

PRINCIPLES, PRAGMATISM, AND POLITICS: THE EVOLUTION OF WASHINGTON STATE'S SENTENCING GUIDELINES

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I INTRODUCTION

Although the U.S. Federal Sentencing Guidelines have received much attention (and criticism),¹ we do well to remember that the United States is a federal system, and that each of the fifty states has its own sentencing rules and procedures. Today, roughly half of the states have sentencing commissions that issue guidelines²—which are generally similar to the federal guidelines in form³ but different in structure and content.⁴ This article examines the history and operation of sentencing in Washington state, an early leader in the development of sentencing guidelines in the United States. Washington state's guidelines are far less complex and rigid than the Federal Sentencing Guidelines. Moreover, whereas federal judges exercise discretion only by departing from the guidance of the U.S. Sentencing Commission, the Washington guidelines themselves

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1. See generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1636–67 (2012).

2. *About NASC*, NAT'L ASS'N OF SENTENCING COMM'NS, <http://www.thenasc.org/aboutnasc.html> (last visited Dec. 14, 2011) (listing the sentencing commission or council websites for twenty-two states); *but see also* S. 5891, 62d Leg., 1st Spec. Sess. (Wash. 2011) (eliminating the Washington State Guideline Commission as an independent agency in 2011 due to state budgetary concerns).

3. See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1325 (2005) (“Most American sentencing guidelines systems use some form of sentencing grid or table similar to the federal model”); *cf.* STITH & CABRANES, *supra* note 1, at 177 (noting that “[s]everal states have adopted only nonbinding guidelines or guidelines in ‘narrative’ format . . . rather than a grid like the Sentencing Table”).

4. STITH & CABRANES, *supra* note 1, at 177, 248 n.149 (“[N]o other jurisdiction has produced sentencing guidelines that come close to matching the United States Sentencing Guidelines in complexity and rigidity.”); *see also* NAT'L ASS'N OF SENTENCING COMM'NS, *OVERVIEW OF NASC 1*, available at http://www.thenasc.org/images/NASC_Overview.pdf (“[T]he sentencing policy changes among the early states, while similar in some aspects, were structured differently depending on each state’s criminal code and sentencing structure.”).

encourage the exercise of judicial discretion in sentencing the individual offender.

In the early 1980s, when Washington began its sentencing reforms, the State was at the forefront of a national movement.⁵ A number of goals motivated its reforms, including the desire to combat “unwarranted” sentencing disparities, to create greater transparency and uniformity in the sentencing process, and to promote a punitive philosophy of “just deserts.”⁶ In the initial stages of those reforms, the state sought to reduce sentencing disparities by confining judicial discretion to “exceptional” cases.⁷ As the number of incarcerated offenders continually increased,⁸ Washington expanded the discretion of trial judges to impose more non-prison sentences.⁹ That move highlights the inherent tension between the high ideals of just deserts and uniformity on the one hand, and the practical reality of limited resources on the other.

One especially interesting aspect of Washington state’s guidelines system is that, from the beginning, most aggravating factors that resulted in a higher guideline range were treated as equivalent to elements of the crime—to be charged in the indictment and proven beyond a reasonable doubt at trial.¹⁰ However, one of the few factors *not* treated as an “element” was fact-finding that could trigger an “exceptional” sentence above the guideline range; judges, not juries, found such facts, and the standard of proof was by a preponderance of the evidence rather than beyond a reasonable doubt.¹¹ In *Blakely v. Washington*,¹² the Supreme Court famously held that such judicial fact-finding violated the U.S. Constitution’s Sixth Amendment right to a jury trial and to proof beyond a reasonable doubt.¹³ In the wake of *Blakely*, Washington state decided to treat *all* exacerbating sentencing factors, including those allowing imposition of an “exceptional” sentence, as elements of the underlying crime.¹⁴ That remedy, like Washington state’s guidelines system itself, was legislatively prescribed.

Washington’s system has several advantages over the Federal Sentencing Guidelines. First, the severity of sentencing in Washington, although greater

5. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 71 (2001) (“Washington State enacted what at the time was the most comprehensive reform of adult sentencing laws in the nation.”).

6. *See id.* at 84–85 (describing the sentencing policy issues the legislation resolved).

7. *Id.* at 88.

8. *Id.* at 114.

9. *Id.* at 113–14.

10. *See* WASH. REV. CODE § 9.94A.537 (2011). Since 1983, for instance, Washington has provided a sentencing enhancement for use of a deadly weapon, and this is effectively treated as an element of the crime. WASH. REV. CODE § 9.94A.125 (2000) (now codified at § 9.94A.825 (2011)) (requiring jury trial and special verdict for deadly weapon sentencing enhancement).

11. *Id.* § 9.94A.535.

12. 542 U.S. 296 (2004).

13. *Id.* at 305.

14. Lenell Nussbaum, *Sentencing in Washington After Blakely v. Washington*, 18 FED. SENT’G REP. 23, 24–25 (2005).

than before the guidelines, has not skyrocketed to the extent it has in the federal system.¹⁵ Second, Washington appears to have been more successful in restraining prosecutorial control over sentencing.¹⁶ Yet Washington's sentencing regime is not without its own weaknesses; in particular, the state (like the U.S. Sentencing Commission) has put great store in relatively arbitrary measures of "compliance" in measuring its success, while largely ignoring less visible forms of sentencing disparity.¹⁷ And despite its efforts to encourage more non-incarcerative sentences,¹⁸ imprisonment rates and prison costs have continued to rise.¹⁹

II

THE ROAD FROM INDETERMINATE TO GUIDELINE SENTENCING

With the passage of the Sentencing Reform Act of 1981 (SRA),²⁰ sentencing in Washington state underwent a radical transformation. Under the new law, the state's longstanding system of expansive judicial and parole discretion was replaced with a set of statutory sentencing guidelines enacted by the state legislature.²¹

The SRA established the Washington State Sentencing Guidelines Commission ("the Commission") to draft the guidelines.²² At the federal level and in other states, there were initial efforts to distance newly established sentencing commissions from the vagaries of politics.²³ In Washington, however, the Commission and its guidelines were transparently part of, and subject to,

15. See STATE OF WASH. SENTENCING GUIDELINES COMM'N, 20 YEARS IN SENTENCING: A LOOK AT WASHINGTON STATE ADULT FELONY SENTENCING FISCAL YEARS 1989 TO 2008, at 22–29 (2010) [hereinafter 20 YEARS IN SENTENCING]. Cf. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236019, PROBATION AND PAROLE IN THE UNITED STATES, 2010, at 29 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus10.pdf> (reporting Washington state as having one of the highest community supervision rates per 100,000 adults of all U.S. states).

16. See *infra* Part VI; see also Boerner & Lieb, *supra* note 5, at 118–23 (discussing, three years before *Blakely v. Washington*, the regional differences in prosecutorial practices across Washington). But see David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 199 (1994) (writing, ten years before *Blakely*, that "[w]hile no formal studies have been conducted, there are no indications [these] provisions have had any effect [on curbing prosecutorial discretion]. The reasons are probably institutional").

17. See Boerner & Lieb, *supra* note 5, at 80–81; STATE OF WASH. SENTENCING GUIDELINES COMM'N, DISCRETION UNDER THE SENTENCING REFORM ACT AND THE IMPACT OF *BLAKELY V. WASHINGTON* 15 (Dec. 1, 2005) [hereinafter DISCRETION UNDER THE SENTENCING REFORM ACT]; see also Kim Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT'G REP. 233, 238 (2005) (explaining that "[a]dvisory guidelines can probably expect success where other mechanisms serve as a strong incentive to judicial compliance").

18. See 20 YEARS IN SENTENCING, *supra* note 15, at 46–48.

19. *Id.* at 13–14.

20. Sentencing Reform Act of 1981, ch. 137, 1981 Wash. Sess. Laws 519 (codified as amended at WASH. REV. CODE § 9.94A (2011)).

21. See *id.* § 12.

22. *Id.* § 4.

23. See STITH & CABRANES, *supra* note 1, at 42–46 (1998); MICHAEL TONRY, SENTENCING MATTERS 60–61 (1996).

political forces inside and outside of the state legislature.²⁴ Moreover, the SRA and the Commission set both idealistic *and* pragmatic goals at the outset of the project.²⁵ These factors—legislative primacy and a mixed-goal approach—resulted in a system that has both reduced visible disparities and endured with few structural changes.²⁶ On the other hand, Washington’s initial success at reducing incarceration costs has given way to national trends of greater reliance on, and longer periods of, incarceration.²⁷

As noted, the guidelines the Commission created are similar in structure to the federal guidelines: Washington uses a sentencing grid—a two-dimensional matrix—with the seriousness of the offense on one axis and the defendant’s prior criminal record on the other. Each box on the grid provides a relatively small sentencing range.²⁸

A. Indeterminate Sentencing

In the decades preceding the Sentencing Reform Act, Washington employed indeterminate sentencing and was explicitly committed to rehabilitation. In a system of “indeterminate sentencing,” a defendant’s release date is not set by the sentencing judge, but by the parole board. Because indeterminate sentencing allows state officials to make individualized determinations about a defendant’s potential for rehabilitation—and to adjust that determination in light of the defendant’s subsequent progress—this approach is tied both philosophically and historically to a commitment to rehabilitation as one of the goals of punishment.²⁹ Washington’s indeterminate structure divided all felony convictions into three broad categories: Class A, B,

24. See Sentencing Reform Act of 1981 § 4(1) (“A sentencing guidelines commission is established as an agency of state government.”); *id.* § 6 (“The commission consists of fifteen voting members, one of whom the governor shall designate as chairperson. With the exception of ex officio voting members, the voting members of the commission shall be appointed by the governor, subject to confirmation by the senate.”). In its most recent form, the commission consisted of twenty voting members. WASH. REV. CODE § 9.94A860(2) (2011).

25. Sentencing Reform Act of 1981 § 1.

26. Boerner & Lieb, *supra* note 5, at 72.

27. Compare 20 YEARS IN SENTENCING, *supra* note 15, at 45–46, with PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 236096, PRISONERS IN 2010, at 5–6 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>. But cf. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 1–2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf> (reporting a total population decline in adult correctional systems).

28. See WASH. REV. CODE § 9.94A.510 (2011).

29. See VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 87 (2009) (asserting that in the late 1960s and early 1970s, Washington state “created a kind of penal sanctioning based on the principle of parsimony. . . . [S]tate officials actively pursued policies to divert offenders away from prison and release inmates early and in large volume through good time credits, parole, and work release. Officials also restricted parole revocation . . .”). For a detailed explanation and critique of the indeterminate sentencing system in Washington at that time, see Jack Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 WASH. L. REV. 617 (1976).

and C felonies.³⁰ Each felony class had a maximum prison term, and the judge had complete discretion to sentence an individual to any term, from probation³¹ to the statutory maximum.³² The sentence imposed was not subject to appellate review.³³ But the sentence pronounced by the judge was simply the *maximum* prison term, for it was Washington's parole authorities who truly determined when prisoners were released.³⁴ In accordance with the reigning rehabilitative theory of the time, the state parole board decided release dates based on individual inmates' progress and expert evaluation.³⁵ Those decisions were opaque and ad hoc; the Washington Board of Prison Terms and Paroles did not even promulgate comprehensive guidelines until 1976.³⁶

During this era, in Washington as in the nation more generally, retribution was a distinctly secondary rationale for criminal punishment. In the 1910 case of *State v. Strasburg*,³⁷ for instance, the state supreme court quoted the *government's* brief:

[T]he science of criminology now convinces us that . . . a dominant percentage of all criminals are not free moral agents, but, as a result of hereditary influences or early environments, are either mentally or morally degenerate . . . [and that the purpose of sentencing] is to instruct, educate, and reform rather than further to debase the individual³⁸

By the 1970s, however, widespread criticism of indeterminate sentencing had surfaced in Washington and throughout the nation, as scholars such as Alan Dershowitz and Andrew Von Hirsch argued for a renewed focus on retribution.³⁹ Both the Washington Association of Prosecuting Attorneys and the Washington State Bar Association proposed revisions to the criminal code that would reflect a greater just-deserts emphasis;⁴⁰ at the same time, judges and

30. See WASH. REV. CODE § 9A.20.010 (Supp. 1975); Meyerson, *supra* note 29, at 618 n.4 (citing WASH. REV. CODE § 9A.20.010 (Supp. 1975)).

31. WASH. REV. CODE § 9A.20.010 (Supp. 1975). Currently, the court has discretion to “summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted.” WASH. REV. CODE § 9.95.200 (2011).

32. Meyerson, *supra* note 29, at 617–18 (citing WASH. REV. CODE § 9.95.010 (1974)).

33. See Boerner & Lieb, *supra* note 5, at 86 (citing WASH. REV. CODE § 9.94A.340 (2001)).

34. *Id.*

35. See Meyerson, *supra* note 29, *passim*.

36. See David Boerner, Comparative Study of Prosecution Systems 23 (April 2010) (unpublished manuscript) (on file with author).

37. 60 Wash. 106 (1910).

38. *Id.* at 122 (quoting Brief for Respondent, *State v. Strasburg*, 60 Wash. 106). For an examination of this same phenomenon at the national level, see STITH & CABRANES, *supra* note 1, at 18–24. See also MODEL PENAL CODE § 7.01 cmt. 3 at 227 (1962).

39. See ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976); Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974). For a discussion of the widespread criticism of indeterminate sentencing in the 1970s, see STITH & CABRANES, *supra* note 1, at 30–34; TONRY, *supra* note 23, at 10.

40. See Boerner, *supra* note 36, at 17 (reporting that the Washington Association of Prosecuting Attorneys proposed a draft criminal code in 1973, and the Washington State Bar Association proposed a draft code in 1974).

prosecutors began to adopt internal standards governing their own conduct and discretion.⁴¹ By the end of the decade, a subcommittee of the House Social and Health Services Committee had decided to reexamine the state's criminal sentencing system and develop policy recommendations for the legislature.⁴² Finally, in 1981, Washington enacted the Sentencing Reform Act.⁴³

B. The Sentencing Reform Act

When it moved to adopt some form of determinate sentencing, the Washington state legislature considered two possible models. The first, represented by California's 1976 Uniform Determinate Sentencing Act, was an entirely legislative process; the California Legislature had enacted a new sentencing law that dramatically curtailed the discretion of both sentencing judges and the Adult Authority, California's parole board.⁴⁴ The second model, represented by reforms in Pennsylvania and Minnesota, involved the creation of a new administrative agency—a sentencing commission that would develop new sentencing rules pursuant to a general legislative mandate.⁴⁵

Washington adopted a middle ground between those two models. The legislature created a sentencing commission to develop guidelines and advise the legislature, but the guidelines would become effective only when the legislature itself enacted them into law. Washington's Commission would be composed of fifteen voting members drawn from a variety of legal, political, and law enforcement backgrounds; the governor would appoint all members.⁴⁶ The Commission would also evaluate the efficacy and results of current practices and policies, advise the legislature on future amendments to the guidelines and other sentencing laws, and recommend modifications to current sentencing practices.⁴⁷ That approach allowed the legislature to take advantage of the time, energy, and expertise of a dedicated sentencing agency while still maintaining democratic control over the process. More transparently and directly than any other jurisdiction with a sentencing commission, the Washington state legislature thus reposed in itself, rather than in the Commission, the broad authority previously delegated to judges and parole officials. In 1983, in a nearly unanimous vote, the legislature adopted the Commission's proposed guidelines with only minor changes.⁴⁸

41. Boerner, *supra* note 36, at 18–19 (describing a series of written policies “restrict[ing] the filing of habitual criminal charges to only a few of the cases in which they were technically sustainable”).

42. See Mary Kay Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 289–312 (1979).

43. Sentencing Reform Act of 1981, 1981 Wash. Laws ch. 127, p. 354.

44. See Act of Sept. 20, 1976, ch. 1139, 1976 Cal. Stat. 5140 (codified as amended at CAL. PENAL CODE §§ 3000–3104 (West 2011)).

45. See MINN. STAT. §§ 244.09–244.11 (2011); 42 PA. CONS. STAT. §§ 2151–2156 (2011).

46. Sentencing Reform Act of 1981, ch. 137, 1981 Wash. Sess. Laws 519 § 6.

47. *Id.* §§ 4–6.

48. See Act of Jan. 10, 1983, ch. 115, 1983 Wash. Sess. Laws 546 (codified as amended at WASH. REV. CODE § 9.94 (2011)).

The SRA instructed the Commission to create a “series of recommended standard sentence ranges for all felony offenses.”⁴⁹ As has been true of virtually all sentencing reform efforts around the country in the last three decades, the legislature insisted that its general objective was to make the criminal justice system “accountable to the public” and to “structure” judicial discretion so as to reduce disparity.⁵⁰ The SRA rejected rehabilitation as the primary purpose of punishment, and focused instead on retribution and general deterrence. To that end, the law announced that the new sentencing system would seek to “(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history; (2) Promote respect for the law by providing punishment which is just; [and] (3) Be commensurate with the punishment imposed on others committing similar offenses.”⁵¹ The statute’s list of objectives also included the intention to “[o]ffer the offender an opportunity to improve him or herself” and “[m]ake frugal use of the state’s resources.”⁵² However, those appeared as the final two purposes specified in the SRA, perhaps reflecting an initial hierarchy of values.

At the same time, the SRA instructed the Commission not to consider factors relating to the defendant’s background and character. In its mandate to the Commission, the legislature insisted that the recommended ranges should be based solely on the seriousness of the offense and “the extent and nature of the offender’s criminal history.”⁵³ In 1983, as the Commission’s recommended ranges were enacted into law, the legislature emphasized that the guidelines would “apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.”⁵⁴

Any reader familiar with the U.S. Federal Sentencing Guidelines will read the previous paragraph with a sense of *déjà vu*. The U.S. Congress echoed the Washington legislature’s mandates to the state Commission in its Sentencing Reform Act of 1984, the law that created the U.S. Sentencing Commission.⁵⁵ Moreover, the federal Commission responded much as Washington’s Commission had, with presumptive guidelines and a grid, and by discouraging consideration of the offender’s personal history and characteristics.⁵⁶ Yet relevant constituencies in Washington have widely accepted the state

49. Sentencing Reform Act of 1981 § 4.

50. *Id.* § 1.

51. *Id.*

52. *Id.*

53. *Id.* § 4.

54. Act of Jan. 10, 1983, ch. 115, § 5, 1983 Wash. Sess. Laws 546, 551 (codified as amended at WASH. REV. CODE § 9.94A.340 (2011)).

55. Compare Sentencing Reform Act of 1984, tit. II, ch. II, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.), with Sentencing Reform Act of 1981 § 1.

56. See WASH. REV. CODE § 9.94A.510 (establishing “sentencing grid” table); *id.* § 9.94A.530 (establishing the “[s]tandard sentence range,” previously codified at § 9.94A.370 with the title “Presumptive sentence”). In *State v. Hunley*, 287 P.3d 584 (Wash. 2012), the Washington Supreme Court held one aspect of this provision (relating to proof of criminal history) unconstitutional.

guidelines,⁵⁷ and evaluations in secondary literature have been mostly positive,⁵⁸ while the federal guidelines, at least in their mandatory form, were widely reviled.⁵⁹

Why have the two reforms been received so differently? Perhaps the simple and less rigid structure of Washington's guidelines, discussed below, is one explanation. Whereas the federal guidelines were functionally mandatory,⁶⁰ Washington state authorized and encouraged the use of "alternative" and "exceptional" non-guideline sentences.⁶¹ Perhaps the content of the guidelines themselves in Washington state gained greater acceptance because the state's larger, more professionally diverse Commission incorporated more voices and served a greater number of interests than did the federal Commission. Perhaps the polity in Washington state—the public and the legislature, state prosecutors, and the defense bar—had greater consensus on the proper purposes, general severity, and considerations in determining punishment than is true of the country as a whole.

There is one other factor that may help explain this difference in constituency reaction: the state Commission, to a much greater extent than the federal Commission, based its guidelines on past sentencing practice.⁶² In other words, its presumptive sentencing guidelines usually sought to replicate past sentences,⁶³ with relatively minor, interstitial changes (in particular, the increased availability of non-incarcerative sentences) that were recommended by the associations of both superior court judges and prosecuting attorneys.⁶⁴ As a result, the introduction of Washington state's guidelines did not produce the marked increase in sentencing severity seen in the federal system.⁶⁵ On the federal level, both the proportion of non-probationary sentences and the duration of prison sentences jumped precipitously with the introduction of

57. See Boerner, *supra* note 36, at 24 (noting that the Sentencing Reform Act "represent[ed] . . . otherwise disparate interests and groups"); see also *id.* at 22–24 (explaining that voluntary sentencing guidelines, developed by various state bodies *before* the official Washington guidelines, helped "judges and other professionals . . . to understand the benefits of the structuring influence of external standards.").

58. See DAVID BOERNER, SENTENCING IN WASHINGTON 1–3 (1985) ("The sense one has from a review of the Sentencing Reform Act is of thoughtful and responsible reform.").

59. See STITH & CABRANES, *supra* note 1, at 5 & 197 nn.13–14. Interestingly, federal judges, defense attorneys, and prosecutors appear to be content with the current system of "advisory" federal guidelines. See Baron-Evans & Stith, *supra* note 1, at 1633–34 nn.8–11.

60. See *United States v. Booker*, 543 U.S. 220, 233–35 (2005) (concluding that the Guidelines were effectively mandatory because they permitted only a limited departure authority in some but not all cases); Baron-Evans & Stith, *supra* note 1, at 1635, 1646–57.

61. These are discussed *infra* Part III.

62. BARKER, *supra* note 29, at 106 ("The emergence of sentencing guidelines in Washington . . . was the result of an ongoing reform process that began in the late 1960s and intensified in the 1970s with the movement away from fortress prisons toward de-escalation.").

63. Boerner & Lieb, *supra* note 5, at 86.

64. See Sentencing Reform Act of 1981, ch. 137, 1981 Wash. Sess. Laws 519 § 4.

65. BARKER, *supra* note 29, at 105 (arguing that Washington's Sentencing Reform Act actually formalized the principle of parsimony that underlied the state's sentencing practices in the late 1960s and 1970s).

sentencing guidelines.⁶⁶ In contrast, the introduction of Washington’s guidelines initially produced an overall *decrease* in the proportion of convicted felons receiving a prison sentence,⁶⁷ as well as a decrease in the average length of actual time spent in prison.⁶⁸ Thus, the negative response to the federal guidelines may have been due not only to their turn toward general deterrence and just deserts, their complexity, and their grid-like structure, but also to their severe *content*.

Washington’s reforms were also different in that the Commission sought to structure the exercise of both judicial discretion *and* prosecutorial discretion. The Washington state SRA specifically instructed the Commission to create “recommended prosecuting standards in respect to the charging of offenses and plea agreements.”⁶⁹ Accordingly, Washington’s guidelines provide direct guidance to prosecutors and expressly seek to structure prosecutorial decision-making. In contrast, although the federal guidelines provide “policy guidance” regarding plea agreements,⁷⁰ that guidance is directed only at federal judges, not prosecutors. By seeking to rein in prosecutorial discretion, Washington may have avoided the concomitant increase in prosecutorial leverage that took place at the federal level—a consequence of the federal guidelines that has produced considerable criticism.⁷¹

Of course, the substance of Washington’s sentencing guidelines has not remained frozen since 1983. A number of changes—amendments proposed by the Commission and adopted by the legislature, amendments adopted by the legislature independent of the Commission, court decisions, and citizen initiatives—have altered the sentencing system, sometimes significantly, in the ensuing decades.⁷² But, beyond the changes mandated by the Supreme Court’s decision in *Blakely v. Washington*,⁷³ the structure of Washington’s system has remained stable.

III

SENTENCING UNDER THE GUIDELINES

Under the guidelines, a judge may impose three types of sentences: standard sentences, alternative sentences, and exceptional sentences. For each crime as adjusted by any statutory mitigating or aggravating factors, there is a presumptive sentence range that varies with the individual offender’s criminal

66. See STITH & CABRANES, *supra* note 1, at 63.

67. See DAVID L. FALLEN, SENTENCING PRACTICES UNDER THE SENTENCING REFORM ACT 5 (1987).

68. *Id.* at 8.

69. Sentencing Reform Act of 1981 § 4.

70. See U.S. SENTENCING GUIDELINES MANUAL, ch. 6.

71. See Stith & Cabranes, *supra* note 1, at 195–97 n.12.

72. For an overview of the developments in Washington’s sentencing system, see Boerner & Lieb, *supra* note 5.

73. See discussion *infra* Part IV.

history; a “standard sentence” is one that falls within that range.⁷⁴ For many less-serious crimes, the guidelines also authorize an “alternative sentence,” which generally involves reduced imprisonment.⁷⁵ “Exceptional sentences” are imposed when a judge determines that there are “substantial and compelling reasons justifying” a sentence (other than an alternative sentence) outside the guideline range.⁷⁶ An exceptional sentence may be either more lenient or more severe than the guideline range. While Washington has a few mandatory minimum sentences,⁷⁷ it has resorted to these minimum sentences far less often than have other states and the federal government.⁷⁸ One possible reason for Washington’s reduced reliance on mandatory minimum sentences is that the guidelines’ “standard” sentence, which itself is legislatively enacted, effectively operates as a statutory mandatory minimum sentence absent the mitigating circumstances permitting an alternative sentence or the extraordinary circumstances warranting an exceptional sentence. Washington’s sentencing code contains an extensive list of felonies, grouping the vast majority of these into fourteen classes, or “seriousness levels,” which form the rows of the standard sentencing grid.⁷⁹ Those rows intersect columns representing “offender scores” that ascend from a score of zero through “9 and up,” producing 140 cells in total.⁸⁰ The number and kinds of previous convictions determine the “offender score.”⁸¹ The offender scoring rules are somewhat complex, with different types of prior convictions counting differently depending on the nature of the current crime.⁸² The system for scoring offense “seriousness level,” however, is contained within a single section of the sentencing code⁸³ and is far simpler than the federal sentencing guidelines.

74. See WASH. REV. CODE § 9.94A.530 (2011); see also *id.* § 9.94A.533 (listing adjustments to standard sentences); *id.* § 9.94A.506 (listing limitations to standard sentencing ranges).

75. See *id.* §§ 9.94A.650–690.

76. *Id.* § 9.94A.535.

77. See, e.g., WASH. REV. CODE § 9.94A.540 (providing for mandatory minimum terms for first degree murder, certain first degree assaults, first degree rape, and “sexually violent predator escape”).

78. See, e.g., U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM A-1-18 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Appendix_A.pdf (listing 194 federal statutes that require mandatory minimum prison terms); CHRISTOPHER REINHART, CONN. OFFICE OF LEGIS. RESEARCH, 2008-R-0619, CRIMES WITH MANDATORY MINIMUM PRISON SENTENCES—UPDATED AND REVISED (2008), available at <http://www.cga.ct.gov/2008/rpt/2008-R-0619.htm> (listing scores of offenses, including burglary and repeat DUI, for which Connecticut law requires mandatory minimum prison terms).

79. WASH. REV. CODE § 9.94A.510. The Commission and legislature left certain rare offenses unategorized, so as to allow for judicial discretion in imposing a sentence between zero and twelve months of imprisonment.

80. *Id.* By contrast, the Federal Sentencing Guidelines contain 258 sentencing cells. See U.S. SENTENCING GUIDELINES MANUAL ch. 5A.

81. WASH. REV. CODE . § 9.94A.525

82. *Id.*

83. *Id.*

Each of the grid's 140 cells contains the presumptive sentencing range—for example, “195–260” months—as well as a median sentence.⁸⁴ Judges who properly calculate the sentencing range and impose a sentence within this range cannot be reversed on appeal. Moreover, because the SRA abolished parole, the sentence handed down by the judge is the sentence that the offender will serve, though it may be reduced by “good time” credits earned while incarcerated, allowing the offender to shorten his effective sentence.⁸⁵ But good time credits can amount to no more than fifteen percent of the sentence for most violent and sexual offenses and no more than fifty percent for most other offenders.⁸⁶

The availability of sentencing alternatives appears to have been critical to the initial success of Washington's system. Sentencing alternatives include the First-Time Offender Waiver,⁸⁷ the Special Sex Offender Sentencing Alternative,⁸⁸ the Parenting Sentencing Alternative,⁸⁹ and the recently introduced Drug Offender Sentencing Alternative.⁹⁰ Judges have discretion to sentence eligible offenders either under these alternative sentencing guidelines or in accordance with the standard grid. Alternative sentences are subject to reversal on appeal for “abuse of discretion.”⁹¹

Under the First-Time Offender Waiver, any offender without a criminal record (and whose crime of conviction is not exempted from this provision) is eligible to have his or her standard guideline sentence waived.⁹² The alternative sentences available include (1) as long as two years in drug or other treatment, (2) as long as a year in community custody, (3) as long as ninety days in a county jail, and (4) supervised probation.⁹³ Because the law treats the First-Time Offender Waiver as the equivalent of a standard sentence, the trial judge's decision to use the waiver cannot be reversed on appeal as long as the individual's eligibility for the alternative sentence was properly determined.⁹⁴ The program reflects the pragmatism that pervades Washington's sentencing regime, which allows the state to balance a philosophy of just deserts with its interest in providing opportunities for rehabilitation and reducing the state's prison population.

84. *Id.* §§ 9.94A.510, 9.94A.517.

85. *Id.* § 9.94A.729.

86. *Id.* § 9.94A.729. The provision authorizing a fifty-percent reduction—subsection (3)(c)—does not apply to offenders convicted after July 1, 2010 of causing injury to another person.

87. *Id.* § 9.94A.650.

88. *Id.* § 9.94A.670.

89. *Id.* § 9.94A.655.

90. *Id.* § 9.94A.660.

91. *State v. Jackson*, 809 P.2d 221 (Wash. Ct. App. 1991); *State v. Hays*, 776 P.2d 718, 720 (Wash. Ct. App. 1989); *see also* BOERNER, *supra* note 58, at 8.

92. WASH. REV. CODE § 9.94A.650 (2011).

93. *Id.*

94. *Id.* § 9.94A.585.

The Special Sex Offender Sentencing Alternative (SSOSA)⁹⁵ represents another pragmatic deviation from the guidelines' emphasis on retribution—and a retreat from the rehabilitative ideal. Rather than standing firmly on abstract principle, Washington listened to victim advocates and psychologists.⁹⁶ Victim advocates argued that victims of sex offenders, who are often family members, would be less likely to press charges if the guidelines' severe presumptive sentences were the only option.⁹⁷ At the same time, criminal psychology experts emphasized that sex offenders' behavior is compulsive, with high rates of recidivism unless the offenders are treated.⁹⁸ Under SSOSA, offenders convicted of sex offenses may be spared the guideline sentence as long as they meet certain criteria; for example, the offense may not be a “serious[ly] violent” sexual offense, the offender must have no prior convictions for a sex offense, and he or she must be found to be amenable to treatment.⁹⁹ As long as the offender is eligible, SSOSA allows the trial judge to sentence the individual to a course of treatment and to design specialized prohibitions that will both aid rehabilitation and protect the community.¹⁰⁰ Indeed, SSOSA has been successful in curbing recidivism.¹⁰¹

The Parenting Sentencing Alternative allows the court to waive the standard sentence for certain offenders who have custody of children under eighteen and to replace those sentences with twelve months of community custody. Similarly, the Drug Offender Sentencing Alternative provides for treatment of offenders who commit minor drug crimes and are deemed to be “addicted.” As such, these alternatives allow judges the flexibility to prescribe effective courses of treatment and to meet the needs of offenders' dependents without being subject to the higher standards of review that apply to exceptional sentence departures.

As noted, an exceptional sentence is one that departs from the guideline sentencing range and is not otherwise authorized. Exceptional sentences may range between zero time in confinement—or the statutory mandatory minimum, if there is one—and the statutory maximum. Unlike the codified sentencing alternatives, exceptional sentences are subject to substantive appellate review.¹⁰² The decision to impose an exceptional sentence is governed by case law interpreting the phrase “substantial and compelling reasons,” which is the statutory criteria under which an exceptional sentence must be justified.¹⁰³

95. *Id.* § 9.94A.670.

96. Boerner & Lieb, *supra* note 5, at 94.

97. *Id.*

98. *Id.*

99. WASH. REV. CODE § 9.94A.670 (2011).

100. *Id.*

101. WASH. STATE SEX OFFENDER POLICY BD., ANN. REP. LEG. 38 (2009) (“[S]ex offenders that completed SSOSA’s [sic] had the lowest recidivism rates of all categories.”) (citing ROBERT BARNOSKI, WASH. STATE INST. PUB. POL’Y, SEX OFFENDER SENTENCING IN WASHINGTON STATE: RECIDIVISM RATES (2005)).

102. WASH. REV. CODE § 9.94A.585 (2011).

103. *Id.* § 9.94A.535 (“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling

The SRA requires the judge imposing the sentence to provide a written explanation of the reasons justifying the extent of her departure from the guideline range. Because both the government and the defendant can appeal an exceptional sentence, the decision to impose such a sentence is almost always subject to appellate review. The SRA provides three standards for reviewing an exceptional sentence: (1) whether the sentence and reasons supplied “are not supported by the record” that was before the trial judge, (2) whether they “do not justify a sentence outside the standard sentence range,” or (3) whether the imposed sentence “was clearly excessive or clearly too lenient.”¹⁰⁴

Interestingly, Washington’s courts have interpreted the SRA to preclude exceptional sentences that are aimed at either rehabilitation or incapacitation. In *State v. Estrella*,¹⁰⁵ Washington’s supreme court overturned an exceptional sentence that sought to allow a repeat offender an opportunity at employment. The court held that “an exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.”¹⁰⁶ According to the court, the trial judge’s reasoning—that the offender “appear[ed] to be a good risk not to re-offend if he c[ould] be worked back into society gradually and under direction and supervision”—did not provide adequate grounds for a sentence below the guideline range.¹⁰⁷ Similarly, in *State v. Barnes*,¹⁰⁸ the Washington Supreme Court ruled that “future dangerousness” was not a sufficient reason to impose an exceptional sentence in non-sexual-offense cases.¹⁰⁹ The reasoning of those cases suggests that neither incapacitation nor rehabilitation could ever be a sufficient basis for an exceptional sentence;¹¹⁰ exceptional sentences must be based on the criminal act itself, rather than on characteristics of the offender.¹¹¹ However, in an important recent decision increasing the scope of judicial sentencing discretion,¹¹² the Washington Supreme Court unanimously held that when the sentencing court orders an exceptional sentence below the presumptive sentencing range, the court is not bound by the seemingly mandatory language in the SRA requiring consecutive (as opposed to concurrent) sentences for crimes arising “from separate and distinct criminal conduct.”¹¹³ Even though alternative sentences allow judges to impose sentences outside the guidelines range, the Sentencing Commission nonetheless scores these sentences as being in “compliance” with

reasons justifying an exceptional sentence.”); *see, e.g.*, *State v. Barnes*, 818 P.2d 1088 (Wash. 1991); *State v. Estrella*, 798 P.2d 289 (Wash. 1990); *State v. Pascal*, 736 P.2d 1065 (Wash. 1987).

104. WASH. REV. CODE § 9.94A.585(4) (2011).

105. 798 P.2d 289 (Wash. 1990).

106. *Id.* at 293.

107. *Id.* at 290.

108. 818 P.2d 1088 (Wash. 1991).

109. *Id.* at 1093.

110. *See id.* at 1092–93; *Estrella*, 798 P.2d at 292–94.

111. John M. Junker, *Guidelines Sentencing: The Washington Experience*, 25 U.C. DAVIS L. REV. 715, 745 (1992).

112. *State v. Mulholland*, 161 Wash. 2d 322, 327–32 (2007).

113. WASH. REV. CODE § 9.94A.589(1)(b) (2011).

the guidelines.¹¹⁴ Only exceptional sentences are scored as not in compliance with the guidelines. Unsurprisingly, then, studies of Washington sentencing boast widespread compliance with the guidelines. In 1987, the first year that the Commission undertook a comprehensive review of the guidelines, only 3.6% of sentences were exceptional; of these, 57% were departures below the guideline range (“mitigated” sentences).¹¹⁵ The remarkably high rate of compliance initially surprised observers because Minnesota—which has a very similar sentencing system—had a departure rate of 8% in the same period.¹¹⁶ The absence of codified sentencing alternatives in Minnesota’s system may well explain the difference in departure rates between the two states, a difference that has only grown over time. In 2010, Minnesota had a 25% departure rate,¹¹⁷ while Washington’s rate was 4.5%.¹¹⁸ If Washington’s alternative sentences (imposed in 11% of cases) are treated as departures, however, the state’s departure rate approximately triples.¹¹⁹

Sentencing authorities in Washington have thus provided significant opportunities for the exercise of judicial discretion within the structure of the guidelines themselves, such that sentencing judges can often “comply” while imposing a non-guideline sentence. The result is a high rate of “compliance,” which has been achieved not by trying to eliminate judicial discretion (as the Federal Sentencing Guidelines sought to do), *but by specifying a broad set of circumstances under which discretion is available*. Although some judges may take advantage of the availability of alternative sanctions, others may be content to impose a sentence within the grid range, and both types of sentence will be considered in compliance with the guidelines. Inevitably, then, allowing for judicial discretion may also allow for inter-judge sentencing disparity.

IV

REAL OFFENSE SENTENCING, ENHANCEMENTS, AND *BLAKELY*

One of the most controversial aspects of modern sentencing reform, at both the state and federal level, has been the rise of “real offense” sentencing. Under this approach, courts look at actual criminal conduct rather than the statutory crime alone. The federal guidelines are perhaps the preeminent example of a real offense system, for they explicitly provide for adjustments based on factors that are not elements of the statutory offense, such as the quantity of harm

114. FALLEN, *supra* note 67, at 14–16.

115. *Id.* at 14–16.

116. *Id.*

117. MINN. SENTENCING GUIDELINES COMM’N, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2010, at 21 (2010), *available at* http://www.msgc.state.mn.us/data_reports/2010/2010%20MN%20Sentencing%20Guidelines%20Comm%20Monitoring%20Data%20Report.pdf.

118. STATE OF WASH. SENTENCING GUIDELINES COMM’N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2010, at iv (2011), *available at* <http://media.digitalarchives.wa.gov/WA.Media/do/22B26EF162FD873B071B90DA9A77AF7AFCB.pdf>.

119. *Id.* at 31.

caused and the presence of a variety of aggravating (and a few mitigating) factors.¹²⁰ Indeed, in the federal system, an offender's sentence may even be increased if the judge finds, by a preponderance of the evidence, that the offender committed a prior crime of which the jury *acquitted* him.¹²¹

In Washington, the Commission considered adopting such an approach, but ultimately chose to reject most aspects of real offense sentencing. It did so both out of a sense of basic fairness, and because it concluded that sentencing based primarily on the crime of conviction would encourage prosecutors to charge more accurately from the outset—rather than relying on the sentencing process to add more time to an individual's sentence.¹²² The sentencing guidelines are explicit on this point, providing that “[f]acts that establish the elements of a more-serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation.”¹²³

That does not mean that Washington's guidelines ignore all aggravating factors beyond the statutory elements of individual crimes. To the contrary, the guidelines list a variety of aggravating “real offense” factors, such as the use of a firearm.¹²⁴ However, by design, specified aggravating factors are charged as if they were elements of the underlying crime, and unless admitted by the defendant, must be found beyond a reasonable doubt by the trial jury.¹²⁵ When the jury finds (or the defendant admits as part of his guilty plea) an aggravating factor, the defendant's standard guideline range is increased.¹²⁶

Nevertheless, as we have seen, Washington's system does allow judges to impose—for “substantial and compelling reasons” found by a preponderance of the evidence—“exceptional” sentences that are outside of the standard guideline range.¹²⁷ In 2004, the United States Supreme Court considered the constitutionality of that system, having already held in *Apprendi v. New Jersey*¹²⁸ that *statutory* sentencing enhancements must be treated as elements of the underlying crime, subject to jury trial and proof beyond a reasonable doubt.¹²⁹ In this watershed case, *Blakely v. Washington*,¹³⁰ the Supreme Court examined the relationship between Washington's exceptional above-guideline sentences, on the one hand, and underlying (and pre-existing) statutory maximum sentences, on the other. One theory posits that the finding of exceptional

120. See, e.g., U.S. SENTENCING GUIDELINES MANUAL §§ 3, 4, 5(H), 5(K).

121. See *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

122. Boerner & Lieb, *supra* note 5, at 88.

123. WASH. REV. CODE § 9.94A.530 (2011).

124. See, e.g., *id.* § 9.94A.602 (requiring enhancement of offense level for offenses involving use of a deadly weapon).

125. *Id.*; see also *Petition of Gunter*, 689 P.2d 1074 (Wash. 1984) (jury must find the aggravating guidelines factor beyond a reasonable doubt).

126. WASH. REV. CODE § 9.94A.537(3) (2011).

127. See *supra* notes 101–113 and accompanying text.

128. 530 U.S. 466 (2000).

129. *Id.* at 496.

130. 542 U.S. 296 (2004).

sentencing factors effectively redefines the crime itself; under this theory, any fact that can be used to impose a sentence beyond the standard guideline maximum is constitutionally equivalent to an additional statutory element. Pursuant to *Apprendi*, such facts must either be stipulated or subject to jury trial and proved beyond a reasonable doubt.¹³¹ An alternative theory posits that the availability of an exceptional sentence above the standard guideline range is simply a structuring of pre-existing judicial discretion to sentence up to the maximum sentence provided by statute for the underlying crime of conviction. Under this second theory, factors warranting an exceptional sentence are not elements of the crime; rather, they are akin to the uncodified factors that sentencing judges took into account during the era of discretionary sentencing, and do not implicate the rights to jury trial and proof beyond a reasonable doubt.

Reflecting a decade-long philosophical shift from the second theory (under which judicial fact-finding is permissible) towards the first (under which judicial fact-finding may not increase the lawful sentence),¹³² the Supreme Court ruled in *Blakely* that, for constitutional purposes, the relevant statutory maximum was the “maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.”¹³³ As such, Washington judges could not constitutionally impose exceptional sentences *longer than* the guideline grid maximum. Extending *Apprendi*, the Court held that the findings of fact that justified exceptional sentences above the standard guideline range were constitutionally inadequate because the judge made them at the sentencing phase, with the defendant having no recourse to a jury trial and proof beyond a reasonable doubt.¹³⁴

Washington judges thus found themselves in a bind. They could still sentence individuals to *alternative* (that is, non-prison) and *mitigated* exceptional sentences; however, they could not constitutionally impose *harsher* exceptional sentences. Realizing that there was now a significant asymmetry in the state’s sentencing regime, the state established a special subcommittee to develop a legislative solution for the problems *Blakely* created.¹³⁵ One solution was obvious from the *Blakely* decision itself: the legislature could enact changes in the procedure for imposing an exceptional sentence above the guidelines range by providing that the underlying factors justifying such a sentence would be subject to jury trial and to proof beyond a reasonable doubt.¹³⁶

131. *Id.* at 313.

132. See Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 246–52 (2004).

133. 542 U.S. at 296.

134. *Id.* at 313.

135. Nussbaum, *supra* note 14, at 24.

136. See *Blakely*, 542 U.S. at 304 (“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.”) (quoting 1 JOEL P. BISHOP, CRIMINAL PROCEDURE 55 (2d ed. 1872)).

But there was another solution that the subcommittee considered: changing the guidelines from presumptive to “advisory.” That making the guidelines advisory would also solve the constitutional problem may not be obvious. Yet that is precisely what the Supreme Court accomplished in *United States v. Booker*,¹³⁷ which was decided shortly after *Blakely*. In *Booker*, the federal guidelines were struck down on the same grounds as the Washington guidelines were in *Blakely*, but a divided Court went on to solve the “*Blakely* problem” by holding that henceforth, the federal guidelines would be advisory only.¹³⁸ As *Booker* explained, as long as sentencing guidelines are only advisory, the “maximum” sentence for constitutional purposes remains the statutory maximum.¹³⁹ In such an advisory system, the judge’s findings of enhancement facts are permissible because, while the sentence imposed may exceed the advisory guideline maximum, it can never exceed the *statutory* maximum.

The advisory guidelines approach held some attraction for Washington as well. In particular, it had the benefit of simplicity and elegance, and other states had been operating with fully advisory guidelines for a decade.¹⁴⁰ Yet there was concern that advisory guidelines would signal a return to wide-open discretionary sentencing: legislators feared that judges would be too lenient, while prison officials worried (inconsistently) that prison populations would spike.¹⁴¹ Still others worried that socioeconomic disparity, including racial disparity, would increase under advisory guidelines.¹⁴²

Washington’s Commission chose to adopt the non-advisory approach—what has become known in the U.S. sentencing world as “*Blakely*-izing” the guidelines. Following the lead of Kansas, which had presciently changed its guidelines in anticipation of *Blakely*,¹⁴³ Washington’s sentencing commissioners and legislators renegotiated the line between sentencing factors and elements of the crime. Before *Blakely*, judges had determined exceptional facts by a preponderance of the evidence as part of a separate sentencing phase. Henceforth, the subcommittee suggested, all exceptional aggravating factors should be incorporated into the initial trial proceedings and treated like statutory elements of the crime, as Washington already did for enumerated aggravating factors such as the use of a deadly weapon.¹⁴⁴ The subcommittee also reworked the “illustrative” list of reasons for aggravated exceptional

137. *United States v. Booker*, 543 U.S. 220 (2005).

138. *Id.* at 259 (Breyer, J., for the remedial majority). The Court asserted that this resolution was more in keeping with Congress’s intent in enacting the federal Sentencing Reform Act of 1984. *Id.* at 265.

139. *Id.* at 232.

140. See DISCRETION UNDER THE SENTENCING REFORM ACT, *supra* note 17 (discussing the success of Virginia’s advisory system).

141. See *id.*

142. See *id.* at 21.

143. See Steven J. Crossland, Comment, *Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court’s Uneasy Passage Through Apprendi-Land*, 42 WASHBURN L.J. 687, 703–06 (2003).

144. See WASH. REV. CODE § 9.94A.602 (2011).

sentences above the guideline range, which had helped define the “substantial and compelling” standard. The subcommittee supplemented the list with additional factors drawn from the extensive case law applying this standard. The legislature then codified this new list as an exhaustive menu of factors for prosecutors to charge and prove if they sought an above-guideline sentence.¹⁴⁵ In the wake of those changes, the sentencing judge could impose an exceptional sentence only if the aggravating factors had been proven to the jury beyond a reasonable doubt, or stipulated by a defendant who pled guilty.¹⁴⁶

Unsurprisingly, that procedural change has led to a significant decrease in the rate of aggravated exceptional sentences, for the requisite sentencing factors are now far more difficult to establish.¹⁴⁷ In 2004, before the *Blakely* decision, 57% of exceptional sentences were above the guideline range;¹⁴⁸ in 2006, this figure had fallen to 45%.¹⁴⁹ Indeed, there are fewer exceptional sentences of any type. In 2006, exceptional sentences represented 2.86% of total sentences imposed;¹⁵⁰ in 2004, that percentage had been 4.4%.¹⁵¹

V

DIRECT POPULAR IMPACT ON SENTENCING POLICY: THE BALLOT INITIATIVE

The existence of a broadly composed professional sentencing agency working closely with the legislature has not shielded Washington’s criminal justice policy from punitive popular reaction to fear of crime. In particular, the citizens of Washington can directly alter sentencing policy through the ballot initiative. In 1994, Washington’s voters enacted Initiative 159, known as “Hard Time for Armed Crime.”¹⁵² Although Washington had long provided for a mandatory sentencing enhancement when a weapon was used in the commission of a crime,¹⁵³ Initiative 159 broadened the applicability of the enhancement and made it more severe. The Washington Institute for Policy Studies had developed and promoted the ballot initiative, which garnered widespread public support for requiring armed criminals to serve longer sentences.¹⁵⁴ Upon realizing the extent of the popular enthusiasm for the

145. Nussbaum, *supra* note 14, at 24. Nussbaum also explains that the decision to include sentencing factors as part of the initial trial—rather than holding the jury for a second phase—was meant to streamline the proceedings.

146. WASH. REV. CODE § 9.94A.537(2) (2011).

147. 20 YEARS IN SENTENCING, *supra* note 15, at 41.

148. STATE OF WASH. SENTENCING GUIDELINES COMM’N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2004, at 22 (2004), *available at* http://wsldocs.sos.wa.gov/library/docs/sgc/StatSumAdultFelonySentencing/FY2004_Statistical_Summary_2008_005088.pdf.

149. STATE OF WASH. SENTENCING GUIDELINES COMM’N, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2006, at 21 (2006), *available at* http://wsldocs.sos.wa.gov/library/docs/sgc/StatSumAdultFelonySentencing/Statistical_Summary_2006_Compressed_2008_004583.pdf.

150. *Id.* at iv.

151. STATE OF WASH. SENTENCING GUIDELINES COMM’N, *supra* note 148, at iv.

152. 20 YEARS IN SENTENCING, *supra* note 15, at 31.

153. WASH. REV. CODE § 9.41.025(1) (1972); *id.* § 9.95.040.

154. Boerner & Lieb, *supra* note 5, at 107.

measure, the legislature itself chose to enact the measure into law even before its popular passage.¹⁵⁵ The statute required sentence enhancements of eighteen to sixty months for felonies committed with a firearm, and six to twenty-four months for felonies committed with other deadly weapons.¹⁵⁶ The Commission estimated that the provision would cost the state \$294 million over the following decade and would increase the state's prison population by 209 in the first year of its implementation, 810 by the fifth year, and 1,145 by its tenth anniversary.¹⁵⁷

The enhancements for use of a firearm are only one way that popular politics have directly influenced sentencing in Washington, even in the era of sentencing guidelines. Another provision of Initiative 159 requires prosecutors to make public the reasons for plea agreements,¹⁵⁸ and requires the Commission to publicize the sentencing decisions of each individual judge.¹⁵⁹ Although there were widespread concerns that those requirements would curtail judicial discretion and subject Washington's judges, who are elected, to possible retaliation for seemingly lenient sentences, the data collected from the reporting requirements have not yet figured prominently in contested judicial elections.¹⁶⁰ At the same time, however, there *was* a marked reduction in the rate of mitigated departures shortly after Initiative 159 became law.¹⁶¹ That has led some observers to theorize that the combination of a "tough-on-crime" political climate and judicial fears about the new reporting requirements has influenced trial judges in the exercise of their discretion.¹⁶²

The bundle of sentencing enhancements and reporting requirements that became Initiative 159 was developed on the heels of a "three strikes" initiative passed just two years earlier.¹⁶³ That 1992 initiative, developed by the same think tank, provides for life in prison without parole for any offender convicted of three distinct serious offenses.¹⁶⁴ The three strikes proposal had been defeated in the state legislature, but was passed by an overwhelming 75% of the public—thereby establishing the ballot initiative as an effective means of

155. Hard Time for Armed Crime Act, ch. 129, 1995 Wash. Sess. Laws 443.

156. WASH. REV. CODE § 9.94A.533 (2011).

157. David Boerner, *Sentencing Policy in Washington*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 30, 33 (Michael Tonry & Kathleen Hadestad eds., 1997). The author has been unable to find more recent data on the impact of Initiative 159.

158. WASH. REV. CODE § 9.94A.475.

159. *Id.* § 9.94A.480(2) (requiring the Sentencing Commission to "compile a yearly and cumulative judicial record of each sentencing judge" in enumerated felony cases, including all violent offenses). See, e.g., STATE OF WASH. SENTENCING GUIDELINES COMM'N, JUDICIAL SENTENCING PRACTICES—SELECTED FELONIES—CALENDAR YEAR 2007 (2008), available at http://www.cfc.wa.gov/PublicationSentencing/JudicialPractice/JudicialSentencingPractices_CY2007.pdf.

160. Boerner & Lieb, *supra* note 5, at 107.

161. 20 YEARS IN SENTENCING, *supra* note 15, at 41.

162. See Boerner & Lieb, *supra* note 5, at 107.

163. See R. David LaCourse, Jr., *Hard Time for Armed Crime: A Review*, WASH. POL'Y CENTER (1997), <http://www.washingtonpolicy.org/publications/brief/hard-time-armed-crime-review>.

164. WASH. REV. CODE §§ 9.94A.570 (2011); see *id.* § 9.94A.030(37) (defining a "persistent offender").

bypassing the legislative process (and the Commission) to achieve harsher sentences.¹⁶⁵

Although the significance of those two initiatives should not be underestimated, the initiatives say little about the wisdom of creating a sentencing commission or sentencing guidelines.¹⁶⁶ Those measures, and their impact on sentencing, speak more to the benefits and perils of direct democracy than to the adoption of a system of sentencing guidelines.¹⁶⁷

VI

PROSECUTORIAL GUIDELINES

Presumptive sentencing guidelines are essentially *ex ante* sentencing rules. Under such sentencing regimes, prosecutors know precisely what the presumptive sentencing range will be when they select a particular charge, and they choose accordingly. The prosecutor's control over sentencing is amplified when guidelines prescribe narrow sentencing ranges and reject "real offense" sentencing.¹⁶⁸ In those cases, the charges selected by the prosecutor will, for the most part, determine an individual's ultimate sentence. Indeed, a standard objection to presumptive guidelines is that they do not so much limit sentencing disparity as obscure it by transferring discretion from the judge to the prosecutor.¹⁶⁹ A related concern is that the prosecutor may have too much leverage to force guilty pleas by threatening to press a charge that has a much higher sentencing range if the defendant insists on going to trial.

The Commission recognized and addressed those concerns by creating, alongside its sentencing guidelines, a series of codified standards that are intended to guide prosecutors in the exercise of their substantial discretion.¹⁷⁰ Published and implemented in 1983, the prosecutorial standards have been explicitly "advisory" only. Unlike the sentencing guidelines, which are binding on Washington's judges, the state's prosecutorial guidelines create no judicially enforceable rights or benefits for any party.¹⁷¹ Unsurprisingly, it has been reported that the guidelines are more routinely followed in some prosecutorial offices than in others.¹⁷²

Yet Washington's prosecutorial guidelines do give trial judges a basis for inquiring into the exercise of prosecutorial charging and bargaining discretion,

165. See Boerner, *supra* note 16, at 198 n.10.

166. See Boerner & Lieb, *supra* note 5, at 109.

167. See also BARKER, *supra* note 29, at 118–20 (arguing that "these reforms may indicate a partial shift in government in Washington . . . toward neopopulism and away from deliberation and compromise," which had characterized the state's approach to sentencing reform through the 1980s).

168. See STITH & CABRANES, *supra* note 1, at 66–67.

169. See *id.* at 130–42.

170. See WASH. REV. CODE §§ 9.94A.401, .411, .421, .431, .441, .450, .460, .470, .475, .480 (2011).

171. *Id.* § 9.94A.401.

172. Boerner & Lieb, *supra* note 5, at 120 (highlighting Norm Maleng's prosecutorial practices in King County as representative of the adherence to the legislative guidelines and a contrast to the starkly different practices in other, smaller county prosecutorial offices).

even though in the end the resistant prosecutor may prevail. Moreover, the SRA itself specifically mandates that the “nature of the [plea-bargaining] agreement and the reasons” for any guilty plea must be presented to the court.¹⁷³ The court has the authority to accept or reject any plea agreement on the basis of its own determination of whether the agreement’s terms are “consistent with the interests of justice and the prosecuting standards.”¹⁷⁴ Finally, even when accepting a plea of guilty, a judge is not bound by the prosecutor’s recommendations.¹⁷⁵ Nevertheless, as has been true in the federal system and many other guidelines regimes, the percentage of convictions obtained by trial has declined significantly since the guidelines—and the concomitant increase in prosecutorial discretion—were introduced in Washington. Whereas conviction by trial constituted 9.9% of all convictions in 1982,¹⁷⁶ that percentage fell to 5.8% in 2010.¹⁷⁷

VII

REFLECTIONS ON WASHINGTON’S GUIDELINES REGIME

Washington’s thirty years of presumptive sentencing guidelines have yielded mixed results. On the one hand, the guidelines appear to have been somewhat effective in reducing the inter-judge sentencing disparities that triggered calls for determinate sentencing. And in its first few years, the new sentencing system was able to contain corrections costs as well. On the other hand, the public demand for severe sentencing of certain classes of offenders has resulted in harsher sentences and higher prison costs in subsequent years, through ballot initiatives as well as some politically popular actions of the Sentencing Commission and the legislature. Such measures have included mandatory guidelines enhancements for fleeing the police, for crimes committed with sexual motivation, and for crimes committed under the influence of alcohol.¹⁷⁸ Unsurprisingly, incarceration and associated costs have increased in Washington in the wake of these enhancements.¹⁷⁹ However, as of 2008, Washington still has an incarceration rate in the bottom fifth of states and at about 60% of the national average;¹⁸⁰ the percentage of general fund expenditures that the state spends on correction costs is slightly below the national average.¹⁸¹

173. WASH. REV. CODE § 9.94A.431 (2011).

174. *Id.*

175. *Id.*

176. FALLEN, *supra* note 67, at 77.

177. STATE OF WASH. SENTENCING GUIDELINES COMM’N, *supra* note 118, at 21 (reporting 2.2% of convictions by bench trial, 3.6% by jury trial, and the remaining 94.1% by guilty plea).

178. WASH. REV. CODE § 9.94A.533.

179. THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008, at 14 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20in%20100.pdf.

180. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 228417, PRISONERS IN 2008, at 31 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

181. *Id.*

A primary goal of Washington's Sentencing Reform Act was to reduce "unwarranted" disparity by ensuring that punishments would "[b]e commensurate with the punishment imposed on others committing similar offenses."¹⁸² However, even complete compliance with the guidelines does not guarantee the absence of unwarranted disparities. Which sentencing disparities are warranted and which are unwarranted is a normative inquiry. For instance, what is a "similar" offense? Is it appropriate to consider prior record, age, motivation, collateral consequences, and so forth? If so, what weight should each of these factors have? These questions have confounded attempts to determine whether presumptive guidelines systems achieve more equality in sentencing than discretionary sentencing systems.¹⁸³ Simply stated, the *content* of the guidelines is important to achieving sentencing justice, which itself is a highly contested subject.

Nevertheless, Washington's Commission—like sentencing commissions everywhere—measures the reduction in disparities largely by looking at judicial rates of "compliance" with its guidelines. The first study of Washington's guidelines, conducted in 1987, concluded that "sentence variability" had been reduced by 47% from the pre-guidelines period.¹⁸⁴ In 1991, the Commission's ten-year report cited this study in concluding that the system had achieved the legislature's goal of uniform sentencing.¹⁸⁵ However, the 1987 study also showed racial disparities in the operation of the alternative sentence regime (such as the First-Time Offender Waiver).¹⁸⁶ Yet there was no racial disparity in who received exceptional sentences, either mitigating or aggravating.¹⁸⁷ Those inconsistent results suggested to some observers that the source of disparity in the alternative sentences regime might not have been judicial or prosecutorial bias, but, rather, differences in local community resources such as drug treatment centers.¹⁸⁸ Commendably, the Washington State Sentencing Guidelines Commission has continued to examine those forms of disparity, and more recent data show a possible reduction in racial disparity in the implementation of sentencing alternatives.¹⁸⁹

A second important—though perhaps underemphasized—goal of the Sentencing Reform Act relates not to reducing disparity in sentencing, but to achieving a more cost-effective use of the state's prison facilities. The importance of "frugality" was made clear from the beginning of Washington's

182. WASH. REV. CODE § 9.94A.010.

183. See generally Baron-Evans & Stith, *supra* note 1, at 1682–1701; STITH & CABRANES, *supra* note 1, at 104–42.

184. FALLEN, *supra* note 67, at 13.

185. STATE OF WASH. SENTENCING GUIDELINES COMM'N, A DECADE OF SENTENCING REFORM 12 (1992) [hereinafter A DECADE OF SENTENCING REFORM].

186. The First-Time Offender Waiver is discussed *supra* Part III.

187. FALLEN, *supra* note 67, at 65.

188. *Id.* at 67.

189. STATE OF WASH. SENTENCING GUIDELINES COMM'N, DISPROPORTIONALITY AND DISPARITY IN ADULT FELONY SENTENCING: FISCAL YEAR 2007, at 3 (2008).

sentencing reform: making “frugal use of the state’s resources” was explicitly listed as a legislative purpose of the reforms.¹⁹⁰ To achieve that goal, the Commission was tasked with seeking to ensure that prisons would be used for violent offenders, and with developing non-prison alternatives for nonviolent offenders.¹⁹¹ A 2001 study by the Commission sought to measure how successful the guidelines system has been in achieving this goal.¹⁹²

Initially, the guidelines system appeared to be an effective way to reduce imprisonment of nonviolent offenders, freeing up space for more violent offenders. With the First-Time Offender Waiver in operation, and jail (rather than prison) sentences prescribed for most low-level crimes, there was both a reduction in the total rate of incarceration and a more directed use of prison sentences. In 1982, before the guidelines came into force, the imprisonment rate for violent offenders was 48.8%; by 1985, this number had climbed to 65.1%.¹⁹³ During the same period, imprisonment for nonviolent crimes fell from 13.3% to 8.8%.¹⁹⁴

Those trends did not continue, in part because the state legislature failed to follow these reforms with appropriations for “alternatives to confinement for nonviolent offenders.”¹⁹⁵ In addition, the American “war on drugs” has resulted in significant increases in the number of individuals imprisoned for drug-related crimes. Between 1986 and 1991, Washington experienced a 64% increase in total felony sentences, with a 235% increase in drug-related offenses accounting for a large bulk of that growth.¹⁹⁶ Moreover, the total number of prison sentences in Washington increased by 167% from 1989 to 2008, an increase four times the rate of the increase in the adult population.¹⁹⁷ In the same period, the rate of nonviolent offenders receiving prison sentences increased from 63% to 83%—apparently due to increased sentences for drug and property violations, and third-degree assault (which is categorized as nonviolent in the Commission’s statistics).¹⁹⁸ Of course, without sentencing alternatives such as the Drug Offender Sentencing Alternative, there might have been an even larger increase in imprisonment rates in Washington.

Moreover, it appears that an even larger portion of the increase in incarceration in Washington is due to increased prosecution of serious offenses. There is a natural tendency to attribute the increase in rates of incarceration to

190. WASH. REV. CODE § 9.94A.010 (2011).

191. *Id.* § 9.94A.850.

192. STATE OF WASH. SENTENCING GUIDELINES COMM’N, A COMPREHENSIVE REVIEW AND EVALUATION OF SENTENCING POLICY IN WASHINGTON STATE: 2000–2001 (2001); A DECADE OF SENTENCING REFORM, *supra* note 185, at 13.

193. FALLEN, *supra* note 67, at 5.

194. *Id.*

195. A DECADE OF SENTENCING REFORM, *supra* note 185, at 13.

196. *Id.* at 8.

197. 20 YEARS IN SENTENCING, *supra* note 15, at 11 (providing rate of population increase for the nation as a whole, not for Washington in particular).

198. *Id.* at 31.

increased use of prison (instead of jail or probation) and to longer prison sentences.¹⁹⁹ But the data from Washington suggest that an increase in felony prosecutions, perhaps made possible by greater prosecutorial plea-bargaining leverage, is also an important cause of imprisonment rates growing faster than the population.²⁰⁰ Felony convictions in Washington have risen by 51% since 1989.²⁰¹

Although Washington's initial achievements—cost savings and lower prison population—did not last, Washington's situation is still recognizably superior to that of most other states. As of 2008, Washington spends far less than most other states on its prison and corrections costs, and it imprisons fewer of its convicted offenders.²⁰² Although Washington has not managed to avoid increases in its rates of imprisonment, the state has remained significantly behind the national curve in this regard—perhaps due to its sentencing commission's active and influential concern about this growth.²⁰³ Moreover, the remarkable expansion in felony convictions, as well as in rates and duration of imprisonment, must be understood in historical perspective. Those increases are part of a nationwide trend, one that began several years *before* the adoption of sentencing guidelines.²⁰⁴

Yet despite its continued concern, Washington's Commission has at best been able to slow the growth in resort to imprisonment.²⁰⁵ One explanation may be the political visibility that a system of public guidelines brings to criminal sentencing, as compared to a sentencing system that relies on the discretion of judges and parole officials, whose decisions are relatively sheltered from the storms of public opinion. Moreover, in Washington, the availability and demonstrated success of ballot initiatives as a way to achieve these ends may well have affected the decisions of the Sentencing Commission, the legislature, and perhaps even sentencing judges. For instance, in the two decades between 1989 and 2008, the average offender score rose from 1.4 to 2.9,²⁰⁶ a shift that appears to be due to legislated changes in the way scores are calculated.²⁰⁷ In the same period, the percentage of felony offenders receiving sentence alternatives

199. See STITH & CABRANES, *supra* note 1, at 206 n.138 (noting that changes in incarceration rates only “crudely” reflect whether crimes are being punished more leniently or more harshly).

200. That the soaring rate of incarceration in the United States until recently was due in significant part to the increase in felony prosecutions is deftly discussed in WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 253–57 (2011).

201. 20 YEARS IN SENTENCING, *supra* note 15, at 16.

202. *Id.* at 10; see also *supra* notes 179–182 and accompanying text. Washington has instead continued to increase spending on prevention and treatment. See BARKER, *supra* note 29, at 122 & 213 nn.144–45.

203. See A DECADE OF SENTENCING REFORM, *supra* note 185, at 13.

204. See STUNTZ, *supra* note 200, at 246–53.

205. See 20 YEARS IN SENTENCING, *supra* note 15, at 39 (“The proportion of prison sentences to total felony sentences averaged 42 percent between 1992 and 2006 nationally. Washington State was far below that, although less so in recent years.”)

206. *Id.* at 27.

207. In 1990, for example, the legislature determined that all crimes of “sexual motivation” would be treated as sex crimes subject to enhancement under SSOSA. See *supra* notes 95–100.

also dropped significantly—despite an increase in eligibility.²⁰⁸ Changes in law and sentencing patterns such as these have in turn led to increased incarceration, as the average guideline sentence maximum is a full six months longer than it was twenty years ago.

The enactment of sentencing reform laws intended to reduce disparity and imprisonment rates does not by itself achieve those goals. Nor does the creation of a sentencing commission with well-meaning, pragmatic members. Perhaps those measures can have a calming effect on popular movements,²⁰⁹ but ultimately it is unsurprising that placing sentencing policy squarely in the legislature holds that policy accountable to the preferences of the people.

* * *

In mid-2011, the Washington state legislature, facing significant budget pressures (like other states), changed the nature and functions of the Sentencing Guidelines Commission. It no longer is operating as an independent agency, but rather as an advisory body to the Office of Financial Management in the state's executive branch.²¹⁰ The gathering and analysis of sentencing data will continue to be conducted; that function will be performed, however, not by staff of the Commission (which has been virtually eliminated), but by another executive branch agency, the Caseload Forecast Council.²¹¹ David Boerner, a professor emeritus at Seattle University School of Law, remains chair of the Sentencing Guidelines Commission. Chairman Boerner notes that the Caseload Forecast Council is presently headed by the former research director of the Sentencing Guidelines Commission.²¹² Meanwhile, the last Executive Director of the Commission, Sandy Mullins, has become Assistant Secretary of the Department of Corrections, where she oversees policy development.²¹³ Professor Boerner reports that Mullins is examining ways of reducing reliance on incarceration (and the attendant costs) as a response to violations of conditions of supervisory release.

208. 20 YEARS IN SENTENCING, *supra* note 15, at 46.

209. See Boerner & Lieb, *supra* note 5, at 110.

210. See S. 5891, 62d Leg., 1st Spec. Sess., § 36 (Wash. 2011) (altering the status of the Commission and transferring its duties effective July 1, 2011).

211. See *id.* § 32; see generally SENTENCING GUIDELINES COMM'N: WASH. STATE, <http://www.ofm.wa.gov/sgc/> (last visited Jan. 12, 2012); WASH. STATE CASELOAD FORECAST COUNCIL, <http://www.cfc.wa.gov/> (last visited August 20, 2012).

212. Telephone Interview with David Boerner, Chair, Wash. State Sentencing Guidelines Comm'n, (Jan. 9, 2012).

213. See Jordan Schrader, *New Secretary Bernie Warner Reshuffles Leadership of Corrections Dep't*, NEWS TRIB. (Sept. 19, 2011, 12:17 PM), <http://blog.thenewtribune.com/politics/2011/09/19/new-secretary-bernie-warner-reshuffles-leadership-of-corrections-department/>.