

How Sentencing Commissions Turned Out To Be a Good Idea

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INTRODUCTION

There is at work in the United States a phenomenon I shall call a contemporary consensus on sentencing law. This consensus holds that the best possible sentencing scheme is a moderately flexible set of guidelines issued by a commission. This consensus is the real story of sentencing in modern America, independent of the widely perceived failure and constitutional invalidation of the most famous commission guidelines structure in history—the federal one. It represents the views of most academics who study sentencing as well as a surprising number of public officials across political lines, often reflecting a bipartisan truce in the political demagoguery over crime. It is also a laboratory study in the possibility (within a carefully bounded area) of what might be called rationality (by an arguably neutral definition) in criminal justice policy.

My claim that there is such a consensus can be neither substantially proved nor substantially disproved, because it is not an empirical finding. Rather, it is an interpretation of complex legal and political developments in a fluid phase of American law. In this paper I argue for the plausibility of this interpretation. I also acknowledge that “consensus” may not be the right name for this phenomenon. “Consensus” suggests some deliberate agreement among academics and politicians, and between these two groups. However, causality is quite uncertain here, and this phenomenon might really be a perfect-storm accident. Also, whether *consensus* or accident, it may or may not prove to be an equilibrium. But assuming that what has occurred is a remarkable incursion of rationality in the arena of criminal justice, I will reflect more generally on how we might identify such a thing as a consensus, an accident, or an equilibrium in this contentious and volatile part of the public world.

First, to elaborate on the key components of this consensus:

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—Under a conventional code of criminal statutes—a code within the mainstream of American law—the best possible sentencing scheme is one built around moderately flexible presumptive sentencing guidelines under a legislated maximum sentence, along with marginal parole release flexibility.¹ The notion of what is “best possible” relies on a complicated mixture of conscious and not-so-conscious assumptions about irreducible political constraints or historically-embedded legacies in our legal system.

—The typical sentencing commission is a body of officials drawn from various branches of government, along with some social science experts as members, staff, or consultants. Legal separation of powers concerns raised by these commissions are not a serious obstacle. Different commissions are differently situated in the states—sometimes in the judicial branch, sometimes as an independent agency; sometimes the guidelines are binding, sometimes advisory; sometimes they require adoption by the legislature, sometimes they are presumptively the law unless vetoed by the legislature.² However, these institutional variations do not reflect deep divisions in this consensus.

—This consensus is “contemporary” in the sense that it began emerging about twenty-five years ago when most states joined a general movement away from highly discretionary and indeterminate systems towards more fixed and rigid sentencing schemes.³ Despite a common perception that American sentencing law moved toward highly rigid and often fully mandatory schemes, many states actually enacted schemes that turned out to be remarkably flexible and resilient in all the ways that the federal system was not. To some extent, the emergence of this consensus has been even more recent, as data from some of these states inspires optimism that a certain structural flexibility in sentencing is politically and economically efficacious.

—The membership of this consensus includes the great majority of those academics—whether from law, social science, or policy programs—who address modern sentencing. It is reflected in the recent version of the American

1. A more technical description would require the use of such terms as determinate and indeterminate, structured and unstructured, and discretionary and mandatory. These are discussed below but note that Professor Steven Chanenson has performed an invaluable service in clarifying these terms for legal discourse. See Steven Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381-86 (2005).

2. See KARA DANSKY, CONTEMPORARY SENTENCING REFORM IN CALIFORNIA: A REPORT TO THE LITTLE HOOVER COMMISSION 1-7 (2006), available at http://www.law.stanford.edu/program/centers/scjc/pdf/Little_Hoover_Commission_written_testimony.pdf, for a review of these alternative structural models of sentencing commissions and guidelines.

3. See Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL’Y 389, 404 (1998).

Law Institute's new model law of sentencing,⁴ forty years after the Model Penal Code (MPC) sentencing project fell into irrelevance.⁵ Many of these experts continue to be frustrated and angered by the state of American sentencing—most obviously about the size and racial disproportionality of the American carceral population generated by modern sentencing schemes.⁶ The moral and political anger over punishment in the United States continues in parallel with a consensus about the best possible form of sentencing, and many academics believe that this consensus model might alleviate some of the disasters of American incarceration. Notably, their belief in this model does not depend on conceiving the consensus model as a panacea for these disasters, or even as a likely means of achieving substantial mitigation anytime soon. Rather, the consensus finds sufficient grounding in the belief that this model of sentencing at least allows for the possibility of rational cost-benefit analysis in American sentencing of the kind long-precluded by modern electoral politics.

—The consensus is reflected in bipartisan political commitments, even in states in the Old South traditionally known for harsh criminal laws and high incarceration rates.⁷ These commitments show that under certain political conditions, and by certain means, it has recently proved possible for state political systems to declare at least partial, temporary truces in the demagogic politics of criminal justice.⁸ If it remains risky for politicians to appear to express sympathy for criminal defendants, it has ceased to be politically *suicidal* for them to discuss—even to advocate and carry out—some pragmatically justified reductions in criminal penalties. This is not to say that the consensus model assumes the desirability of reducing either penalties or incarceration rates. Rather, the model rests on the notion that to achieve rational efficiency in sentencing, and to avoid an excessive incarceration rate in relation to available state resources or prison space, lawmakers must be free to consider and evaluate all manner of costs and benefits that manifest themselves

4. MODEL PENAL CODE: SENTENCING (Tentative Draft No. 1, 2007).

5. *Id.* at xxvii-xxix (Kevin Reitz's introductory memorandum).

6. *See, e.g.*, MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.

7. *E.g.*, Dov Cohen & Richard E. Nisbett, *Self-Protection and the Culture of Honor: Explaining Southern Violence*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 551 (1994) (observing how culture of honor in the South manifests itself in both more violence and a harsher response to it); PUBLIC SAFETY PERFORMANCE PROJECT, THE PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-11, 2015-16 (2007) (among regions, Southern states traditionally have had the highest incarceration rates, and this disproportion will likely continue in the next decade).

8. *See, e.g.*, STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (Temple University Press 1991). Chapters 3-4 on policy change patterns and reforms related to policing issues and criminal courts processes are especially relevant. *See id.*

in sentencing systems. Drivers of this consensus often include civic or political leaders drawn especially from the judiciary or correctional bureaucracies who are viewed either as statesperson-like figures above the political fray, or at least as moderate conservatives. The consensus drivers include elected officials, especially Republican governors, largely from conservative states.

—In terms of guiding jurisprudence, the new consensus relies on a loose mixture of conventional notions of retributivism and incapacitation as express justifications for punishment. On the whole, however, this consensus eschews any worry about deep or elegant foundational thinking. Its premise is philosophically mundane: incarceration serves public safety through sensible incapacitation and at least a marginal possibility of reducing recidivism (whether or not we call the latter “rehabilitation”), all the while remaining constrained by retributivism. The consensus does not devote too much attention to alternative notions such as deterrence, nor is it concerned with achieving any comprehensive coordination of these jurisprudential principles.

—The recent upheaval in American sentencing law caused by *Blakely v. Washington*,⁹ holding sentencing schemes to strict new Sixth Amendment standards, has not posed a serious threat to this consensus in most states and does not fundamentally challenge the legal concepts underlying the consensus. Indeed, while *Blakely* has become one of the most discussed doctrines in modern American law and has vastly increased academic attention to sentencing, it remains an accidental, if powerfully influential, sideshow. *Blakely* has caused far greater upheaval in the federal commission/guidelines scheme through its application in *United States v. Booker*,¹⁰ but the travails of the federal system stand happily aside from the consensus developments in the states. Of course *Blakely* was a state case, and several states have had to effect some constitutional adjustments. Nevertheless, to some extent the challenges of legislative or judicial adaptation to *Blakely* have been useful to the consensus by forcing state leaders to put sentencing law back on the political agenda and thus allowing for the possibility of reforms far broader than what *Blakely* requires.

The present article hardly represents the first attempt to note these developments. Some work has treated these developments in the context of doctrinal changes in American sentencing law like those that occurred via

9. 542 U.S. 296, 313-14 (2004) (affirming the right of trial by jury on any facts raising a sentence above the level authorized by the jury verdict at guilt phase or by a defendant’s plea).

10. 543 U.S. 220, 226-27, 245-46 (2005) (holding, based on *Blakely*, that the binding nature of federal sentencing guidelines was unconstitutional, and the federal sentencing guidelines are to be only advisory for federal judges).

Blakely and *Booker*¹¹ or as part of an exhortation for legislative reform.¹² Other work has already addressed the plausible political conditions necessary for the emergence of sentencing commissions and delineated the most sensible features of such a commission.¹³ Still other work has usefully described a happy irony of federalism: by virtue of the odd combination of their broad criminal jurisdiction, their constitutional discretion, and their severe budgetary constraints, states, out of both opportunity and necessity, often deploy sensible cost-benefit analysis in criminal justice.¹⁴ The present article assesses how these developments have congealed into what I am calling a “consensus;” gauges its extent; traces its nature, causes, and conditions; and speculates on the future prospects of non-demagogic rationality in criminal justice.

Part I of the article reviews the modern course of sentencing jurisprudence and policy out of which this consensus emerged. Part II—alas, unavoidably—reviews the rise and fall of the intellectual and legal status of the federal sentencing guidelines to clarify how the consensus described in this article differs from and thrives independently of the federal disaster. Part III elaborates the components of the consensus in terms of the varieties of guided discretionary sentencing schemes and commission structures and the political and economic conditions that have enabled them. Part IV focuses on two somewhat representative states to illustrate the workings of the guidelines-commission model in detail and considers the feasibility of generating metrics to evaluate the success of the consensus model. Part V closes with speculations about the future of the consensus, especially in regard to California—the great volatile laboratory in which the modern sentencing experiment may face its sternest test.

I. A NUTSHELL RECENT INTELLECTUAL HISTORY OF SENTENCING

A few decades ago sentencing was a major topic of inquiry, and was academically and politically at the heart of American criminal law. This phase of legal scholarship occurred at the crossover moment when the double-sided attacks on indeterminate sentencing undermined any consensus behind the classic twentieth-century model, and the long steady move toward (relatively) determinate sentencing began.¹⁵ The double-sided attack was a remarkable, if

11. See generally Chanenson, *supra* note 1.

12. See Robert Weisberg & Marc L. Miller, *Introduction: Sentencing Lessons*, 58 STAN. L. REV. 1 (2005).

13. See, e.g., Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 CRIME & DELINQUENCY 307 (1991); Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973 (2006); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194-1206 (2005).

14. See generally Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

15. See Franklin E. Zimring, *Sentencing Reform in the States: Lessons from the 1970s*, in

adventitious, event whereby clashing ideologies found a common enemy and (in theory) a common solution. At one end of a continuum, civil libertarians thought the combination of vast discretionary ranges for judges and unregulated parole decisions were the very epitome of lawless caprice.¹⁶ At the other end, and spurred by urban unrest, the law and order movement in national politics (typified by the Nixon Southern Strategy and countered by the civil rights movement) attacked the leniency and the dishonesty of the actual sentences.¹⁷ Whatever agreement there had been that indeterminate sentencing enhanced the system's capacity for rehabilitation disappeared, with some coming to doubt that the system could rehabilitate well at all and others fearing that the moral and political costs of even trying to rehabilitate were too great.¹⁸ The liberals, who thought a revamped version of indeterminate sentencing could serve the rehabilitative goals associated with modern psychology and social theory, were left in an anachronistic no-one's-land.¹⁹

The federal exception aside (discussed below), sentencing lost much of its visibility in criminal law scholarship, especially in terms of foundational normative thinking. Conservatives rhetorically trumpeted a return to just deserts.²⁰ Neoconservatives started pushing a seductive, if empirically questionable, model of incapacitation.²¹ Meanwhile, liberals (which, in the demography of American universities, means most academics) were very wary of attacking either of these rationales for punishment. To the extent that academics went after sentencing at all, the attack was rarely foundationally normative,²² but rather reactive to some of the indirect consequences of new

REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING 101-21 (Michael Tonry & Franklin E. Zimring eds., University of Chicago Press 1983).

16. See generally Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 40-42, 48-49 (2005); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005).

17. See Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1245-48 (2005); MICHAEL TONRY, SENTENCING MATTERS 6-15 (Oxford University Press 1996), for a concise review of this history.

18. See, e.g., FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (Yale University Press 1981). See also Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 CRIMINOLOGY 1, 5-8 (2005) (citing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) as an example of the power of a single article to change the national and academic discourse, because Martinson's article created the misimpression that no sound research confirmed the efficacy of rehabilitation in reducing recidivism).

19. See O'Hear, *supra* note 16, at 758 (rehabilitative ideal's claim of political neutrality proved vulnerable to conservative reactions to civil rights movement).

20. See, e.g., Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 124-28, 130 (Jeffrie G. Murphy & Jean Hampton eds., Cambridge University Press 1988); Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179-215 (Ferdinand Schoeman ed., Cambridge University Press 1987).

21. JAMES Q. WILSON, THINKING ABOUT CRIME 145-58 (Basic Books rev. ed. 1983).

22. See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992), for an

determinate-style sentencing.²³ For example, the prison population's racial disproportions led to continued civil rights challenges.²⁴ An explicit equal protection focus on such things as the crack/powder cocaine disparity represented one target area for scholarship related to concerns over racial disproportionality.²⁵ Additionally, the sheer magnitude implied by new sentencing schemes created a widespread sense of embarrassment, continuing to this day, regarding the astoundingly high incarceration rate in the United States in comparison to the rest of the developed world.²⁶

For a while that embarrassment was complicated by a parallel anomaly that the United States had the highest crime rate in the developed world. The fact and perception of that anomaly has changed in recent years: the dramatic drop in the American crime rate, better research about comparative international crime rates, and an actual rise in serious crime in other countries have revealed some striking things. The United States is not greatly anomalous on the crime rate side (though it is still fairly anomalous in terms of *violent* crime), but it is hugely anomalous on the incarceration side.²⁷ Of course, that change does not necessarily condemn the size of the American prison population, because many believe that the increase in incarceration helped decrease crime in the United States, and there is at least equivocal research support for that proposition.²⁸

important work that almost serves as an exception that proves the rule. Miller took the occasion of the debates over the federal guidelines to take a fresh and optimistic look at the possibility of a coherent sentencing jurisprudence.

23. Of course, for those scholars who remained committed to deep jurisprudence on sentencing, the expansion of habitual offender laws provided a major theme for their scholarship. See, e.g., FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT & DEMOCRACY: THREE STRIKES & YOU'RE OUT IN CALIFORNIA (Oxford University Press 2001).

24. See generally MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (Oxford University Press 1995).

25. See UNITED STATES SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY 1-4, 14-16 (2007), for a concise review of the disparity in punishments for the two types of cocaine and the differences in use of the two types depending on race, which critics claim is evidence of illicit racial discrimination in the criminal justice system.

26. United States figure is 714 per 100,000 population, as compared to Russia (532), Western Europe (ranging from about 50 to 150), and Japan (58). ROY WALMSLEY, WORLD PRISON POPULATION LIST 3-5 (6th ed. 2006).

27. See generally FRANKLIN ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (Oxford University Press 1997).

28. See Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. OF ECON. PERSP. 163, 177-79 (2004), for some empirical support for this proposition; FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (Oxford University Press 2006), for a skeptical examination of these findings and of other explanations of the crime drop; RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 4 (2005), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_iande_complex.pdf, for an overall assessment of this research, suggesting that about twenty-five percent of the decline in violent crime can be explained by increases in incarceration and that, past a certain point, incarceration has diminishing returns, because the most prolific offenders are in prison, and much of the increase involves non-violent drug offenders, some of whom are quickly

Currently, sentencing law and policy have returned as major subjects for academic discourse—indeed they are almost dominant on the intellectual agenda of criminal law scholars.²⁹ To sort out how this has happened requires at least brief treatment of the federal story.

II. THE UNFORTUNATE FEDERAL EXAMPLE

A. *The Troubled Rise of the Federal System*

I will now address the big exception—the infamous federal sentencing guidelines (“Guidelines”). They have few defenders. It is a cliché to say that they have been a disaster, and the reasons require only brief rehearsal here.³⁰ In reviewing the most commonly cited symptoms, we can start with the simple fact that they set most sentences much too high (though comfortably within legislative ranges with maximums much higher than any one received anyway). Indeed for double jurisdiction crimes (most notably drug and gun crimes), federal sentences are so much higher than state sentences that one of their major effects has been to enhance the power of *state* prosecutors to win plea bargains. This is because their greatest hammer is the threat not to send the defendant to trial but to call in the United States Attorney.³¹ In that regard, the Guidelines have operated in a manner very similar to that of the separate, much-denounced phenomenon of mandatory minimum sentences.³²

Additionally, though rules-versus-standards questions in the abstract cannot produce any general answer about optimal mixes, most federal judges and virtually all academics believe that the narrow range structure of the Guidelines has wildly erred on the side of rules.³³ From the judges’

replaced.

29. The racial distribution aside, sentencing has not been a very visible academic matter. I put aside for now a strong but highly abstract revival of “purposes of punishment jurisprudence” focused on retribution, see Daniel Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004) (example of creative new approaches to retributivism), as well as a continuing law-and-economics inquiry into general deterrence, e.g., Isaac Ehrlich & Zhiqiang Liu, *Sensitivity Analyses of the Deterrence Hypothesis: Let’s Keep the Econ in Econometrics*, 42 J. LAW & ECON. 455 (1999), both of which focus on criminal law generally more than sentencing policy under an established code.

30. See Alschuler, *supra* note 16, for a succinct bill of particulars; KATE STITH & AND JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (University of Chicago Press 1998), for a comprehensive bill of particulars.

31. See William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 839-45 (2006).

32. See *Judicial Conference of the United States, on How Judges are Properly Implementing the Supreme Court’s Decision in United States v. Booker, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (March 16, 2006) (statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law), available at www.uscourts.gov/testimony/Cassell031606.pdf, for a passionate critique of the rigidity and harshness of mandatory sentences proffered to Congress by a distinguished conservative judge and scholar.

33. E.g., STITH & CABRANES, *supra* note 30, at 69 (authors of guidelines created rules based

perspective, the Guidelines not only undermined the very art of judging, which judges consider to be the core of their craft, but the Guidelines also heightened disparity by suppressing individualized criteria crucial to any test of meaningful uniformity. Also compounding this rigidity is complexity. The number and hyper-subtlety (or pseudo-subtlety) of the distinctions in factors that aggravate a crime or an offender's record is such that a somewhat mechanical sentencing process became a bizarre pseudo-mathematical science. As a simple statistical fact, the complexity served to undermine the possibility of sentencing uniformity across judges and districts, which was supposedly the main goal of the new system.³⁴

My main concerns, after stipulating to these manifest failures, are (a) to briefly suggest their sources and causes so as to anticipate why they do not—indeed, in retrospect, did not—portend the parallel failure of modern state sentencing guidelines-type reforms; and (b) to describe the ambiguous influence of the Guidelines' failure on our jurisprudence of sentencing.

The Guidelines were a sort of second try at a very different congressional goal—a coherent federal criminal code.³⁵ Whereas by the 1970s most states, inspired by the MPC, had undertaken true codification and succeeded in achieving remarkable clarification of and coherence among criminal statutes, the federal effort of the 1970s failed. The federal criminal “code” remained a bizarre mélange of vague, ill-coordinated, and overlapping statutes, generally with strikingly wide sentencing ranges and high statutory maximums. Thus, when Congress and the first United States Sentencing Commission set to work, they were, perhaps half-consciously, enacting a legislative code in the guise of a sentencing scheme.

In addition, the enactment of the Guidelines was a serious intellectual experiment driven by serious, if conflicting, philosophical concerns, but this seriousness of intellectual effort actually proved to be a drawback in designing a sentencing scheme because it favored abstract concerns over practical ones. The standard candidates for the major problem were disparity and subjectivity among judges, and the most passionate analyst of these problems—and most passionate proponent of possible solutions—was the universally admired Judge Marvin Frankel, whose condemnation of the non-law of federal sentencing was rooted in a highly idealistic rule-of-law-model.³⁶ Missing from the documented history of the motivation for the Guidelines was any set of urgent practical concerns related to cost, prison over-crowding, or even crime rates.

on quantifiable measures of harm).

34. See Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328-40 (2005), for a good treatment of these critiques.

35. See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 92-135 (1998), for a history of the failed effort at systematic codification.

36. See generally MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (Hill and Wang 1973).

Indeed, congressional leaders admitted or even proclaimed that part of their preferred solution to the disparity problem was the ratcheting up of actual sentences, with the expectation of an increase in the federal prison population in the name of rational parity.³⁷ As noted below, the lack of compelling economic or at least political exigency is a distinguishing factor between the federal and state stories.

The scientific ambitions underlying the Guidelines were of a particular sort. The indeterminate sentencing/rehabilitation model that the Guidelines sought to replace was based in various promises of social science.³⁸ Those aspirations had to do with the malleability of the human character and the curative power of behavioral programs, all tied to a set of aspirations about the general social good.³⁹ The Frankelian concept of the guidelines balanced juridical concerns with rule-of-law principles,⁴⁰ always evincing deep faith in the neutral science of rehabilitation.⁴¹ However, the Frankelian vision all too easily morphed into an almost Langdellian legal science model, abstract and mechanistic.⁴²

One set of promoters among the original members of the United States Sentencing Commission sought an almost medieval, theological, harm-based metric for punishments based on exquisite calculations of degrees of harm.⁴³ Its rivals in sentencing jurisprudence were crime control promoters who wanted to make the Guidelines a highly visionary experiment in general deterrence.⁴⁴ Thus the utilitarian voice in the debate looked not to the pragmatic question of incapacitation, with its somewhat, relatively measurable outcomes, but rather to the most econometrically uncertain utilitarian goals. When these two sides fought to a stalemate, the compromise, though surely borrowing from both the just deserts and crime control sides, was a kind of inductive measure with statistical analyses of sentencing patterns before the Guidelines, focusing on simply averaging out the status quo without the outliers.⁴⁵

Put differently, the Guidelines failed because they aimed to be more than merely *administrative*. This phrasing may seem odd for two reasons. First, the

37. O'Hear, *supra* note 16, at 749-53.

38. See generally Edward Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343 (2001).

39. ALLEN, *supra* note 18, at 2.

40. FRANKEL, *supra* note 36, at 3-5.

41. O'Hear, *supra* note 16, at 763.

42. For discussions of how Frankel's vision of humane judicial flexibility transformed into a technical set of rules rooted in quantification of ostensibly objective factors, see STITH & CABRANES, *supra* note 30, at 48-59; O'Hear, *supra* note 16, at 777-84.

43. This effort was led by Prof. Paul Robinson. See Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987). See also O'Hear, *supra* note 16, at 777-84, for a recounting of the history of this debate.

44. See Michael Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991).

45. STITH & CABRANES, *supra* note 30, at 59.

creation of the Commission, with its research staff and social science experts, was, after all, designed on a federal administrative agency model, despite the troublesome constitutional oddity of placing the Commission in the judicial branch. Second, it is a ritual trope of those who condemn the Guidelines' equipping of United States Attorneys with the vast power to force guilty pleas that our federal criminal justice system is now "administrative," not legal or adversarial.⁴⁶ However, while prosecutors can now act like high-volume processor-bureaucrats, the Guidelines failed to be administrative in ways that, as noted below, state commissions and systems appear to have succeeded—"administrative," that is, in the sense of being legally residual or secondary to criminal law. The hyper-scientific and overly comprehensive aspirations of the Guidelines were legislative in nature, and, perhaps as a corollary, soon there were as many federal court decisions interpreting the novel criminal law doctrines generated by the Guidelines as there were decisions interpreting the traditional doctrines generated by substantive criminal law statutes.⁴⁷

Perhaps as a corollary, the Commission has suffered far more legislative interference than have its state counterparts. Indeed, the story of the passage of the Sentencing Reform Act is one of a series of legislative hijackings of an earlier somewhat more "administrative" model, as various congressional interest groups took the Frankelian model and turned it into a leveling-up mechanism that amounted to new penalty-raising legislation.⁴⁸ By contrast, the success of many state sentencing systems has been the modest, residual, clean-up nature of their designs and goals, often as a second-best reaction to pressing financial or political problems.⁴⁹

B. Booker and the Academics

This readily-assembled bill of particulars against the Guidelines would seem to belie my earlier statement that sentencing has dropped from the academic radar in the last few decades, because the particulars derive from the vast (largely denunciatory) legal and academic commentary on the Guidelines.⁵⁰ There is something deceptive about this, however, because the academic profession of Guidelines-condemnation has diverted attention from

46. E.g., Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM. L. REV. 2117, 2118 (1998).

47. See Robert Weisberg, *Guideline Sentencing, Traditional Defenses, and the Evolution of Substantive Criminal Law Doctrine*, 7 FED. SENT'G REP. 168 (1995) (federal courts of appeals have generated a body of quasi-substantive criminal law doctrines interpreting "elements of crimes" described in guidelines).

48. O'Hear, *supra* note 16, at 776 (authors of guidelines clearly desired and expected that some sentences would be more severe and contemplated the possibility that the federal prison population would increase).

49. See *infra* text at notes 182-214.

50. The most notable example, as exemplified by the term "Fear of Judging" in the title, is STITH & CABRTANES, *supra* note 30 (the former author is a Yale law professor, the latter a federal judge).

problems and very promising developments elsewhere. For one thing, Guidelines scholarship has been largely negative—relatively focused on curbing the excesses and hyper-rigidities of the system rather than imagining a feasible positive alternative.⁵¹ For another, this commentary has been *federally* focused in the worst way—i.e., a reflection of the federal law-obsession of legal academia generally whereby the less visible, harder to quantify conditions of state law get ignored.⁵²

However, now we have the irony of the *Blakely-Booker* transition. When *Apprendi v. New Jersey* was decided in 2000,⁵³ dramatically applying the Sixth Amendment to a state sentencing scheme, constitutional law entered sentencing in an unforeseen way. The Warren Court's revolution in criminal procedure paid little attention to sentencing as a distinct area,⁵⁴ and in the 1970s the Court's invocation of the Eighth Amendment as it intervened in sentencing was focused almost solely on capital punishment.⁵⁵ *Apprendi* led to murmurings that the new Sixth Amendment doctrine could threaten the federal Guidelines.⁵⁶ Later, when *Blakely*⁵⁷ drastically expanded *Apprendi* in attacking another state sentencing system, the bulk of the academic focus remained on how the new doctrine might affect the federal system.⁵⁸ Then *Booker*⁵⁹ re-enabled academia to deflect attention from the state contexts that

51. For a recent strong critique that also synthesizes earlier critiques, see generally Alschuler, *supra* note 16; for a comprehensive description of the perceived deficiencies of the guidelines by one of the most prolific experts on sentencing law, see Bowman, *supra* note 34.

52. Gerard E. Lynch, *Sentencing: Learning From, and Worrying About, the States*, 105 COLUM. L. REV. 933, 934-35 (criticizing journalistic and academic concentration on the federal system, which represents a "minuscule part of law enforcement in this country").

53. 530 U.S. 466 (2000) (holding that the Sixth Amendment right to jury trial applies to proof of any fact that would raise the statutory maximum sentence for a crime).

54. A rare counter example is *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that termination of citizenship as punishment for crime violates Eighth Amendment by offending "evolving standards of decency").

55. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (holding then operative state death penalty statutes unconstitutional); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding certain new "guided discretion" death penalty laws).

56. *E.g.*, Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002); Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775 (2002); Jane Dall, "A Question for Another Day": *The Constitutionality of the U.S. Sentencing Guidelines under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617 (2003).

57. 542 U.S. at 313 (2004) (interpreting *Apprendi* to hold that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

58. *E.g.*, Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004); Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of Blakely v. Washington*, 17 FED. SENT'G REP. 28 (2004); Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935; Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENT'G REP. 333 (2004).

59. 543 U.S. at 245-46 (holding that *Blakely* requires invalidating the United States Sentencing Guidelines as rules binding federal judges).

actually generated the new Sixth Amendment doctrine.⁶⁰ Thus, as a result of *Booker*, academics can write endlessly about sentencing and even do so in light of fashionable constitutional jurisprudence—and yet still do so largely on federal matters. On the other hand, the exogenous shock of *Blakely/Booker* could put the federal discussion on a state-like footing by substituting for the political and economic shocks that have spurred state reform and thereby at least make the federal discussion more constructive.⁶¹

In a key sense, *Blakely* was not about sentencing at all; it was not an attack on the unfairness of a sentence or on the proclivity of the Washington statutory scheme to produce unfair sentences generally.⁶² It was about an abstract concept of the supposedly venerable role of the jury—and indeed, it was not even about the special functional advantages of juries in any practical sense.⁶³ *Blakely* was part of a chain of constitutional cases representing a dramatic exercise in purportedly originalist constitutional archaeology; these cases linked sentencing to jury trial rights that were in turn linked to a vague principle of due process and a highly conceptual notion of crime definition.⁶⁴ Thus, *Blakely* had its roots in a bizarre series of episodic threats by the Supreme Court to intrude into the substantive criminal law.⁶⁵

Probably the most notable episode in this story occurred in the 1970s. In *Mullaney v. Wilbur*,⁶⁶ the Court seemed to say that if a finding of “heat of passion” reduced murder to manslaughter, then its absence was part of the definition of murder, and thus it was part of the prosecution’s case in chief and evidentiary burden.⁶⁷ The implications of *Mullaney* were enormous,⁶⁸ but almost immediately thereafter the Court reassured the states, in *Patterson v. New York*, that if they explicitly treated such a factor as a kind of affirmative defense, they could draft their way around the prosecutorial burden.⁶⁹ In other pairings of cases, the Court hypothesized an abstract constitutional

60. E.g., Symposium, *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 STAN. L. REV. 1 (2005).

61. See Weisberg & Miller, *supra* note 12.

62. See Kevin Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086-87 (2005).

63. Indeed, in a decision handed down that same day Justice Scalia expressed deep skepticism over the jury’s comparative advantages in finding facts or applying legal standards. *Schiro v. Summerlin*, 542 U.S. 348, 356-58 (2004).

64. Ronald Allen & Ethan Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 195-202 (2005).

65. *Id.* at 202.

66. 421 U.S. 684 (1975).

67. Under the somewhat antiquated Maine statute, absence of heat of passion was a component of the criminal element of “malice.” *Id.* at 703-04.

68. Indeed, even in its abstraction, it generated some of the most distinguished criminal law scholarship of the era. Ronald J. Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); John C. Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

69. 432 U.S. 197, 197 (1977).

reconception of the definition of crimes and concomitant procedures, and then backed away.⁷⁰

In this context, *Apprendi* was a transitional case, because the Court might have done its usual quick pull-back by upholding the scheme at issue in *Blakely* and thus approving an *Apprendi* write-around. As Ronald Allen and Ethan Hastert cogently argue, the Court's choice to do otherwise was not only an exercise in hypertextualism, but was also a strange exercise in supposedly protecting the solemn space of jury induction and inference.⁷¹ The Court acts as if it is allocating sentence-determining epistemology to the jury, while ignoring the rich and vast array of legitimate devices by which the legislature, the judiciary, and prosecutors can circumscribe the size of the space in which the jury operates or fairly directly guide or constrain that epistemology.⁷² If this reading makes *Blakely* look inadvertently narrow, however, the Court nevertheless stuck by its constitutional incursion in dramatic ways that never happened with *Mullaney-Wilbur* and other pairings.

As Allen and Hastert note, *Apprendi* and *Blakely* owe a lot to the "original intent" beliefs of Justices Scalia and Thomas in particular, and however abstract their approach may be in theory, it has created a lot of unforeseen externalities in practice.⁷³ It has destabilized a great variety of experiments in modern sentencing structure—some good ones in the states, and arguably some bad ones. The reasons for this destabilization, however, are often orthogonal to the flaws in the affected schemes. Furthermore, as suggested by Allen and Hastert, judicial or legislative discussions about *Blakely*, even when they implicate important substantive policy concerns, are usually subjected to abstract and even metaphysical analysis.⁷⁴ To be sure, the positive consequences are notable. The unbelievably vast explosion of scholarship on

70. Compare *Robinson v. California*, 370 U.S. 660 (1962) (holding that the Eighth Amendment forbids punishment of involuntary "status" or "condition" of drug addiction) with *Powell v. Texas*, 392 U.S. 514 (1968) (holding that public manifestation of intoxication is sufficiently voluntary conduct to be punishable even if arguably entailed by condition of alcoholism); compare *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that a presumption, even if rebuttable, that defendant intended the "necessary and natural consequences of his acts" violates due process by shifting burden of proof on element of crime to defendant) with *Ulster County Ct. v. Allen*, 442 U.S. 140 (1979) (upholding a statute that made the presence of a gun in a car presumptive evidence of illegal possession by all occupants).

71. Allen & Hastert, *supra* note 64, at 208-15.

72. *Id.* at 201 (noting that the other branches "have their hands all over the inferential process"); *id.* at 209-15 (reviewing such incursions as judges applying rules of evidence and instructions; legislative power over whether to convert elements of crimes into defenses; and prosecutors' power under *Old Chief v. United States*, 519 U.S. 172 (1997), to insist on recounting the full facts of prior crime where defendant prefers just to stipulate to prior conviction).

73. Allen & Hastert, *supra* note 64, at 200.

74. California is an alarming example, as I will discuss in Part V of this article. But note for now one particular California issue. While the California prison system is an unconstitutional wreck, the legislature was told that one part of its sentencing law violated *Blakely*. The intellectual energy of the California courts is now being expended in resolving a wide range of *Blakely*-created issues. See *infra* text at notes 247-249.

Blakely-Booker has brought sentencing back to academic visibility in ways that may prove salutary regardless of their cause. Additionally, even if the new Sixth Amendment cases provide only a fortuitous occasion, not a logical basis, for doing so, state legislatures that are making substantial revisions to their sentencing schemes can rethink serious questions of fairness, severity, distribution, and economics in fundamental ways.

So what intellectual results have the Guidelines yielded? While academics have become heavily involved in sentencing, their emphasis on the federal system has been an unfortunate distraction. This emphasis has forced us to look at sentencing in a largely reactive way, leaving little room for foundational thinking about sentencing. In our emphasis on the rigidities and hyper-complexities of the federal sentencing guidelines, we have paid too little attention to the wide variety of emerging guidelines systems in the states, some of which have proved remarkably successful in ways that demonstrate, at the very least, that guidelines/commission systems have great value and should not be condemned for their misapplication at the federal level. We have not fully appreciated the rich and potentially fruitful political dynamics that have made sentencing a striking opportunity for rational lawmaking.

III. ELABORATING THE CONSENSUS

In order to understand this consensus in the context of American sentencing generally, we need to define some general terms.⁷⁵ A “determinate” sentence is one whose length is fixed or prospectively measurable at the time of sentencing. Thus, what makes a sentence “indeterminate” is the possibility of parole release to be decided by some administrative means during incarceration. A determinate sentence can include the possibility of reduction in a term of years imposed by the judge, if that reduction is according to some formula contingent on good behavior or earned conduct credits. If there is no possible reduction in the time served, the determinate sentence is called a “flat sentence.”⁷⁶

Determinate and indeterminate sentencing schemes can be either “discretionary” or “nondiscretionary.” A discretionary, determinate system allows a judge to pick the actual sentence from a statutory range of punishments.⁷⁷ In a nondiscretionary, determinate system, the legislature specifies the actual sentence—i.e., a truly mandatory sentence.⁷⁸

Finally, discretionary systems—be they determinate or indeterminate—may be “guided” or “unguided” (“structured” or “unstructured”). Unguided

75. An excellent summary comes from Chanenson, *supra* note 1.

76. A somewhat similar taxonomy is laid out by Reitz in *The New Sentencing Comundrum*, *supra* note 62, at 1101-05; Kevin Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 159-63 (2005).

77. Chanenson, *supra* note 1, at 382-85.

78. *Id.* at 384.

discretionary indeterminate systems were the dominant sentencing approach in the years leading up to the advent of the sentencing guidelines reform movement. For example, the statute may say that burglars can receive sentences ranging from probation to ten years in prison. The judge can choose any sentence in that range and may allow for discretionary parole to occur later, although judges often prescribe a minimum and maximum term of years.

A significant fraction of the states, approaching half, have sentencing commissions, and an overlapping and almost equal number have operative or incipient guidelines.⁷⁹ The numbers are uncertain because a number of states are in flux,⁸⁰ but they are very useful common denominators to observe.

A. *The Nature of Guidelines*

A guided or structured discretionary system can rely on sentencing guidelines issued by either the legislature or some commission, and these can be either “presumptive” or “voluntary.” Obviously, presumptive sentencing guidelines require judges to either adhere to a presumptive sentence (or sentencing range) or justify any deviation with reasons, often mandating appellate review of those reasons. Fully voluntary guidelines are merely hortatory, though in some systems—such as Virginia, which is described below—voluntary compliance is remarkably high.⁸¹

The consensus system is built around presumptive guidelines—rules that address aggravating and mitigating factors that cannot sensibly be captured in substantive criminal legislation.⁸² The guidelines themselves can set very narrow ranges for the sentence after the factors are taken into account, but beyond whatever range they offer the judge, they remain presumptive. However, the judge can depart from the range so long as she refers to on-the-record reasons, probably subject to appellate review, that demonstrate why factors peculiar to the case were not accounted for by the guidelines.⁸³ Judges

79. Frase, *Diversity*, *supra* note 13, at 1194-1204.

80. Well annotated lists and estimates appear in Frase, *id.* at 1196; Barkow & O’Neill, *supra* note 13, at 1994; John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 241-45 (2006).

81. A more elaborate taxonomy of these choices is offered in Frase, *Diversity*, *supra* note 13, at 1197-1296.

82. Chanenson calls this Indeterminate Structured Sentencing (ISS). “ISS presumptive sentencing guidelines address only the judge’s imposition of the minimum term, not the maximum term. Typically, the minimum sentence must be no more than some percentage of the maximum sentence in order to allow for an adequate period of potential post-release supervision. . . . ISS presumptive sentencing guidelines, however, would afford judges a meaningful amount of discretion to adjust the minimum sentence even within the presumptive standard range.” Chanenson, *supra* note 1, at 433, 441-42.

83. Chanenson suggests that the intensity of the review should vary, depending on the action taken by the sentencing judge. “For example, a sentence within the standard presumptive range would be subject to the lowest level of review. A judge’s decision to sentence within the mitigated or aggravated range would warrant heightened review. Departure sentences would trigger the most searching review by the courts of appeals.” *Id.* at 445.

typically also retain some of the traditional discretion to choose between concurrent and consecutive sentences, but, again, they would have guidelines to help determine that choice.⁸⁴

For some jurisdictions, abolition of discretionary parole release by parole boards was a *sine qua non* of new structured guidelines systems. Such abolition seems fairly consistent with the general spirit of the change from indeterminate sentencing.⁸⁵ That result is hardly universal; moreover, the states have varied widely in the degree or way in which they have retained some sort of post-prison supervised release.⁸⁶ Perhaps something like a consensus variation is a modest good-time reduction from the original sentence, earned by passively good conduct while in prison and set by a formula. However, the consensus would probably include, as an alternative or supplement to that formula for good time, some opportunity for “gain time” through actively good conduct, or, more specifically, constructive participation in pre-reentry programs with ample opportunities for alternative, non-custodial forms of supervision. Some agency—whether or not called a parole board—would then assess whether the prisoner has indeed earned the gain time, but it would also use risk assessment metrics to evaluate the consequences of releasing the prisoner at that point. Those evaluations would be guided by a subset of presumptive guidelines.

Next, we face an apparent fissure, though surprisingly narrow, in the new consensus. Many suggest that a parole agency should also have some unguided discretion, at the margin, to judge whether the prisoner exhibits indicia of severe risk of future criminal activity not captured by the sub-guidelines. Others would require that any such discretion be regulated by guidelines; still others would eliminate even good-time credit reductions.⁸⁷ Finally, with regard to post-release supervision, it would only be required for a subset of prisoners who demonstrably need it, though the degree of supervision would

84. *Id.* at 428-29 (concurrent/consecutive choice is wholly unguided under the Kansas guidelines scheme, while Minnesota has a menu of presumptive constraints on the choice—constraints from which the judge can depart).

85. See Frase, *Diversity*, *supra* note 13, at 1199-1200.

86. See *id.* at 1221-23, for a review of these variations.

87. ALI Reporter Kevin Reitz, who generally opposes parole release, acknowledges that good time, in the range of twenty to twenty-five percent of an inmate's sentence, is a desirable feature of a prison system. See Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in *THE FUTURE OF IMPRISONMENT* 199, 228 (Michael Tonry ed., Oxford University Press 2004). Chanenson prefers to focus on “bad time”—release authority by which “all of the things that could warrant the forfeiture of good time in a nonflat, determinate system could, pursuant to transparent parole release guidelines, justify an equally long reduction in the amount of sentence mitigation granted by the parole board.” See Chanenson, *supra* note 1, at 453. Joan Petersilia underscores the value of parole release authority in helping the prisoner reintegrate, especially in the well researched area of drug treatment, and Petersilia also argues that risk assessment research has greatly improved our ability to predict recidivism. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 70-73, 212 (Oxford University Press 2003).

depend on the set of half-way house alternatives that state or local authorities provide. Also, the revocation process would be governed by some sub-guidelines and include a graduated series of penalties that would avoid returning parolees to prison for so-called technical violations.⁸⁸

B. *The Nature of Commissions*

Theoretically, the consensus's legal scheme could be generated by the legislature. However, the next key component of the consensus is that the legislature can do no more than mandate an overarching outline of this system.⁸⁹ According to the consensus, it probably takes a commission to undertake the hard work of designing and revising the guidelines, both for initial sentences and parole release criteria.⁹⁰

As Michael Tonry notes, the concept of a sentencing commission arose in the 1970s,⁹¹ along with other sentencing experiments such as legislative parole guidelines, judge-developed voluntary sentencing guidelines, and determinate sentencing statutes—most notably California's. Now the commission concept has become the star of sentencing reform. The commission concept has been ratified, in broad outline, by the ALI's proposed Model Sentencing Code and by the actions of an impressive number—and impressive political range—of states.⁹² It is sometimes viewed as the most obvious means to achieve the proper guidelines system—the substantive component of the consensus—and at least one expert has wryly suggested that in states with sentencing and corrections systems in desperate need of repair, a commission is a step worth taking, on the theory that *anything* that emerges from the special political laboratory of the commission must be *some* improvement on anything done without it.⁹³

In examining the assumptions underlying the sentencing commission model, one negative jurisprudential principle stands out—an overall coherent philosophical mission is unnecessary and probably counterproductive. Founding statements of, or rationales for, commissions tend to use rote shibboleths about the conditions and resources necessary for successful commissions, including such phrases as “Strong Purpose,” “Political

88. See Chanenson, *supra* note 1, at 433.

89. Louis B. Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines under Legislative or Judicial Hegemony*, in REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING, *supra* note 15, at 71, 79-80 (founding drafter of the Model Penal Code calls for guidelines to fine-tune broad legislative categories).

90. Andrew von Hirsch, *The Sentencing Commission's Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3-5 (Andrew von Hirsch, Kay A. Knapp & Michael Tonry eds., Northeastern University Press 1987).

91. Michael Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 90, at 16-18.

92. MODEL PENAL CODE: SENTENCING, at xxxii-xxxiii (Tentative Draft No. 1, 2007) (Kevin Reitz's introductory memorandum).

93. Tonry, *Politics and Processes*, *supra* note 13, at 326-27 (example of California).

Atmosphere of Support,” “Adequate Resources,” “Adequate Composition and Staffing,” and “Consensus Building.” The use of these phrases reflects mundane pragmatic principles, not philosophical ones.

Commentary on sentencing often focuses on the explicit or ostensible choice among the standard jurisprudential rationales for punishment. In that regard, one might describe the consensus model as concerned with “incapacitating” the most violent criminals, expressing “retributivist” goals by reaching a modest consensus on proportionate severity, and promoting “rehabilitation,” largely by providing for drug treatment and vocational programs just before or after release to improve reentry, with provision in some states for parole supervision. But the highly pragmatic political discourse surrounding the creation of guidelines/commission systems suggests little concern with achieving any crystalline philosophical coherence in these terms. Perhaps most notably, the discussion of general deterrence so ritualized in typical jurisprudential discussions of sentencing seems almost wholly absent from the discourse on commissions and their guidelines, perhaps because of an assumption that even revised legislated sentences are likely to remain so high that they are well past the point of diminishing returns in this regard.

Indeed, more representative than any abstract discussion of purpose is the consensus’s eclectic discussion of the *functions* of a commission. To the extent that they invoke the purposes-of-punishment tropes at all, proponents of the commission model tend to rely on fairly casual incantations of assorted purposes or to focus on public safety and economy, with a nod toward the theory of “limiting retributivism” that is associated with Norval Morris.⁹⁴ For instance, the consensus seems unconcerned by the passionate critique of the new MPC Model Code of Sentencing for abandoning the old MPC’s embrace of rehabilitation as the main goal of sentencing⁹⁵ Thus, Michael Tonry, in an important work on sentencing reform, pays only quick fealty to purposes-of-punishment jurisprudence.⁹⁶ Instead he elaborates the “overt functions” of sentencing as distributive functions (consistency, evenhandedness, and fairness), preventive functions (crime, fear of crime, costs of crime, and consequences of victimization), and management functions (efficiency, cost-effectiveness, and resource management), as well as such “latent functions” as self-interest, ideological expression, and partisan advantage.⁹⁷

94. See Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005); Frase, *Diversity*, *supra* note 13, at 1208-1212. “Limiting retributivism” refers to Morris’s doubts regarding the possibility of social consensus on specific punishments for offenses, and his belief in the feasibility of identifying a consensus on a range of punishments, especially the upper bounds. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 161, 182-87, 196-200 (University of Chicago Press 1982).

95. See Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003).

96. Tonry, *Functions of Sentencing*, *supra* note 16, at 38.

97. *Id.* at 38-45.

But we can infer from the consensus discourse some key assumptions about the purpose of commissions in determining guidelines:

1. The fine-tuning of sentencing rules—even if aimed at permanence—is too great an opportunity for legislative demagoguery, or alternatively, too susceptible to legislators’ ignorance.

2. In any event, guidelines should not aim at permanence, because they will always require some revision, especially to the extent they are based on empirical averages and patterns, and the legislature has neither the time nor the skill to engage in the continuing evaluation of operating guidelines by any jurisprudential standard.

3. The first two assumptions apply with even greater force when it comes to parole release or revocation guidelines, especially because the data-gathering work required for evaluating parole matters is even more daunting than it is for initial sentences.

4. A key criterion for all the decisions and revisions to guidelines is the guidelines’ capacity to work within the budgetary and real estate limits of the system in relation to crime rates or general fiscal conditions. The resilience in adapting to these limits—especially in terms of just-in-time inventory of alternative facilities—is beyond the capacity of the legislature. Whether out of practical realism or as salutary intellectual constraint, those who set sentencing policy should operate on the assumption of zero-growth in prison capacity into the future.⁹⁸

5. In following with the first four assumptions, an indispensable role for sentencing commissions is to assemble and analyze all the data about the inflows and outflows of the criminal justice system needed to make sensible cost-benefit decisions and population projections. The commission may then use this data in a number of ways. It may “offer” this data to the legislature to guide sentencing legislation. The legislature also could agree that no bill altering a criminal sentence or defining a new crime may be considered unless it contains a data analysis and projection done by the commission. Additionally, the commission itself may use the data to the extent that it has internal rulemaking power.⁹⁹

6. Though advocates of commissions disagree on whether a commission

98. *E.g., id.* at 59. Even in the federal system, where the result of the SRA has been a large excess of prisoners over capacity and where a large increase in sentences was the express goal of many original designers of the system, the original legislation at least contained an exhortation to contain growth. 28 U.S.C. § 994(g) (2006). The operative goal of zero growth may seem belied by the blame many place on modern, post-indeterminacy sentencing rules for increasing prison population; but that blame has met some very firm empirical refutation. *See Reitz, The New Sentencing Comundrum, supra* note 62, at 1103-06, and my own discussion, *see infra* text at notes 220-222.

99. *See* Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: Sentencing Information and Its Uses, 58 STAN. L. REV. 361 (2005).

should be treated as an independent agency, a part of the executive branch, or a subset of the courts, this allocation may be no more than formalistic, since there is broad agreement on membership: commissions should be comprised of some combination of branch representation, professional representation, political representation, and expertise.¹⁰⁰

7. Finally, one often-overlooked staffing issue remains. One of the most cautious advocates of commissions, Tonry, believes it an entailment of all the criteria above that the members of the commission be part-time, because full-time members tend to view their positions as platforms for the very kind of grand intellectual envisioning that undermines good commissions, or, conversely, tend to micromanage or bias the research work of staff.¹⁰¹ In effect, part-time status is itself a species of political insulation or moderation.

C. *How the States Got to Yes*

The advent of the consensus model is a political story ripe for a variety of causal interpretations ranging, at the very least, from public choice theories of political science, to more cultural theories about civic attitudes towards crime and punishment, to facts about sheer fiscal necessity. Of course to purport to trace causes is to boldly—or naively—assume some stipulated consensus on the nature of the effect we are trying to explain. In the pragmatic and intellectually eclectic spirit of the consensus model itself (and at the risk of some tautology), I will focus on a few key descriptive features of the consensus and link these to some of the more salient, if not always mutually consistent, candidates for causality.

First, let me proffer a brief summary of the effects for which we seek an explanation:

Some time over the last decade, it became possible, under very limited and often carefully orchestrated political circumstances, for elected leaders to agree that the possibility of reducing sentences for certain crimes was a discussable subject in public discourse.¹⁰² This discussion was opened either by inviting public discussion of regulatory cost-benefit analysis, which undeniably contained the possibility of lower sentences,¹⁰³ or even by

100. E.g., Tonry, *Politics and Processes*, *supra* note 13, at 318-20; LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT 48 (2007) (hereinafter "LHC") (policy group's recommendation for California commission); Kay A. Knapp, *Organization and Staffing*, in THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 90, at 117-19; Frase, *Diversity*, *supra* note 13, at 1197-98.

101. Tonry, *Politics and Processes*, *supra* note 13, at 320.

102. E.g., Fox Butterfield, *States Ease Laws on Time in Prison*, N.Y. TIMES, Sept. 2, 2001 (legislators have begun to take risky steps on the previously unthinkable possibility of reductions in sentencing).

103. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1703-05 (2006).

straightforward advocacy of shorter sentences.¹⁰⁴ To make such a discussion possible, elected leaders were willing to delegate some control over criminal justice to an agency highly visible to the public with quasi-legislative powers.¹⁰⁵

The limitations of this discussion are crucial. The consensus governs a somewhat circumscribed space within a larger system significantly controlled by substantive criminal legislation, and it does not directly challenge that legislative structure. Thus, the political dynamics that permit the evolution of the consensus system include an implicit stipulation prohibiting macro-structural changes in crime definition or maximum sentences. Obviously some proponents of the consensus often hope that the changes it can achieve within this circumscribed space might have some subversive feedback effects on the macro-structure. By contrast, other parties who promote, or at least acquiesce in, the consensus model may prefer to keep its effects small by resisting any change in the macro-structure. The latter have in effect made a plea bargain with the other side, agreeing that peace on one small front does not preclude spirited battle on a larger front.

These developments are remarkable in light of the general academic understanding of the relationship between politics and criminal justice in modern America. That understanding views centralized state crime control as a key manifestation of modern popular democracy¹⁰⁶ and crime legislation and law enforcement as not only part of a standard political agenda but also as the very form that modern governance takes.¹⁰⁷ More particularly, the new consensus defies the notion that, at least as compared to Europe, the American political system is poorly designed to insulate criminal justice decisions from populist politics.¹⁰⁸

Moreover, it somewhat defies—or certainly complicates—the notion that our criminal justice system lost its flexibility and fairness when informal democratic processes gave way to modern federalized and centralized control. This notion, expounded in an important new work by William Stuntz, holds that through the first half of the last century, crime statutes were broad enough, with enough flexible mens rea and affirmative defense components, that police, prosecutors, and juries could exercise local good sense in calibrating

104. Marc Mauer, *State Sentencing Reforms: Is the "Get Tough" Era Coming to a Close?*, 15 FED. SENT'G REP. 50, 50-52 (2002).

105. Of course, as noted above, the advent of the sentencing commission somewhat predates the political phenomena of the last decade described here, but the rapid growth and greater salience of the commission is much more of a latest-decade phenomenon.

106. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (University of Chicago Press 2002).

107. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (Oxford University Press 2007).

108. Franklin Zimring, *Insulating Punishment Decisions from Punitive Popular Sentiment* (2007) (unpublished article, on file with author).

punishment to crime.¹⁰⁹ Moreover, in the absence of large constitutional procedural entitlements for defendants, prosecutors were less prone to engage in aggressive plea bargaining out of fear of dismissal.¹¹⁰ When the federal government co-opted the states in the war on drugs, the criminal justice system became more rigid and centralized, and criminal laws were designed to yield few defenses.¹¹¹ The ironically simultaneous rise of Warren-court rights raised the stakes of trial so much that prosecutors began exacting more and more guilty pleas, thereby weakening the democratic processes of jury acquittal.¹¹² The rise of the sentencing consensus shows that a public and somewhat formal mechanism can serve as the sensible pressure-valve for criminal legislation, partially replacing the role of local informal democracy.

How did this happen? What events had to occur and what political structures had to be obtained to make it possible for elected officials to put the theoretical or implied possibility of sentencing reduction on the table and to do so by ceding their populist-sensitive authority to neutral agencies?

1. End of the Threat of Political Suicide

In the past decade, state sentencing law began showing some surprising resilience—more than is realized by those who follow the politics of crime or focus on the federal system. The reasons seem largely fiscal, but by focusing on one key target in particular—mandatory minimum drug laws—several states also at least ambiguously acknowledged the wider social cost of these laws.¹¹³ A number of states somehow fashioned political compromises whereby legislators would put on the political table the repeal or softening of these mandatory minimums.¹¹⁴ Also, the states have varied in the degree to which officials and the public were motivated by the belief that prison expenses were wrecking their states' budgets or that cutbacks in mandatory minimums laws would significantly mitigate those burdens. For example, in some states a major factor has been the activity of groups challenging mandatory minimums and other severe sentences and putting forth a moral challenge to political leaders by denouncing these laws for the harm they cause to the social, familial, and civic life of inmates and their families.¹¹⁵

Nelson Rockefeller essentially began the war on drugs in 1973 when he pushed a new regime of mandatory minimum sentencing laws through the New

109. William Stuntz, *Unequal Justice*, 121 HARV. L. REV. (forthcoming June 2008) (manuscript at 27, on file with author).

110. *Id.* at 32.

111. *Id.* at 61.

112. *Id.* at 53-54.

113. JUDITH GREENE & VINCENT SCHIRALDI, JUSTICE POLICY INST., CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 10-11 (2002).

114. Gottschalk, *supra* note 103, at 1699-1705.

115. *Id.* at 1707-12.

York State Legislature.¹¹⁶ The state prison population then jumped 350% in twenty years.¹¹⁷ As of 2002, about 30,000 people were being charged with a drug felony each year in New York, and over a third of the state's prisoners were drug felons never convicted of a violent crime. Of these, about ninety percent were non-white; in addition, this category represents sixty percent of all female prisoners.¹¹⁸ As calls for reform grew, Republican Governor Pataki started working with the Legislature around 2002 to allow for a significant repeal of or reduction in these laws,¹¹⁹ and this development was much-heralded as revolutionary.

Unfortunately, the results in New York disappointed many: the reforms in the 2004 Drug Law Reform Act allowed for only modest reduction prospectively and though they appeared to offer some retroactive relief for old-law inmates, the procedural obstacles to obtaining that relief prevented all but a few hundred from gaining early release.¹²⁰

Nevertheless, other states took the steps on which New York equivocated. In Michigan, in 1998, Families Against Mandatory Minimums won a cutback in Michigan's "650 Lifer" law, which had set a mandatory sentence of life without parole for delivery of 650 grams or more of cocaine or heroin.¹²¹ The new law resets the sentence to "life or any term of years, but not less than 20," and applies retroactively to supply some parole rights to old-law prisoners.¹²² In Indiana, under the state's original mandatory minimum law, possession of three grams of cocaine—just enough for a street-level addict to deal in order to support a drug habit—mandated a twenty-year sentence.¹²³ The amended Indiana law gives judges discretion to set lower penalties (although it also increased penalties for dealing).¹²⁴ Connecticut relaxed its mandatory minimum sentencing requirements, allowing judicial discretion in cases not

116. GREENE & SCHIRALDI, *supra* note 113, at 26; Note, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message*, 30 HOFSTRA L. REV. 557, 558-60 (2001); Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALBANY L. REV. 777 (2000). Under the original Rockefeller Laws, sale of two ounces, or possession of just four ounces, of a narcotic drug merited a minimum sentence of fifteen years and a maximum of life in prison. GREENE & SCHIRALDI, *supra* note 113, at 26. Most drug crime prisoners were sentenced to a minimum of three years to life. *Id.*

117. GREENE & SCHIRALDI, *supra* note 113, at 27.

118. *Id.* For an empirical review of the effects of the New York law, see Note, *Are New York's Rockefeller Drug Laws Killing the Messenger*, *supra* note 116, at 560-63.

119. Al Baker, *Governor Offers Legislation to Soften Harsh Drug Laws*, N.Y. TIMES, July 16, 2003.

120. WILLIAM GIBNEY, LEGAL AID SOC'Y, ONE YEAR LATER: NEW YORK'S EXPERIENCE WITH DRUG LAW REFORM (2005). The recent New York history is fully documented by the organization Common Sense for Drug Policy, at <http://www.csdp.org/news/news/newyork.htm>.

121. GREENE & SCHIRALDI, *supra* note 113, at 27.

122. *Id.*

123. *Id.* at 11.

124. *Id.*

involving violence or possession of a weapon.¹²⁵

In addition, though often in ways overlapping with the mandatory minimum reforms, many states have greatly expanded drug diversion programs and created new drug courts.¹²⁶ Indeed, California's Proposition 36, a voter initiative that diverted most nonviolent drug offenders from regularly criminal prosecutions into community-based treatment, was premised on government projections of \$150 million in annual savings to prison costs, and on the prediction that it would moot the building of at least one new prison.¹²⁷

Moreover, contrary to the general perception that prisons expand indefinitely or that voters treat prison construction as an apple pie-issue unrelated to their general anti-tax attitudes (or do not notice the future tax effects of government bond financing), a number of states have downsized or closed large prisons, and a greater number have decided not to build projected prisons.¹²⁸ These choices sometimes blend fiscal concerns with evidence of declining prison admissions, but sometimes the fiscal concerns motivate these decisions regardless of actual or projected changes in prison admissions.¹²⁹ In a dramatic example, Arkansas's Republican Governor invoked the state's emergency powers act to mandate early release from prison for hundreds of prisoners.¹³⁰ Obviously, as a fiscal matter, closing prisons in whole or in part saves more money than simply reducing overall prison system populations, since the average annual cost per inmate is as much as double the marginal per prisoner cost savings derived from reducing the population of an otherwise overcrowded prison.¹³¹

Many of these dramatic actions have come in states in the Deep South—a fact that is either logical (they have the lowest tax base) or surprising (they have the highest crime rates and most punitive criminal and sentencing laws). Louisiana, with one of the nation's highest incarceration rates, recently abolished mandatory minimum sentences, drastically reduced other sentences for dozens of nonviolent offenses, and even amended its Three Strikes law to require that both of the convictions that would count for the first two strikes be for violent crimes.¹³² Louisiana corrections officials also have set up "risk review panels" to evaluate old-law prisoners for early release.¹³³ Mississippi actually repealed a 1995 Truth in Sentencing Law that limited opportunities for

125. *Id.*

126. *Id.* at 15-17.

127. GREENE & SCHIRALDI, *supra* note 113, at 16.

128. *Id.* at 3-4.

129. Ohio's Republican governor, seeing a decline in the state's prison population and a \$1.5 billion dollar budget deficit, closed the 1724-bed Orient Correctional Institution. Michigan's Republican governor closed the maximum-security prison at Jackson and several others in a move not clearly prompted by inmate population changes. GREENE & SCHIRALDI, *supra* note 113, at 3.

130. *Id.* at 11.

131. *Id.* at 4.

132. *Id.* at 10.

133. *Id.*

early release, and, as a result of this repeal, prisoners now can gain parole just one-fourth of the way into their sentences.¹³⁴ Alabama, whose prisons are notoriously overcrowded with non-violent lifers convicted under habitual offender laws, recently made over a thousand of them eligible for parole release, and it now has a commission/guidelines scheme that exemplifies the consensus model.¹³⁵ Indeed its key architect was former State Attorney General William Pryor.¹³⁶ In one arena, now-Judge Pryor accumulated a reputation for such extreme conservatism that when he was nominated for the Eleventh Circuit he initially was targeted by the Senate Democrats for non-confirmation.¹³⁷ Yet his published explanation for why Alabama needed a sentencing commission to deal with its overcrowded, inefficient, and inhumane prison system—and his praise of the power of a commission to achieve the political harmony necessary to mitigate them—is as eloquent and comprehensive a statement of the consensus model as can be found.¹³⁸

Very little political science research has been conducted to explain the reasons for these developments, but the obvious patterns include: severe state budget crises, usually, but not always, with a disproportionate increase in prison expenditures as a contributor; overcrowding great enough to pique fear of or induce the actual prosecution of federal court civil rights litigation; bipartisan political support; and the leadership of a Republican governor—especially in the very red states.¹³⁹ However, an important and little-examined issue is the declining crime rates in the United States after 1993.¹⁴⁰ There is little, if any, evidence that lawmakers anywhere explicitly mentioned the decline in crime as a reason for reconsidering the severity of 1970s level punishment schemes.¹⁴¹ Such an argument might have been too great a risk for politicians. Regardless, that inference is hardly clear in its empirical foundation, since some serious analysts and politicians would argue that the crime decline resulted from the incarceration increase.¹⁴² Nevertheless, the

134. *Id.*

135. GREENE & SCHIRALDI, *supra* note 113, at 10.

136. William H. Pryor Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943 (2005).

137. Matthew Wald, *2 Democrats Seek Delay in Vote on Bush Nominee*, N.Y. TIMES, July 27, 2003.

138. Pryor, *supra* note 136.

139. Two examples are the highly regarded sentencing commissions in North Carolina and Virginia. *See infra* notes 182-214 and accompanying text. Those two commissions were created under the governorships of Republicans James Martin and George Allen, respectively, and of course it was Republican George Pataki, not his liberal Democratic predecessor Mario Cuomo, who helped effect reforms to the mandatory minimum drug laws in New York.

140. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_01.html.

141. Mauer, *State Sentencing Reforms*, *supra* note 104, at 51, speculates on this as a factor, but, for example, the role of declining crime rates receives no mention in the careful analysis of new efforts to reduce the amount and cost of incarceration in Gottschalk, *supra* note 103.

142. KING ET AL., INCARCERATION AND CRIME, *supra* note 28; Levitt, *supra* note 28.

declining crime rate surely reduced the political salience of tough-on-crime demagoguery, and Bill Clinton's brilliant centrist tacking on crime in the early 1990s completed the Democrats' success in immunizing themselves on the issue.¹⁴³ Thus, the crime rate decline at least lowered the political temperature of the crime issue and made some of these changes less dangerous to consider. But what might political science tell us?

2. *The Political Science of the Guidelines/Commission Model*

Somewhat independent of the willingness of legislators to put punishment in cost-benefit terms is the structural question of whether they are willing to cede some of their authority over sentencing law and policy to another body. This is an excellent example of what has become a staple of modern political science—the delegation puzzle. In perhaps the most famous academic treatment of the subject, David Epstein and Sharyn O'Halloran proffer a “transactional cost politics model.”¹⁴⁴ Delegation is usually explained by three motivations: to deploy greater expertise than legislators possess; to ensure political neutrality on the merits of a decision; and to provide political “cover” for politicians fearing voters' wrath for unpopular but unavoidable decisions.¹⁴⁵ Epstein and O'Halloran elaborate a utilitarian explanation of these motivations. Legislators will act mostly out of elective self-interest and will delegate when it serves that interest.¹⁴⁶ More particularly, Epstein and O'Halloran examine how legislators measure the possibilities and consequences of upsides and downsides from decisions and decide whether to delegate accordingly. For example, in regard to airline safety, legislators will get minimal credit when there are no accidents but a significant amount of blame when disaster occurs. Thus, in a situation where regulation requires expertise and there is only a political downside, they will delegate.¹⁴⁷ In addition, airline safety is an example of a category where legislative and

143. President Clinton encouraged and signed the Violent Crime Control and Law Enforcement Act of 1994, which offered a balanced menu of provisions, including those augmenting federal death penalty laws, increasing penalties for use of weapons in drug crimes, enhancing restrictions on assault rifles, and increasing funding for state and local police. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994). He also signed the 1996 Antiterrorism and Effective Death Penalty Act that drastically limited federal habeas corpus jurisdiction, Pub. L. No. 104-32, 110 Stat. 1214 (1996) (codified as amended in scattered sections of Title 28 of the United States Code), and, while still Governor of Arkansas but running for President, he made a controversial decision to deny a death penalty commutation for a severely brain-damaged inmate. See Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 *BUFF. L. REV.* 283, 283-84 (1996).

144. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 7-11 (Cambridge University Press 1999).

145. *Id.* at 8 (politicians delegate decisions that have little positive and considerable negative potential effects on their reputations).

146. *Id.* at 7-8.

147. *Id.* at 8.

executive preferences are likely to be aligned; the individuals benefiting from safety are diffuse, while the airlines paying (at least initially) the bills are well-organized and active. These factors also argue for delegation.¹⁴⁸

Epstein and O'Halloran open their book with one of the most fabled case studies of delegation—the post cold-war Base Realignment and Closure Commission (BRAC).¹⁴⁹ This is viewed as a fairly positive model because it achieved much of its stated goal. In the view of Epstein and O'Halloran, the premise of delegation is that legislators face a collective action problem: they agree in the abstract that bases must be closed but may disagree on whether their home bases should be closed; even if they agree that their home bases should be closed, they are terrified of the electoral consequences of directly approving their closure.¹⁵⁰ Congress circumvented this conundrum through this neutral commission and certain special procedures. BRAC would proffer a list of recommended bases to be closed, and it would forward the list to the President, who could approve or disapprove it as a whole. The list became operative unless Congress disapproved it by joint resolution, but Congress did not have a “line-item veto” of the list—the vote had to be all or nothing.¹⁵¹

Kenneth Mayer has applied the conventional political science modeling about delegation to BRAC and pondered what generalizations can be gleaned from its (partial) success.¹⁵² He concludes that the most salient factors were that BRAC was built on a strong initial congressional consensus that some bases had to be closed; Congressmen had faith in the neutrality of the commission scheme; and the voting procedures gave them plausible (if disingenuous) political cover if they wanted to protest home closures while claiming they were bound to vote for the whole list.¹⁵³ Perhaps most important, however, BRAC was about a single, well-defined issue with some broad, if abstract, consensus about the objective. Unfortunately, delegation decisions become much harder when they involve more varied participants and sub-issues. On multidimensional political issues, such as general budget cuts, the likelihood of gaining a consensus on the best recipients of delegation is low,

148. *Id.*

149. *Id.* at 1-4. The BRAC statute is actually a cluster of laws, including the Defense Base Closure and Realignment Act of 1990 (Pub. L. No. 101-510), as amended through the FY 05 Authorization Act; the Base Closure Community Assistance Act of 1993 (Subtitle A of Title XXIX of Pub. L. No. 103-160); and the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (the "Redevelopment Act," Pub. L. No. 103-421).

150. EPSTEIN & O'HALLORAN, *supra* note 144, at 2-3.

151. *Id.* at 1-4.

152. Kenneth R. Mayer, *The Limits of Delegation: The Rise and Fall of BRAC*, REGULATION, Fall 1999, at 32, available at <http://cato.org/pubs/regulation/regv22n3/limitsofdelegation.pdf>. The success was only partial because, in some controversial closings, the government permitted privatization of the facilities in lieu of closing to ensure that local economic interests were protected. *Id.* at 36.

153. *Id.* at 32, 37.

given the wildly heterogeneous and conflicting possible interest groups.¹⁵⁴

How this modeling applies to sentencing reform is enormously complex and uncertain. Sentencing reform, as well as even more specific issues such as “prison overcrowding,” might be cast as a single-dimensional issue. However, such verbal framing can mask very heterogeneous and conflicting constituencies (and one broad and powerless one—defendants and inmates) and multiple political and economic interests. Moreover, the upside/downside model exemplified by the air safety regulation example is very hard to apply to criminal justice, where defining upsides and downsides is a matter of complicated sociological empirics and even media analysis. The best that readily can be said is that sentencing reform presents a considerable challenge to the delegation model, so a fairly particularized analysis is needed.

Some tentative forays into that examination are available for review. The success of the guidelines/commission model has been remarkable enough to provoke scrutiny of the political conditions that have made it possible. Michael Tonry and others began this examination in the late 1980s, and therefore, by necessity, partly prospectively.¹⁵⁵ With two decades of “data” now available, new analyses are in the works. Surely the most ambitious is that of Rachel Barkow and Kathleen O’Neill.¹⁵⁶ In a new paper, they conscientiously begin with some basic political science for their basic predicates and hypotheses.

The key predicate is that delegation to a sentencing commission is an inherently improbable thing for a legislature to do, because it fits so poorly onto the usual model of rational delegation to an agency.¹⁵⁷ One major model, they note, involves a decision to resolve strong interest group contests on regulatory matters in a situation where rival groups are deeply competitive and can align with political factions.¹⁵⁸ Such a situation hardly applies in sentencing, where one of the rival groups is the rather feeble coalition of prisoners, their families, their defense lawyers, and their civil rights/nonprofit advocates; and another might be autonomy-loving judges, who are a constrained and often very weak force in state politics.¹⁵⁹ Another model is the much derided but still operative expertise model,¹⁶⁰ but criminal law and even sentencing are hardly areas where legislators are willing to concede that there is a neutral science or professional expertise worthy of deference.

On the other hand, Barkow and O’Neill suggest that at least in states with close electoral balance between ideologies or parties, the model focusing on a legislature’s desire to avoid “race-to-the bottom” political battles might apply

154. *Id.* at 37-38.

155. *See generally* THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 90.

156. Barkow & O’Neill, *supra* note 13.

157. *Id.* at 1982-83.

158. *Id.* at 1979-80.

159. *Id.* at 1980-83.

160. *Id.* at 1983-85.

when there are important and perhaps indirect fiscal consequences of decisions about sentencing, especially where the balance is so close that neither side can expect to be in power for enough time to impose its will.¹⁶¹ They add, of course, the Nixon-goes-to-China theory, whereby it takes a conservative leader to risk the appearance of softness on crime, while also having the advantage of credibility on tax-and-spend constraint.¹⁶² Finally, they note that even though conservative state officials are likely to be in general ideological harmony with prosecutors, the possibly selfish interest of prosecutors in winning long sentences might be inconsistent with the state's goals,¹⁶³ and the autonomy of county officials makes central state control impossible. Hence, the commission idea is attractive as an indirect lever of state power.¹⁶⁴ Moreover, they speculate that commissions, having a judicial and legislative flavor, are likely to be either placed within the judiciary or created as independent agencies, though more likely in the latter form if the spurring political factor is the perceived excessive subjectivity of individual judges.¹⁶⁵

Finally, Barkow and O'Neill offer some interesting but not clearly coordinated speculations about the role of the background sentencing law. On the one hand, they correctly note that commissions tend to be established in states moving away, or hoping to move away, from unstructured sentencing schemes that give judges too much discretion.¹⁶⁶ On the other hand, they suggest that commissions often arise as a safety valve for controlling prison populations in states that have abolished parole altogether and therefore lack the usual safety valve provided by parole release.¹⁶⁷ These two speculations are not necessarily contradictory, but their relationship demands additional explanation.

Barkow and O'Neill then attempt a multiple regression analysis across a variety of these dimensions.¹⁶⁸ It would be churlish to attack the obvious problems in their methodological premises, because they acknowledge the limits of their effort and however unsystematic the information they generate, it is usefully suggestive. The first key flawed premise is that something can be learned from these very small numbers (fifty states and a few handfuls of commissions),¹⁶⁹ regardless of the rigor of selection of the variables. The second is that in order to generate more data and even replicate a panel study, they do not simply look to the year of adoption of the commission; rather, they treat each year in each state as having or not having a commission at that point

161. *Id.* at 1985-86.

162. Barkow & O'Neill, *supra* note 13, at 1987-88.

163. *Id.*

164. *Id.* at 1990.

165. *Id.* at 1989-91.

166. *Id.* at 1990-91.

167. Barkow & O'Neill, *supra* note 13, at 1991 n.81.

168. *Id.* at 1992-2000.

169. *Id.* at 1992-1997.

in time.¹⁷⁰ Thus, I will not belabor the econometrics, but I will address their rough conclusions.¹⁷¹

On the positive side, i.e., factors positively associated with the adoption or maintenance of a sentencing commission (although some of their analysis blurs between commissions *per se* and a full system of guidelines generated by commissions), the factors include: a Republican majority in the legislature, elected judges and the abolition of parole,¹⁷² increases in the portion of the state budget going to corrections, and higher incarceration rates.¹⁷³ On the negative side, the factors include: larger partisan margins in state legislatures, divided government, and Republican governors.¹⁷⁴

While Barkow and O'Neill find these outcomes roughly consistent with their hypotheses, they are surprised by a few of their findings. The authors had surmised that appointed judges would be perceived as greater enemies to sentencing uniformity than elected ones and hence a likelier spur to commission-building.¹⁷⁵ However, their data indicate otherwise, so they characterized the outcome the other way.¹⁷⁶ They suggest that elected judges would be just as prone to fiscal and political pressures as the legislators, and thus would need the political cover or self-restraint as much as the legislators, or perhaps that elected judges would engage in grandstanding with longer sentences and hence exacerbate fiscal problems.¹⁷⁷ They also had expected divided government to be more positively correlated with commissions, and they now suggest that perhaps commissions are simply not as truly independent as other types of agencies and hence would lack the traditional appeal of agencies in cases of divided government.¹⁷⁸ As for party affiliation, they surmise that Republican leadership, given its ideological commitment to fiscal restraint, would be especially inclined to favor the commission model.¹⁷⁹ Yet their findings link commissions to Republican legislative majorities but to Democratic governorships. Of course, the outcomes neither confirm nor refute the surmises, since the data cannot account for subtler allocations of political power in particular states, nor is it any surprise that Democrats sometimes

170. *Id.*

171. *See id.* at 2000-10.

172. Barkow & O'Neill, *supra* note 13, at 1999 n.149. Note that parole is typically abolished after a sentencing commission is established, though it could be a factor in a jurisdiction's decision to maintain a commission. *Id.*

173. *Id.* at 2011.

174. *Id.* at 2012-17.

175. *Id.* at 1991.

176. *Id.* at 1976; *see also id.* at 1991, 2006 n.162 (relationship between elected judges and commissions may turn on whether elected judges are less prone to independence in exercising sentencing discretion or overly-prone to public sentiment favoring tough (and therefore expensive) sentencing decisions).

177. *Id.* at 2011.

178. Barkow & O'Neill, *supra* note 13, at 2011-17.

179. *Id.* at 1976-77.

deliberately mimic Republicans on both crime and fiscal policy.

Finally, Barkow and O'Neill follow Tonry in surmising immeasurable but impressive effects of simply having individuals of great political prestige or savvy. They offer the strikingly famous contrasting examples of Minnesota and New York, with the former reflecting a triumph of good-government political brilliance by key administrators and the tolerance of that work by the legislature, and the latter reflecting a disaster where the politicians never surrendered any political self-interest to create any consensus on sentencing policy.¹⁸⁰ I am not sure what to make of this pairing, given the huge problem of circularity in its superficially attractive implications. A no-worse reading of this pairing, in the context of other states' experiences, may be that the key factor is the demographic and political character of the states involved. Put bluntly, the two largest liberal states in the nation, New York and California, have been poster-child failures by the standards of the consensus.

Thus, the noble effort of Barkow and O'Neill, alas, runs the risk of devolving into mere issue-spotting, since every causal theory can be turned on itself. It is not their fault, except to the extent that they oversell the idea that we can ever have any reasonably systematic, much less econometrically rigorous, analysis of this sort of phenomenon. Nevertheless, they indirectly confirm that a concern over unstructured and indeterminate sentencing, leading to oversized and unpredictable prison populations, is a major animating motive for guidelines and commission systems. This inference will be important in addressing why California is now the glaring outlier in its failure thus far to follow this approach.¹⁸¹

IV. SUCCESS AND SUCCESS-CLAIMING IN THE STATES

A common refrain of observers and proponents of the new consensus is that a number of states are already success stories. Indeed, the self-documentation of new sentencing structures, through official commission founding statements and reports, has become an important manifestation of the new consensus. For decades, the public self-congratulation of state or local governments on crime issues has been almost wholly a matter of announcing new criminal laws and higher penalties, and once crime rates started dropping, claiming credit for such things as three-strikes laws in causing large declines. These "new generation" success stories are a very different matter.

The new success stories have some common themes—most notably reductions in prison population, redistribution of prison spaces toward more

180. *Id.* at 2013-15. The Minnesota Commission's first chair, Jan Smaby, became legendary for negotiating with all interested groups and convincing them to rely on neutral research about the fiscal and logistical restraints of the state prison system. The New York experience was quite the opposite—an ideological and interest group free-for-all dominated by fights between prosecutors and defense lawyers (the latter group actually having some clout in New York).

181. *See infra* Part V.

violent criminals, greater “transparency,” reduction of costs, avoidance of judicial intervention, and at least no absolute or relative worsening of the crime rate. However, the relative weight of each of these components, in terms of actual proof or state proclamation thereof, varies. Additionally, any such success story is inevitably contestable, since defining the very measures of success for sentencing reform is a highly contestable matter—politically and philosophically. It is also contestable empirically, because no measurement along any dimension can be reliable in a short time frame. Nevertheless, the very rhetoric of the self-proclamation of successes is an important set of data for evaluation of the consensus model, because it helps us understand the meta-phenomenon of agreement on some kind of rational success criteria in criminal justice.

To make more concrete this inquiry into success measurement, I review two important state examples and then critically evaluate the very nature of success claiming.

A. Sentencing Reform in North Carolina

1. The North Carolina Model

North Carolina owes its Sentencing and Policy Advisory Commission to one essential factor: prison overcrowding. Throughout the 1970s and 1980s, the prison population rose to the point of embarrassment, and potential unconstitutionality.¹⁸² Indeed, the problem became so serious that public opinion connected it with increasing crime rates. The public came to believe that overcrowding led to premature releases of dangerous prisoners, and therefore increased crime.¹⁸³ Whether or not this was accurate, the fact that voters believed it is a striking political datum.

Before the Commission was created, and for some time thereafter, the chosen method of dealing with overcrowding was to release prisoners before their anticipated release date. In 1987, the average prisoner served only forty percent of his sentence, and this fraction declined steadily to nineteen percent in 1993.¹⁸⁴ This policy of early release effectively turned North Carolina into an indeterminate system,¹⁸⁵ with the real determinant being the irreducible constraints of (barely) habitable space. In 1990, the Legislature created a Sentencing and Advisory Policy Commission and gave it five directives: (1) to build a correctional simulation model, in order to help predict the likely effect of any sentencing changes on the correctional system; (2) to classify criminal

182. See Thomas W. Ross & Susan Katzenelson, *Crime and Punishment in North Carolina: Severity and Costs Under Structured Sentencing*, 11 FED. SENT'G REP. 207, 207 (1999) (authors were then Chair and Executive Director, respectively, of the North Carolina Commission).

183. *Id.* at 207-08.

184. *Id.* at 208.

185. *Id.* at 207.

offenses into categories; (3) to recommend a structure for sentencing, including guidelines if appropriate; (4) to develop a “comprehensive community correction” strategy to reduce the reliance on incarceration for nonviolent offenders; and (5) to consider other policy issues.¹⁸⁶

The Commission began by distilling sentences into four components: the offense, the defendant’s prior record, the disposition (prison or no prison), and the duration (the entire length of the sentence). It divided offenses and conviction records into ten categories of severity and then classified punishments into severity categories that overlapped with the classifications of offenses, so that, for example, a person convicted of a certain level of offense could get quite a range of sentences depending on his record.¹⁸⁷ Finally, the Commission assigned presumptive, aggravating, and mitigating sentencing ranges to each cell within the grid, based on an analysis of historical sentencing data. Under this new system, the sentencing judge first determines the applicable sentencing range (i.e., whether to sentence the defendant within the presumptive, aggravated, or mitigated range) and then imposes a determinate sentence within the applicable range.¹⁸⁸

2. *Some North Carolina Outcomes*

In fiscal year 2005-2006, North Carolina achieved a version of Truth-in-Sentencing (TIS), when the average inmate served 100% of his or her sentence.¹⁸⁹ Certainly the State trumpets Truth-in-Sentencing as a key rationale for the new system, though, as I note below, TIS is an extremely malleable concept with regard to the political sales appeal of a sentencing scheme. Quite distinct from TIS (but perhaps associated in the public’s thinking), violent offenders are serving longer sentences and non-violent offenders are serving shorter (and frequently non-custodial) sentences.¹⁹⁰ There is also more community supervision, including drug treatment and job

186. Ronald Wright & Susan Ellis, *A Progress Report on the North Carolina Sentencing and Policy Commission*, 28 WAKE FOREST L. REV. 421, 439-43 (1993); North Carolina Court System, North Carolina Sentencing and Policy Advisory Commission, <http://www.nccourts.org/Courts/CRS/Councils/spac/> (last visited Feb. 5, 2008).

187. It is worth noting that prior record is the *only* characteristic of the defendant that is factored into the guidelines calculation.

188. Ross & Katzenelson, *supra* note 182, at 209.

189. N.C. SENTENCING AND POLICY ADVISORY COMM’N, CURRENT POPULATION PROJECTIONS: FISCAL YEAR 2006/07 TO FISCAL YEAR 2015/2016, at 1 (2006) [hereinafter CURRENT POPULATION PROJECTIONS], available at www.nccourts.org/courts/CRS/councils/spac/documents/2007populationprojections.pdf.

190. If we put aside life sentences and mandatory habitual offender sentences, North Carolina classifies its felons into nine groups of severity. In 1997, for then-incarcerated felons, the average estimated sentences for the nine classes, measured in months, and in descending order of severity were: 257/167/90/73/30/18/15/9/7. Ross & Katzenelson, *supra* note 182, at 209. The parallel figures for 2006 were: 295/182/96/79/33/25/19/10/6. CURRENT POPULATION PROJECTIONS, *supra* note 189, at 6. Hence, sentences for the most severe felonies got notably longer over that decade, while sentences for the lesser felonies were about the same or lower.

training, for non-violent offenders.¹⁹¹

Since the new regime began, the prison population has tended to remain at or just above capacity, and there was even a period between 1998 and 2000 when the population fell below capacity.¹⁹² Though this trend has turned somewhat upward recently,¹⁹³ there has been a notable redistribution in the direction of more violent offenders. In 2007, 53.2% of prisoners were in prison for an offense within the four highest classes, and only 20.2% were in for an offense within the lowest two classes. Projections suggest that by 2016, 55.9% will be in for an offense within the four highest classes, while only 17.8% will be in for an offense within the two lowest classes.¹⁹⁴

In 1980, North Carolina had the highest incarceration rate in the South. Today, the state has the second lowest rate in the region, having achieved one of the most impressive reductions in incarceration rates in the country.¹⁹⁵ Moreover, North Carolina touts that this was accomplished without producing a crime wave. Its crime rate dropped after 1993 no less than (if no more than) the general decline in the United States—a twelve percent drop in violent crime and a nine percent drop in property crime.¹⁹⁶

B. Sentencing Reform in Virginia

1. The Virginia Model

If North Carolina's change was driven by an "economic" problem, Virginia's was driven by a political one, with a powerful governor denouncing parole and other points of flexibility in the sentencing system.¹⁹⁷ In the early 1990s, Virginia was perhaps the most extreme example of an unstructured and indeterminate system in the United States. Judges enjoyed almost total

191. Ross & Katzenelson, *supra* note 182, at 210.

192. CURRENT POPULATION PROJECTIONS, *supra* note 189, at 5.

193. This may simply be due to short-term changes in the crime rate, or arrest or prosecutorial decisions.

194. CURRENT POPULATION PROJECTIONS, *supra* note 189, at 6.

195. In 1995, North Carolina's incarceration rate was 382 prisoners per 100,000 people, compared to the then-national figure of 409. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995, at 3 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji95.pdf>. In 2005, the state was at 360, when the national number was 491. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISONERS IN 2005, at 4 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

196. The North Carolina rate for violent crime went from 644.6 in 1995 to 475.6 in 2006—the latter at a time when the overall South regional number was 547.5. BUREAU OF JUSTICE STATISTICS, REPORTED CRIME IN NORTH CAROLINA, (2008), available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/statebystaterun.cfm?stateid=34>; FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2006 (2006), available at http://www.fbi.gov/ucr/cius2006/offenses/standard_links/regional_estimates.html.

197. TONY FABELO, WENDY NARO, & JAMES AUSTIN, THE JFA INST., EXPLORING THE DIMINISHING EFFECTS OF MORE INCARCERATION: VIRGINIA'S EXPERIMENT IN SENTENCING REFORM (2005), available at www.drugpolicy.org/docUploads/JFAInstituteVirginia.pdf.

autonomy and subjectivity in their sentences, within very broad legislative ranges, and parole authorities enjoyed equivalent discretion over early release.¹⁹⁸ Though an increasing and costly prison population was of some concern among politicians and voters, the primary concern was excessive discretion and non-uniformity. The perceived leniency and indeterminacy of the system became a major political issue and catalyzed legislative change by calling not only for an end to discretionary parole but also new constraints on judicial sentencing.¹⁹⁹

In 1994, the Legislature created the Virginia Criminal Sentencing Commission, invoking the ritual tropes we associate with commission founding statements, although the statement was somewhat unusual in that it spoke of the importance of alternative sanctions for nonviolent offenders.²⁰⁰ The Legislature and the Commission, however, had taken insufficient account of the historically entrenched power of the Virginia judiciary. Judges were reluctant to support anything that reduced their sentencing discretion and insisted that any guidelines, even if entirely discretionary, be anchored in past sentencing practices.²⁰¹

This residual judicial power posed quite a political dilemma. The odd logical outcome was a compromise whereby the Virginia Criminal Sentencing Commission promulgated very systematic-looking guidelines (approved by the Legislature). These guidelines gave judges a detailed sentencing structure, replete with worksheets implementing elaborate risk assessments, but left judges (legally) free to follow or not follow the guidelines as they chose.²⁰² Eccentric as this may seem on its face, it may have been a brilliant political maneuver. The Commission followed the demands of the judges that they anchor the guidelines in the empirics of sentencing practices, but it also trimmed away outliers, especially where attributable to clearly improper factors such as geography or certain demographics. The Commission eliminated the inappropriate factors, reapportioned the guidelines factors accordingly, and assigned values to each of the guidelines factors, reflecting the relative weight that the Commission thought should be attributed to each factor.²⁰³ In addition, as a politically clever and also empirically imaginative way of invoking the truth-in-sentencing trope, the Commission relied on the time-served data, as

198. See *id.* See also Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 702 (2007).

199. See Frank B. Atkinson, *George Allen's 1,000 Days Have Changed Virginia*, UNIVERSITY OF VIRGINIA NEWSLETTER, Sept. 1996, at 1, 4, available at <http://www.coopercenter.org/publications/sitefiles/vanl/vanl0996.pdf>.

200. See Netter, *supra* note 198, at 702-03.

201. BRIAN OSTROM, ET AL, NAT'L CTR. FOR STATE COURTS, TRUTH-IN-SENTENCING IN VIRGINIA: EVALUATING THE PROCESS AND IMPACT OF SENTENCING REFORM 10-11 (1999).

202. Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT'G REP. 165, 165-66 (2004).

203. *Id.*

opposed to sentence length. The Commission ensured that the new recommended sentence ranges were based on the amount of time that offenders had actually been serving in prison, rather than the time that the judge had imposed (a number that had always been viewed as essentially meaningless). The Commission then increased each piece of data by up to fifteen percent (in order to account for approximate good time credit), eliminated the upper and lower twenty-five percent, and established the middle fifty percent (with minor variations) as the initial range, with the median of that range as the midpoint.²⁰⁴

2. *Virginia Outcomes*

Since the early 1990s, the incarceration rate in Virginia has risen as steeply as the national average, so, at least on the superficial numbers, the new commission system cannot be credited with or blamed for any dramatic effect in that regard. However, the distribution of offenders within the increasingly large prison system has changed in the intended direction.²⁰⁵ The key change the new system has wrought is that judges are imposing significantly longer sentences for violent and recidivist offenders—the ones with the highest worksheet scores—and inmates are serving about ninety-one percent of their prescribed time.²⁰⁶ At the same time a slowly increasing proportion of nonviolent offenders previously subject to imprisonment are now being rerouted to alternative dispositions.²⁰⁷

Thus, Virginia's new system has not immunized it from the fiscal challenges of increased incarceration numbers,²⁰⁸ but it has achieved much of its rational stated goal of redirecting resources toward violent offenders, and it has certainly achieved its much trumpeted Truth-in-Sentencing goal. Of course the former goal, though clearly rational, is contestable in terms of any causal link between the violence-focus of prison space and the payoff in reducing crime, and the latter may be more a matter of symbolism than any empirical effect on crime. Nonetheless, at least Virginia can say that its crime rate has roughly tracked the national downward trend of the 1990s,²⁰⁹ and that its "crime returns" rate—that is, the superficial relationship between incarceration and crime rate—makes Virginia look at least reasonably successful compared to other states.²¹⁰

Perhaps more striking in terms of the political finesse described above, the rate of judicial compliance with the voluntary guidelines has been remarkably

204. OSTROM, *supra* note 201, at 29-30.

205. FABELO, ET AL., *supra* note 197, at 6.

206. *Id.* at 6.

207. *Id.*

208. On the other hand, the jump in incarceration is notably lower than state researchers forecasted at the time the new system was conceived. *Id.*

209. *Id.* at 8.

210. *Id.* at 10.

high.²¹¹ One explanation may lie in another detail of the finesse. Judges are not free to *ignore* the guidelines; rather they are simply free not to follow them. By statute, if they choose to depart from the guidelines, they must state their reasons for departure on the record. Those reasons are not reviewable on appeal, but the record and the reasons must be reported to the Commission, which maintains this information and can use it if an accumulation or pattern of related departure reasons calls for an actual change in the guidelines.²¹² One can obviously describe the Virginia story in terms of the unchangeable historical fact of unusual judicial power and autonomy, and therefore as a series of mild, optimizing concessions and “takebacks” between the legislature/commission and the judiciary. One component of that interpretation is the more-than-formalistic placement of the Commission within the judicial branch with a stated purpose to assist the judiciary in the imposition of sentences, along with a heavy allocation of seats on the Commission to judges.²¹³

Nevertheless, I am unaware of any political science that enables us to generalize from this example about how these optimal mixes can be replicated, in part because any generalization would have to assess such variables as the exogenous fact of anomalous judicial power in the Commonwealth. Nor am I inclined to follow the casual empirics of law-and-norms commentary by suggesting that the lesson here is the brilliant methodology of norms entrepreneurship and social status negotiations between the legislature and the judges, and among the judges themselves,²¹⁴ although the Virginia story may well provoke such a suggestion.

Rather, Virginia’s story is a somewhat different retelling of North Carolina’s. Superficially, they differ in a couple of ways. First, compared to each other, North Carolina was arguably more motivated by necessity and Virginia more by political opportunism, but evaluations and perceptions of economic necessity are themselves politically contingent. Second, North Carolina has a very structured guideline system, whereas Virginia’s is “voluntary.” Yet these differences may be less important than the similarities in terms of overall state commitment to some negotiated political processes of cost-benefit analysis through a partially and flexibly structured sentencing metric. Indeed, once we compare the different legal and structural baselines from which North Carolina and Virginia started, the degree and direction of change they have achieved look remarkably similar. In both states, the redistribution of prison space to more violent criminals is the most striking

211. VA. CRIMINAL SENTENCING COMM’N, 2007 ANNUAL REPORT 22 (2007), available at <http://www.vscs.virginia.gov/2007VCSCReport.pdf> (compliance rate has been in seventy-five to eighty percent range since 1995).

212. *Id.* at 19-22.

213. *See id.* at 7-8.

214. *See* Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030-31 (1996).

short-term outcome, and can be described as a success by some fairly neutral standard. More generally, both stories proclaim success in part in terms of the very achievement of bipartisan rationality.

C. *The Problem of Success Measurements*

Obviously, to analyze or evaluate the effects of a commission/guidelines model is even more challenging than to analyze causes—especially just two decades into the experiment. Moreover, the criteria for analysis or evaluation are hardly uncontroversial. They are difficult to define and measure, not least because selection of any criteria must assume some consensus on the goal of the sentencing reform in question.

As a temptingly simple first effort, if we view sentencing and corrections as a key component of the criminal justice system, and if we posit that the purpose of criminal justice is to reduce crime, then crime rate would be the best success measure. Using crime rates as our measure, however, presents quite an empirical challenge for two fundamental reasons. The first concerns the shaky state of econometric science in explaining changes in crime rates, evidenced by the great division among econometric authority in explaining the great crime rate decline of the 1990s.²¹⁵ Second, if changes in sentencing affect crime rates, a key mediator of those changes (although not the only one) will be the marginal incapacitative effects of any change in the size or demographics of the prison population.

Indeed, at first guess we should be skeptical that the consensus model will reduce crime. One common animating purpose of the model is to reduce incarceration rates in times of fiscal crisis, yet it seems illogical to speculate that less incarceration means less crime. Of course some will argue that more sensible selective incapacitation can reduce both crime and incarceration rates. But all speculation aside, the more logical assumption—that *increasing* incapacitation reduces crime—is itself an empirically messy matter.²¹⁶ An important sub-branch of academic analysis focusing on the crime rate drop has produced very equivocal research on the extent to which the great increase in

215. See *supra* note 28 and accompanying text.

216. Empirical conclusions about the relationship between prison population increases and crime rates are difficult to draw. As pointed out in GREENE & SCHIRALDI, *supra* note 113, at 3: In the 1990s, Texas added more prisoners to its prison system (98,081) than New York's entire prison population (73,233) by some 24,848 prisoners. While Texas had the fastest growing prison system in the country during the 1990s, New York had the third slowest growing prison population in the U.S. Overall, during the 1990s, Texas added five times as many prisoners as New York did (18,001). Yet from 1990 to 1998, the decline in New York's crime rate was twenty-six percent *greater* than the drop in crime in Texas. Texas' 1999 incarceration rate (1014 per 100,000) was seventy-seven percent higher than New York's (574 per 100,000), yet Texas' 1998 crime rate (5111 per 100,000) was forty-two percent higher than New York's (3588 per 100,000). In 1998, Texas' murder rate was twenty-five percent higher than New York State's rate. *Id.*

incarceration in recent decades contributed to decreases in crime rates.²¹⁷

Another problem with using crime rates as our measure—a subtler one—has to do with specifying which particular components of possible future crime we expect sentencing reform to prevent. Thus, we might focus on the more specific goal of reducing crime by recidivists in particular, as opposed to first-time offenders' crime. However, determining what portion of crime is recidivist crime is itself a formidable challenge, because we would have to define the types and numbers of prior offenses, convictions, and incarcerations that help define the recidivist pool. Comparative recidivism rates among the states are hard to come by because of these difficulties. California has an egregiously high rate of released inmates cycling back to prison, but how many of these returnees count as recidivists is a matter of definition. If a recidivist is a former inmate returning to prison for a new crime, the measurement of recidivism in California is clouded because some inmates return to prison for minor parole violations that are not statutory crimes, while a great number commit new crimes that, for prosecutorial and administrative convenience, are classified as parole violations.²¹⁸

Even if we solved those challenges, we would have to acknowledge that sentencing is just one component of criminal justice. Then the question would be whether resource allocation to new sentencing schemes, even if it demonstrably reduces crime, is the best investment for a state, and addressing that question requires us to consider much more complex measures of *efficiency* in reducing crime. However, even this modified broad focus—i.e., on efficiency in reducing crime—makes little sense in terms of the motivations behind sentencing reform, which rarely have anything to do with perceptions that the current sentencing system fails to reduce crime. Rather, these motivations have been a mix of economics, politics, and social ethics, and success would have to be measured in terms of some of those motivations, with a look to crime rates as perhaps just an insurance check—i.e., to make sure that in solving some other problems we at least did not *worsen* crime rates.

In defining the goals against which success is to be measured, it is difficult to ignore the sheer incarceration rate, especially because we tend to assume some fiscal limit on prisoner resources, so that the incarceration rate is

217. For an excellent review of this research, see RYAN S. KING ET. AL., INCARCERATION AND CRIME, *supra* note 28. The authors note serious deficiencies in the statistical record needed to clarify the incarceration-crime relationship, including inconsistencies of definitions and measures across jurisdictions and differing time frames for analysis. *Id.* at 2-4. But they also posit some reasons why marginal increases in incarceration might not reduce crime. For example, we would at least expect diminishing returns on crime reduction at some point if the highest rate offenders are captured first. *Id.* at 6. Also, especially with regard to drug crimes, incapacitation of one offender may simply invite a new substitute offender to replace him in a fixed-sum market of drug-dealing opportunities. *Id.* at 6.

218. JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 71-76 (2006).

always a proxy for at least the risk of prison overcrowding. After all, overcrowding crises are often a major factor spurring reform—whether because of legal challenges to prison conditions or political and public concerns about them. To gain some helpful modesty on this subject, we should note that the most plausible-sounding hypotheses about what factors or programs will lead to higher incarceration rates find at best very inconclusive confirmation in empirical research.²¹⁹ For example, the utterly plausible projection that a strong new Three Strikes law will greatly increase the incarceration rate has hardly been validated by experience.²²⁰

To return to the consensus model, the best we can say is that there is some tentative support for the inference that the adoption or maintenance of sentencing commissions/guidelines systems has a downward pressure effect on incarceration rates,²²¹ as it is associated with the few instances of actual reduction in a smattering of states in the late 1990s and a slowing of the rate of increase in others that had especially high growth rates.²²² However, the savviest analysts of this problem are very agnostic about the causal direction of this inference, particularly in terms of the proportional significance of the choice of sentencing system in the mix of factors influencing incarceration rates.²²³ Nonetheless, we are left to speculate that many other factors—demographic, economic, and political—may tend to dominate.

Regardless of constitutional or political challenges to overcrowding, a reduced incarceration rate is by no means itself an uncontroversial goal for sentencing reform. Indeed, the least controversial goals might be to reduce disparity and to improve, by various *modest* measures, the cost-efficacy of the correctional system. The disparity-reducing effect could be measured in part

219. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (University of Chicago Press 1991) (finding no clear links between incarceration rate and such factors as crime rate, public attitudes toward imprisonment, and national economic trends).

220. LEGISLATIVE ANALYST'S OFFICE, *A PRIMER: THREE STRIKES: THE IMPACT AFTER MORE THAN A DECADE 15-16 (2005)* (1994 prediction that law would add 100,000 inmates to state prison in a decade proved wrong, in part because of prosecutorial discretion not to exercise Three Strikes option). One speculation might be that the true effect of laws like three strikes and truth in sentencing may not be noticeable for several years, materializing only after the extended time served exceeds that which offenders would have served in the absence of such laws.

221. *E.g.*, Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 707 (1995); Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time*, 50 CRIME & DELINQ. 395, 396 (2004); Jon Sorensen & Don Stemen, *The Effect of State Sentencing Policies on Incarceration Rates*, 48 CRIME & DELINQ. 456, 469 (2002).

222. *See* Kevin Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1799-1801 (2006). Reitz has argued strongly against what he sees as a common perception that the guidelines/commission model has generally increased incarceration rates. *Id.* He offers studies to show that much of the modern increase in incarceration happened under old-fashioned indeterminate or unstructured schemes, and more contemporary cross-state comparisons do not support any inference that the guidelines schemes lead to incarceration rate increases. *Id.* at 1794-1801.

223. *Id.* at 1794-97.

by whatever analytic schemes are normally used to tease out impermissible factors, especially race and ethnicity, from those factors that could legitimately affect sentencing. In a major recent study, John Pfaff finds significant evidence that both presumptive and voluntary guidelines systems have decreased sentencing disparities for those convicted of a particular offense and also have reduced the statically measurable role of race or gender in sentencing.²²⁴ Pfaff is careful to note that reduction in disparity, in the sense defined above, is not an uncontested virtue, since it may allow less individuation for offender characteristics than we would prefer.²²⁵ But given the widespread perception that the pre-guidelines systems were too prone to irrational or prejudicial disparity, some significant reduction comes very close to an uncontested virtue.

The cost-efficacy effects, in turn, might be captured by any number of possible metrics—i.e., a measurement of reduced cost per prisoner or some other unit, some measure of the cost per unit of reduction in recidivism, some measure of the relationship between prison expenditures and the crime rate (although we may expect a notable lag between cause and effect in this linkage), or some measure of the relationship between prison expenditures and the recidivism rate where we might expect less of a lag, since any effect of the prison experience on recidivism is likely to show up right after release. These measures are all complex themselves and, in turn, any one of them will bear only an elusive relationship to incarceration rates. More modest measures would be some combination of reduced prison costs as a portion of the state budget, the absence of any disturbing increase in the crime rate or recidivism rate, and, most simply and appealingly, the absence of any serious political controversy over the commission/guidelines operation itself.²²⁶

224. John F. Pfaff, *The Vitality of Voluntary Guidelines in the Wake of Blakely v. Washington*, 19 FED. SENT'G. REP. 202 (2007); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 235, 269-81 (2006). Interestingly, Pfaff's study was motivated by a *Blakely* issue. He observes that to ensure *Blakely* compliance, some states changed to voluntary systems, on the theory that increasing judicial discretion got around the Sixth Amendment obstacle. See Pfaff, *Continued Vitality*, at 248-49. He happily infers that under a voluntary system, judges still adhere closely to the guidelines, so that improvements on the disparity and race/gender scale are almost as great under voluntary as they are under presumptive systems. *Id.* at 283-84. But as the necessary predicate to make that comparison he manages to provide an excellent data analysis of pre-*Blakely* or otherwise *Blakely*-proofed presumptive systems. *Id.* at 270-71.

225. Pfaff, *Continued Vitality*, *supra* note 224, at 281. Perhaps too carefully, he allows for the possibility that gender neutrality also may be a contestable virtue, since sentencers might want to mitigate to parents who are especially crucial to their children's care and who, he says, may be disproportionately female. *Id.* at 281-82.

226. A good example of the difficulty of success measurement comes in privatization research, aiming to determine whether private prison contractors can incarcerate more efficiently than the public system. See Kathryn Young, *The Privatization of California Correctional Facilities: A Population-Based Approach*, 18 STAN. L. & POL'Y REV. 438 (2007). Analyzing the relative efficacy of private and public systems is daunting even if we have good data, because determining the right frames to sort the data is such a contestable enterprise. For example, in the

Looking at these issues alone still greatly understates the conceptual, philosophical, political, and empirical difficulties of measuring success in sentencing reform. For example, there is the much-invoked goal of reform called “Truth-in-Sentencing”—the close tie between the sentence decreed in legislation or announced at trial and the sentence the offender actually serves. Yet this is a very contestable goal and indicator of success, as demonstrated by the Virginia case claiming success along these lines.²²⁷ Truth-in-Sentencing might aid in general deterrence if we make certain assumptions about the extent to which potential offenders rely on fairly precise warnings of likely incarceration time. It also somewhat may aid prison financial and logistics managers in making projections of population flows and costs. But there remains in our jurisprudence a very strong legacy of belief in the rehabilitative value of indeterminate sentencing, and in terms of that aspiration, Truth-in-Sentencing may be irrelevant. Worse yet, if the old indeterminacy model was at least somewhat right in its behaviorist belief in the tempting incentive of earlier release for inmates, Truth-In-Sentencing might even be an obstacle.

Another possibility is that by emphasizing a regulatory cost-benefit model of sentencing, the consensus model might lead systems to usefully focus on the realistic possibilities of behavioral predictions bearing on short-term violence risks. Thus, the model could have a large, if subsidiary, effect on the use of so-called evidence-based risk assessments at all stages of prosecution and sentencing, even if such metrics are not necessarily logically tied to animating purposes.²²⁸ Even then caution about unintended consequences is necessary: one possible side-effect of such risk-assessment, and the concomitant redistribution of punishment toward the most violent and dangerous, would be that the prison population would become much younger. The diffuse social effects of recharacterizing the modal prisoner as a young predator may prove culturally troublesome in re-invoking some of the images of criminals that

world of privatization we often distinguish “avoidable” costs, those that can be imposed on the contractor, from “unavoidable ones,” those that the state must continue to bear, but drawing the boundary between the two is a complex matter that will obviously influence the measure of the contractors’ success. *Id.* at 439. In addition, if we look at efficacy in terms of cost per prisoner housed, we would have to control for the varying categories of prisoners housed in private facilities. *Id.* If the contactors get the less dangerous inmates, the apparent success advantages will suffer from severe sampling biases. *See id.* at 440 n.11. If they get older prisoners their security costs will go down but their medical costs will go up, with the relative effects being wildly unpredictable. *See id.* at 461. Further, cross-vendor and cross-state comparisons are difficult because some contactors subject themselves to the industry-standard criteria of the American Correctional Association but some do not. *See id.* at 464-65. Moreover, if vendors follow the common public model of using remote rural locations for facilities, the lower land and related costs might seem to improve efficacy, but these savings will be at the cost of greater access to reentry programs and social services in more urban areas. *Id.* at 465-66.

227. *See supra* notes 202-204 and accompanying text (goals and effects of Virginia’s Truth-in-Sentencing principle).

228. Roger Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307 (2007).

sparked the harsh populism the consensus has sought to fight.

Finally, of course, there is the risk that the consensus will suffer the unintended consequence of its own modesty in one key sense—its relation to substantive criminal law. That is, the consensus model treats crime-defining legislation as an exogenous factor while only focusing on the sentencing effects of that legislation. Proponents of the model may recognize that the criminal law inputs create many of the bad sentencing outputs, but they may have chosen to keep their goals politically realistic. And the risk, then, is that this “pass” that the consensus model gives to crime legislation could provide an opportunity for demagogic crime populism to arise on that side of the equation. If, for example, terrorism fears or some other new social motive sparked a new kind of harsh crime-definition legislation with draconian maximum penalties, then the marginal flexibility offered by the consensus model may seem more modest than ever.

Given the common view that that we over-incarcerate and probably inefficiently or irrationally incarcerate in the United States,²²⁹ and the strong evidence to support it,²³⁰ a safe conclusion might be as follows: most new-consensus systems have shown the capacity to adjust or reduce incarceration rates in response to perceptions of inhumane overcrowding or economic distress, and to substantially reapportion incarceration rates from nonviolent to violent offenders (however crude the definitional distinctions). There is no evidence that they worsen disparity, some evidence that they reduce it,²³¹ and at least no indications that they increase crime rates.²³² That the consensus model has made these things possible by recasting criminal justice in the vocabulary of cost-benefit regulation, and that it has enabled politicians to deploy this vocabulary without substantial political risk—these are some signs of success indeed.

V. CONCLUSION—THE CONSENSUS AND CALIFORNIA

By the reckoning of its own established state oversight agency, California

229. *E.g.*, Symposium, *Exploring Alternatives to the Incarceration Crisis*, 3 ST. THOMAS L. REV. 375 (2006).

230. It is a truism that the expansion of America's prisons in the last few decades has been largely driven by the incarceration of nonviolent offenders. The percentage of violent offenders held in state prisons declined from fifty-seven percent in 1978 to forty-eight percent in 1999, but the prison and jail population has tripled over that period, from roughly 500,000 in 1978, to two million. GREENE & SCHIRALDI, *supra* note 113, at 4. From 1980 to 1997, the number of violent offenders committed to state prison nearly doubled (up 82%), while the number of nonviolent offenders tripled (up 207%) and the number of drug offenders increased eleven-fold (up 1040%). *Id.* In the aggregate, inmates newly convicted of nonviolent offenses accounted for seventy-seven percent of the growth in in-flows into America's state and federal prisons between 1978 and 1996. *Id.*

231. *See supra* note 224 and accompanying text.

232. *See, e.g.*, *supra* notes 196, 209 and accompanying text.

has the most dysfunctional correctional system in the nation.²³³ Unsurprisingly, it has the nation's largest prison population in absolute numbers, so we might expect the evidence of dysfunctionality in such measures as incarceration rates or such outputs of the incarceration system as crime rates. But California's anomalies take other forms. California has an egregious ratio of prisoners to prison bed space,²³⁴ a notorious and unconstitutional set of living conditions for prisoners, including verifiably unconstitutional medical and mental health care,²³⁵ an ostensibly narrowly limited but operatively chaotic and barely monitored parole system,²³⁶ an utter paucity of even the most mundane and politically uncontroversial rehabilitation and reentry programs,²³⁷ and, overall, an embarrassing absence of rational control over the inflows and outflows of the prison system.²³⁸

It is tempting to infer that these conditions should be especially ripe for deployment of the consensus model. However, the nature of that dysfunctionality is partly consistent with, but partly very orthogonal to, common legal and political indicia of dysfunctionality that have tended to prove conducive to the consensus model in other states. Thus, it may be safer to suggest that the potential role of the consensus model in California will be to spur lawmakers to realize better the breadth and diversity of conditions of political economy and legal dynamics in which rational sentencing and correctional policy can be made. In addition, because the undeniable disasters in California are, strictly speaking, about corrections, not sentencing, the California story will illuminate how undeniably grave symptoms of a diseased political economy in the former can lead to a new intellectual and political conception of the latter.

California's abrupt and harsh turn three decades ago to determinate sentencing actually prevented some of the political conditions that seem conducive to the rise of guidelines/commission reform. As we have seen, it was commonly—perhaps typically—the perceived ill effects of unstructured and indeterminate sentencing that provided the fertile conditions for the consensus model.²³⁹ And this is where the sentencing law anomaly of California must be set side-by-side with the current anomaly of its correctional

233. *See generally* LHC, *supra* note 100.

234. *Id.* at 19.

235. *See* Plata v. Schwarzenegger, No. C01-1351 TEH, 2007 U.S. Dist. LEXIS 56031 (N.D. Cal. July 23, 2007) (order granting Plaintiffs' Motion to Convene Three-Judge Court) (reviewing earlier holdings that inadequate medical care for prisoners in California violates the Eighth Amendment); Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist LEXIS 56043 (E.D. Cal., July 23, 2007) (reviewing, similar to *Plata*, holdings on unconstitutionally inadequate provision of mental health care).

236. *See* PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS, *supra* note 218, at 59-68.

237. *See id.*

238. *E.g.*, LHC, *supra* note 100, at 17.

239. *See supra* notes 3, 15, 85 and accompanying text.

catastrophe. California, in its famous 1976 Determinate Sentencing Law (DSL), shifted early and abruptly into an extremely rigidly structured and determinate system, all without any component of the consensus model.²⁴⁰ The modern California sentencing system is the result of aggressive and rigid legislation (occasionally abetted by public referenda).²⁴¹ The law of sentencing in California is essentially the same structure as its Penal Code. It is a bizarrely complex legislative structure, in which definitions of crimes set fairly formulaic ranges for sentences, and then an even more complex adjunctive structure of enhancements and special aggravating factors add to possible sentences in a formulaic and virtually mandatory way.²⁴² Moreover, the post DSL evolution of California sentencing laws has been largely a matter of episodically legislated enhancements placed in various parts of the penal code,²⁴³ resulting in an uncoordinated maze.²⁴⁴ Therefore, as compared to the most notable consensus states, in California there has been no risk of complaint about judicial discretion creating disparity in sentences, because there is so little judicial discretion in the first place.²⁴⁵

It would be a daunting test of causal analysis to show that—or how—this modern sentencing structure led to the correctional outputs that now afflict California. However, these outputs have been so disastrous that they raise the possibility of legal reverse-engineering to discover ways of rethinking the sentencing law inputs as the solution. Of course, conceiving a solution is a moot exercise if the public and the state government avoid acknowledging that that there are urgent problems to be solved. But this is where California poses such a fascinating test site for the political science analysis evoked by the consensus model. If California is unique in its avoidance of egregious sentencing and corrections problems, it may also be unique in its vulnerability

240. The drafters of the law proclaimed it “the most rigid of any major state.” Raymond I. Parnas & Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29, 29 (1978).

241. Note, however, that the Three-Strikes law essentially builds a new indeterminate sentencing layer on top of the DSL. ZIMRING, ET AL., PUNISHMENT AND DEMOCRACY, *supra* note 23, at 115-17.

242. See KARA DANSKY, INCREASES IN CALIFORNIA SENTENCING SINCE THE ENACTMENT OF THE DETERMINATE SENTENCING ACT, A STANFORD CRIMINAL JUSTICE CENTER REPORT (December 2006), in LHC, *supra* note 100, at 67-76 (Appendix F).

243. *Id.*

244. “As a sentencing judge winds his way through the labyrinthine procedures of section 1170 of the Penal Code, he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys.” Cmty. Release Bd. v. Superior Court, 91 Cal. App. 3d 814, 815 n.1 (1979).

245. For a lament along these lines by a veteran California jurist, see Justice Steven Perren, Sentencing Reform in California: A Proposal For Changing Determinate Sentencing in California, Materials for the Stanford Criminal Justice Center Executive Session (March 9, 2007) (unpublished article, on file with Stanford Criminal Justice Center).

to an exogenous force that is making avoidance more and more difficult—the federal judiciary. Unlike the situations in *Blakely* and *Booker*, the Supreme Court and the Sixth Amendment are not involved; rather California faces an *Eighth* Amendment issue before the United States *District Court*.

To be sure, California has proved to have a *Blakely* problem. The early predictions were that *Blakely* would be only a minor problem in California because of the enhancements that were tried by juries.²⁴⁶ The *Cunningham* case showed, however, that California was somewhat *Blakely* vulnerable, because of its triad structure, whereby judges could choose between a high, low, and middle term for many crimes, and the factual predicates for applying the upper-term, which turned out to be *Blakely*-applicable criteria.²⁴⁷ Nevertheless, the *Blakely-Cunningham* doctrine, while requiring some predictable litigation work in application to old cases,²⁴⁸ has proved to be a mere sideshow. The Legislature, if only temporarily, successfully responded to *Cunningham*,²⁴⁹ and to the extent that there will be *Cunningham* issues down the road, they will likely involve the nuanced Sixth Amendment metaphysics that we see elsewhere in the nation.²⁵⁰ These nuances, however, have little to do with the ills of sentencing in California. Rather, the federal law component in the political dynamics of California will be the California-specific injunctive cases coming out of the local federal courts.

The presence of federal judicial injunctive control over the correctional outputs adds an amazing new factor into the political science mix. Most dramatically, the recent constitutional litigation has brought California closer to the unprecedented step of a federal court order to cap prison populations and possibly, as a consequence, force release of prisoners.²⁵¹ Determining whether

246. Jonathan Soglin & Bradley O'Connell, *Blakely, Booker, & Black: Beyond the Bright Line*, 18 FED. SENT'G. REP. 46 (2005).

247. *Cunningham v. California*, 127 S. Ct. 856, 868-71 (2007).

248. *E.g.*, *People v. Black*, 161 P.3d 1130 (Cal. 2007); *People v. Sandoval*, 161 P.3d 1146 (Cal. 2007). Both cases address questions of waiver, harmless error, and other issues resulting from *Cunningham*.

249. It passed Senate Bill 40, which "solved" the Sixth Amendment problem by making the choice within the triad wholly discretionary. However, even that solution sunsets in 2009. S.B. 40, 2007-08 Leg., Reg. Sess. (Cal. 2007).

250. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that defendants have no right to a jury trial on proof of prior offenses. *Almendarez-Torres*, at least for now, has survived *Blakely* and *Booker*, but its scope remains unclear. In *People v. McGee*, 133 P.3d 1054 (Cal. 2006), the California Supreme Court held that *Almendarez-Torres* applied not only to the sheer existence of a prior criminal judgment but also to more normative questions, like the seriousness of past felonies, including those from out of state. However, as in the pending case of *People v. Towne*, No. S125677, 2004 Cal. LEXIS 10273 (Cal. filed Feb. 7, 2007) (addressing whether various recidivist-related factors fall within the prior conviction exception to the right to a jury trial), the California courts now face finer and finer distinctions about the scope of *Almendarez-Torres*, distinctions that speak more of analytic philosophy than substantive sentencing issues.

251. *See Plata*, No. C01-1351 TEH, 2007 U.S. Dist. LEXIS 56031 (N.D. Cal. July 23, 2007). Under The Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(3)(A), a court with

the federal courts can be some remarkable new consensus-catalyzing cure for collective action problems, or at least one more potentially provocative political actor in this complex dynamic, is the challenge for institutional analysts and predictors.

There has been reason to predict that this mix of conditions could prove fertile for a consensus-focused effort due to the quick and vigorous legislative activity in this direction at the time. In theory, proponents of a commission/guidelines model might have moved years ago, but if the momentum did not pick up until early 2006, a convergence of political factors may explain this. First, Democratic Governor Gray Davis, who was committed to holding the most conservative possible position on criminal justice, was ousted from office (doubtless for thoroughly unrelated reasons), and was replaced by one of the most remarkable characters in modern American political history. Arnold Schwarzenegger, by virtue of being a Republican, had unusual political capital to spend in moving forward on sentencing reform—capital that any Democrat might have lacked. Further, if his predecessor had been constrained by his dependence on funding from the California Correctional Peace Officers' Association,²⁵² this was not a concern of the ebulliently wealthy Schwarzenegger.²⁵³ However, Schwarzenegger is also an unusual, perhaps unique, Republican, because of his of highly pragmatic and malleable ideology. Thus the hopes of proponents of sentencing reform were encouraged by Schwarzenegger's ascension.

A second political factor is the CCPOA. The union, as noted, had been associated with the previous governor's tough-on-crime policy and hence was thought to favor prison construction over cost-benefit-focused reform. Its ties to the former governor may have masked, however, its more complex role. The CCPOA is legitimately concerned with the rational self-interest of its members, such self-interest is not necessarily inconsistent with the goals of the consensus model, and indeed the two have proved to be fairly consistent.²⁵⁴ Though an

injunctive control of a state prison or prison system may not order prisoner release unless previous, less intrusive orders have failed to alleviate the unconstitutional condition, and the defendant has had a reasonable time to comply with court orders. Under 18 U.S.C. § 3626(a)(3)(C), a plaintiff seeking a prisoner release order must file a request for appointment of a special three-judge court to consider the necessity of such a release order. Judge Henderson, in the *Plata* case, joined Judge Karlton, in the *Coleman* case, to issue the order for creation of a three-judge panel, and Chief Judge Schroeder of the Ninth Circuit has now appointed the panel (to consist of Judges Henderson and Karlton and Court of Appeals Judge Stephen Reinhardt). Kevin Yamamura, *Judge Named to Prison Panel*, SACRAMENTO BEE, July 28, 2007, at A4.

252. Mark Martin & Pamela Podger, *Prison Guards' Clout Difficult to Challenge*, S.F. CHRON., Feb. 2, 2004, at A1 (depicting close relation between Davis and union).

253. Andy Furillo, *Contract Pits Guards vs. Governor*, SACRAMENTO BEE, June 12, 2005, at A1 (union and Schwarzenegger in conflict over pay package and correctional issues).

254. Even if one views the union as wholly self-interested, its advocacy of reform, and its opposition to the build-more-prisons approach, can be logically consistent with the consensus model. Assuming the union wants more members but also wants them to be safe and secure in their jobs, it would logically prefer a higher ratio of staff to inmates, a position consistent with

early executive branch effort at changes in parole reform was thwarted by opponents and also criticized by some proponents for being too weak,²⁵⁵ the legislative activity soon picked up. However, the other factors that surely tipped the political scales were the economic and moral concerns about the state of the prison system.

Perhaps most important, increasingly strong injunctive actions in *Plata*,²⁵⁶ *Coleman*,²⁵⁷ and other cases, made the threat of a full judicial takeover more imminent. The arguable necessity to demonstrate some effort to satisfy the judges might have been a useful political lever to enable commission/guidelines proponents to get broader sentencing reform onto the political table. In effect, state leaders had no choice but to engage in some cost-benefit analysis of criminal justice. Two bills were introduced in the Legislature, and though they differed on details, they were both quite harmonious with the consensus model.²⁵⁸ The Governor purported to offer his own commission plan, though it was so rooted in executive branch power as to lie outside the consensus model and be wholly unsatisfactory to the backers of the two bills.²⁵⁹ In any event, although converging forces provided a seemingly opportune moment for the consensus to emerge, other forces trumped them. Most obviously, a fervent minority of legislators announced categorical opposition to anything that smacked of a sentencing commission. The lawyerly basis for the opposition, widely supported by California District Attorneys, was that any commission with even presumptive sentence-determining power would represent an

greater efficiency and better staff resources to enhance reentry programs, and insistence on a better ratio can be a fiscal brake on legislative tendencies to increase inmate populations without regard to anti-recidivism measures generally. Hence the union's skepticism about Assembly Bill 900 and its stated support for the Romero bill put them in an odd but logical bedfellowship with the Little Hoover Commission. See CAL. CORR. PEACE OFFICERS ASS'N, FROM SENTENCING TO INCARCERATION TO RELEASE: A BLUEPRINT FOR REFORMING CALIFORNIA'S PRISON SYSTEM (2007), available at http://www.ccpoa.org/documents/blueprint_for_reform.pdf.

255. Daniel Weintraub, *Governor Tries Parole Reform—Again*, SACRAMENTO BEE, Oct. 4, 2007, at B7 (2004 plan for non-prison sanctions for parolees committing minor technical parole violations; plan thwarted by opposition from prison guards, parole agents, and victims' rights groups).

256. *Plata*, No. C01-1351 TEH, 2007 U.S. Dist. LEXIS 56031 (N.D. Cal. July 23, 2007).

257. *Coleman*, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist LEXIS 56043 (E.D. Cal., July 23, 2007).

258. Assembly Bill 160 (Lieber) and Senate Bill 110 (Romero) had slight differences in the categories of membership and specificity of mandate for the Commission. However, they were similar on the key points—membership cutting across branches of government and including non-government members, and commission power to make sentencing guidelines binding law unless the legislature overrode them (although the senate bill would have required a two-thirds vote to override and the assembly bill only a majority). Assemb. B. 160, 2007-08 Assemb., Reg. Sess. (Cal. 2007); S.B. 110, 2007-08 S., Reg. Sess. (Cal. 2007).

259. Press Release, Governor Schwarzenegger, Governor Schwarzenegger Unveils Comprehensive Prison Reform Proposal, (Dec. 21, 2006) (proposed state budget includes concept of commission, with seventeen members, all appointed by the Governor, including four legislators, the attorney general, and the Secretary of the Department of Corrections and Rehabilitation), available at <http://gov.ca.gov/press-release/4972/>.

unconstitutional, or at least highly imprudent, delegation of legislative power.²⁶⁰ The less lawyerly argument, proffered by some in the Legislature, was that commissions necessarily or inevitably would end up releasing prisoners, and that the threat to public safety was intolerable—in short, that cost-benefit analysis remained a forbidden subject for public discourse.²⁶¹

Of course, in some states economic necessity ultimately wore down opposition to the consensus approach, so the question is when, if, and how such necessity might manifest itself in California. A widely respected and open-minded new Secretary of the California Department of Corrections and Rehabilitation²⁶² has somewhat slowed the onset of unavoidable economic necessity with efficacious managerial measures. The other looming necessity has been legal—the possibility of an absolute cap/release order from the federal district courts. Presumably faced with such an absolute order, the state would choose to make the cuts itself and in doing so might be forced to generate criteria and procedures that would end up in the form of a commission/guidelines model.

Most important, however, the Governor convinced two-thirds of the Legislature to pass Assembly Bill 900, a bill clearly designed to do just enough to forestall the absolute judicial cap.²⁶³ Assembly Bill 900 became the major legislative response to the federal judges and to economic necessity. It called for significant new funding to expand the number of state prison beds.²⁶⁴ It also directed funding and managerial measures to somewhat augment rehabilitation and reentry programs inside and outside prison,²⁶⁵ to create incentives for counties and cities to share the burden of housing state prisoners,²⁶⁶ and to create a new hybrid entity called a “Secure Reentry Facility.”²⁶⁷

Unsurprisingly, proponents of reforms resembling the consensus model either denounced this bill as a regressive turn to prison construction or, at best, viewed it as a minor gesture in the direction of mitigating, but failing to address the underlying sentencing law causes of correctional dysfunctionalities. Of course, nothing in Assembly Bill 900 precludes achievement of the consensus

260. Andy Furillo, *State Sentencing Bill Advances*, SACRAMENTO BEE, April 11, 2007, at A4.

261. Both are reflected by the dissent to Little Hoover Commission report by LHC member Audra Strickland, a member of the Assembly. LHC, *supra* note 100, at 77-78.

262. See Editorial, *An Impossible Job?*, ORANGE COUNTY REGISTER, Sept. 18, 2006 (James Tilton's background in corrections and finance offer some possibility he can be effective reformer); Don Thompson, *California Will Run Out of Prison Space Next Year, Official Says*, S.F. CHRON., July 20, 2006 (Tilton admonishes legislators that unsafe prison conditions, inadequacy of staff and rehabilitation programs, and poor record-keeping systems require creative reforms).

263. Public Safety and Offender Rehabilitation Services Act of 2007, Assemb. B. 900, 2007-08 Assemb., Reg. Sess. (Cal. 2007) (Assembly member Solorio introduced Assembly Bill 900).

264. *Id.* ch. 3.2.1 and ch. 3.2.2 (Revenue Bond Financing of Prison Construction).

265. *E.g., id.* ch. 9 (Prison to Employment).

266. *Id.* ch. 3.12 (Financing of County Jail Facilities).

267. *Id.* ch. 9.8 (Reentry Program Facilities).

model through revival of the failed commission legislation, but if it is the maximum concession that opponents of sentencing reform will tolerate, or if it is just over the minimum that the federal courts require to avoid a cap, then Assembly Bill 900 might have a preclusive effect. While not foreclosing the possibility that further managerial and budgetary adjustments might forestall an absolute cap, the federal judges have vigorously denounced Assembly Bill 900 and related State measures as woefully insufficient.²⁶⁸ Thus, the unprecedented process of the Prison Litigation Reform Act will unfold, and this complex political science laboratory experiment will continue.

There is still the special issue of “mandatory parole” in California—the structure created by the DSL that puts almost all ex-prison inmates on fixed parole terms, and which has led to the chaotic revolving door of relapse-and-catch that has foiled the hopes of an efficient planning scheme for the California prison system. If sentencing commissions tend to arise because of the ills of an indeterminate system, then the mandatory parole scheme may prove to be a uniquely Californian species of indeterminacy that could motivate officials to acquiesce in a consensus model. This parole scheme is perfectly ripe for commission control but has gotten little attention due to the focus on actual sentencing legislation. One possibility is to launch a commission with its mission almost wholly focused on system-wide data-gathering. If the commission thereby generates data uncontroversially implying the need for changes in parole, the State could then incrementally broaden the commission mandate to functions like recommending structural changes in the parole system—and even the probation system. This way, without tackling the greater political challenge of sentencing legislation, a commission could capitalize on its capacity to offer the State a more holistic view of the life course of a prisoner than it has now. If that reduced the chaos and size of the inflow to the prisons, it might somewhat satisfy the federal judges, dodge the difficulty of legislative sentencing reform or large-commission powers, and be a cautious step in the consensus direction.

A Final Note

If the theme of this article has been to explore what it would mean to say that there has been an episode of rationality in modern criminal justice, then a useful perspective on this phenomenon comes from Jonathan Simon’s essay on one of the great rationality-inducers of criminal law, Herbert Wechsler.²⁶⁹ Wechsler’s creation of the MPC was a high point in an effort to bring neutral rationality to the political contentiousness of criminal law. As Simon shows,

268. The judges sharply criticized Assembly Bill 900 for effecting only a paltry reduction in overcrowding, and for leaving the expanded prison space with too little staffing. Plata, No. C01-1351 TEH, 2007 U.S. Dist. LEXIS 56031, at *8 (N.D. Cal. July 23, 2007).

269. Jonathan Simon, *Wechsler’s Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247 (2004).

Wechsler believed that the criminal law could be part of the progressive New Deal model of useful social legislation. He also recognized that the New Deal era signaled a concern about both major organized crime and violent crime and therefore prompted populist calls for serious enforcement.²⁷⁰ Wechsler's goal, notes Simon, was to steer between the pull of populism and what he considered to be the arrogance of New Deal academic expertise, while staying close to mainstream public perception and educating the public, in the hopes of inducing reasonable expectations about what criminal law enforcement could do.²⁷¹ The result was a Code that served the prophylactic goal of stopping the national spread of crime by enhancing such inchoate laws as attempt, solicitation, and conspiracy, and also created a *mens rea* structure that made individualized moral culpability a bulwark against the kind of strict-liability law he feared would be promoted by both the populists and the experts.²⁷² For Wechsler, criminal law was to be harmonious with the emerging form of government, but because of its repressive potential, it had to be a subordinate adjunct to government.²⁷³

Simon concludes by noting that new would-be rationalists of criminal law now face a different kind of governance scheme of criminal justice. The new governance, he sharply notes, is not about the government having the expertise to engage in regulatory engineering of crime prevention as part of broader social legislation.²⁷⁴ Rather, it rests on the government's claim to empathize with the class of victims of crime and to engage in zero-tolerance incapacitation to respect that victimization.²⁷⁵ Perhaps it is more than a coincidence that the most important new revision of the MPC happens to be the new Sentencing Code, the very epitome of the consensus model.

270. *Id.* at 256-58.

271. *Id.* at 256-57.

272. *Id.* at 262.

273. *Id.* at 260.

274. *Id.* at 264-66.

275. Simon, *supra* note 269, at 266.