manual 22 (2016), available at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2016.pdf.

²² See, e.g., Utah Adult Sentencing & Release Guidelines 14, Form 1 (2016), available at <https://justice.utah.gov/Sentencing/Guidelines/Adult/2016%20Adult%20Sentencing%20Guidelines.pdf>.

²³ See, e.g., Va. Sentencing Guidelines Manual, Gen'l Instructions 28 (2014).

²⁴ Minn. Sentencing Guidelines §§ 1.B.10, 2.B.1.e (2016). *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). Note that the Minnesota rule is limited to cases in which the multiple offenses arise from separate behavioral incidents. Multiple offenses arising from a single course of conduct cannot be sentenced in this manner. Minn. Sentencing Guidelines § 2.B.1.e (2016).

²⁵ The Federal Sentencing Guidelines offer an example of a decay rule. Prior convictions are no longer counted in the criminal history score calculation after 10 or 15 years, depending on the length of sentence for the prior offense. U.S. Sentencing Guidelines Manual § 4A1.2(e) (2016). The Washington Sentencing Guidelines offer an example of a gap rule. Prior Class B felony convictions are not counted in the criminal history score if, since the last date of release from confinement, the offender has spent 10 consecutive years in the community without committing any crime. Wash. Stat. Adult Sentencing Guidelines Manual 18 (2016), available at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2016.pdf.

¹⁶ See e.g., Ark. Sentencing Standards Grid Offense Seriousness Rankings & Related Material 15-90 (Oct. 2015).

¹⁷ Delaware divides offenses by offense class and whether the offenses are violent or nonviolent, resulting in 18 offense levels.

¹⁸ *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015).

¹⁹ See, e.g., Minn. Sentencing Guidelines § 2.B (2016) (setting forth the weighting scheme and rules for counting prior felony, gross misdemeanor, and misdemeanor convictions).

factors described above come together to determine the appropriate criminal history score or category.

In deciding how to represent criminal history within the guidelines, two main approaches have emerged. Like the federal guidelines, 11 of the 15 highlighted state jurisdictions use a point-based system in which the total criminal history score is determined by adding up points for the various measures of criminal history described above. The remaining four state jurisdictions²⁶ take a categorical approach in which the applicable criminal history category is determined by the number and severity of prior offenses. As an example, Table 4 shows the criminal history categories used in Oregon.

Both approaches to criminal history are methods of accounting for the seriousness of prior offenses. When a point-based system is used, the guidelines usually also weight prior offenses so that more serious priors add more points to the score and push the defendant into higher criminal history categories more quickly than less serious offenses. Very lengthy criminal histories will also result in higher criminal history scores. When a categorical system is used, the defendant's progression through the criminal history categories is nonlinear. A first-time defendant will always be placed in the lowest criminal history category; Category I in the Oregon example. But a second-time offender could be placed in any number of categories, depending on the severity of the prior offense. In the Oregon example, if the defendant's prior offense was a Class A misdemeanor, the defendant's criminal history would increase from Category I to H, a one-step move. If the prior was a non-person felony, the defendant would move from I to G, a two-step move. But if the prior was a felony person offense, the defendant would move from Category I to D—a full five-step move—even if the current offense is much less serious than the prior. Both methods of structuring criminal history present pros and cons.

Under the point-based approach, the defendant's criminal history builds gradually as the individual develops a criminal record until the highest criminal history point value is reached. Progression across the point-based

TABLE 4.
Oregon Criminal History Categories

A	The criminal history includes three or more person felonies in any combination of adult convictions or juvenile adjudications.
B	The criminal history includes two person felonies in any combination of adult convictions or juvenile adjudications.
C	The criminal history includes one adult conviction or juvenile adjudication for a person felony; and one or more adult conviction or juvenile adjudication for a non-person felony.
D	The criminal history includes one adult conviction or juvenile adjudication for a person felony but no adult conviction or juvenile adjudications for a non-person felony.
E	The criminal history includes four or more adult convictions for non-person felonies but no adult conviction or juvenile adjudication for a person felony.
F	The criminal history includes two or three adult convictions for non-person felonies but no adult conviction or juvenile adjudication for a person felony.
G	The criminal history includes four or more adult convictions for Class A misdemeanors; one adult conviction for a non-person felony; or three or more juvenile adjudications for non-person felonies; but no adult conviction or juvenile adjudication for a person felony.
H	The criminal history includes no adult felony conviction or juvenile adjudication for a person felony; no more than two juvenile adjudications for non-person felonies; and no more than three adult convictions for Class A misdemeanors.
I	The criminal history does not include any juvenile adjudication for a felony or any adult conviction for a felony or Class A misdemeanor.

Source: *Or. Admin. R. 213-04-007 (2015)*.

criminal history categories is relatively modest, generally increasing by one to two categories at a time, depending upon the weighted value of the prior crimes. However, a long record of very low-level offenses can accrue a significant criminal history score, resulting in sentences of confinement for crimes that might ordinarily garner probation sentences.

The categorical approach divides criminal history categories between person and non-person, or less serious and very serious offenses. Movement across the categories is sporadic. Punishment is significantly increased for individuals with the more serious offenses in their past. Thus, although the progression of sentences on the grid may appear to increase incrementally, because an offender who commits a person or very serious offense will leapfrog over several criminal history categories, the resulting sentence will represent a significant—and one might argue, disproportional—increase from the punishment received by the first-time offender. On the other hand, the categorical approach also prevents a low-level repeat offender from attaining the highest criminal history categories. Offenders who never commit a person offense (or a more serious offense, depending on the criteria for establishing the categories) will remain in the lower three or four criminal history categories indefinitely, regardless of the number of offenses on their criminal records. In this way, the categorical approach serves to cap the sentence for low-level offenders.

Parole Release Discretion

One might assume that a shift to sentencing guidelines also requires a shift to determinate sentencing (a fixed term rather than a range) and abolishment of parole as a release mechanism. But in fact, 7 of the 15 states highlighted in this article have retained parole release discretion: Alabama, Arkansas, Maryland, Massachusetts, Michigan, Pennsylvania, and Utah. In these states, the guidelines are generally utilized to establish one end of the sentencing range—either the minimum time to serve or the maximum sentence—and the parole board determines the actual time served within that range. The guidelines are used to set the minimum term in Michigan and Pennsylvania and the maximum term in Alabama, Arkansas, and Massachusetts. The guidelines set both ends of the range in Maryland. And in Utah, the guidelines are merely a guide to the parole board as to the typical time served.

Operating on the Advisory to Mandatory Continuum

An important characteristic of sentencing guidelines is whether they are considered advisory or mandatory. The term “advisory” connotes that the guidelines are a starting point or suggestion for sentencing while the term “mandatory” connotes that the sentences established by the guidelines are required. In truth, no system is fully advisory or mandatory. Though just 5½ jurisdictions would classify themselves as mandatory (with one

²⁶ The jurisdictions that use point-based criminal history are Alabama, Arkansas, Maryland, Michigan, Minnesota, North Carolina, Pennsylvania, Utah, Virginia, Washington, and Washington, D.C. Delaware, Kansas, Massachusetts, and Oregon take the categorical approach.

of Alabama's two sets of guidelines constituting the ½), all guidelines systems exist on a continuum of enforceability, and some jurisdictions that label their guidelines advisory are in application further along the continuum towards the mandatory end. Two key factors that impact the advisory or mandatory nature of the guidelines are departures and appeals.

Departures

A departure is a sentence other than that recommended in the sentencing guidelines. Every state guidelines system permits judges to pronounce sentences that are harsher than (aggravated) or less severe than (mitigated) the recommended guidelines sentences. But while some systems place no limits on these actions, others place greater restraint on the exercise on judicial discretion. The degree of restraint relates somewhat to whether the system deems its guidelines to be advisory or mandatory, but in reality, this restraint is actually a factor that may push the system along the advisory to mandatory continuum.

One measure of restraint on judicial discretion is to require that a specific standard be met in order for the court to pronounce a departure sentence. Six jurisdictions do not articulate such a standard: Arkansas, Michigan, Maryland, Pennsylvania, Utah, and Virginia. But oddly, with all the variation in the states as to every other aspect of sentencing guidelines, the other nine states articulate variations on just two standards. Either the court must have substantial and compelling reasons for ordering a sentence that deviates from the guidelines,²⁷ or the court must specify or make findings about aggravating or mitigating factors that support a departure sentence.²⁸

A second measure of restraint is to require, or at least request, the court to state on the record or in writing its reasons for sentencing outside of the guidelines. Here, every state except Michigan imposes such a requirement, including those that did not articulate a standard for departure in the first place. The only reason that Michigan differs from the other jurisdictions is that the statute originally containing this requirement was struck by the Michigan Supreme Court when the court rendered the Michigan Sentencing Guidelines advisory in a *Booker*-type fix.²⁹

Having required or requested the court to state the reasons for departure, most sentencing commissions collect and track the departure reasons, and this can operate as a third restraint on departures. There are two primary reasons that a state might choose to collect and track departure data. The first is to establish the rate of compliance with the guidelines. If the goal of sentencing guidelines is to bring greater uniformity and proportionality to sentencing, then that can only be achieved when the majority of cases are sentenced in accord with the guidelines. Monitoring and regularly reporting on compliance provides feedback to the criminal justice system about whether it is meeting that goal. In some jurisdictions, data is reported by county or judicial district; in others, it is reported even by judge, and thus can serve as a type of peer pressure to conform. The second reason to collect and report on departure data is so that it can serve as a feedback loop for the commission and state legislature. When the sentencing commission regularly collects and analyzes sentencing data, the commission will be able to discern patterns and trends in sentencing practices over time. This might reveal offenses for which the courts regularly impose departures, and such information is a signal that the criminal justice system is dissatisfied with the recommended sentences under the guidelines, or the laws for which the sentences are recommended, or both.

It should be noted, however, that a few jurisdictions undercut the value of the measures described above by defining departures in such a way that many sentences outside of the guidelines are not deemed to be departures. For example, in Washington D.C., where the guidelines are purely advisory, there are three ways to sentence outside the presumptive range within a given cell. The first is to follow the departure procedure, which includes the requirement to state reasons for the departure. But the second and third methods fall wholly outside of the guidelines. The court can impose a non-guidelines sentence that is the result of a plea agreement or the court can simply choose not to follow the guidelines altogether. Neither of these situations is considered a departure.³⁰

unconstitutional when in *Alleyn v. U.S.*, decided in 2013, the U.S. Supreme Court extended the rule in *Blakely* to sentencing systems in which judges could impose mandatory minimum sentences based on facts not found by a jury. *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015).

³⁰ D.C. R. Crim. P. 11(c)(1)(C); D.C. Voluntary

Appeals

Another factor that impacts the strength of sentencing guidelines within a system is whether the parties can appeal guidelines and non-guidelines sentences. When parties can appeal sentences that are within the scope of the guidelines, the parties may be able to seek redress when the guidelines are calculated incorrectly or when a legitimate argument arises as to the application of a certain provision (e.g., deciding how an out-of-state offense should be counted in criminal history). This serves as a check on the court's accuracy in applying the guidelines, and ensures that there are common understandings and interpretations of the various sentencing guidelines provisions.³¹ When parties can appeal sentences that are outside of the guidelines, the appellate courts have the ability to establish the outer boundaries of the trial court's discretion by accepting or rejecting departure reasons and by considering whether limits should be placed on the extent of the departure sentence.³² Of the fifteen jurisdictions highlighted in this article, six permit appellate review of sentences that are within the recommended guidelines range, primarily for error correction purposes, while eight permit review of departure sentences.³³

Just as the federal guidelines must be the starting point for sentencing in federal court, three state systems that are self-described as advisory also require the court to consider the jurisdiction's sentencing guidelines: Maryland, Michigan, and Pennsylvania. However, this requirement is hollow in Maryland, where there is no right to appeal either a within-guidelines sentence or a departure. In contrast, the requirement is more meaningful in Michigan, where one can appeal a departure sentence, and the requirement pushes the jurisdiction significantly towards the mandatory end of the continuum in Pennsylvania, where sentences can be appealed in both situations.³⁴

Sentencing Guidelines Manual § 5 (2015).

³¹ See, e.g., *Commonwealth v. Kopp*, 591 A.2d 1122, 1127 (Pa. Super. Ct. 1991) (court applied an incorrect offense gravity score).

³² See, e.g., *State v. Evans*, 311 N.W. 2d 481 (Minn. 1981) (holding upward departures may not exceed twice the presumptive prison term except in rare cases of extremely aggravated circumstances).

³³ Alabama has two sets of guidelines: one set that is voluntary, and one set that is presumptive. Only sentences that deviate from the presumptive guidelines may be appealed. Ala. Code §§ 12-25-34.2(c), 12-25-35(c) (2017).

³⁴ The Pennsylvania guidelines have strong characteristics of a mandatory system, despite the fact that

²⁷ See, e.g., Or. Admin. R. 213-008-0001 (2017).

²⁸ See, e.g., N.C. Gen. Stat. § 15A-1340.16(b) (2017).

²⁹ The Michigan guidelines were deemed to be

TABLE 5.
Placing Jurisdictions on the Advisory to Mandatory Continuum Based on Appeal and Departure Standards

Jurisdiction	Advisory or Mandatory (Self-Described)	W/In Guidelines Appeal Permitted	Appeals of Departures Permitted	Departure Standard Articulated	Departure Reasons Required	Advisory or Mandatory In Application
Arkansas	Advisory	No	No	No	Yes	Advisory
Maryland	Advisory	No	No	No	Yes	
Utah	Advisory	No	No	No	Yes	
Virginia	Advisory	No	No	No	Yes	
District of Columbia	Advisory	No	No	Yes	Yes	Mandatory Elements, but Advisory in Application
Delaware	Advisory	No	No	Yes	Yes	
Massachusetts	Advisory	No	No	Yes	Yes	
Federal	Advisory	Yes	Yes	Yes	Yes	Leans Mandatory
Michigan	Advisory	Yes	Yes	No	No	
Pennsylvania	Advisory	Yes	Yes	No	Yes	
Alabama*	Both	No	Yes	Yes	Yes	Mandatory
Kansas	Mandatory	No	Yes	Yes	Yes	
Minnesota	Mandatory	Yes	Yes	Yes	Yes	
North Carolina	Mandatory	Yes	Yes	Yes	Yes	
Oregon	Mandatory	Yes	Yes	Yes	Yes	
Washington	Mandatory	Yes	Yes	Yes	Yes	

Source: Sentencing Guidelines Resource Center, *Jurisdiction Profiles and Case Law Summaries*, sentencing.umn.edu

* Alabama has two sets of guidelines; only the presumptive guidelines, which would be characterized as mandatory, are featured here.

Looking at departures and appeals together, one can see that a further relationship underlies the more mandatory systems (Table 5). All of the jurisdictions that would label themselves as mandatory permit appeals of departure sentences, and all articulate a departure standard, thereby establishing a parameter to govern the appeal (e.g., whether the court's reason for the departure was substantial and compelling). These are the jurisdictions that are firmly on the mandatory end of the continuum, because the guidelines must be followed unless the court meets a specified standard for departure, and even then, appeal is permitted, thereby creating a mechanism to enforce the use of the guidelines. Pennsylvania and Michigan, which would self-identify as advisory, lean more towards the mandatory end of the continuum by requiring that the guidelines be considered and by permitting appeal based upon errors in application of the guidelines and departure

the Pennsylvania Supreme Court has deemed them to be advisory. *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1119 (Pa. 2007).

sentences. Moreover, a robust case law has developed to fill in the lack of a departure standard in Pennsylvania, and case law is developing in Michigan. But here, jurisdictions like the District of Columbia, Delaware, and Massachusetts stand out: although they articulate a standard for departure, with no right of appeal to enforce that standard, the requirement is somewhat meaningless. The remaining jurisdictions are firmly on the advisory end of the system, relying only on the potential for peer pressure to enforce the application of the guidelines.

Conclusion

The state sentencing guidelines described in this article present a variety of structures and variations, as one would expect in the laboratory of the states. Some variations, such as the choice between a point-based and categorical criminal history system, raise policy questions. Further, variations—such as the District of Columbia's policy to define departures so as to exclude a multitude of non-guidelines

sentences—serve to weaken the impact of the guidelines. And others, such as Pennsylvania's requirement to articulate departure standards and enforcement by appeal, serve to strengthen the ability of the guidelines to deliver on the twin promises of uniformity and proportionality or to contribute to the management of the state's prison population. All systems need constant monitoring and adjustment, and for that, the retention of an active sentencing commission is essential. This article just begins to scratch the surface of the full range of variation and policy issues that comprise state sentencing guidelines. For more information, visit the Sentencing Guidelines Resource Center (sentencing.umn.edu), where the Robina Institute is frequently adding content and cross-jurisdictional analysis about additional sentencing guidelines topics.