

HOW SENTENCING COMMISSIONS TURNED OUT TO BE A GOOD IDEA

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To Boalt Hall Readers: This draft is clearly –in-progress, not yet fully footnoted and awaiting further development of some key sections. In that regard, it is not a ceremonial formality to say that I look forward to guidance and criticism.

Symposium in Honor of Professor Caleb Foote

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INTRODUCTION

This is a tentative thematic sketch of an effort to understand a phenomenon I will call for now the “new sentencing consensus.” I start with a rough description of the substance and membership in that consensus, before I proceed to a more useful level of detail.

First, 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. It has become at least non-suicidal for politicians to discuss and even advocate and carry out reductions in criminal penalties. Second, something like a “contemporary consensus” on an optimal sentencing scheme has emerged.

Both words in that phrase require unpacking. The mundane part is the meaning of “contemporary.” To some extent this consensus, at least in the states, began emerging 30

¹Deep thanks for help on this paper—for research assistance but for far more than that—go to my colleague Kara Dansky, Executive Director of the Stanford Criminal Justice Center.

years ago when some states, participating in the general trend toward determinate sentencing, enacted schemes that turned out to be remarkably flexible and resilient in all the ways that the federal system did not. To some extent, the emergence of this consensus has been more recent, as enough years of data have come in from some of these states to inspire some optimism that a certain structural flexibility in sentencing has been demonstrated as politically and economically efficacious.

Now let me turn to the not so mundane matter of the nature of that consensus. It is the following matter of substance: Under an established code of criminal statutes—at least a code within the mainstream of American law—the best possible sentencing scheme is a moderately indeterminate structured system built around moderately flexible presumptive sentencing guidelines and marginal parole release flexibility. The notion of what is “best possible” relies on a complicated mixture of conscious and not-so-conscious assumptions about irreducible political constraints or historical forces.

The membership of this consensus includes the great majority of those academics—from law and social science and policy programs—who address modern sentencing, along with a class of civic or political leaders of sentencing drawn especially from the judiciary or from correctional bureaucracies who are viewed either as statesperson-like figures above the political fray or at least moderate conservatives, plus elected officials, especially Republican Governors, largely from conservative states. I concede that the prose of the previous sentence is elephantine but insist that its content, given the recent history of the politics of crime in America, is astounding.

A Nutshell Recent Intellectual History of Sentencing

A few decades ago sentencing was a major topic of academic inquiry at the heart of American criminal law, academically and politically. This was 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. That double-sided attack was itself a remarkable, if adventitious, event whereby by clashing ideologies found a common enemy and (in theory) common solution. At the extremes, civil libertarians thought the combination of vast discretionary ranges for judges and unregulated parole decisions were the very epitome of lawless caprice. The law and order movement in national politics, spurred by urban unrest, the Nixon Southern Strategy (and by reaction, the civil right movement itself) attacked the leniency and the dishonesty of the actual sentences. Left in an anachronistic no-one's-land were the liberals who thought a revamped version of indeterminate sentencing could serve the rehabilitative goals associated with modern psychology and social theory.

With the humongous federal exception I will discuss below, sentencing pretty fell from prominence. While conservatives rhetorically trumpeted a return to just deserts, and neoconservatives started pushing a seductive, if empirically questionable, model of incapacitation, liberals (hence most academics) lost nerve to attack either of these rationales for punishment. To the extent that academics went after sentencing at all, the attack was not foundational, but reactive to some of the indirect consequences of new determinate-style sentencing.² One consequence was a matter of distribution; the other of sheer magnitude. The racial disproportions in the prison population called for a continued civil-rights attack--indeed an explicit equal protection focus on such things as the crack/powder cocaine disparity. This concern with racial disproportionality was combined with a widespread sense of embarrassment, continuing to this day, that the United States has an astoundingly high incarceration rate in comparison to the rest of the developed world.

For a while that embarrassment was complicated by the parallel perceived anomaly that the United States had the highest crime rate in the developed world. The

²Of course, some major scholars remained committed to deep jurisprudence on sentencing throughout this era, and the expansion of habitual offender laws provided a major theme for this scholarship. See, e.g., by [Franklin E. Zimring, Sam Kamin, Gordon Hawkins, Punishment & Democracy: Three Strikes & You're Out in California \(2001\).](#)

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 (including a surge in violent crime in such places as Great Britain)—all these have revealed that the US is now chiefly anomalous on the incarceration side, not the crime side. Of course, that change itself does not necessarily logically condemn the size of the American prison population, because many believe that it is precisely the increase in incarceration that helped decrease crime in the United States, and there is at least equivocal research support for that proposition.³ In any event, 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, and a continuing law-and-economics inquiry into general deterrence, both of which focus on criminal law generally more than sentencing policy under an established code.)

The Unfortunate Federal Example

Now the big exception--the infamous federal sentencing 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: In terms of the symptoms of whatever disease with which the Guidelines were born, we start with the simple fact that they set most sentences much too high (though comfortably within legislative ranges that had generally set the maximums much higher than any one received anyway). Indeed for double jurisdiction (most notably drug and gun) crimes, federal sentences are so much higher than state sentences that a major effect of them has been to enhance the power of *state* prosecutors to win plea bargains, since their greatest hammer is the threat not to send the defendant to trial but to

³For some empirical support for this proposition, see Steven Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not, 18 *Journal of Economic Perspectives* 163 (2004). For a skeptical examination of these findings and of other explanations of the crime drop, see Franklin E. Zimring, *The Great American Crime Decline* (2006).

call in the United States Attorney.⁴ In that regard, the Guidelines have operated in a manner very similar to that of the separate, much-denounced phenomenon of mandatory minimum sentences.

Second, though in the abstract rules-vs.-standards questions cannot produce any general answer about optimal mixes, at least the federal judiciary and virtually all academics believe that the narrow range structure of the Guidelines has wildly erred on the side of rules: From the judges' perspective, the Guidelines not only undermined the very art of judging which they think is the core of their craft, but erred in the direction of heightening disparity by suppressing individualized criteria crucial to any test of meaningful uniformity. Third, compounding this rigidity is complexity: The number and hyper- (or pseudo-) subtlety of the distinctions in factors that aggravate a crime or an offender's record is such that an otherwise somewhat mechanical sentencing process became mad pseudo-mathematical science, and, as a simple statistical fact, the complexity served to undermine the possibility of sentencing uniformity across judges and districts that was supposedly the main goal of the whole new system.

My main concern, after stipulating to these manifest failures, is 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.

For one thing, the federal Guidelines were a sort of second try at a very different Congressional goal—a coherent federal criminal code. Whereas by the 1970's most states, inspired by the Model Penal Code, had undertaken true codification and succeeded in achieving remarkable clarification of and coherence among criminal statutes, the federal effort of the 1970's failed. The federal criminal "code" remained a bizarre mishmash of vague, ill-coordinated, and overlapping statutes, generally with absurdly wide sentencing ranges and high statutory maximums. Thus, when Congress and the first

⁴See William Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780 (2006).

United States Sentencing Commission set to work, they were, perhaps half-consciously, enacting a legislative code in the guise of a sentencing scheme.

For another, the enactment of the Guidelines was a serious intellectual experiment driven by serious, if conflicting, philosophical concerns. And, I suggest, that proved to be a very bad thing in designing a sentencing scheme. The standard candidates for the major problem to be cured were disparity and subjectivity among judges, and the prophet of this concern and its cure 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. Missing from the documented history of the motivation for the Guidelines was any set of urgent practical concerns related to cost or prison over-crowding or even to crime rates. Indeed, before long Congressional leaders admitted or even proclaimed that their preferred solution to the disparity problem lay in part with a ratcheting up of actual sentences that was expected to increase the federal prison population in the name of rational parity. 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 itself, of course, based in various scientific aspirations. 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. The Frankelian rule-of-law model in which the concept of the guidelines began was more juridical than scientific, except in a 1950's political science/Legal Process sense. But the Frankelian vision all too easily morphed into an almost Langdellian legal science model, abstract and mechanistic.

One set of promoters among the original members of the United States Sentencing Commission sought an almost mediievally theological harm-based metric for punishments based on exquisite calculations of degrees of harm.⁵ Its rivals in sentencing jurisprudence

⁵This effort was led by Prof. Paul Robinson. See Paul H. Robinson, A Sentencing System for the 21st Century?, 66 Tex. L. Rev. 1 (1987). The history of this debate is recounted in Michael O'

were crime control promoters who wanted to make the Guidelines a highly visionary experiment in general deterrence.⁶ 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. And then when these two sides fought to a stalemate, the compromise was a kind of inductive measure (though surely borrowing from both the just deserts and crime control sides) with statistical analyses of sentencing patterns before the Guidelines, and focused on simply averaging out the status quo without the outliers.

Put differently, the Guidelines failed because they aimed to be more than merely *administrative*. This phrasing may seem odd, for two reasons. First, the creation of the Commission, with its research staff and social science experts, was, after all, placed on a federal administrative agency model—putting aside the troublesome constitutional oddity of placing it in the judicial branch. Second, it is a ritual trope of those who condemn the vast power the Guidelines gave United States Attorneys to force guilty pleas that our federal criminal justice system is now “administrative,” not legal or adversarial.⁷ But 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—namely, in the sense 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, the federal courts soon started handing down more decisions interpreting the substantive criminal law doctrines inadvertently generated by the Guidelines than those advertently generated by statute law.

Perhaps as a corollary, the Commission has suffered far more legislative interference than its state counterparts have. Indeed, the story of the actual passage of the

Hear. The Original Intent of Uniformity in Federal Sentencing 74 Univ. of Cincinnati Law. Rev. 743 (2006).

⁶See Michael Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U. L. Rev. 395 (1991).

⁷E.g., Gerard E. Lynch, Our Administrative System of Justice, 66 Fordham. L. Rev. 2117 (1998).

Sentencing Reform Act is one of 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. 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.

Now this readily-assembled bill of particulars against the federal Guidelines would seem to belie my earlier statement that sentencing has dropped from the academic radar in the last few decades, since the particulars derive from the vast (largely denunciatory) legal and academic commentary on the Guidelines. But there is something deceptive about this, because the academic profession of federal guidelines-condemnation has diverted attention from problems—and indeed 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. 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.

But now we have the irony of the *Blakely-Booker* transition. When *Apprendi v. New Jersey* came down in 2001⁸, dramatically applying the Sixth Amendment to a state sentencing scheme, constitutional law entered sentencing in an unforeseen way. In the Warren Court years and thereafter, constitutional law had intervened in a sentencing and sparked an interest in sentencing only in the peculiar area of the intersection of the Eighth Amendment and capital punishment. *Apprendi* led to murmurings that the new Sixth

⁸*Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Sixth Amendment right to jury trial applies to proof of any fact that would raise the statutory maximum sentence for a crime).

Amendment doctrine could threaten the federal Guidelines, and then when *Blakely*⁹ drastically expanded *Apprendi* in attacking yet again a state sentencing system, still the focus was on how the new doctrine might affect the federal system. And then *Booker*¹⁰ re-enabled academia to deflect attention from state laws that actually generated the new Sixth Amendment. 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.¹¹

So here are the intellectual results of the Guidelines: Academics have become heavily involved in sentencing—but the federal emphasis has been an unfortunate distraction. It makes us look at sentencing in a largely reactive way, without much foundational thinking about sentencing; and in our emphasis on the rigidities and hyper-complexities of the federal guidelines, we have paid too little attention to the wide variety of emerging guidelines systems in the states, some of which systems 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; and we have not fully appreciated that the political demagoguery and legislative cowardice that afflicted the federal scheme need not be generalized to all political situations.

⁹*Blakeley v. Washington*, 542 U.S. 296 (2004) (extending *Apprendi* to any fact that raises the actual sentence higher than it would have been authorized by necessarily decided by the jury at conviction or acknowledged in a guilty plea.

¹⁰*United States v. Booker*, 543 U.S. 220 (2005) (*Blakely* requires invalidating the United States Sentencing Guidelines as rules binding federal judges.)

¹¹See Robert Weisberg & Marc Miller, Sentencing Lessons, in *A More perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 *Stan. L. Rev.* 1 (2005).

ELABORATING THE CONSENSUS

In understanding this consensus in the context of American sentencing generally, we need to stipulate to some vocabulary.¹² 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."

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. In a nondiscretionary, determinate system, the legislature specifies the actual sentence—i.e., a truly mandatory sentence.

Finally, discretionary systems--be they determinate or indeterminate--may be guided or unguided ("structured"/"unstructured"). Unguided 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 be sentenced anywhere from probation to 10 years in prison; the judge can choose any sentence in that range, with discretionary parole to occur later, though often within the constraints of a minimum and maximum set by the judge.

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

¹² An excellent summary comes from Steven Chanenson, *The Next Era of Sentencing Reform*, 53 Emory L. J. 377 (2005).

"presumptive" or "voluntary." Obviously, presumptive sentencing guidelines require judges to either hew 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 (as described below)—voluntary compliance is remarkably high.

The consensus system is built around presumptive guidelines—rules that address aggravating and mitigating factors that cannot sensibly be captured in substantive criminal legislation.¹³ The guidelines themselves can set very narrow ranges for the sentence calculated after the factors are taken into account. But beyond whatever range they allow the judge, they remain presumptive—the judge can, on some stated reason, depart from the range, but the departure must be based on on-the-record reasons, probably subject to appellate review,¹⁴ that demonstrate why factors peculiar to the case were not accounted for by the guidelines. Judges would 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.

A modest good-time reduction from that sentence, earned by passively good conduct while in prison and set by a formula, would be a fairly uncontroversial adjunct. But the consensus would treat as an alternative or supplement to that formula for good-time some opportunity for “gain time” through positive good conduct, or, more

¹³Chanenson 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 postrelease 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.”

¹⁴ 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.”

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 will also use risk assessment metrics at that point to evaluate the consequences of releasing the prisoner at that point. Those evaluations would themselves be at guided by a kind of sub-set of presumptive guidelines. Next, and here we face an apparent fissure in the new consensus—but still turns out to be a surprisingly narrow one: 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 crime not captured by the sub-guidelines; others would require that any such discretion should itself be regulated by guidelines; others would eliminate even good-time credit reductions.¹⁵ [I will return to this issue in the conclusion.]

Finally, there is post-release supervision: It would only be required for a subset of prisoners who demonstrably need it, though the degree of supervision would depend on the menu of half-way house alternatives to a binary choice between release and no release. And the revocation process would be governed by some sub-sub guidelines and include a graduated series of penalties that avoid returning parolees to prison for so-called technical violations.¹⁶

The Commission

¹⁵ALI Reporter Kevin Reitz, who generally opposes parole release, acknowledges that good time, in the range of 20-25% of an inmate's sentence, is a desirable feature of a prison system. 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." Joan Petersilia underscores the value of parole release authority in helping the prisoner reintegrate, especially in the well researched area of drug treatment, and also argues that risk assessment research has greatly improved our ability to predict recidivism. *When Prisoners Come Home; Parole and Prisoner Reentry* 62 (2004).

¹⁶Chanenson, *supra*.

Now in theory this consensus legal scheme could be generated by the legislature (though implemented in the latter part by a parole agency). But the next part of the consensus is that the legislature can do no more than mandate the big outline of this system—that the hard work of designing the guidelines and revising them—that is, guidelines for both initial sentences and parole release criteria—must come from a commission.

As Michael Tonry notes, the sentencing commission concept arose in the 1970's along with such other sentencing experiments as legislative parole guidelines, voluntary sentencing guidelines developed by judges, and determinate sentencing statutes—most notably California's.¹⁷ Now the commission concept has become the star of sentencing reform. It is thereby sometimes viewed as the most obvious means to achieve the proper guidelines system—the substantive part of the consensus—and sometimes as a virtual goal of its own, on the theory that *anything* that emerges from the special political laboratory of the Commission has to be an improvement on anything done without a commission. The commission concept has now 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.

Founding statements of or rationales for commissions tend to use some rote shibboleths about conditions and resources for successful commissions, including such phrases as “Strong Purpose”; “Political Atmosphere of Support”; “Adequate Resources”; “Adequate Composition and Staffing”; “Consensus Building” More concretely, the consensus in favor of commissions is based on the following notions:

1. The fine-tuning of sentencing rules--even if aimed at permanence—is too great an opportunity for legislative demagoguery or too susceptible to legislators' ignorance.¹⁸

¹⁷Michael Tonry, *Sentencing Guidelines and Their Effects*, in Andrew Von Hirsch, Kay Knapp, and Michael Tonry, *The Sentencing Commission and its Guidelines* 16 (1987).

¹⁸Cf. The Federal Rules of Civil Procedure, etc.

2. In any event, guidelines should not aim at permanence, since 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 do engage in the continuing evaluation of operating guidelines by any jurisprudential standard.

3. Assumptions 1 and 2 apply with even greater force when it comes to parole release or revocation guidelines, especially because the data gathering work for parole matters is even more daunting than it is for initial sentences.

4. A key criterion for all the decisions and revisions made above are the budgetary and real estate limits of the system in relation to crime rates or general fiscal conditions, and the resilience in adapting to these—especially in terms of just-in-time inventory of alternative facilities—is beyond the capacity of the legislature.

5. Next, though advocates of commissions disagree on whether the commission should be treated as an executive branch or independent agency or a subset of the courts—and also disagree as to the extent to which that allocation is more than formalistic, there is surely consensus on membership—which is that it be some combination of branch representation, professional representation, political representation, and expertise.

6. Commissions should avoid grand statements of principle about purposes of punishment—indeed they should even avoid ambitious thinking about this subject-- but by virtue of some degree of insularity should have some leeway to experiment with rehabilitative measures.

7. One often-overlooked staffing issue remains. One of the most cautious advocates of commissions, Michael Tonry, believes it an adjunct of all the criteria above that the members of the commission themselves 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. In effect, part-time status is itself a species of political insulation or moderation.¹⁹

¹⁹ Michael Tonry, __ (1987)

HOW THE STATES GOT TO YES

Before turning to the conditions specifically conducive to the guidelines/commission model, I suggest a brief look at the surprising change in momentum in state criminal and sentencing law in recent years that is reflected in other, more reactive legal and political events. State sentencing law started showing some surprising resilience over a decade ago-- more than many who follow the politics of crime or those who focus on the federal system realize. The reasons seem largely fiscal, but in their focus on one key target in particular—mandatory minimum drug laws-- several states also at least ambiguously exhibited some degree of bad conscience about the wider social cost of these laws. A number of states somehow fashioned political compromises whereby legislators would put repeal or softening of these mandatory minimums on the political table. And very impressionistic political science suggests that legislators varied in the degree to which they actually believed that prison budgets were wrecking their states' budgets or that cutbacks in mandatory minimums laws would significantly mitigate those burdens. Rather, some legislators were clearly morally embarrassed by the widely perceived social evils of mandatory minimums—the absurdly high and irrational sentences—the effects on urban neighborhoods, the parallel consequences for women in terms of accomplice liability and forfeiture—and were delighted to have the fiscal argument as political cover.

Nelson Rockefeller essentially began the war on drugs in 1973 when he pushed a new regime of mandatory minimum sentencing laws through the New York State Legislature.²⁰ The state prison population soon jumped 250 percent in 20 years. About 30,000 people are charged with a drug felony each year in New York, and over a third of the state's prisoners are drug felons never convicted of a violent crime. Of these, about

²⁰ Under the Rockefeller Laws, sale of two ounces, or possession of just four ounces, of a narcotic drug merits a minimum sentence of 15 years and a maximum of life in prison. Most drug crime prisoners are sentenced to a minimum of 3 years to life. But the Second Felony Offender law mandates a prison sentence for a person convicted of two felonies within ten years, no matter the circumstances, or whether either or both offenses were nonviolent.

90 percent are non-white; in addition, this category represents 60 percent of all female prisoners. Republican Governor Pataki started working with the legislature around 2002 to allow for a significant repeal of or reduction in these laws, and this development was much-heralded as revolutionary. The results in New York disappointed many: It allowed for only modest reduction prospectively and though it 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.²¹

Nevertheless, other states took the steps that New York equivocated on. 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. 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. Under Indiana's original mandatory minimum, possession of three grams of cocaine meant a 20-year mandatory sentence—just enough for a street-level addict to deal in order to support a drug habit. The amended Indiana law gives judges discretion to set lower penalties, but, notably, it also increased penalties for dealing. Connecticut relaxed its mandatory minimum sentencing requirements, allowing judicial discretion in cases not involving violence or possession of a weapon.

In addition, though often in ways overlapping with the mandatory minimum reforms, we find in many states a great expansion in drug diversion programs and creation of new drug courts. Indeed, California's Proposition 36 was premised on government projections of \$150 million in savings to prison costs annually and on the prediction that it would moot the building of at least one new prison. There is at least tentative evidence that these programs reduce recidivism and drug use.

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

²¹The recent New York history is recounted by the organization Common Sense for Drug Policy, at <http://www.csdp.org/news/news/newyork.htm>

attitudes (or do not notice the future tax effects of government bond financing), a number of states have closed large prisons, and a greater number have decided not to build projected prisons. 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.²² 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. Obviously, as a fiscal matter, closing prisons in whole or in part saves more 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.

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 the nation's highest incarceration rate, recently abolished mandatory minimum sentences and 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. Louisiana corrections officials have even set up "risk review panels" to evaluate old-law prisoners for early release. 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. Mississippi actually repealed a 1995 Truth in Sentencing Law, enabling prisoners to gain parole just one-fourth of the way into their sentences.

There is very little political science as yet done on these developments, but the obvious patterns include: severe state budget crises, usually, but not always, with a

²² Ohio's Republican governor, seeing a decline in the state's prison population, and a \$1.5 billion dollar budget deficit, closed the 1,724-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.

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. But an important and little-examined issue is the sheer fact of declining crime rates through the United States after 1993. There is little, if any evidence that lawmakers anywhere explicitly invoked the decline in crime as a reason for reconsidering the severity of 1970's level punishment schemes. That might have been too great a risk for politicians. In any event that inference is hardly clear in its empirical foundation, since some serious analysts as well as politicians would argue that that the crime decline resulted from the incarceration increase. Nevertheless, the 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. Thus, the crime rate decline at least lowered the political temperature of the crime issue and made some of these changes less dangerous to at least consider.

But to turn to the more specific guidelines/commission model: Its success has been remarkable enough to provoke examination of the political conditions to make it possible. Michael Tonry began this examination in the late 1980's, and therefore, by necessity, partly prospectively. But 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.²³ 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 jibes so poorly with the usual model of rational delegation to an agency. 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. That situation hardly

²³Delegating Punitive Power: The Political Economy of Sentencing Commission and Guidelines Formation (forthcoming 2006).

obtains 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. Another model is the much derided but still operative expertise model. 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 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 long enough at any time to impose its will. 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. 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, yet the autonomy of county officials makes central state control impossible. Hence the commission idea is attractive as an indirect level of state power. 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.

Finally, Barkow & O'Neill offer some interesting but not clearly coordinated speculations about the role of the background sentencing law. On the one hand, they note correctly that commissions tend to get set up states with determinate sentencing laws, because it is often the chaotic imagery of indeterminate sentencing that spurs reform. 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 parole release provides. These two speculations are not necessarily contradictory, but their relationship demands a bit of explanation.

Barkow and O'Neill then attempt a multiple regression analysis across various of these dimensions. It would be churlish to attack the obvious problems in their methodological premises—because they acknowledge knowledge the limits of their effort and also because, however unsystematic the information they generate, it is usefully suggestive. But of course the first key flawed premise is that can be learned from these pathetically small numbers (50 states and a few handfuls of commissions), regardless of the rigor of selection of the variables. And 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/not having a commission at that point in time. So I will not belabor the econometrics, but will just ponder their rough conclusions.

On the positive side, i.e., factors positively associated with the adoption or maintenance of a sentencing commission (though some of their analysis blurs between commissions per se and a full system of guidelines generated by commissions).

--a Republican majority in the legislature; elected judges and the abolition of parole.²⁴

- increases in the portions of the state budget going to corrections.
- higher incarceration rates.

On the negative side:

- larger partisan margins in state legislatures
- divided government.
- Republican governors.

²⁴ 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.

Barkow and O'Neill find these outcomes roughly consistent with their hypotheses. But they are surprised at a few of their own findings. They had surmised appointed judges would be perceived as a greater enemy to sentencing uniformity than selected ones and hence a likelier spur to commission-building—both their data show otherwise. They spin the outcome the other way, suggesting that elected judges would be just as prone to fiscal/political pressures as the legislators themselves, and hence would in effect 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. They also had expected divided government to be more positively correlated with commissions, and now suggest that perhaps commissions are simply not as truly independent as other types of agencies and hence would not be as appealing as agencies generally are in cases of divided government.²⁵

Finally, Barkow and O'Neill follow Tonry in surmising that immeasurable but impressive effects of simply having individuals of great political prestige or savvy. They offer the strikingly famous opposed stories of Minnesota and New York, the former reflecting a triumph of good-government political brilliance by key administrators and the tolerance of that work by the legislature, the latter a disaster where the political leaders never surrendered any political self-interest to create any consensus on sentencing policy.²⁶ 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.

²⁵Rather startlingly they are not startled by the counter-intuitive inference that having a Republican governor is a negative, not a positive factor.

²⁶The Minnesota Commission's first chair, Jan Smaby, became legendary for negotiating with all interested groups and in convincing them to rely on neutral research about the fiscal and logistical restraints of the state prison system. The New York experience was quite 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).

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. That is not their fault, except to the extent that they oversell the idea that we can ever have anything like reasonably systematic, much less econometrically rigorous, analysis of this sort of phenomenon. But they indirectly confirm that may be the most important factor, especially in light of California's outlier failure to consider the guidelines/commission model. One of the useful disasters that seems a necessary trigger/predicate to generating the consensus model commission is an extremely indeterminate and unguided sentencing scheme manifesting all the dangers associated with such a scheme.²⁷

[Note to readers: Here or elsewhere, I will provide what I hope is a useful digression into the some other political science explanations for how commissions might work. At one end they can be compared in administrative law terms conventional independent agencies. At the other end, they can be compared to special ad-hoc political finessing mechanisms—with the most intriguing example being the recent federal base closing commission, by which Congress tried to (perhaps successfully) to optimize its interest in nonpolitical rationing of scarce base placements and the competing goal of socially harmless but electorally helpful opportunities for zealous political advocacy.]

A reasonable inference about this sort of mildly quixotic research might be that its basic value is to help guide our thinking as we look to individual state narratives with some detail in the hopes of finding useful, if inevitably merely suggestive, explanations. In that regard, I offer some information North Carolina and Virginia. Both have advertised themselves, but are also widely and objectively perceived, as exemplary stories of correctional reform—all the more striking because they are Southern states.

²⁷Barkow & O'Neill cannot resist spinning this the opposite way as well, suggesting the situation where a legislature tries guidelines, realizes it cannot keep up, and then sees the commission as the next step.

And in both cases we have very recent information from their respective leaders, Thomas Ross and Richard Kearns, who gave presentations at the recent Stanford Criminal Justice Center conference on sentencing commissions.

SENTENCING REFORM IN NORTH CAROLINA

North Carolina owes its Sentencing Commission to one essential factor--prison overcrowding. Throughout the 1970s and 1980s, the prison population rose to the point of embarrassment, and potential unconstitutionality. Indeed the problem became so serious that it connected in the public mind with an increasing crime rates--the public came to believe that overdoing led to unwise premature release of dangerous prisoners and therefore led to crime. Whether or not this was accurate, it is a striking political datum that voters thought it was.

Before the Commission was created, and for some time thereafter, the chosen method of dealing with the overcrowding problem was to release prisoners before their anticipated release date. In 1986, the average prisoner served only 40% of his sentence, the percentage then declining steadily down to 12% in 1998.²⁸ This policy of early release turned North Carolina effectively into an indeterminate system, with the irreducible constraints of (barely) habitable space the real determinant. In 1990, the legislature created a Sentencing and Advisory Policy Commission and gave it five directives: (1) to build a correctional simulation model, to help predict the likely effect of any sentencing changes on the correctional system; (2) to classify criminal 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.

²⁸ The 1998 figure is a projection based on 1993 data and reflects the amount of a sentence that the average prisoner would serve if there were a prison cap in place and no new prisons were built.

The Commission began by first 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).

- Offenses were divided into ten classifications, with Class A being reserved for First Degree Murder and Class M consisting of misdemeanors not involving serious property loss or societal injury.
- Conviction records were then scored on degree of seriousness.²⁹
- Defendants were then to be assigned a Prior Record Level depending on the number of points that they had accumulated, and a grid was then designed to correlate Offense Classes with Prior Record Level.³⁰
- Types of punishments were categorized as “Community” (probation, fines, treatment, restitution, and community service), “Intermediate” (some form of custodial sanction such as house arrest, day reporting, or a residential facility), or “Active” (jail or prison time).
- Each cell within the grid was then assigned one or more punishment types, i.e., a defendant with a high Prior Record Level newly convicted of high Offense Class crime would receive an Active (incarceration) sentence; the combination of a Prior Record Level of I and a new crime in Class I a Community sentence.
- Finally, the Commission assigned presumptive, aggravating, and mitigating sentencing ranges to each cell within the grid based on an analysis of historical sentencing data.

²⁹ It is worth noting that prior record is the ONLY characteristic of the defendant that is factored into the guidelines calculation.

³⁰ The grid includes Offense Classes through Class I and does not include Class M. This is because Class M includes only minor misdemeanors, which are not incorporated into the guidelines.

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.

Some North Carolina Outcomes:

North Carolina achieved a version of Truth-in-Sentencing, because in fiscal year 2004/05, the average inmate served 100% of his or her sentence. Certainly the state trumpets Truth-in-Sentencing as a key justifying rationale for the new system, though, as I note at the end, TIS is an extremely malleable concept in 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. There is more community supervision, including drug treatment and job training, for non-violent offenders.

Since the new regime began, the prison population has tended to remain just at or above capacity, and there was a period between 1998 and 2000 when population fell below capacity³¹, though it has turned somewhat upward of late.³² But there been a notable redistribution in the direction of more violent offenders. In 2006, 52.6% of prisoners were in prison for an offense within the four highest classes, and only 21.2% were in for an offense within the lowest two classes. Projections suggest that by 2015,

³¹The state had projected that the new system would lower the incarceration rate by 72 per 100,000 residents and to lower the prison admission rate by 55 per 100,000. . By June of 1995, more than half of the courts' caseload were "new law" cases. The effect of this law has diverted 10,000 to 12,000 offenders each year from prison sentences to non-custodial penalties involving treatment and/or strict community supervision. Before the reform was introduced, 44 percent of sentenced felons were receiving a prison term. After implementation, that rate fell sharply to just 29 percent. At the end of 1999, the prison system maintained an operating capacity of 32,344, and held 31,086 prisoners.

³² This may simply be due to short-term changes in the crime rate, or arrest or prosecutorial decisions.

56.0% will be in for an offense within the four highest classes and the number of those in for an offense within the two lowest classes will have dropped to 18.8%.

In 1980, North Carolina had the highest incarceration rate in the South. Today the state has the second lowest rate in the region. North Carolina has achieved one of the most impressive steady reductions or plateaus in incarceration rates in the country. In the late 1990's its annual decline was as high as 10 percent, in a period when the rate grew by 14 percent in the Southern , by 16 percent for the U.S. as a whole, and by 31 percent for the federal prison system under the more punitive federal guidelines system.³³

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 12 percent drop in violent crime and a nine percent drop in property crime.

SENTENCING REFORM IN VIRGINIA

If North Carolina's change was driven by an "economic" problem, Virginia's was driven by a more clearly political one. It was perhaps the most extreme example of an unstructured and indeterminate system in the United States, with judges enjoying almost total autonomy and subjectivity in their sentences, wholly unguided, much less regulated, within broad legislative ranges, and parole authorities enjoying equivalent discretion over early release. Though an increasing and costly prison population was of some evident concern among politicians and voters, that factor was overwhelmed by, and in no clear way related to, the dominant factors of excessive discretion and non-uniformity.

³³Change in Incarceration Rate, 1995-99:

North Carolina: -10%

Southern States: +14%

Federal Prisons: +31%

U.S. Average: +16%

In 1994, the legislature created the Virginia Criminal Sentencing Commission, invoking the usual ritual tropes we associate with commission founding statements, though that statement was somewhat unusual in explicitly speaking of the importance of alternative sanctions for nonviolent offenders. But the legislature and the Commission had insufficiently reckoned with the historically entrenched power of the Virginia judiciary. Judges were reluctant to sign on to anything that reduced their sentencing discretion and insisted that any guidelines, even if entirely discretionary, be anchored in past sentencing practices.

This residual judicial power posed quite a political dilemma. The oddly 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 and explanations, but left judges wholly (legally) free to follow or not follow the guidelines as they chose. Nutty 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, while trimming 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.

In addition, as a politically clever but also empirically imaginative way of invoking the truth-in-sentencing trope, the Commission relied on the time-served data, as opposed to sentence length was significant. That is, 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 (which was always understood to be essentially meaningless). The Commission then increased each piece of data by 13.4 percent (in order to account for approximate good time credit), and eliminated the upper and lower 25%. The middle 50% (with minor variations) was

established as the initial range and the medial of that range was established as the midpoint.

As for recent results, the incarceration rate has not changed much in Virginia but the distribution has changed in the intended direction. Burglary is an example: the Commission compared incarceration rates under the old system to incarceration rates under the new system. Both under the old and new systems, approximately 50% of burglary defendants are given a prison sentence. The difference is that of defendants with the highest offender scores, 100% now go to prison and of defendants with the lowest scores, only 9.9% do (as opposed to 90.0% and 10.1% respectively, earlier).

Perhaps more striking in terms of the political finesse described above has been the rate of judicial compliance with the voluntary guidelines is remarkably high. One explanation may lie in another detail of the finesse: The judges are not free to *ignore* the guidelines—they are just free not to follow them. That is, by statute if they choose to depart they must state their reasons for departure on the record. Though 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 call for an actual change in the guidelines. A good example is the set of guidelines ranges for embezzlement. The Commission began to notice that judges were consistently departing upward when the amount of money being embezzled exceeded a certain threshold. It recommended to the legislature that the guidelines for embezzlement be increased to reflect this development in judicial practice, and the modification was enacted.

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 “assist the judiciary” in the imposition of sentences, and with a heavy allocation of seats on the Commission to

judges. 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 I can hardly be sure of such assumptions 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 and toss out the suggestion 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, though the Virginia story may well provoke such a suggestion.

THE PROBLEM OF SUCCESS MEASUREMENTS:

Obviously to analyze or evaluate the effects of a commission/guidelines model is even harder than analyzing causes—especially just two decades into the experiment. Moreover, the criteria are hardly uncontroversial. At best we can detect, to a very uncertain extent, the effects of the consensus model incarceration rates—as noted below, a slightly downward one.

But a reduced incarceration rate is by no means itself an uncontroversial goal for sentencing reform. The least controversial goals are reducing disparity and improving, by various measures, the cost-efficacy of the correctional system. The latter factor, in turn, might be measured by anything ranging from reducing cost per prisoner or some other unit, or some measure of the cost unit of reduction in recidivism, or some measure of the relationship between prison expenditures and the crime rate (we would expect quite a lag there)³⁴ or between prison expenditures and the recidivism rate (less of a lag).

³⁴Despite significant state expenditures on corrections growth, the connection between prison population increases and crime reduction remains elusive. One provocative set of data: In the 1990's, 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 1990's, New York had the third slowest growing prison population in the U.S. Over all, during the 1990's, 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 26 percent *greater* than the drop in crime in Texas. Texas' 1999 incarceration rate (1,014 per 100,000) was 77 percent higher than New York's (574 per 100,000), yet Texas' 1998 crime rate

These are all complex themselves and, in turn, any one of them will bear only a fuzzy relationship to incarceration rates. More modest measures would be some combination of reduced prison costs as a portion of the state budget, or the absence of any disturbing increase in the crime rate or recidivism rate, or, most simply but appealingly, the absence of any serious political controversy over the commission/guidelines operation itself.

It is dangerous to say more than that, given the general sense that we over-incarcerate and probably inefficiently or irrationally incarcerate in the United States,³⁵ that most new-consensus systems have substantially reapportioned even fixed incarceration rates from nonviolent to violent offenders (however crude the definitional distinctions)—that’s not bad.

So for now, let me just return briefly to the effects on incarceration rates. To gain some helpful modesty on this subject, note in considering the types of modern sentencing scheme about which we see the most plausible-sounding hypotheses about effects on incarceration rates, the research is very inconclusive. For example, the plausible guesses that three-strikes³⁶ or mandatory minimums will increase the rate find only very weak confirmation in the empirical research.³⁷ But a slight glimmer of help comes from the

(5,111 per 100,000) was 42 percent higher than New York's (3,588 per 100,000). In 1998, Texas' murder rate was 25 percent higher than New York State's rate.

³⁵It is a truism, but true, 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 has actually declined from 57 percent in 1978 to 48 percent in 1999, but the prison and jail population has tripled over that period, from roughly 500,000 in 1978, to two million today. From 1980 to 1997, the number of violent offenders committed to state prison nearly doubled (up 82 percent), the number of nonviolent offenders tripled (up 207 percent) while the number of drug offenders increased 11- fold (up 1040 percent).²⁰ Nonviolent offenders accounted for 77 percent of the growth in intake to America’s state and federal prisons between 1978 and 1996.

³⁶ Although three strikes laws have been pushed as a way to keep repeat violent offenders in prison, it appears that their primary effect seems to be on drug offenders. States with three strikes laws do not admit more offenders per arrest for violent offenses than states without such laws.

³⁷ Many argue 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.

marginally better indications that presumptive sentencing guidelines might decrease a state's prison admission rate by a figure on the rough order of .02 percent.

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 rates³⁸ and is associated with the few instances of actual reduction in a smattering of states in the late 1990's and a slowing of the rate of increase on others that had especially high growth rates. But the savviest analysts of this problem are very agnostic about even this inference, even in terms of the causal direction but surely in terms of the proportional significance of the choice of sentencing system in the mix of factors influencing incarceration rates. But many other factors—especially demographic, economic and political tend to dominate, along with the very paradoxical ones—i.e., alternative sanctions increase incarceration rates by creating new opportunities for parole violations.

SOME CLOSING SPECULATIONS

[I offer here a sketch of what will be some closing thoughts on these themes.]

--The new sentencing consensus, probably unintentionally, suggests the sneaky triumph of the modern neoconservative rethinking of criminal justice led by James Q. Wilson 30 years ago. It deliberately eschews deep causes-of crime philosophizing. In terms of purposes-of-punishment thinking, it relies on a very constrained "limiting retribution" principle for the rough ordinal and cardinal measures of sentences and then tinkers around the margins on a selective incapacitation model--all this very much in the JQW mode.

38. 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).

--The new consensus does rely on some notion of rehabilitation (though perhaps better recast as specific deterrence), but the rehabilitation model itself is remarkably constrained—focusing on concrete and probably short-term measures of recidivism and the various incentive and specific deterrence maneuvers that might affect the short-term success of reentry.

--On the other hand, the new consensus may usefully focus attention on the realistic possibilities of behavioral predictions bearing on short-term violence risks.

--In its redistributions of punishments, the new consensus may succeed in directing resources at the most violent and dangerous. But the prison population would then become much younger, and the diffuse social effects of recharacterizing the modal prisoner as a young predator may themselves prove troublesome.

--The “pass” that the new consensus implicitly gives to actual criminal legislation defining crimes may prove troublesome.

--The success of the new consensus illustrates the great flexibility of some of the key tropes of criminal justice propaganda. Most notably, “truth-in-sentencing” is a political tool that can be selectively deployed, sometimes constructively, to induce (fool?) the public into accepting reforms it would not otherwise tolerate.

--California may prove the great test of the new consensus. California’s abrupt and harsh turn three decades ago to determinate sentencing actually prevented some of the political conditions that seem conducive to guidelines/commission reform from arising. To the extent that an indeterminacy crisis is necessary to get the consensus model going, California’s form of indeterminacy is buried in the crucial but subtle nuances of its parole revocation crisis, in a legal context where most people think California had already mostly abolished parole. Moreover, political facts about California—the weakness of party organization and the extreme power of the referendum process, may make the consensus model especially hard to achieve. On the other hand, California, as it

awkwardly backs into a somewhat anomalous but widely perceived sense of exigency and disaster about its correctional system, might indeed prove conducive to the consensus model. Indeed, the unusual role here of one very major player in the politics of criminal justice—the California Correctional Peace Officers Association (aka the guards' union) -- could itself prove constructive.