

CHAPTER I.
SURVEY OF SENTENCING SYSTEMS IN USE
IN THE UNITED STATES

Section 6 of the Advisory Commission on Sentencing Establishment Act of 1998, as amended by the Sentencing Reform Amendment Act of 2000, provides, in pertinent part:

“(a) The Commission shall submit to the Council in the 2002 annual report a survey of the various types of structured sentencing systems in use in the United States and the Commission’s recommendations as to which system would best serve the District of Columbia.”

D.C. Official Code § 3-105(a)(2001).

This chapter reports on the Commission’s study of structured sentencing systems in use in the United States, and makes recommendations regarding which type of system would best serve the District of Columbia.¹ The first section, “Defining The Terms,” provides a brief review of structured sentencing and the rationale for its recent development. Next, in “Sentencing Guidelines in the United States,” we discuss the variety of structured sentencing systems in use in the United States and report on the Commission’s survey of these systems. We then present the methodology used by the Commission to assess the relative merits of these different systems, with a view toward adapting a structured sentencing approach to fit the needs of the District of Columbia. Finally, in the section called “Commission’s Deliberations and Recommendation” we present the Commission’s current thinking with regard to the form of structured sentencing that would best serve the District.

Defining The Terms And Understanding Structured Sentencing

Structured sentencing is a relatively new development. In 1975, all state sentencing systems were based on an indeterminate sentencing model that had changed very little during the

¹ The Sentencing Reform Amendment Act of 2000 directs the Commission to include in its 2003 Report a comprehensive structured sentencing system or to explain why such a system is not recommended.

previous fifty years. “Its core features were broad authorized sentencing ranges, parole release, and case-by-case decision making”² with virtually unfettered judicial discretion. This system came under stinging criticism in a seminal book by Judge Marvin Frankel, Criminal Sentencing: Law Without Order published in 1973. Judge Frankel argued for a system of sentencing based on the rule of law, including some form of “detailed chart or calculus” to reduce or channel judicial discretion in individual cases. Indeterminate sentencing is still widespread, but by 2000 at least sixteen states, the federal government, and the District of Columbia have adopted determinate sentencing, in which discretionary parole release is eliminated, “good time” credit is limited, and the sentence imposed is very close to the actual time to be served. Eighteen states have adopted numeric sentencing guidelines (and at least four more have them under consideration). These guidelines take various forms, but all seek to channel judicial discretion in individual cases by providing a recommended disposition for each offense (e.g. prison, probation, or intermediate sanction) and a proposed sentence length or range where a prison term is the recommended sentence.

This chapter examines various structured sentencing systems, which include, but are not limited to, sentencing guidelines, with particular focus on states that have moved to determinate sentencing and instituted some form of structured sentencing. It should be noted that the two are not necessarily intertwined. Like the District, Wisconsin has also instituted determinate sentences without yet moving to structured sentencing. A number of states, including Pennsylvania, have instituted structured sentencing, but have retained indeterminate sentencing.

Two forms of structured sentencing are predominant in the United States, new statutory limits on sentences and sentencing guidelines. Both forms may reduce the problem of

² Tonry, M. (1999) *The Fragmentation of Sentencing and Corrections in America*. Washington, D.C.: U.S. Department of Justice (hereinafter cited as “Tonry, 1999”).

unwarranted sentencing disparity, defined as offenders with similar crimes and similar criminal histories receiving disparate treatment due to extra-legal factors such as race, class, or gender.³

In fact, reduction in unwarranted sentencing disparity has been one of the driving forces for the adoption of structured sentencing in the past twenty-five years.

Structuring Sentences Through Statutory Limits

In the first form of structured sentencing, when moving from indeterminate sentencing to determinate sentencing, some state legislatures placed new statutory limits on sentences rather than adopting sentencing guidelines. In these jurisdictions, legislatures have statutorily narrowed the sentencing range within which a judge can sentence an offender by 1) setting a new maximum sentence,⁴ 2) setting a new sentencing range, including both a minimum sentence and a maximum sentence,⁵ or 3) setting a specific presumptive sentence with departure principles.⁶ These statutory limits serve to narrow judicial discretion in individual cases, and are mandatory for judges to follow. The Commission identified five states that implemented this form of structured sentencing without instituting guidelines: Arizona, California, Illinois, Maine, and New Mexico.

Sentencing Guidelines in the United States

Among the states that have instituted sentencing guidelines, some states use presumptive or mandatory guidelines, which limit or take away the judicial discretion to impose a sentence outside of the guidelines.⁷ Other states have adopted voluntary guidelines, which guide the

³ Bureau of Justice Assistance (1996) *National Assessment of Structured Sentencing*. Washington, D.C.: U.S. Department of Justice, p. 5 (hereinafter cited as “BJA, 1996”).

⁴ Maine

⁵ Illinois

⁶ California

⁷ North Carolina provides a presumptive range, and aggravated and mitigated ranges. Judges must select a sentence within the presumptive range, unless they find specific aggravating or mitigating circumstances as detailed in the criminal code. If the judge finds that an aggravating or mitigating circumstance exists, the judge may sentence the

judicial selection of a sentence, but do not require the judge to remain within the recommended range. Any lawful sentence is authorized in a system of voluntary guidelines.⁸ Guideline systems may also be “prescriptive” or “descriptive.” Sentencing guidelines are descriptive when they deliberately mirror past sentencing practices. Prescriptive guidelines rely more on normative principles to set sentence ranges without rigid adherence to historical practice; for example, a state may choose consciously to depart from historical sentencing patterns in order to incapacitate more violent offenders and divert non-violent ones. Past sentencing practices may still be used as a reference for prescriptive guidelines, but recommended sentences usually deviate from past practices in a number of respects.

The Commission identified twenty-two states and the federal government that have a sentencing guidelines system in effect (18 states) or under study (4 states)⁹ (See Table A-1 in the Appendix A): Alabama, Alaska, Arkansas, Delaware, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, and Washington. Of the eighteen states that currently have sentencing guidelines, eight are voluntary and ten are presumptive. In these eighteen jurisdictions, five have descriptive guidelines, seven have prescriptive guidelines, and six did not specify in response to the Commission’s inquiry. The federal sentencing guidelines are virtually mandatory, and they have been widely criticized for their rigidity.

Finally, most of the twenty-three states that have not adopted or are not actively considering some form of structured sentencing appear to have indeterminate sentencing similar to the system that previously existed in the District of Columbia. Sentences in these systems are

offender within the aggravated or mitigated sentencing range, but must place the sentence within that range. All sentences must fall within one of the approved ranges.

⁸ Virginia provides an example of voluntary guidelines. Judges may give any lawful sentence, but must provide a rationale for any departure on the sentencing guideline form. Maryland’s guidelines are also voluntary.

⁹ After the completion of the survey, Georgia also began to study sentencing guidelines.

only loosely structured by wide legislatively-defined sentencing ranges, with substantial judicial discretion to impose any sentence up to the maximum in individual cases.

Structured Sentencing Systems Of Other Developed Countries

The Commission has also briefly reviewed the structured sentencing systems of other developed countries. Although numerical guidelines are unique to the United States,¹⁰ their intended goal of documenting past judicial practices (reflecting “going rates” for like offenses) and structuring judicial discretion is similar to systems found in Canada, Australia and Scotland. These countries have sentencing information systems, which provide judges with past court practices for like cases without utilizing a grid format.¹¹ In England, appellate court decisions (“guideline judgments”), which cover only a few serious crimes thus far, provide another means of providing general guidance to judges.¹² The appellate “guideline judgments” establish starting points for the “typical” crime within each category, suggest a generally appropriate sentence for that type of case, and offer aggravating and mitigating factors, which might justify an upward or downward adjustment of the sentence. These judgments can also serve as a precursor for “heartland case definitions,” which serve to define a crime in terms of its most frequently occurring form.¹³

Implications of Different Sentencing Systems

One means of understanding why states have considered and adopted structured sentencing is to consider two hypothetical sentencing systems. In the first, the legislative body

¹⁰ See Tonry, Michael (2001). Punishment Practices and Patterns in Western Countries, in *Sentencing and Sanctions in Western Countries*, M. Tonry and R. Frase (Eds.), New York: Oxford University Press, p.22) (hereinafter cited as “Tonry, 2001”).

¹¹ All of these systems appear voluntary rather than presumptive. (Tonry, 2001).

¹² See A. Ashworth (2001). The Decline of English Sentencing and Other Stories. In *Sentencing and Sanctions in Western Countries*, M. Tonry and R. Frase (Eds.), New York: Oxford University Press

¹³ The Commission has similarly used heartland case definitions to help define certain crimes in order to explain their placement in the rankings, discussed in Chapter V of this Report.

provides mandatory sentences for every offense. All offenders charged and convicted of a given crime would receive exactly the same sentence. The second is a sentencing system in which the legislature sets no limits on sentences, and a given offender can receive anything from probation to life in prison for any felony, primarily based on what the judge views as a just punishment for that individual case (and, to a lesser extent, on the charging decisions of prosecutors and plea bargains struck with defendants and their attorneys).

In the first paradigm, the legislature has assured uniformity in sentencing: persons charged and convicted of like offenses receive like punishment. However, all discretion is removed, and all exceptional circumstances are ignored. In the second system, total judicial discretion is preserved, and judges can craft an individualized sentence to fit the unique circumstances of each case. However, disparities will almost certainly result, as offenders with very similar backgrounds convicted of the same crime can receive vastly different sentences, based solely on the views of the judge who happens to preside over the individual case.

These hypothetical paradigms are presented merely to illustrate a point. All actual sentencing systems fall somewhere in between these two extremes. The legislature sets some parameters, which help promote some level of uniform treatment, and the judge and other actors involved in an individual case have some discretion within these parameters to craft a sentence that appears just given the circumstances. Each sentencing system is located somewhere on this continuum, some emphasizing uniformity and others emphasizing the exercise of judicial discretion in each individual case. The Commission is charged with reviewing these various systems and recommending a system designed to balance these competing goals for the District of Columbia.

Sentencing Practice in the District of Columbia

The sentencing structure in effect in the District of Columbia today, as well as the previous sentencing structure, is dissimilar to both of the extreme examples presented above, but can be understood in light of these extremes. An indeterminate sentencing system is in effect in the District of Columbia for crimes committed prior to August 5, 2000. In this system, with the exception of a few mandatory sentences for murder, carjacking, and armed crimes of violence, judges and other courtroom actors retain the bulk of the discretion, and it is therefore closer to the second model. This is so because the legislature set the penalty structure within very broad limits from probation to the maximum term. For example, the penalty structure for one count of distribution of cocaine under the old system ranges from a probation sentence to 30 years in prison. The judge and prosecuting and defense attorneys involved in individual cases play the major role in determining the actual sentence imposed. Any prison sentence has to have a maximum term and a minimum term, which cannot exceed one-third of the maximum term. The paroling authority has discretion to release the offender anytime after service of the minimum term (less good time credits). As can be seen, the indeterminate sentencing system leaves a substantial portion of discretion to the parole authority for the District of Columbia at the back-end.

The determinate sentencing system currently in effect in the District of Columbia for crimes committed on or after August 5, 2000 retains a penalty structure set by the Council within very broad limits. The courtroom actors retain substantial discretion, although parole has been abolished. In fact, at the individual case level, judicial discretion is actually expanded by the removal of parole release decisions at the back-end. Now, a prison sentence consists of a single

term of imprisonment up to the maximum authorized sentence, and the offender must serve not less than 85% of that sentence.

In summary, under both old law and new law systems, the District of Columbia's sentencing system is closer to the second paradigm, with few legislative mandates and substantial discretion entrusted to judges and other courtroom actors. Harkening back to Judge Frankel's criticisms of such systems, the Commission proceeded to develop a set of limiting principles, and then used those principles to determine the advisability of recommending a structured sentencing plan for the District of Columbia.

Setting the Framework:

The Commission's Methodology For Analyzing State Systems

Early in its work, the Commission developed the following mission statement:

“Sentencing policies should be just, fair, consistent and certain: similarly situated offenders should receive similar sentences. Sentencing policies should be truthful: the offender, victim, and the public should understand what a sentence means at the time it is imposed. Sentencing policies should make judicious use of resources: incarceration should be used for violent and repeat offenders, while intermediate sanctions should be considered for other offenders as appropriate. Sentencing policies should reflect the goals of sentencing: incapacitation of the violent or habitual offender, deterrence of the offender and others from future crime, reintegration of the offender into the community following release from incarceration, rehabilitation of the offender, and restitution to victims and the public. Sentencing policies should be supported by adequate prison, jail, and community resources.”

The mission statement was shaped by the diverse views of members of the Commission. The goals embodied in this statement guided the Commission in its review of the various types of structured sentencing systems in use in the United States, as it sought to determine which system or combination of systems best meets the District of Columbia's circumstances.

The Commission's mission statement highlights key goals against which current District of Columbia processes can be compared to those in other jurisdictions. By attempting to develop measurable standards, the Commission sought a relatively objective way to compare the goals embodied in the mission statement to the successes and failures of other jurisdictions in meeting the same goals. This exercise is imperfect, however, as not all of the goals embodied in the mission statement are capable of precise measurement. For example, the Commission was unable to measure the extent of unwarranted disparity in each jurisdiction's current practice, and was limited to looking at practices that have been shown to reduce unwarranted disparity.

Nine measurable standards of court processes and sentencing were developed after reviewing (1) the Trial Court Performance Standards Project, initiated in 1987 by the National Center for State Courts and the Bureau of Justice Assistance (BJA), and (2) BJA's National Assessment of Structured Sentencing. Admittedly, these nine standards are not a universal set of objectives that could be derived solely from the Commission's mission statement. Where possible, however, these objectives are tied to research in the field of sentencing and corrections policy and are logical extensions of the broader goals identified by the Commission. In the discussion that follows, the mission statement has been broken down into its separate goals and each of the nine standards used to rank state sentencing systems is discussed briefly to explain what it means and how it relates to the goals derived from the Commission's mission statement.

Goals from the Commission's Mission Statement	Standards Used to Rank Systems of Other Jurisdictions
Goal I. "Sentencing policies should be just, fair, consistent and certain: similarly situated offenders should receive similar sentences."	<u>1. Consistency/Reduction in Unwarranted Disparity</u> <u>2. Preserving Adequate Judicial Discretion</u> <u>3. Proportionality</u> <u>4. Accountability of Individual Decisions Through Appellate Review</u>
Goal II. "Sentencing policies should be truthful: the offender, victim, and the public should understand what a sentence means at the time it is imposed."	<u>5. Clear Standards</u> <u>6. High Compliance</u>
Goal III. "Sentencing policies should make judicious use of resources: incarceration should be used for violent and repeat offenders, while intermediate sanctions should be considered for other offenders as appropriate.... Sentencing policies should be supported by adequate prison, jail, and community resources."	<u>7. Correctional Capacity Mandate/Adequate Resources</u>
Goal IV. "Sentencing policies should reflect the goals of sentencing: incapacitation of the violent or habitual offender, deterrence of the offender and others from future crime, reintegration of the offender into the community following release from incarceration, rehabilitation of the offender, and restitution to victims and the public."	<u>8. Violent/Habitual Offender Incapacitation</u> <u>9. Fair and Effective use of Intermediate Sanctions</u>

Goal I. "Sentencing policies should be just, fair, consistent and certain: similarly situated offenders should receive similar sentences."

1.Consistency/Reduction in Unwarranted Disparity: In general, offenders who commit similar crimes and have similar criminal records should receive comparable sentences. The goal here is not to eliminate all disparities in sentencing, but to eliminate all *unwarranted* disparity.

Thus, if two defendants with substantial criminal records each commit armed robbery with a gun, it is unfair for one to receive 15 years in prison and the other to receive 5 years in prison, absent a legitimate reason to distinguish between the two cases. Sentences should not be affected by race or other improper factors that are not legitimate considerations in our legal system. There is substantial evidence that presumptive sentencing guidelines reduce, but do not eliminate, unwarranted disparity in sentencing.¹⁴

2.Preserving Adequate Judicial Discretion: Second, if justice is to be achieved, judges require a degree of discretion to *treat different cases differently*. This standard usually focuses on legitimate differences in circumstances not readily discernible from an offender's crime and prior record. Extenuating circumstances may require differential treatment to achieve just and fair sentencing decisions. For example, it may be reasonable to give a longer sentence to a defendant who continues to threaten the victim than to a defendant who is perceived to be remorseful and offers to make restitution to the victim. Similarly, a mentally retarded offender, who is manipulated to commit a crime as an agent for a more sophisticated principal, should ordinarily not receive as severe a sentence as the principal offender (even though a principal and an aider and abettor are both guilty of the same crime under the law). Some criminal justice practices reduce or eliminate judicial discretion, such as mandatory sentences that require a judge to give the same sentence regardless of circumstance, and thereby fail to satisfy this standard. Of the various forms of structured sentencing, voluntary guidelines, which retain maximum judicial discretion within statutory limits, best achieve this objective.¹⁵

¹⁴ Miethe, T. D., & Moore, C. A. (1985). Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota. *Criminology*, 23, 337-363; M. Tonry (1996). *Sentencing Matters*, New York: Oxford University Press (hereinafter cited as "Tonry, 1996").

¹⁵ There is a necessary tension between discretion and consistency, as previously demonstrated in the hypothetical examples of two systems based on extreme uniformity and extreme discretion.

3.Proportionality: Third, the principle of proportionality in sentencing is that crimes that are perceived to be more serious receive more severe sentences than crimes considered less serious, and vice versa. In practice, where the legislature prescribes only the maximum permissible sentence with a wide repository of judicial discretion, it is possible for some offenders convicted of less serious crimes to receive more severe sentences than offenders convicted of more serious crimes. One objective of sentencing guidelines systems is to increase the proportionality of sentences, and these systems appear to achieve this outcome more efficiently than traditional systems without guidelines or other methods of structuring judicial discretion. Logically, presumptive or mandatory guidelines are more efficient than voluntary guidelines in achieving the objective of proportionality.

4.Accountability of Individual Decisions Through Appellate Review: Just sentencing policies are promoted through accountability of individual decisions which can be reinforced by appellate review. Jurisdictions that authorize appellate review develop over time a body of jurisprudence that helps promote fairness in future sentencing decisions.¹⁶ Presumptive sentencing guidelines systems with appellate review go farther than other systems to promote uniformity and accountability.

Goal II. “Sentencing policies should be truthful: the offender, victim, and the public should understand what a sentence means at the time it is imposed.”

5.Clear Standards: One means of achieving truthfulness in sentencing is to articulate clear standards and to simplify the application of those standards. Clear and relatively simple rules are established for sentencing policy, for both custodial and non-custodial penalties, and may include

¹⁶ Frankel, Marvin (1973). *Criminal Sentencing: Law Without Order*. New York: Hill & Wang; American Bar Association (1994). *ABA Standards for Criminal Justice Sentencing* (3rd Edition).

standards for the use of alternative sanctions. For example, structured sentencing systems provide a clear and simple framework that allows victims, offenders, and the general public to understand the basis of a sentencing decision. Sentencing guidelines are open to public scrutiny, allowing monitoring and evaluation of sentencing practice. In practice, maintaining sentencing databases and regularly reporting on sentencing practice can also help to make the sentencing process easier to understand.

6.High Compliance: Sentencing guidelines tell practitioners and the public what sentence can be expected in any given case, within established parameters. A high level of compliance with guideline recommendations fosters a higher degree of clarity and truthfulness. Conversely, a low level of compliance may indicate that the sentencing system is largely ignored in practice, resulting in unclear standards and less, rather than more, truthfulness (since the sentencing system purports to guide sentences, but that guidance is routinely ignored). Some sentencing systems carefully track departures and consider changes to guidelines if the persistent departures indicate that the guideline ranges are incompatible with prevailing practice and acceptable standards. Presumptive or mandatory guidelines, by definition, are more likely than voluntary guidelines to achieve a high level of compliance, but states that have adopted voluntary guidelines consistently report high levels of voluntary compliance.

Goal III. “Sentencing policies should make judicious use of resources: incarceration should be used for violent and repeat offenders, while intermediate sanctions should be considered for other offenders as appropriate.... Sentencing policies should be supported by adequate prison, jail, and community resources.”

7.Correctional Capacity Mandate/Adequate Resources: The Commission’s mission

statement accepts as a principle that sentencing policies should make judicious use of resources. Since 1980, the incarcerated population in the U.S. has grown 281 percent, approaching two million inmates, while at the same time expenditures in state and local corrections grew by 601 percent.¹⁷ Many states are now questioning the long-term viability of correctional expenditures at these levels.¹⁸ Sentencing guidelines tied to explicit capacity objectives is one method of promoting the judicious use of resources. In such systems, guideline recommendations can be adjusted to conform to available correctional resources, and if correctional resources are restricted, punishment levels are restrained.¹⁹ Judicious resource use requires that the costs of actions be known and publicized. For example, systems with explicit capacity restraints will usually require that any legislative bill to increase sentencing for one category of crime be accompanied by a correctional impact statement, and some require that there be a simultaneous and corresponding decrease in sentencing for another crime category. In some states, an administrative body such as a sentencing commission is required to review all proposed amendments to the sentencing penalty structure to determine fiscal impact. Sentencing commissions in these states typically use computer simulation models of criminal justice resources to access the costs of proposed policy changes or sentencing legislation.²⁰

Goal IV. “Sentencing policies should reflect the goals of sentencing: incapacitation of the violent or habitual offender, deterrence of the offender and others from future crime,

¹⁷ Bureau of Justice Statistics (January 8, 2002). *Criminal Justice Expenditures and Employment Extracts*. U.S. Department of Justice.

¹⁸ Wilhelm, D. and Turner, N. (2002). *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?* New York: Vera Institute.

¹⁹ BJA, 1996.

²⁰ We note that the District is unique in that the cost of incarcerating convicted felons is borne by the federal government. Under the Revitalization Act, any person who is sentenced to incarceration pursuant to the District of Columbia Code is assigned to a Federal Bureau of Prisons facility. See D.C. Official Code § 24-101 et seq. Prison capacity, therefore, is not as critical a sentencing issue here as it might be in some states. The greater challenge in this jurisdiction will be designing, siting, building, and funding high-quality alternative sanction programs.

reintegration of the offender into the community following release from incarceration, rehabilitation of the offender, and restitution to victims and the public.”

8.Violent/Habitual Offender Incapacitation: One objective reflected in the mission statement is the need to incapacitate violent offenders. Selectively longer punishments for violent offenders can be accomplished through structured sentencing, developed with the explicit goal of incapacitating violent offenders, or through other presumptive systems that serve to narrow discretion of judges so as to ensure protection of the public against further crimes from selected defendants. Mandatory sentences also target violent offenders for incapacitation, but do so at great cost to judicial discretion and proportional sentences.

The incapacitation of habitual offenders is another objective reflected in the mission statement. One means to accomplish this objective is to prescribe longer punishments as the criminal record of the offender increases. Most guidelines systems prescribe longer sentences for habitual offenders, and other structured sentencing systems also target habitual offenders. Here, too, mandatory sentences, such as the current trend toward “three strikes” laws, are another means to this objective, but they suffer from the aforementioned drawbacks.²¹

9.Fair and Effective use of Intermediate Sanctions: Rehabilitation of offenders can be promoted through the fair and effective use of intermediate sanctions, which are alternatives to traditional incarceration, as discussed in the Commission’s report of April 5, 2000. Evidence is growing that well designed intermediate sanctions programs with treatment components reduce recidivism at a lower cost than treatment in a prison setting.²² Judicious use of intermediate sanctions must discourage “net widening,” defined as the practice of using intermediate sanctions for offenders who would otherwise receive probation, thereby exceeding program

²¹ The District of Columbia’s three strikes statute is not mandatory. D.C. Official Code § 22-1804(a) (2001).

²² Gendreau, P., Cullen, F. and Bonta, J. (1994). Intensive Rehabilitation Supervision. *Federal Probation*, 58, 72-78.

capacity and making prison diversion for the targeted population impossible. Sentencing guidelines that recommend intermediate sanctions for a targeted population of offenders have demonstrated some success in avoiding net widening while promoting the rational use of intermediate sanctions.²³

Narrowing the Scope of the Study

After moving from the mission statement's broad goals of a just and fair sentencing system to a discrete set of standards, Commission staff used a state survey, prior research findings, and other sources to evaluate state systems relative to these nine standards. This exercise provided an imperfect, but systematic, method of using research-based measures to identify states whose sentencing practices may provide good models for the District of Columbia as we consider structured sentencing. In order to evaluate each jurisdiction, staff used the survey to score each state on whether it met, or failed to meet, each of the nine standards. States that scored higher would generally be regarded as embodying important principles that the Commission could investigate further.

The Commission concluded that it is difficult to form definitive conclusions about “best practices” in the field of criminal sentencing. This stems in part from the complex and potentially conflicting purposes of sentencing and in part from the constant tension between maintaining judicial discretion in individual cases and promoting consistency in sentencing practice across all cases. Typically, systems that are best at maintaining discretion case by case are worst at maintaining consistency in sentencing for similarly situated offenders across all cases. A second reason that the concept of “best practices” has limited applicability in this area is

²³ Tonry, Michael (1997). *Intermediate Sanctions in Sentencing Guidelines*. Washington, D.C: Bureau of Justice Assistance.

that each jurisdiction has its own set of unique norms and values that inform its policy choices when designing its system of criminal sentencing. Accordingly, the Commission decided that rather than search for a universal set of “best practices,” its efforts would be better spent by deepening its understanding of our own local norms and values and developing a methodology for discovering the parts of other systems that could be pieced together to best serve the needs of the District of Columbia. As a result, the Commission has evaluated different sentencing systems in terms of how they promote or detract from the perceived goals and needs of the District.

Results of the Evaluation of Structured Sentencing Systems

After the preliminary scoring of all 50 states, the Commission surveyed the twenty-two states and the federal government, which have sentencing guidelines systems in place or under study.²⁴ The surveys were sent out in April 2001, and responses were received from twenty-one of the twenty-three jurisdictions. The Commission supplemented the responses with other sources of information.²⁵

The survey asked the responding jurisdictions to report on: 1) type of sentencing structure -- determinate or indeterminate; 2) type of sentencing guidelines -- voluntary or presumptive, descriptive or prescriptive; 3) mandatory minimum sentences; 4) presence of a sentencing commission; 5) extent of truth-in-sentencing; 6) existence of discretionary parole; 7) if parole was abolished, presence of post-release supervision; 8) availability of good time credit; 9) appellate review; 10) whether the guidelines or proposed guidelines incorporate intermediate

²⁴ The following states were surveyed: Alabama, Alaska, Arkansas, Delaware, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, and Washington. Limited information was available for Louisiana and Oregon.

²⁵ For example, BJA, 1996 and Truth in Sentencing in State Prisons, 1999 (BJS).

sanctions; 11) whether the sentencing commission has the authority to change the sentencing guidelines; and, 12) whether the sentencing commission has authority over juvenile sentencing?

Based on the survey, eighteen states and the federal government currently have some form of sentencing guidelines and others are considering establishing guidelines. As noted earlier, eight are voluntary guidelines and ten are presumptive guidelines. Of the eighteen jurisdictions, five have descriptive guidelines, seven have prescriptive guidelines, and six did not specify.

Of the eighteen states with sentencing guidelines, nine contain a provision for appellate review of sentences that fall outside the guidelines and one additional jurisdiction is in the process of implementing an appellate review process. The use of intermediate sanctions is incorporated in fifteen jurisdictions and another two are proposing the inclusion of intermediate sanctions.

In eight of the jurisdictions, sentencing commissions have the authority to revise the sentencing guidelines without any action by the legislature or the judiciary. However the legislature (and the judiciary in one state) retains the power to strike down any revisions made by the sentencing commission. If the legislature does not act within a specified time limit, the revisions take effect.

Most sentencing commissions have authority only over adult sentences. Only three of the eighteen sentencing commissions have the authority to set sentencing guidelines for juveniles.

Overall, the Commission discovered several approaches to structured sentencing that appear to offer advantages on a number of the goals embodied in the Commission's mission statement. Consequently, the Commission selected for further study states that appeared to provide good examples of different approaches to structured sentencing. The Commission first

grouped states by type of sentencing system, and then identified one state within each type that had higher scores and “better” practices. Four different structured sentencing approaches were chosen: presumptive guidelines, voluntary guidelines, presumptive without guidelines, and hybrid guidelines. Next, the Commission totaled the number of standards each state met, which yielded a preliminary score (See Table A-2 in the Appendix A). Finally, it selected one representative state within each system for in-depth examination. This procedure guaranteed a relatively diverse mix of practices for further exploration.

Closer Inspection of Selected Well-Performing States with Diverse Features

The four states chosen for further review were North Carolina (presumptive guidelines), Delaware (voluntary guidelines), Pennsylvania (hybrid guidelines),²⁶ and Illinois (presumptive sentencing without guidelines). These four states met an equal or greater number of the standards (See Table A-2 in the Appendix A) than other sentencing systems of their type. For example, North Carolina, along with Washington state, met 8 of 9 standards, highest among presumptive guidelines states. In contrast, Illinois met only 3 of 9 standards, but this tied for highest among non-guidelines states. Each state also contained urban population centers that were roughly comparable to the District of Columbia in terms of poverty and crime.

A closer examination of these four jurisdictions was conducted to understand better the inner workings of these systems and to probe for strengths and weaknesses in each. The Commission asked the VERA Institute of Justice to summarize the operation of the sentencing system in each of the four states. VERA described each state as follows:

North Carolina (presumptive guidelines)

“Sentencing Structure: The North Carolina Sentencing and Policy Advisory Commission was established in 1990 and four years later, the state inaugurated a presumptive

²⁶ Hybrid means not wholly presumptive or voluntary, but with features of each. A National Center for State Courts study found that presumptive and voluntary guidelines systems were better thought of as a continuum than a dichotomy, and Pennsylvania appears to blend presumptive and voluntary features.

guideline system - Structured Sentencing - eliminating indeterminate sentencing and discretionary release. The new sentencing system is designed to restore truthfulness, increase the probability of incarceration and longer sentences for violent offenders and open bed space by diverting non-violent offenders to intermediate and community punishments.

“Individual sentences are defined by reference to cells on a grid with ten offense levels and six criminal history levels. Each cell contains a presumptive, aggravated and mitigated range of sentence duration. The judge, after determining the appropriate grid cell for the offender, imposes a sentence in the presumptive range, or in the aggravated or mitigated ranges if certain statutorily defined factors are present. For sentences falling in the aggravated or mitigated ranges, the judge must provide written reasons; these sentences can be appealed by the defendant or the state.

“Structured sentencing has been recognized as a model of innovation. North Carolina was the first state to propose guideline standards for felonies and misdemeanors as well as for incarcerative and non-incarcerative punishments and there is a separate grid for misdemeanor offenses. The implementation of structured sentencing was accompanied by new state investment in community and intermediate punishments (Vera Institute, 2001).”

Delaware (voluntary guidelines)

“Sentencing Structure: Delaware has an advisory guideline system that was established by the 11-member Sentencing Accountability Commission (SENT AC) in 1987 and amended in 1990 after the passage of the state's Truth in Sentencing Act of 1989. In developing Delaware's sentencing system, SENT AC was guided by the principles that prison space is best reserved for violent offenders and that individuals should be sentenced to the least restrictive and least costly sanction consistent with public safety concerns.

“Delaware's guideline system is unusual in that it is not characterized by a grid, but by a five-level continuum of sanctions. Levels I through IV consist of varying degrees of non-incarcerative sanctions, from administrative supervision to electronic home confinement and day reporting. Level V mandates full incarceration. Offenses fall into ten offense classifications - seven for felonies and three for misdemeanors - to which presumptive levels and sentence duration are assigned. For example, for Class E violent felonies, the presumptive level is V and the presumptive sentence length is up to 15 months.

“SENTAC suggests that judges impose a sentence within the presumptive sentence range for most offenses when there is an absence of aggravating or mitigating factors. Different standards are set out for cases where the offender has a criminal history or aggravating factors, such as excessive cruelty, exist. Judges are required to state, on the record, reasons for sentences that deviate from the presumptive standards. The adequacy or persuasiveness, however, cannot be appealed to higher courts. Delaware has been called the exception among voluntary guideline states; unlike other states where voluntary guidelines have had little effect because compliance with them is not required by law, at least one commentator has noted that the guidelines in Delaware ‘appear to have substantial normative and collegial authority’ (Vera Institute, 2001).”

Pennsylvania (hybrid guidelines)

“Sentencing Structure: The Pennsylvania Commission on Sentencing was established in 1978. Sentencing guidelines became effective in 1988 with revisions coming into effect in 1994 and 1997. The Commission was guided by the idea that sanctions should be proportionate to the severity of a crime and to an offender's prior conviction record.

“Sentences are determined on a single grid according to a fourteen-level offense gravity score and an eight-level prior record score. For each grid cell, three guideline ranges are provided: a standard range (for use under normal circumstances); an aggravated range (for use when the judge determines that there are aggravating circumstances); and a mitigated range (for use when the judge determines that there are mitigating circumstances). The range provided in each recommendation suggests a minimum number of months of incarceration; the guidelines do not contain maximum sentence recommendations. Enhanced guideline ranges apply if an offender possessed or used a deadly weapon during the commission of the offense, involved youths in drug trafficking, or trafficked in drugs within 1,000 feet of a school.

“A court must consider the guidelines before sentencing, but retains the discretion to sentence outside the guidelines. The guidelines are designed to structure the discretion of the sentencing court without denying the court the power to craft sentences to address the particular needs of the defendant and the interests of justice. If the sentence imposed is in the aggravated or mitigated range, the judge is encouraged to identify specific aggravating or mitigating reasons. If the sentence imposed is a departure from the guidelines (i.e., below the mitigated range or above the aggravated range), the judge is required to provide a written statement of the reasons for deviating from the guidelines. By statute, both prosecution and defense may appeal the discretionary aspects of a sentence. The Superior Court is instructed to vacate a sentence when the lower court failed to consider the guidelines, applied the guidelines erroneously, departed from the guidelines and imposed an unreasonable sentence, or sentenced within the guidelines and imposed a clearly unreasonable sentence (Vera Institute, 2001).”

Illinois (presumptive sentencing without guidelines)

“Sentencing Structure: Since 1978, Illinois has adhered to a system of determinate sentencing in which a trial court will impose a specific term of months, days or years within a range of permitted sentences. The sentence will be served either in custody (e.g., in prison) or on conditional release (e.g., on probation). Certain murder convictions may be punished either with a sentence of life imprisonment without possibility of release or by death. A life sentence also is available for certain enhanced-penalty situations.

“Mandatory Minimums and Habitual Offenders: Separate sentencing structures govern felonies and misdemeanors. Illinois has six felony classes. For each, statutes provide minimum and maximum terms of imprisonment and, where applicable, probation terms. For prison sentences, the law specifies a regular prescribed term of incarceration and an extended term which is triggered by certain aggravating circumstances, such as a defendant's history of prior felony convictions or when the offense is particularly brutal or heinous. Illinois's habitual offender statute provides that anyone twice convicted of certain violent felonies, including criminal sexual assault or first-degree murder, is a habitual offender and shall be sentenced to life imprisonment upon conviction for a third such offense. In addition, non-life enhancements are available for other offenses

including aggravated stalking, aggravated battery, child abandonment or endangerment, hate crimes and vehicular endangerment.

“In sentencing defendants in non-capital cases, a pre-sentence investigation is conducted and a report is prepared. The court holds a sentencing hearing and is required to consider the financial impact of incarceration as well as any acceptable factors in aggravation or mitigation. The most obvious aggravating factor is a defendant's prior criminal conduct and whether the defendant's conduct was brutal or heinous. The court also may consider a victim-impact statement (Vera Institute, 2001).”

In order to gain a better understanding of the sentencing systems of North Carolina, Delaware, Illinois, and Pennsylvania, the Commission invited representatives from each state to a workshop in November of 2001. The invited participants included judges, defense attorneys, prosecutors, and sentencing commission staff directors.²⁷ The principal goal of the workshop was to allow the members of the Commission to question invitees on the practical political and legal features of their systems, to probe into the strengths and weaknesses of these systems, and to form their own opinions about what features made the most sense for the District of Columbia. Members were especially interested in learning how each system was created, how it works, and whether or not it is perceived by all parties to be successful within the state (in comparison to the previous system or other alternatives). In addition, the Commission asked participants to explain in more detail how their systems deal with mandatory minimum sentences, drug cases, plea-bargaining, so-called “real offense sentencing,”²⁸ alternatives to incarceration, and judicial discretion. In order to understand the application of each system, concrete scenarios were

²⁷ The Commission wishes to thank Daniel Wilhelm of the Vera Institute of Justice’s State Sentencing and Corrections program and Nicolas Turner of Vera’s National Associates program for facilitating the meeting.

²⁸ “Real offense sentencing” allows the judge to consider, or base the sentence on, the defendant’s “real conduct” during the commission of the crime, even where the defendant pled guilty to, or was convicted of, a lesser offense. States vary on whether they explicitly permit the practice and how the defendant’s “real conduct” must be shown or proven.

developed to address each area. For example, in an attempt to learn how each of the jurisdictions incorporates judicial discretion into their system, participants were given the following scenario:

Scenario: Suppose you have an offender convicted of manslaughter, which has a presumptive or guideline sentence to prison. If there are unusual mitigating circumstances in the case (e.g., the victim was the boyfriend of the defendant's mother who regularly beat up the mother, and defendant stabbed him to death in the home one night after he abused defendant's mother "one last time"), can the judge go outside the guidelines or presumptive range? Suppose the judge disagrees strongly that any prison time should be given. How would he/she craft a departure? Have you seen similar situations and what was the result? Could the prosecution appeal the sentence?

The Commission closed the session by asking participants if they had it to do over, would they create the same system; and if not, what they would do differently in the process, planning, or implementation.

Following the session, members of the Commission summarized the views of many of their fellow colleagues. One member commented as follows:

Now, when you look at the system [in the respective states] while you might like to see some changes in certain areas -- by and large, reflecting on the mission that we all share and commitment to our communities, in fact, the consensus is that guidelines along some lines will result in justice and fairness and that it reserves prison space for those who really need to be there in the judgment of the community and that other approaches [be utilized] for everyone else.

Another noted:

In general, any jurisdiction that wants to look at criminal sentencing is trying to do that same thing. Trying to figure out how to achieve individual justice in individual cases without allowing so much discretion that by individualizing your justice you end up treating people who should be treated the same quite differently and in that sense unfairly and, you know, how you do that is certainly a lot easier said than done.

A third said:

But, over time although as much as I want to preserve my own discretion because I have very strong feelings about certain types of criminal acts and how they should be punished, I have always been willing to give up some of that discretion for a greater goal. If that greater goal is certainty, punishment, a system that's rational and fair, that people understand, that we incapacitate only those who need to be in jail, I'm willing to give up something to achieve that and I'm willing to give up some of my discretion.

Commission's Deliberations and Recommendation

Following the four-state meeting, the Commission took stock of what it had learned regarding structured sentencing options that would make sense for the District. All members concluded that any system needs to be carefully crafted to local circumstances, needs and preferences, and that a “cookie cutter” approach to justice – where the District would adopt another state’s system in its entirety – is not acceptable. Members were also unanimous that a system that eliminates all discretion in individual cases will not serve the ends of justice. The Commission met a few weeks later in an effort to build a consensus on a system of structured that would best serve the District of Columbia.

The following preliminary proposal was presented as a starting point, for discussion purposes only, at the Commission’s next meeting in December of 2001. This proposal was designed to incorporate many features borrowed from the systems of the other states and to provoke discussion:

The Commission should proceed toward the goal of recommending to the Council in its 2002 Annual Report a system of sentencing guidelines based on the following principles:

1. The guidelines would begin as advisory only. If implementation revealed wide disparity or unacceptably low rates of compliance, the Commission would review the guidelines with a view to modifying them to better reflect sentencing practices (where warranted) and converting them from voluntary to presumptive or mandatory, subject to legislative approval.

2. Voluntary guidelines necessarily imply no appellate review in the first phase described above.
3. The guidelines would have relatively wide ranges of recommended sentences for each offender/offense so as to provide the maximum room for the exercise of judicial discretion within the recommended range.
4. The recommended sentences and ranges would be based primarily on the severity of the offense of conviction and the offender's criminal history.
5. Each offender/offense category would have a "normal" recommended range and both an "aggravated" and "mitigated" range similar to the North Carolina and Pennsylvania approaches. Factors considered relevant to move into the upper or lower range would be enumerated. In the initial voluntary phase, judges would be free to use the upper and lower ranges, but would be asked to identify the aggravating or mitigating factors on which they relied.
6. Because, in the initial phase, the guidelines would be purely advisory or voluntary, judges would be allowed to sentence outside the ranges in both directions (i.e., above the aggravated upper limit or below the mitigated lower limit). Judges would be "encouraged" by peer pressure and training to reserve such departures for "extraordinary" cases and would be asked to state their reasons on the record or in writing from a list of "approved" factors (including "other, please specify"). Again, however, it is assumed that there would be no appellate review beyond what would be available under current law.
7. Judges reasons for sentencing in the aggravated or mitigated ranges or for sentencing outside the ranges would be collected and analyzed by the Commission to better understand judges' decisions, with an eye toward possible modification of the initial guidelines.
8. Alternative sanctions (also known as correctional options) should be included in the guidelines, giving the judges a zone of discretion to select an alternative to incarceration for selected ranges. Within approved zones, the selection of an alternative to incarceration will not represent a departure, even if the sentence recommendation otherwise calls for incarceration.
9. Data collection and continuous analysis and refinement are of primary importance in a pilot program designed to evaluate the advisability of making the program permanent in its current form or with modifications. Consequently, judges will be asked (required) to complete forms indicating that they have seen the sentencing worksheet and recommendation, and then provide the sentence that was selected along with a rationale if the sentence represents a departure.

The members reviewed the proposal and modified it after extensive discussion and debate over the next several months. The modified proposal appears below as the Commission's recommendation pursuant to Section 6 of the Advisory Commission on Sentencing Establishment Act of 1998 (as amended by the Sentencing Reform Amendment Act of 2000).

The recommendation that appears below represents the Commission's current thinking on structured sentencing for the District of Columbia. It is difficult to evaluate the merits of any such system in the abstract. Details, including actual sentencing recommendations for specific felonies, will be provided in the Commission's 2003 Report, assuming that Report recommends the adoption of guidelines along these lines. At this time, the members of the Commission are in general agreement that a voluntary guidelines system such as the one described below is at least the direction that would best serve the needs of the District in its present circumstances. All members of the Commission wish to preserve judicial discretion in individual cases to the maximum extent compatible with the goal of reducing unwarranted disparity. At the same time, members are concerned that "truth in sentencing," while adding a certain degree of certainty and predictability to the process, may do little to promote desired consistency and uniformity, and may have indeed detracted from these goals by opening up wider ranges in which sentencing judges would exercise discretion with little guidance. The resulting recommendation is an attempt to harmonize the competing goals of sentencing in a way intended to improve the system of sentencing in the District of Columbia while still preserving its best features.

Recommendation 1: The Commission will develop by November 2003 a system of voluntary sentencing guidelines based primarily on the severity of the offense of conviction and the criminal history of the offender. The guidelines will include recommended sentencing dispositions and, where prison is the disposition, recommended ranges for terms of imprisonment. The ranges would be relatively wide to preserve judicial discretion, but not so wide as to defeat the goals of uniformity and proportionality. The guidelines would be

based on two principles of proportionality: the more serious the offense of conviction, the more severe the recommended sentence; and the more serious the offender's criminal record, the more severe the recommended sentence. Judges would be encouraged to follow the recommended sentences and to sentence within the recommended ranges. The Commission will consider aggravated and mitigated ranges for prison sentences, which would still be considered "within the guidelines" as long as the judge relied on one of the listed aggravating or mitigating factors. Since the guidelines would be voluntary, judges would be free to depart in both directions in "extraordinary" cases, but would be expected to state reasons in writing or on the record using the aggravating or mitigating factors provided, including "other, please specify." Consistent with current law, there will be no appellate review of sentences.

If such a system were to be developed in the Commission's 2003 Report and ultimately adopted by the Council, close monitoring of sentencing practices would be imperative. In that event, the Commission would propose a detailed plan for the collection and analysis of information on all felony sentences imposed with a view to measuring the degree of compliance, the number and reasons given for departures, the extent of acceptance by judges and practitioners, and other information that would enable the Council, on an on-going basis, to evaluate the system and identify areas in need of improvement.

