ARTICLE

THE POWER OF BUREAUCRACY IN THE RESPONSE TO BLAKELY AND BOOKER

Ronald F. Wright*

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I. INTRODUCTION

There is no script to tell us what happens next in these befuddling times of legal uncertainty for criminal sentencing. How will different jurisdictions respond to the recent Supreme Court decisions in Blakely v. Washington1 and United States v. Booker,2 which require jury fact-finding to support certain types

* Professor of Law, Wake Forest University.
of sentences? Will jurisdictions fold juries into the existing sentencing rules? Will they move to less binding sentencing guidelines, leaving judges with enough sentencing discretion to avoid the need for jury findings at sentencing? Or will they avoid the jury requirement through more mandatory sentencing statutes, making the case-specific facts at sentencing irrelevant?

The best clues in predicting the answers to these questions come from the people who know this world best, the sentencing bureaucracy. Sentencing commissions, through experience and full-time attention to the issues, understand the political landscape and how the sentencing laws operate in the courts. They do not hold the ultimate power over the direction of sentencing policy, but their resources and persistence on these questions make them influential. And it is possible to predict how sentencing bureaucracies will use their influence.

Sentencing commissions, mostly for benign reasons, hope to preserve or expand their own place in the sentencing structure. Sentencing bureaucracies, like other bureaucracies, predictably aim for self-preservation. The particulars shift from place to place, but those who would predict what comes next in the law of sentencing must identify the policy options that best preserve the role of the full-time sentencing bureaucracy.

In states with a vibrant sentencing commission or other players who advocate for predictability and resource planning, an expanded role for juries at sentencing is the most typical result. In states with less influential actors at the center of crime and corrections policy, the trial court actors scattered among the courtrooms in that state by default have more influence with the legislature. Thus, changes to the sentencing laws that give those trial actors more discretion have resulted.

The federal system, however, presents a special case. In the aftermath of Booker, the federal sentencing commissioners will find themselves advocating a different set of outcomes than their state counterparts. Because the federal institutional landscape makes it difficult for the U.S. Sentencing Commission ("Commission") to hope for jury-enhanced guidelines, the most realistic option that preserves the influence of the federal Commission is asymmetrical guidelines that constrain minimum but not maximum sentences.

Furthermore, the allure of mandatory minimum sentences, the worst possible outcome for a sentencing bureaucracy, will be far stronger for the U.S. Congress and for federal prosecutors than for their state counterparts. The federal Commission will spend much of its time and political capital fending off
mandatory minimum sentences, an option that has no politically realistic chance in the states. Thus, the institutional struggle at the federal level is almost certain to produce results that look nothing like the state outcomes.

Some of the reasons for this prediction grow out of the Commission’s recent history. Events over the years have damaged the Commission’s relationship with Congress and have made the commissioners reluctant to take positions with any political consequences. The fiscal realities of federal criminal justice also place some limits on the Commission’s influence because the cost of corrections does not give the federal commissioners the sort of political leverage in Congress that their state counterparts enjoy in the state legislatures.

Another reason for this prediction comes from the unusual starting point in the debate that the Booker remedial decision created. The unexpected Booker remedy creates a starting point that favors voluntary guidelines and produces less urgency to move to a jury system for the sake of stability. Finally, an enhanced jury system would be especially costly in the federal system because of the Federal Sentencing Guidelines’ (“Guidelines”) current reliance on real offense conduct.

This Article closes with observations about the politics of crime during major shifts in sentencing rules. One lesson to draw from the experience after Blakely and Booker is that prosecutors alone do not determine the legislative outcomes on sentencing questions. Neither do the partisan affiliations of the prosecutors or the majority party in the legislature. While these factors obviously do affect the sentencing legislation that a legislature passes, partisan affiliation does not tell the entire story. Institutions matter, and their place in the political landscape matters. The long-term resources and habits of commissions and other full-time criminal justice bureaucracies can outlast the partisan agendas of the present in shaping sentencing legislation.

II. THE POLICY OPTIONS AFTER BLAKELY AND BOOKER

The Supreme Court held in Blakely v. Washington that juries rather than judges had to find any facts that served as a prerequisite to receiving a longer prison sentence. The Justices recognized in Blakely that their decision would prompt an immediate legislative response in many jurisdictions. Justices Breyer and O’Connor, in their dissenting opinions, explored some

of the specific policy options available. Justice O'Connor framed the legislative choice as between sentencing guidelines and some less costly options.

The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of Apprendi to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform... The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing.4

Justice Breyer offered a more exhaustive list of the possibilities. The first legislative option would be a determinate sentencing system: "create a simple, pure or nearly pure 'charge offense' or 'determinate' sentencing system," for example "[r]obbery would carry a single sentence, say, five years' imprisonment."5 Second, a state could "return to a system of indeterminate sentencing."6 Third, it could insert juries into their existing guidelines systems, "retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them...[so] Judges would...not be able to depart upward unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt."7 This was the model that the Kansas legislature tried when the state supreme court anticipated the Blakely holding three years earlier.8 Finally, Breyer imagined an inverted guideline system: "Congress and state legislatures might...rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts..."9

Another policy option emerged in the months after the appearance of the Blakely decision: a system of asymmetrical guidelines (or "guidelines without tops").10 These asymmetrical

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4. Id. (O'Connor, J., dissenting).
5. Id. at 2552–53 (Breyer, J., dissenting).
6. Id. at 2553.
7. Id. at 2554.
10. See Frank O. Bowman, III, Essay, Train Wreck? Or Can the Federal Sentencing...
guidelines would constrain judges who hoped to move lower than the guideline minimum but would not put serious limits on judges who planned to set a sentence anywhere between the guideline minimum and the statutory maximum.

The Justices debated which of these proposals were most likely to attract the necessary votes in state legislatures. Justices Breyer and O'Connor believed that discretionary sentencing rules or mandatory sentencing statutes (Justice Breyer's first and second options) would win out. Justice Scalia remained agnostic, placing more weight on the Kansas attempt to include juries within a guideline system. Academics, handicapping the political odds for post-Blakely sentencing laws, have tended to agree with the dissenters, predicting that states will find the use of juries within binding guidelines to be too costly.

Such predictions, however, ignore the power of partiality. Sentencing policy is not made by a unitary decisionmaker who rationally weighs the cost to the whole state based on complete information. Instead, that policy falls together through an interaction among many different institutions and individuals in the state. They each have partial information about the costs of various options, and they are each partial to some policy options over others. For instance, judges plainly would prefer more discretionary systems because they would give the judges the most control over case outcomes. If judges could choose the new system alone, they would choose this one regardless of cost estimates. Indeed, that is precisely what the Supreme Court did for the federal system. Through a rather strained reading of the severability doctrine, the Court in United States v. Booker instituted a voluntary guideline system that made judicial power


11. See Blakely, 124 S. Ct. at 2556–58 (Breyer, J., dissenting) (arguing that the third option would be cost-prohibitive and the fourth option difficult to implement).

12. Id. at 2541 (majority opinion).


the best available method to cure the problem of too little jury involvement in federal sentencing.\textsuperscript{15}

Once we start to take the partial perspective of single institutions or sentencing actors, attention must turn quickly to the preferences of one of the most influential sentencing policy institutions: the sentencing commission.

III. THE PRESENCE AND ABSENCE OF STATE SENTENCING BUREAUCRACIES

At the time of the Blakely decision, about a dozen states used presumptive sentencing schemes, which made findings of fact by a jury potentially relevant in almost every case.\textsuperscript{16} In most other states, certain elements of the sentencing laws, applicable to at least some cases, were possibly affected. Thus, the Supreme Court's new application of trial-by-jury rights to sentencing facts created a natural experiment in the politics of sentencing.

A national tour reveals some interesting patterns left behind by sentencing commissions in policy debates. Sentencing bureaucracies, like all other bureaucracies, understand the importance of their missions, and they predictably advocate positions that retain or increase their own involvement. In states with especially well-funded or well-respected bureaucracies, the option that kept the administrators closest to the center of sentencing power was a jury system—the necessary price to pay for a continued presumptive guidelines system. That was the outcome in North Carolina, Minnesota, and a few other jurisdictions.

By comparison, states with no strong centralized sentencing bureaucracy were more likely to adopt voluntary guidelines or other systems that emphasized judicial sentencing discretion. This option became most appealing because in the absence of a sentencing commission, accurate information about sentencing practices and the likely cost of new jury procedures pushed the jurisdiction to less risky options, which also happened to be the favored options of the trial actors who dominated the debate.

\textsuperscript{15} United States v. Booker, 125 S. Ct. 738, 756–57 (2005).

A. Strong Bureaucracies and the Jury Options

In North Carolina, it was clear from the start that the Supreme Court's decision in Blakely would require some refurbishing of the state's sentencing structure. After months of debate, the sentencing commission and the general assembly chose a jury procedures plan as the best response. This outcome happened because policy designers in the capital saw jury procedures as the best way to keep themselves in control of correctional resources.

North Carolina used a familiar sentencing grid with a vertical axis based on seriousness of offense and a horizontal axis based on prior criminal record. Each cell of the grid laid out three ranges for the judge to use in selecting the proper duration for a prison sentence: a presumptive, aggravated, and mitigated range. The judge made certain factual findings about the offense or the offender's background to justify selection of a sentence from the aggravated or mitigated range. It was obvious to criminal justice actors throughout the state that the Blakely decision would affect several aspects of this system.

Because the difference between the presumptive and aggravated range was not large for most crimes, the effort of proving an aggravating circumstance to a jury was not worthwhile to prosecutors in high-volume crimes. For a few


18. For a more detailed account of post-Blakely developments in North Carolina, see Ronald F. Wright, Blakely and the Centralizers in North Carolina, 18 Fed. Sent’g Rep. 19 (2005), which presents the same information that appears in this article in the text accompanying notes 19-29.


20. Id.

21. Analysts from an institute responsible for training prosecutors declared that Blakely applied to aggravated range sentences, and possibly to other aspects of the system, such as the extra point added to the criminal history score because the current crime was committed while the defendant was on probation or parole status. Memorandum from Professor Robert L. Farb, Univ. of N.C. Inst. of Gov’t, Blakely v. Washington and Its Impact on North Carolina’s Sentencing Laws 7-9 (July 9, 2004), http://nicinfo.io.g.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf.

more serious crimes like homicide, prosecutors filed a superseding indictment alleging the aggravating circumstance and proved the aggravating fact to the jury at trial.

When the sentencing commission first debated the best response to Blakely, commissioners with the strongest connections to trial court actors argued for a more discretionary sentencing structure. Although prosecutors considered the status quo to be tolerable in the short run, many saw Blakely as a larger opportunity to shift the overall structure of the sentencing laws to make aggravated sentences easier to obtain. The representative for the Conference of District Attorneys asked the commission to combine the presumptive and aggravated ranges in each cell on the sentencing grid, leaving the judge to choose between one expanded presumptive range and a mitigated range that still required special fact-finding. The representative for the Conference of Superior Court Judges upped the bid, asking to expand the available range in each cell to cover both the aggravated and mitigated ranges.

Other commissioners, such as the designees for the Department of Correction, the attorney general, and the court of appeals, favored centralized monitoring and control of sentences. The chair of the sentencing commission and the staff also approached the Blakely questions from this centralized perspective. For them, the proposal by the trial court actors to collapse the three smaller ranges into a single larger range threatened the predictability of sentences.

The staff presented data to show that 79% of all sentences under the existing structure were placed at the top or bottom of the available range, suggesting a possible desire by many judges to move the sentence higher or lower if the legally-approved sentencing range expanded. With less predictable sentences, the commission could no longer accurately forecast the prison beds

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24. Id.

25. Id.

26. Id.

27. See N.C. Sentencing Policy & Advisory Comm'n, Blakely Subcommittee Meeting Minutes 1 (Oct. 8, 2004) [hereinafter October Minutes] (on file with author); see also N.C. SENTENCING REPORT, supra note 22, at 21–22 (reporting 78.8% of all sentences placed at the extremes of the available ranges).
necessary in the coming years, making fiscal planning far more difficult for corrections officials.\textsuperscript{28}

After the commission sent its recommendations to the general assembly in January 2005, the legislators never questioned the basic choice in favor of a greater role for juries in sentencing, rather than larger discretionary ranges for judges. The cost of juries never became a serious issue: commission staff presented data indicating that only a small number of defendants would be likely to invoke any newly-available jury procedures, so the commission proposal passed with no serious opposition.\textsuperscript{29}

The same dynamic played out in other states with binding sentencing guidelines and strong sentencing commissions that carried great weight in the policy debate.\textsuperscript{30} In Washington and Minnesota, the commissions reminded legislators and others of the value of sentencing guidelines in managing correctional resources.\textsuperscript{31} Commission staffers convinced legislators that they would also benefit from the accurate caseload and cost data that was possible under the current guideline system, a predictive power that would be jeopardized under a more discretionary system. They also gave reassuring predictions about the modest costs of adding the necessary jury procedures to the existing guidelines.\textsuperscript{32} In each case, the commissions got what they wanted in the amended sentencing laws.

\textsuperscript{28} See N.C. BLAKELY REPORT, supra note 17, at 2 (explaining that “expanding the presumptive range would make the prediction of resources much more difficult and less reliable”); October Minutes, supra note 27, at 2 (chronicling the response to different proposals for change with concerns about the effect on prison beds).

\textsuperscript{29} The Governor signed the jury procedures bill on June 30, 2005. The next day, the North Carolina Supreme Court issued its decision confirming that Blakely did apply to the state’s sentencing laws. State v. Allen, 615 S.E.2d 256, 264–65 (N.C. 2005).


\textsuperscript{32} See, e.g., MINN. SHORT TERM RECOMMENDATIONS, supra note 30, at 6–7.
When the available post-Blakely options are viewed from the commission's vantage point, one can see the appeal of the jury option. It comes closest to restoring the control that central actors like the commission can have over sentencing outcomes and corrections budgets. This is particularly true when one considers how often defendants plead guilty and waive their rights to jury fact-finding at trial, and presumably at sentencing. By comparison, voluntary guidelines or other more discretionary systems push the Commission and other system-wide actors to the periphery.

B. The Absence of Bureaucracies and the Judicial Discretion Option

In Tennessee, where the central institutional actors were weaker, the policy debate ended with a move to a more discretionary system that decentralized sentencing power to the trial court judges. At the time, Tennessee used presumptive guidelines, but it did not maintain a strong sentencing commission to manage the adaptations in the guidelines or to advise the legislature regularly along the way. The governor appointed a Blakely advisory committee late in 2004, composed of people with courtroom experience, including a few with past central institutional experience. The committee chair was a former chair of the Tennessee Sentencing Commission.

Early in their deliberations, the committee developed two options, one converting the system entirely to voluntary guidelines and the other inserting a jury procedure into the existing binding guidelines. Initially, the commission was agnostic and showed no preference between these two, pointing out that each option presented many unknowns.


37. Id. at 2–3.

38. Id. at 3.
The lack of any cost data proved pivotal as time passed. Because the committee had no convenient access to data that would allow an estimate of the costs of new jury procedures, the fear of the unknown drove the decision. The trial court actors on the committee could assure the group that Tennessee had used discretionary sentencing in the past and had been able to afford the necessary judicial resources.\textsuperscript{39} Requiring juries to find sentencing facts, however, appeared to be an untried and potentially expensive procedure.

Oddly enough, the U.S. Supreme Court's partial reconstruction of federal sentencing statutes in \textit{Booker} suggested to the Tennessee committee what it called a "compromise" solution.\textsuperscript{40} They recommended that the legislature convert the sentencing guidelines into a voluntary system, while retaining appellate review and a requirement that the sentencing court explain any sentence outside the voluntary guidelines.\textsuperscript{41} The legislature followed this recommendation and the governor signed the bill in June 2005.\textsuperscript{42}

Indiana presented a second example of a state that adopted more discretionary sentencing rules in the absence of a strong sentencing bureaucracy. At the time of the \textit{Blakely} decision, Indiana statutes designated presumptive sentences for each class of crime, and certain factual findings triggered a presumption that the judge should impose an aggravated sentence.\textsuperscript{43} The judges used no sentencing guidelines and the state did not rely on a sentencing commission to monitor the system.

The Indiana Supreme Court forced the issue when it ruled in \textit{Smylie v. State} that the \textit{Blakely} interpretation of jury trial rights did apply to the Indiana presumptive sentencing statutes.\textsuperscript{44} Without any strong statewide institutions of sentencing or corrections policy to advocate for the control over resources that presumptive sentencing rules make possible, or to offer any reassuring estimates of the costs of a new jury procedure, the

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\textsuperscript{40} TENN. REPORT, supra note 33, at 3.


legislature converted the presumptive system to a voluntary basis in April 2005.\footnote{S. 96, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005). A study committee in Indiana did recommend jury procedures to the legislature, SENTENCING POLICY STUDY COM., FINAL REPORT 82 (2004), available at http://www.in.gov/legislative/igareports/agency/reports/SPS01.pdf, but the committee did not have the sort of long-standing credibility and expertise with data that a full-time sentencing commission would bring to the debate.}

An example of mixed effects arising from weaker sentencing institutions came from Alaska. The state's prosecutors and public defense agencies developed temporary procedures to respond to the immediate impact of the Blakely decision, which required the prosecutor to allege and prove to the jury any potential aggravating sentencing factors.\footnote{Nat'l Ass'n of Sentencing Comm’ns, Alaska: Blakely in Alaska, SENT’G GUIDELINE, Feb. 2005, at 3, available at http://www.uscc.gov/states/NASC_030205.pdf.} The prosecutors and public defenders also cooperated in drafting proposed legislation.\footnote{Id.} The proposal from these trial court actors called for “presumptive ‘ranges’ rather than a single presumptive sentence for qualifying offenses.”\footnote{Id. (emphasis added).} Judges could sentence anywhere in the range, but if the government wanted a sentence above the range, it would need to prove aggravating facts to a jury beyond reasonable doubt.\footnote{Id.} The legislature endorsed the package.\footnote{See S. 56, 24th Leg., 1st Sess. (Alaska 2005) (calling for presumptive ranges and requiring aggravating factors to be proved to a jury beyond a reasonable doubt).}

This mix of increased sentencing discretion (in the form of broader presumptive ranges) and increased use of juries for sentencing facts reflected the mixed institutional backdrop in Alaska. The state had a long history of strong appellate involvement in sentencing that exerted a centralizing tendency on sentencing law.\footnote{See Susanne Di Pietro, The Development of Appellate Sentence Review in Alaska, 75 JUDICATURE 143, 145–46 (1991) (chronicling Alaska’s rise in filings of sentence appeals); see also Teresa White Carns, Sentencing Reform in Alaska, 6 FED. SENT’G REP. 134, 134 (1993) (noting that “Alaska’s courts created their own guidelines through judicial decisions”).} Alaska also maintained a full-time sentencing commission, although not in the classic sense of a commission that created and monitored sentencing guidelines.\footnote{See Carns, supra note 51, at 134–36 (describing Alaska’s Sentencing Commission and its successor, the Alaska Judicial Council). For further description of the work of the Alaska Judicial Council as it relates to sentencing, see Alaska Judicial Council, http://www.ajc.state.ak.us (last visited Apr. 21, 2006).} This state, with centralized sentencing traditions and institutions in an attenuated form, produced a mixed legislative response to Blakely.
One other possible effect of weak central sentencing institutions showed up in state judicial rulings. In the months after Blakely, a number of state appellate courts reached highly improbable decisions, ruling that Blakely did not apply to the state sentencing laws despite obvious parallels to the Washington and federal systems. Such rulings came from courts in California, Hawaii, Idaho, New Mexico, and Tennessee.  

With the possible exception of New Mexico, these states all lacked vigorous sentencing commissions or other sentencing bureaucracies. Perhaps because there was no institution providing assurance that any system disruption would be manageable and affordable, other actors in the state (including the appellate courts) were more likely to find ways to duck the issue or to postpone the effects of Blakely.

IV. FEDERAL SENTENCING POLITICS AND THE THIRD WAY

The interaction between federal sentencing actors and their counterparts in state systems has been thin and unsatisfying over the last two decades. The lack of cross-fertilization among

53. See People v. Black, 113 P.3d 534, 543, 548 (Cal. 2005) (finding California’s determinate sentencing scheme, which allows judicial fact-finding of aggravating factors for selecting a sentence, constitutional); State v. Maugaotega, 114 P.3d 905, 915–16 (Haw. 2005) (finding Hawaii’s discretionary sentencing system constitutional); State v. Stover, 104 P.3d 969, 973 (Idaho 2005) (finding Blakely inapplicable to Idaho’s indeterminate system with a maximum sentence of life imprisonment at the trial level); State v. Lopez, 123 P.3d 754, 768 (N.M. 2005) (holding that New Mexico’s sentencing scheme is not unconstitutional because it limits, rather than prescribes, the judge’s sentencing discretion); State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005) (finding that Tennessee’s discretionary sentencing scheme does not “infringe[] upon the province of the jury” and is thus constitutional (alteration in original) (quoting Blakely v. Washington, 124 S. Ct. 2531, 2540 (2004))); see also Peter B. Rutledge, The 2004 Gunderson Lecture: Apprendi, Blakely and Federalism, 50 S.D. L. REV. 427, 435–39 (2005) (suggesting that the antifederalist implications of Apprendi and Blakely may prompt a judicial response and may foster experimentation in the states). The Delaware Supreme Court also ruled that Blakely did not apply to the state’s guideline system, but the ruling offered a less strained reading of Blakely because of the relatively voluntary character of the Delaware guidelines. See Benge v. State, 862 A.2d 385 (Del. 2004) (“Blakely does not impact Delaware’s sentencing scheme because [its] guidelines are voluntary and non-binding.”), cert. denied, 125 S. Ct. 1943 (2005).

54. New Mexico recently renamed its long-standing Criminal and Juvenile Justice Coordinating Council the New Mexico Sentencing Commission. N.M. STAT. § 9-3-10 (2005). Nonetheless, New Mexico is still working toward an initial set of sentencing guidelines. See Frase, supra note 34, at 1197.

55. See Frase, supra note 34, at 1196–97 (summarizing the states that either have sentencing commissions or were contemplating commission-based guidelines).

56. See Gerard E. Lynch, Sentencing: Learning from, and Worrying About, the States, 105 COLUM. L. REV. 933, 942 (2005) (arguing that federal officials would be wise to broaden their “narrowly insular focus” and learn from the divergent state sentencing practices); Marc L. Miller & Ronald F. Wright, “The Wisdom We Have Lost”: Sentencing
these structured sentencing systems has been one of the major lost opportunities in criminal sentencing in this country. In the early years of the Federal Sentencing Guidelines, state sentencing actors saw the political unpopularity of the federal system among key constituencies and steered clear of all things federal. State commissions took great pains to explain how their guidelines differed from the federal structure. That initial wariness has, perhaps, lingered longer than necessary among state sentencing actors, for it should now be possible for states to draw ideas from the federal system without importing all the federal political baggage.

Conversely, federal actors have not taken adequate account of sentencing developments in the states. They have ignored too often and too easily the deep pool of experience and wisdom the state systems and players offer.

In this particular transitional moment, however, state systems may have less to say than they usually do about potential federal outcomes. For several interconnected reasons, the federal system is likely to go its own way.

A. The Commission's Power to Get Its Wish

The differences between the likely political outcomes at the state and federal levels might be explained partially by the political weakness of the U.S. Sentencing Commission. Assuming for a moment that sentencing bureaucracies everywhere would wish for the same response to Blakely, the federal Commission might have less power than some state commissions to achieve its wishes.

As Frank Bowman has pointed out, the Sentencing Reform Act placed the Commission in a structurally weak position. Although the statute labeled the Commission an “independent

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Information and Its Uses, 58 STAN. L. REV. 361, 375 (2005) (noting that “informed comparisons” of state and federal sentencing rules have not been widely utilized in sentencing policymaking).


commission in the judicial branch, the Commission has not yet
developed a working relationship with federal judges that would
inspire the Judicial Conference and other units of the
institutional judiciary to provide political cover.

Neither do relations with the executive branch give the
Commission any political strength. One ex officio member of the
Commission comes from the Department of Justice, but the
Commission rightly has resisted the idea that it should duplicate
the role of the Department as an advocate for prosecutors. Thus,
the Commission often conflicts with the Department (albeit,
perhaps not often enough for most critics of the Commission).

As for the relationship between the Commission and
Congress, recent history offers no comfort. Congress’s view of the
Commission falls somewhere between indifference and hostility,
as demonstrated by the debacle over the crack-to-powder
punishment ratio, the Commission’s vain attempts to curb
congressional appetite for mandatory minimum sentences, and
the rushed legislative debate on the 2003 Feeney Amendment
that ignored Commission priorities. While many state
sentencing commissions came to be identified as institutional
resources for the legislative branch (much like the Congressional


62. See U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY 90–
(criticizing the congressionally established “100-to-1 drug quantity ratio between powder
cocaine and crack cocaine offenses” because it is “unjustified and fails to meet the
sentencing objectives set forth by Congress”).

63. See U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE
r_congress/MANMIN.PDF [hereinafter MANDATORY MINIMUM PENALTIES] (observing that
pending legislation may increase substantially the number of mandatory minimum
provisions); see also Rachel E. Barkow, Recharging the Jury: The Criminal Jury’s
Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 34–35
(2003) (describing the adoption of mandatory minimum sentences by the federal
government as a “secret machination” hindering the jury’s and judiciary’s ability to
impose effective checks on the legislature); Justice Anthony M. Kennedy, Speech
Delivered at the American Bar Association Annual Meeting (Aug. 9, 2003), in 16 FED.
SENT’G REP. 126, 127 (2003) (finding mandatory minimum sentences frequently “unwise
and unjust”).

64. See Stephanos Bibas, The Feeney Amendment and the Continuing Rise of
(arguing that the Feeney Amendment restrains the U.S. Sentencing Commission and
represents Congress’s lost faith and trust in the sentencing bureaucracy); Michael M.
O’Hear, Cooperation and Accountability After the Feeney Amendment, 16 FED. SENT’G
REP. 102, 108 (2003) (predicting that the increased prosecutorial control resulting from
the Feeney Amendment will frustrate the goal of consistent sentencing). But see Max
Schanzenbach, Have Federal Judges Changed Their Sentencing Practices? The Shaky
Empirical Foundations of the Feeney Amendment, 2 J. EMPIRICAL LEGAL STUD. 1, 39
(2005) (praising the Feeney Amendment’s reporting requirements for obviating further
regulation).
Budget Office or the Government Accountability Office in the federal government), such a mutually supportive relationship does not exist now between the Commission and Congress. Events over the years have damaged the Commission's relationship with Congress and have made the commissioners reluctant to take positions with any political undertones.

The fiscal reality of federal criminal justice also limits the Commission's influence because the costs of corrections do not amount to much in relative terms. Spending on prisons and other correctional programs makes up a huge portion of the budget at the state level. With so much riding on the effects of sentencing rules, state legislatures listen closely to trustworthy information about the effects of their bills. The need to produce accurate forecasts gives the state commissions a powerful source of credibility and access among legislators.65

In the federal system, however, the Commission's predictions about the effects of proposed crime legislation are not as crucial to a viable budget.66 Federal corrections spending makes up a relatively small slice of the federal budget, and even if spending in this category grows quickly, it will not overwhelm the federal budget. The Commission must make its projections, but Congress can ignore the predictions with fiscal impunity.

While it is true that the Commission must live within these structural limits on its authority, it is not without political resources. Unlike some state commissions, which can only recommend statutory amendments to the legislature, the federal Commission can change the rules of sentencing through its own amendment process.67 The strengths of the federal sentencing bureaucracy include a capable staff, an adequate budget, strong data collection practices, and long experience with the system. Where many state commissions cannot afford any meaningful studies to evaluate their systems, apart from routine collection of sentencing statistics, the federal Commission has sponsored some insightful and meaningful research.68 It has also sponsored

65. See Wright, supra note 58, at 70–77 (providing an example of financially and politically realistic results by tracing the efficient cooperation between North Carolina's legislators and its sentencing commission).

66. See Rachel E. Barkow, Administering Crime, 52 UCLA L. REV. 715, 760 (2005) (arguing that federal system's relative lack of fiscal restraint explains faster growth in imprisonment rates); Marc L. Miller, Cells vs. Cops vs. Classrooms, in THE CRIME CONUNDRUM 127, 149 (Lawrence M. Friedman & George Fisher eds., 1997) (noting that higher levels of government operate on larger budgets, allowing for additional expenditures without noticeably decreasing allocations made for other agencies).


68. For a recent example, see U.S. SENTENCING COMM'N, FIFTEEN YEARS OF
comprehensive reconsiderations of the Guidelines in key areas such as the measurement of economic losses. On occasion, the federal Sentencing Commission has demonstrated its real potential, despite the structural limits on its political influence.

B. The Commission’s Distinctive Wish List

Putting aside the question of whether the U.S. Sentencing Commission has the resources to achieve what it wants for federal sentencing policy, it likely will choose different objectives than the state commissions have chosen. For various reasons, the use of juries within sentencing guidelines will appear lower on the federal Commission’s wish list than it did on the lists of state commissions. In addition, the federal Commission must place a higher priority than its state counterparts on fending off the use of mandatory minimum sentences.

As we have seen, the live options as the state legislatures debated how to respond to Blakely have been either (1) more discretionary sentencing laws or (2) more jury involvement in binding guideline systems. The most well-established and influential state sentencing commissions favored the second of these options, knowing that this route would preserve the unifying and centralizing virtues of their existing sentencing guidelines. The jury option would also keep the commissions centrally involved in monitoring the system and planning for any future amendments as conditions changed. Bureaucratic self-preservation, in this case, also served important public purposes.

The basic priorities of the federal sentencing bureaucracy, in theory, should be similar to those of their state counterparts. Those priorities, however, will lend support to different policy options in the federal system. At the federal level, the juries-within-guidelines option is less realistic than it was for the state systems because it would require a more thorough restructuring of the federal system. In charge-based sentencing systems, such as those typically found in the states, the elements of the offense do much of the sentencing work, and juries are needed only in a


few cases to resolve a handful of aggravating facts for sentencing. Not so for the federal system.

The reliance on real offense conduct in the federal system means that each enhancement of the relevant offense level and each potential upward departure rest on a different fact that a jury must now find.\textsuperscript{70} Federal sentencing juries would become involved in far more cases and would need to find a much larger range of facts than state juries. The modified real-offense structure of the federal Guidelines boosts the overall costs of an enhanced jury system, and it makes the necessary revisions more complicated than is true in the states.\textsuperscript{71} One of the virtues of the jury option at the state level—its incremental effects on the sentencing laws, allowing the system to function much as it had in the past—is simply not applicable at the federal level.

Another obstacle to major change in the federal system derives from the comfortable starting point that the \textit{Booker} decision created for federal sentencing. The strained and unexpected use of the severability doctrine in \textit{Booker} converted the federal system into a more voluntary guideline system, a policy outcome with clear appeal for judges. The voluntary system also created some breathing room for all federal sentencing actors. While the state systems required immediate action before they could pursue many aggravated sentences, there has been no sense of urgency to replace the voluntary federal system that first started operating in January 2005. The pressing need to change an unacceptable system in many states convinced legislatures to opt for juries, despite some unknowns about their costs or operation.

While advisory \textit{Booker} guidelines have moved the federal system away from crisis, the Commission still has plenty of reasons to press for change. From the Commission's perspective, voluntary guidelines qualify as a mediocre option. Guidelines reinforced only by an evolving but modest "reasonableness review" in the appellate courts\textsuperscript{72} have little binding power and give the Commission very limited control over the direction of

\textsuperscript{70} See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004) (outlining the factors relevant to determining the appropriate guideline range).

\textsuperscript{71} See Frank O. Bowman, III, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker, 2005 U. CHI. LEGAL F. 149, 214 (advocating a simplified federal system that empowers the jury to find a limited range of aggravating facts); James Felman, The Need for Procedural Reform in Federal Criminal Cases, 17 FED. SENT'G REP. 261 (2005).

\textsuperscript{72} See Nancy J. King, Reasonableness Review After Booker, 43 HOUS. L. REV. 325 (2006) (reporting as unclear how the reasonableness review standard elicited in \textit{Booker} will impact sentencing at the appellate level).
sentencing policy. Such guidelines restrict the Commission’s power to forecast the necessary resources and the impact of proposed legislative changes.\footnote{See Reitz, supra note 13, at 1113–15. But see John F. Pfaff, The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines 3–4 (Fordham Law Legal Studies Research Paper Series, Working Paper No. 102, 2005), available at http://ssrn.com/abstract=869977 (exploring three reasons judges likely would follow voluntary guidelines).} If the members of the federal sentencing bureaucracy, like their state counterparts, rank policy options according to the level of involvement the options allow for them in setting sentencing policy, the advisory \textit{Booker} guidelines would not rank near the top of the list.

By contrast, asymmetrical guidelines offer the federal Commission more influence over the sentences imposed because minimum guidelines restore half the binding power of the pre-\textit{Booker} guidelines. Restoring the full presumptive power of guidelines through adding jury fact-finding would give the Commission even more influence, but as we have seen, this option is unrealistic. A move from \textit{Booker} guidelines to asymmetrical guidelines will improve matters from the Commission’s vantage point and is more incremental and realistic than the jury-within-guidelines option.

If asymmetrical guidelines appear fairly high on the federal Commission’s wish-list, mandatory minimum sentences must appear at the very bottom of that list. The Commission has recognized for many years that mandatory minimum sentences are fundamentally inconsistent with their efforts to achieve, through guidelines, some balance between uniformity and individualization in sentencing.\footnote{Mandatory Minimum Penalties, supra note 63, at 27–29.} When Congress passes a mandatory sentencing law, it not only controls the outcome for defendants convicted under that statute, but also exerts some pull on the cases of all defendants who arguably could be charged under the statute. It also pressures the Commission, for the sake of consistency, to amend guideline sentences for related crimes to conform to the mandatory levels, even though the statute does not apply to those related crimes.\footnote{See Michael Tonry, Commentary, Salvaging the Sentencing Guidelines in Seven Easy Steps, 4 FED. SENT’G REP. 355, 358 (1992) (proposing that the Commission draft guidelines without accounting for mandatory minimum statutes); see also Andrew von Hirsch & Judith Greene, When Should Reformers Support Creation of Sentencing Guidelines?, 28 WAKE FOREST L. REV. 329, 340–41 (1993) (advising reformers considering the creation of a sentencing commission to note the mandatory minimums in their jurisdiction and bear in mind the conflicts these minimum sentences can create).}

The prospects for mandatory sentencing statutes look different in the federal system than they do in the state systems.
All states do have mandatory minimum sentences built into their criminal codes. The sentences for many serious violent offenses contain substantial minimum prison terms. Some states also include a few mandatory minimum sentence statutes for narcotics and firearms offenses, often passed during fiscally flush times. But the most troubling forms of mandatory minimum statutes—those reaching large potential groups of defendants and leaving prosecutors to select between a mandatory or non-mandatory penalty at the charging stage for many defendants—do not play as heavy a role in state sentencing as they do in federal sentencing.

There are several reasons that state legislators have shown relative restraint when it comes to mandatory minimum sentences. The leading factor, as always, is money. Because state budgets cannot easily absorb large increases in corrections spending, a device such as mandatory minimum penalties, that expands the prison system, gets a skeptical hearing in the state legislature. A second and related force for restraint in the state legislature is the value of coherence: lawmakers recognize the benefits of maintaining coherent packages of sentencing laws. When sentences for related crimes work together well as a body, the legislature can expect more consistent and predictable behavior from prosecutors and from sentencing judges. Such predictability makes it easier to plan for the necessary prison construction and corrections operating costs. Mandatory minimum sentences, on the other hand, gouge a hole in the fabric of the criminal code, often overriding for a single crime the sentences that the legislature chose as part of a more comprehensive reworking of the state sentencing laws. The resulting inconsistency in the pattern of sentences raises questions of fairness.


77. See Carns, supra note 51, at 134 (noting that the bulk of Alaska’s felony offenders are subject to nonpresumptive sentences); John H. Kramer & Cynthia Kempinen, History of Pennsylvania Sentencing Reform, 6 FED. SENT’G REP. 152, 152 (1993) (highlighting Pennsylvania’s goal of avoiding the harmful effects of mandatory sentencing during the guidelines setting process); cf. Richard S. Frase, The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines, 28 WAKE FOREST L. REV. 345, 356 (1993) (discussing an unusual application of a mandatory minimum statute for use of a weapon during the commission of a crime).
A third source of restraint in the use of mandatory minimums at the state level is the absence of lobbying from prosecutors. Although there are exceptions, state prosecutors do not habitually ask for mandatory minimum sentence regimes. Perhaps they more fully buy into the need for systemic predictability, given the real fiscal constraints on prison capacity. They may also worry about the political minefield that can result from a lack of uniform sentences around the state. Elected district attorneys, with their independent political bases and distinctive courtroom cultures, will likely produce inconsistent outcomes from district to district.

The setting for mandatory minimum sentences looks much more hospitable at the federal level. If the U.S. Congress has a wish list, mandatory rules must appear near the top of that list. Those laws keep Congress most centrally involved in sentencing policy and send the strongest messages about particular crimes worth emphasizing. Because the corrections budget at the federal level leaves plenty of room for error, federal legislators have less incentive to approach crime problems systematically. Members of Congress gain political benefits from frequent visits to the area in response to individual cases where judges impose sentences that on first glance appear to be too low. Federal legislators have little reason to value a system that can forecast corrections costs or contain prison growth.

Prosecutors at the federal level are also more likely than their state counterparts to ask repeatedly for broadly-applicable mandatory minimum sentencing laws. The Department of Justice in recent months has made statements supporting a change from the Booker advisory guidelines. Attorney General Gonzales has called for sentencing laws with more power to bind judges, comments that could be interpreted to endorse either asymmetrical guidelines or mandatory minimum sentences. The Department of Justice might be operating with confidence that its internal guidelines on charging and plea bargaining will

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78. See Wright, supra note 18, at 21–22.
prevent the worst inconsistencies from district to district, discrepancies that could become most threatening under mandatory minimums.

In sum, the U.S. Sentencing Commission will probably direct its natural self-preservation energies toward different options than the state sentencing commissions did. The use of juries to find sentencing facts would require profound changes to the federal structure, changes that prosecutors and other key actors are not likely to endorse. This Commission-friendly outcome is likely out of reach for the federal system. Asymmetrical guidelines restore some of the Commission’s influence over sentencing policy and can be accomplished without daunting changes to the familiar structure of the Guidelines.

If change does come to the federal system, the struggle will likely boil down to a choice between asymmetric guidelines and mandatory minimum sentences. The Commission might prefer asymmetric guidelines over the status quo but conclude that the Booker status quo is the safest bet because Congress is bound to enact mandatory penalties once the legislative logjam breaks.

The long-term prospects for the Booker voluntary guidelines, however, do not look strong. Legislative change does not have to happen at one definitive moment. Congress can apply mandatory terms to the sentences for many crimes or only a few crimes, and it can return to the issue as often as it likes. The U.S. Sentencing Commission might achieve asymmetrical guidelines in the short term, but the explosive forces that favor mandatory penalties will not go away any time soon.

V. Conclusion: Lessons for the Politics of Crime

The institutional interests of sentencing commissions tell us something about the likely response to Blakely at the state level, and to Booker at the federal level. This observation runs counter to received wisdom about crime politics in the United States. In particular, the post-Blakely natural experiment in sentencing policy, cutting across many jurisdictions at the same time, offers two powerful revisions to the guiding principles now in use among observers of crime politics.

The first lesson we can draw from the pivotal role of sentencing commissions in the response to Blakely and Booker is this: prosecutors do not dominate all changes in crime policy. When criminologists, political scientists, and legal scholars

survey the politics of crime, they only have eyes for the prosecutor. They note that ever since the 1960s in the United States, fear of crime has led voters to elect leaders who advocate harsh treatment for criminals.83 Those political leaders who want to demonstrate their qualifications as crime fighters take their cues from prosecutors: when prosecutors ask for a new investigative technique or an increase in potential penalties, legislators deliver.

The roots of this political dynamic spread out in many directions. The media plays a role, by emphasizing the most sensationally violent stories rather than long-term crime trends.84 The political weakness of social groups that produce the most criminal defendants also matters.85 Criminal defendants are mostly poor, mostly male, and disproportionately racial minorities.86 These groups do not contribute money or time to political campaigns at the same rates as other groups, and after conviction, criminal offenders forfeit their voting rights for some time, perhaps for the rest of their lives.87 All told, it is no surprise to learn that legislators do not hear much from those who identify with criminal defendants.


85. See Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 Syracuse L. Rev. 1079, 1089 (1993) (suggesting that legislators do not fully consider the rights of the accused because political constituencies typically sympathize with victims of crime); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 587–88 (2002) (surveying Judiciary Committee staffers and showing that "standard criminal law issues" are the only issues where paid lobbyists play a limited role).

86. See Thomas H. Cohen & Brian A. Reaves, U.S. Dept of Justice, Felony Defendants in Large Urban Counties, 2002, at 4–5 (Carolyn C. Williams ed., 2006) (reporting that in the seventy-five largest counties, 82% of felony defendants were male and 67% were either black or Hispanic).

William Stuntz points out that the strong influence of prosecutors in the legislature is not a recent development, but a long-term institutional dynamic. It cuts across election cycles and parties. Legislators of all political stripes have incentives to ally themselves with prosecutors and to rewrite substantive criminal laws to expand the charging options available to prosecutors.88

While this framework reveals some important features of crime politics, it is overbroad. Prosecutorial views are central to most debates about the definitions of crimes and the reach of the substantive criminal law. When it comes to the legal rules for selecting a criminal sentence in a particular case, however, legislatures will sometimes refuse to go along with a request from the prosecutors. As several states demonstrated when they changed sentencing laws after the Blakely decision, they will amend statutes to involve juries more heavily in the finding of sentencing facts, even when prosecutors lobby against that position.

The reason prosecutors sometimes lose arguments in these settings is because sentencing commissions and other sentencing bureaucrats can make competing offers to the legislature. Prosecutors appeal to legislators at the individual case level. In essence, they propose a deal along these lines: if you give us legal authority to criminalize a broader range of unsavory conduct, or if you give us more charges to file in response to the same criminal act, or if you give us more convenient investigative tools or more severe criminal penalties to impose, we will use them with full force against the worst criminals and will only threaten to use them (or never even mention them) against less serious criminals. In short, with more tools available, prosecutors promise to do justice in individual cases. They do argue that their efforts will have more comprehensive effects, especially on the control of crime. These broader effects, however, are the product of the options available to prosecutors in individual cases: incapacitation happens one criminal at a time.

Sentencing commissions can compete with this prosecutorial offer by appealing to legislators at the system level. They can, for instance, convince the legislature that jury procedures will preserve a more predictable system, and reinforce the legislature's own continued ability to direct the system. Such central control is especially important when expensive correctional resources are at stake. Hence, the rhetoric of

budgets, planning, and fiscal responsibility is critical to the appeal of sentencing commissions.

The competing offer to legislatures from a commission, however, can also invoke themes of fairness. From their system-wide vantage point, commissions can promote more consistent outcomes across cases. They offer a unifying voice across a state with different resources or practices in different regions. For prison sentences, they can enforce rules that disfavor outlier sentences and publish information that encourages more uniformity among judges. The state-level bureaucracy can also advocate the spread of intermediate sanctions by making program slots available in different regions after a pilot project in one location shows promising results.

Prosecutors' views will always carry great weight with legislators because the public's interest in controlling crime and neutralizing the danger from particular defendants is legitimate and powerful. Sentencing commissions and other centralizing agents will often agree with prosecutors and form a common cause in their arguments to the legislature. In some contexts, the centralizing actors will not bother to propose an alternative because prosecutors could neutralize any change in the law: prosecutor charging and disposition choices would in the end produce the same outcomes regardless of the sentencing rules. Sometimes, however, the system-level actors such as sentencing commissions will present the legislature with an alternative to the prosecutors' proposal. The prosecutor-centered account of crime politics will not hold true in those settings where sentencing bureaucrats convince the legislature that system-level values matter the most.

The second lesson we can draw from the policy debate after the Blakely and Booker cases is this: institutions matter, and they make a difference independent of the partisan balance in the state's leadership. The partisan makeup of the legislature, the prosecutors, and the other key actors, will of course have some impact on the political outcomes on criminal justice questions. The fact that Republicans currently hold majorities in the U.S. House and Senate is highly relevant to the sort of sentencing legislation that can attract a majority of votes. The fact that a Republican President appointed the current Attorney General and the members of the U.S. Sentencing Commission surely tells us something about the policy options that each will find plausible and worth advocating.

But partisan affiliation does not tell the whole story. Certain types of policy options will appeal to sentencing commissions regardless of the political background of its members. Putting
aside party politics, sentencing commissioners and their staffs will see the value they add to the sentencing process, and they will tend to favor policies that preserve or enhance their place in the structure. They see quite naturally the value of a systemic unifying perspective on sentencing questions.

By the same token, prosecutors will see the appeal of certain approaches to criminal sentencing questions regardless of their politics. Prosecutors, both Democrats and Republicans, will believe that their priorities for handling individual cases are sound and that they produce a pattern of outcomes that benefit all of society. They will be skeptical of efforts by judges or sentencing commissions to dilute their control over sentencing outcomes.

When these visions clash in the political arena, the prosecutorial view will not always get the winning votes, as post-

Blakely developments have confirmed. In my view, this is an indicator of a reasonably healthy political process. In attractive sentencing systems, the centralizing actors improve the cost, fairness, and consistency of sentencing law and practice. It is good news when legislatures declare that prosecutors do their best work not by acting alone, but by leaving room for contributions from other sentencing institutions.

The Supreme Court’s interpretation of the Sixth Amendment right to a trial by jury in criminal cases might not, in the end, get juries actively involved in setting the sentences for most criminal defendants.\(^9\) Perhaps it should not surprise us that the occasional visitors to criminal justice—the jurors—do not wind up holding more sentencing power, even though Blakely tried to redistribute power for their sake. When new legal rules portend a change in the routines of the criminal courtroom, you can count on two things. First, the impact of the change is likely to be smaller than expected, for the criminal justice system is amazingly elastic. Second, any benefits from the change will probably land in the hands of regular players rather than occasional visitors to the world of criminal justice. Where a sentencing commission is one of those regular players, it could easily become the institution that gets a boost from Blakely and Booker.

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