

# ADMINISTERING CRIME

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*Although agencies are the dominant force in criminal law today, existing scholarship has largely failed to analyze how these bodies perform as agencies. We know little about how the institutional design of these agencies affects their output or whether the politics of regulation are different when an agency is responsible for the regulation of criminal justice issues as opposed to traditional regulatory areas. This Article takes up that task by evaluating the agencies charged with regulating one of the most important aspects of criminal law: sentencing. Many reformers turned to agencies to regulate sentencing because they did not trust the political process on its own to produce rational sentencing policy in a tough-on-crime culture. This Article explores what kind of model works for regulating criminal sentences if the goal is to create an influential agency that can temper rash political impulses. Drawing from administrative law, political science, and the actual experience of state and federal commissions, the Article demonstrates that—contrary to conventional wisdom—the agency model can succeed. But, unlike other substantive areas where an independent agency is seen as the most effective, an insulated agency model is not a viable answer when the agency is responsible for regulating criminal sentencing. Instead, agencies responsible for sentencing are more efficacious when they are politically enmeshed and operate largely like interest groups. Like an interest group, a well-connected agency that can produce politically salable information is more likely to wield influence than one that is aloof from political pressures.*

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## INTRODUCTION

The use of agencies is commonplace in American government and has long been a subject of academic study. Scholars have analyzed the use of agencies to regulate the environment, communications, labor relations, securities, and virtually every other activity. But there is a category of agencies that has not received sufficient attention as a separate field of study: the agencies responsible for criminal justice policies. To be sure, many scholars have written on the policies and output of sentencing commissions, parole boards, corrections departments and the like. But what is often overlooked is how these bodies perform *as agencies*. How does institutional design affect the output of these agencies? Are these agencies subject to the same dynamics of capture as other agencies? Do the politics of regulation differ when an agency is responsible for criminal justice issues? Can an independent agency model be applied in this context in the same way it is used in other fields?

These questions remain unanswered in the scholarly literature. Indeed, they have not been asked. But it is difficult to understand criminal justice policy today without exploring these institutions, for agencies are responsible for many—if not most—critical criminal justice policies.

This Article begins to fill this void by analyzing the agencies that regulate one of the most important areas of criminal justice: sentencing. For the past three decades, the federal government and roughly one-third of the states have turned to expert commissions to overhaul their criminal sentencing regimes. These agencies have been charged with the Herculean task of eliminating unwarranted sentencing disparity and rationalizing punishment.<sup>1</sup> As has been the case with the emergence of so many agencies, these commissions were founded on the belief that experts could develop rational sentencing policy more effectively than politicians or courts. So, while legislative reformers themselves could have taken on the task of reforming sentencing laws, many jurisdictions chose instead to use an agency model.

One stated justification for relying on an agency was that it would allow a group of experts to set policy based on the best knowledge available, as opposed to the political winds. For example, Senator Ted Kennedy, a leading advocate for the development of a federal sentencing commission, argued that it was necessary to have a commission rather than Congress take the lead in sentencing reform because it is not “likely that Congress could avoid

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1. See, e.g., 28 U.S.C. § 991(b) (2001) (noting that one of the purposes of the United States Sentencing Commission is to “establish sentencing policies and practices” that further the purposes of sentencing, that “avoid[] unwarranted sentencing disparities,” and “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”).

politicizing the entire sentencing issue.”<sup>2</sup> Indeed, the desire to insulate sentencing decisions from raw politics prompted Congress to use an “independent agency” model in establishing the U.S. Sentencing Commission. So, like the members of the Federal Communications Commission (FCC) or the Securities and Exchange Commission, the Federal Sentencing Commission’s members cannot be appointed or removed at will by the president. The members must represent both sides of the political spectrum and, once appointed, they serve a set term of years and cannot be removed without cause.

It is not difficult to understand why sentencing reformers might have wanted to insulate sentencing decisions from immediate political pressures. The political dialogue over criminal justice issues is not inspiring. Elected officials cannot risk being seen as soft on crime, so rational debate often must take a backseat to symbolic legislation and political posturing.<sup>3</sup> A commission could, in theory, provide needed political cover for highly charged decisions. But whether this will be true in practice depends on whether agencies responsible for criminal sentencing are like agencies that regulate other fields.

This Article takes up the inquiry and explores what kind of model works for regulating criminal sentences if the goal is to create an influential agency that can temper rash political impulse. Drawing on administrative law, political science, and the actual experience of federal and state sentencing commissions, the Article demonstrates that, contrary to conventional wisdom, using an insulated agency model is not the answer if the goal is to maximize the agency’s influence over sentencing policy. Instead, agencies responsible for sentencing are more efficacious when they are politically enmeshed—working within the political landscape, not outside it.

Part I sets the stage for this analysis by situating sentencing commissions within the traditional agency model. Legislators endorse sentencing commissions believing that they will operate, by and large, like other regulatory agencies. And, in fact, sentencing commissions have many powers and functions that mimic traditional agencies. But Part I explains how the

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2. Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353, 380 (1979). Kenneth Feinberg, who served as Special Counsel to the U.S. Senate Judiciary Committee and drafted earlier versions of the federal sentencing law, similarly observed that the Federal Sentencing Commission was created out of the concern “that a Congress caught up in the politically volatile issues of law enforcement and crime control would be unable or unwilling to avoid the temptation to increase criminal sentences substantially.” Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993).

3. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (calling criminal justice political debate “pathologi[cal]”).

unique politics of criminal law distinguish the former from the latter in several important respects. To begin with, sentencing commissions regulate most directly the behavior of judges who are not traditional regulated entities. Indirectly, sentencing commissions regulate criminal defendants. Neither group has the lobbying ability or power of a traditional regulated entity. Moreover, almost all of the powerful interest groups in this context support harsher sentences and less flexibility for judges—and that view tends to resonate with voters. The political landscape therefore creates strong incentives for legislatures to exercise close oversight of commissions to ensure that the commissions promote policies that appeal to these powerful groups and to voters. As a result, one would expect the traditional means of insulation to be largely ineffective at deterring political control.

Part II moves the discussion from theory to practice and looks to the actual experience of the U.S. Sentencing Commission and state commissions to determine under what circumstances, if at all, these agencies were able to influence sentencing policy. As Part I predicts and Part II shows, political pressures are overwhelming, and an insulated agency model does not appear viable in this context. Indeed, because of the highly politicized nature of sentencing, the more influential agencies are not those with the greatest insulation from politics, but rather those commissions that are closer to political actors and work within the political culture.

Part III combines the lessons of theory and the actual experience of sentencing commissions to suggest a more effective sentencing commission design if the goal is to temper political impulse. In particular, it highlights two attributes that can enable the sentencing commission to better negotiate the highly politicized world of criminal sentencing. First, the agency must have strong connections with the relevant political actors. This can be achieved informally through contacts between the commission's members and the political branches, or it can be formalized by having legislators serve on the commission in some capacity. Although it may seem counterintuitive that having a legislator serve on a commission gives the agency more power, the experience of many state commissions shows that this can be an asset. These legislative members alert the commission to political concerns and provide ready-made advocates for the commission's conclusions when the legislature as a whole debates its proposals.

The second key characteristic involves the information generated by the agency. When sentencing commissions make persuasive policy arguments grounded in political concerns, legislators are more likely to defer to their judgment. And the arguments that have held the greatest sway are those

that identify the costs of various sentencing policies. When agencies have shown that increased severity would strain existing prison resources and require new construction and financial outlays, state legislators have often been willing to compromise on their tough-on-crime proposals. This success is not surprising. Many states established sentencing commissions because they were facing prison overcrowding and believed sentencing commissions could help them control their use of penal resources. When the commissions then report that specific legislative changes will exacerbate already stretched prison resources, legislatures often opt to forego their proposals or enact alternatives that are less severe. Sentencing commissions in these circumstances thus provide the type of sober second thought that is often associated with the agency model. But their power does not derive from independence; it comes from the ability to generate politically salable information.

In other words, the successful sentencing commission acts, in effect, as an interest group for rational sentencing policy. When the sentencing commission is charged with focusing on the costs and benefits of sentencing, it may provide the legislature with a more measured assessment of what is needed than can law enforcement lobbyists. And like any other interest group, a politically savvy and well-connected agency is more likely to wield influence than one that is aloof from political pressures. Consequently, the structural features that enhance independence may cut against an agency's effectiveness when it needs to operate as an interest group to have its greatest influence.

The Article concludes by noting the value of studying criminal justice agencies as agencies. First, the examination of federal and state sentencing commissions shows that questions of institutional design and political control that scholars have explored in other areas are worth pursuing in the context of criminal justice. Second, the analysis reveals that the agency model might present a viable option for correcting perceived deficiencies in the way the political process addresses questions of criminal justice policy. Third, it appears that the value of structural agency independence is overstated, at least in the context of criminal sentencing.

Thus, as scholars shift their focus from the study of criminal trials to the more prevalent and consequential proceedings of today—plea bargaining, sentencing proceedings, and postconviction policies—it is worth remembering that the institutional players involved in these decisions are as worthy of attention as the underlying substantive policies. Indeed, one cannot fully understand the substantive policies without understanding the institutional dynamics that create them. Because those dynamics often revolve around

agencies, one can no longer understand the criminal law without beginning to understand the many agencies responsible for administering crime.

## I. THE SENTENCING COMMISSION AS REGULATORY AGENCY

The administrative agency is pervasive in American law. Agencies regulate everything from the air we breathe to the cars we drive to the shows we watch on television. In a typical agency scenario, an agency is responsible for the regulation of an economic or social activity, and the subject of regulation suffers a concentrated cost. For instance, a regulation might prevent media conglomerates from expanding their reach and therefore their profit base. Or, an environmental regulation might prevent an industry from operating at its desired level because of the pollution generated by its production.

In this traditional scenario, the agency responsible for regulating the substantive area is either an executive agency or an independent agency. The heads of executive agencies are subject to executive control and can be removed at will. The heads of independent agencies are subject to less executive control and cannot be removed by the executive except for good cause.

While scholars have analyzed the structure and design of agencies in a multitude of areas, the agencies responsible for criminal justice policy have commanded far less attention.<sup>4</sup> Yet agencies bear the primary responsibility

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4. This is not to say that scholars have ignored administrative law in analyzing criminal justice agencies. Ronald Wright, for example, has persuasively argued that administrative law review principles should inform federal judges' departure power under the U.S. Sentencing Guidelines and their review of the Commission's procedures. Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 47-74 (1991). He also urged Congress to defer to the Sentencing Commission, though he did not discuss how to encourage or enforce such deference. *Id.* at 74-79. Joseph Luby has similarly asserted that Congress and courts should treat the Federal Sentencing Commission like any other administrative agency and mandate and apply the same type of judicial review to it. Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1268-73 (1999). Other scholars have also recognized the relationship between administrative law and crime in particular contexts. Dan Kahan has argued that the *Chevron* doctrine should apply to federal criminal law. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996). Stephen Schulhofer applied traditional administrative law delegation arguments to the criminal justice context in evaluating the benefits of vesting sentencing authority with a commission. Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 810 (1980). Daniel Richman has used an administrative law perspective to analyze the relationship between prosecutors and their agents. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003). And Judge Gerard Lynch has written a wonderful article explaining the commonalities between prosecutors' decisions and those of other administrators and suggesting ways to incorporate administrative law concepts into prosecutorial decisionmaking. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2141-50 (1998).

All of these articles draw valuable insights from administrative law and apply them to criminal justice issues. But they do not address the larger structural issues of using agencies to regulate criminal

for regulating criminal justice issues. Prosecutors form the classic enforcement agency; they determine when to bring actions to ensure compliance with the criminal laws. Corrections boards regulate the lives of prisoners, and parole boards establish the terms of their release.

Sentencing commissions are among the most important of criminal justice agencies—indeed, of all agencies—because they promulgate rules and establish policies that determine how much liberty an individual will lose upon conviction of a certain crime. Although the specific legal mandate and institutional design of these commissions varies by jurisdiction—as Part II will explain in greater detail—they share in common features that are familiar characteristics of other agencies. Sentencing commissions, like other agencies, are responsible for the regulation of an economic or social activity. So, for example, just as the FCC promulgates regulations governing how many television stations a single entity can lawfully own, the U.S. Sentencing Commission promulgates regulations governing how many years a defendant must be incarcerated when he or she is convicted of a specified criminal act.

The basic structure of these commissions also mimics other regulatory agencies. To again use the U.S. Sentencing Commission and FCC as examples, both agencies are headed by commissioners who are selected because they have some knowledge of the area being regulated. In addition, both agencies follow the independent model. Thus, the legislation creating these agencies requires that the membership not be dominated by one political party and provides that the commissioners cannot be removed but for good cause.<sup>5</sup>

In many ways, then, the regulation of sentencing fits into the model that has developed for other regulatory agencies. At the federal level, for example, congressional mechanisms of oversight should be the same for the U.S. Sentencing Commission as for any other independent agency. Congress can use both *ex ante* and *ex post* controls to a greater or lesser degree, depending on how much oversight it deems desirable.

But there are also critical differences that make the agencies responsible for the regulation of criminal justice policies unique.<sup>6</sup> This part explores

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justice policies that are discussed in this Article. In particular, they do not seek to identify how the institutional dynamics of criminal justice agencies differ from other regulatory agencies and what that should tell us about the optimal institutional design and structure of those agencies.

5. For an excellent catalog of the various independent agencies and their institutional features, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000). See also Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51 (listing features of independent regulatory commissions).

6. There may also be important differences in the political dynamics depending on the particular area of criminal justice for which the agency is responsible. Ronald Wright has recently posited that there are four public choice categories for criminal justice legislation: substantive criminal



those differences. Subpart A begins the inquiry by analyzing how the interest group dynamics in the context of sentencing differ from other regulatory contexts. Subpart B considers how those interest group dynamics create incentives for legislators to exercise stronger oversight of agencies responsible for sentencing than of other regulatory agencies. Subpart C explains how the accessibility of criminal justice issues further distinguishes sentencing commissions from agencies responsible for other regulatory areas. These differences make agencies responsible for sentencing especially susceptible to political control, and make it more difficult to insulate them from political forces.

### A. Interest Group Dynamics

The first key difference between agencies responsible for criminal sentencing and other agencies involves the different interest group dynamics at work in the sentencing context.

#### 1. The Regulated Entity

When political scientists and administrative law scholars speak of agencies and interest groups, they observe that interest groups typically can have a disproportionate amount of influence because they stand to gain some concentrated benefit while imposing diffuse costs on the general public, or they aim to limit a concentrated cost that they bear that might promote a general public benefit. In both scenarios, the conventional explanation is that the interest group will be able either to extract benefits or minimize costs because it will be better organized than the general public.<sup>7</sup> For example, an industry that pollutes the air or water may achieve regulatory exemptions because it will be better organized than the citizenry at large, which may prefer more stringent environmental regulations. Similarly, consumers may prefer greater safety protections in automobiles, but they may lose out to the more organized automotive industry. The regulated entity can easily mobilize to

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law, policing and detection of crime, adjudication of criminal charges, and punishment for crimes. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 255–56 (2004). While the interest group imbalance discussed in this Article is similarly present when the relevant legislation regulates substantive criminal law and policing (and, in fact, might be even worse in those contexts), *id.* at 257–58, Wright points out that there are important differences in the case of legislation addressing the adjudication of crimes. In particular, he argues that there are strong interest groups on both sides of that issue. *Id.* at 259–60.

7. For a discussion of capture in the traditional regulatory context of agriculture, commerce, and labor, see THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 67–91 (2d ed. 1979).

defend its profit-making interests because it does not suffer from the collective action problems of the diffuse public.

Sentencing does not follow this pattern. Whereas the traditional model addresses the regulation of firms which form interest groups to protect their profits, sentencing commissions regulate judges, who in turn regulate criminals. Neither judges nor criminals comfortably fit into the existing paradigm of agency control mechanisms.

Judges do not have the same interest in sentencing policy that plant owners have in reducing pollution limitations or that the automakers have in resisting safety features. The latter firms have a strong incentive to fight these regulations because they want to increase their profits. If the firms are comparably situated, they will pursue the same regulatory strategy. That explains why, for example, there are so many industry groups representing hundreds of similar firms (such as the Chemical Manufacturers Association, the National Association of Broadcasters, and the American Petroleum Institute). Judges, in contrast, are not pursuing a bottom line. Their views on sentencing policy may differ because they are based not on a shared profit motive, but rather on ideology. Some judges might prefer longer sentences whereas others prefer shorter sentences. And although many trial judges would like more discretion—and therefore more power—other judges have urged proposals that curb discretion.<sup>8</sup> They may not, in other words, have a unified interest, because they are not pursuing a unified goal. Moreover, even if a large group of judges could agree on a course of action—such as more discretion in sentencing—there is very little that judges can offer politicians in return for favorable legislation. They cannot deliver dollars or votes in the same way traditional interest groups can.

The relative lack of influence and a common cause makes judges less likely to lobby. That is not to say that judges have remained silent when faced with the prospect of having their sentencing decisions regulated. They have tried to influence sentencing commissions and legislatures through their opinions and writing,<sup>9</sup> as well as through direct appeals to agencies and

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8. For example, the movement to create federal sentencing guidelines that limit the discretion of judges was spearheaded by Judge Marvin Frankel. Other judges have similarly advocated limits on judicial discretion. See, e.g., Alex Kozinski, *Carthage Must Be Destroyed*, 12 FED. SENTENCING REP. 67 (1999). In addition, appellate judges and trial judges might be at cross-purposes. District judges would presumably want unreviewable discretion or a more deferential standard of review to increase their power vis-à-vis appellate judges. In contrast, appellate judges' power increases when they can limit the discretion of trial judges under a less deferential standard of review.

9. See, e.g., *United States v. Flores*, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., concurring) (noting that "[t]he passage of the PROTECT Act creates new and greater problems in federal sentencing"); *United States v. Green*, No. CR. A. 02-10054-WGY, 2004 WL 1381101 (D. Mass.

legislatures.<sup>10</sup> But these occasional efforts do not amount to the concerted lobbying effort put forth by most interest groups representing regulated entities. Nor can judges challenge a sentencing agency's decisions in court. It is hard to think of another context where the direct target of regulation is so ill-positioned to mobilize for its position.

Sentencing regulation has a traditional concentrated cost that falls on those convicted of crimes and, at a more general level, on their families and communities.<sup>11</sup> But this group is also in a poor position to mobilize to fight. To be sure, certain industry groups pay attention to corporate criminal sanctions, such as penalties for violations of securities and environmental laws, though

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June 18, 2004) (criticizing federal sentencing policy before ultimately concluding that the Guidelines are unconstitutional); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING* 195–97 n.12 (1998) (listing judges who have “published numerous articles, essays, and letters that express deep criticism of the Guidelines regime”); CHIEF JUSTICE WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004), at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html> (criticizing Congress for failing to obtain the views of the Judiciary before enactment); Justice Anthony M. Kennedy, *Speech Delivered at the American Bar Association Annual Meeting*, 16 FED. SENTENCING REP. 126 (2003) (arguing against mandatory minimum sentences and urging the ABA to study the issue and lobby Congress to repeal them); John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (criticizing the PROTECT Act). The Rehnquist report also noted:

Obtaining the views of the Judiciary before the PROTECT Act was enacted would have given all members of Congress the benefit of a perspective they may not have been aware of on this aspect of the legislation and other aspects that deal with a delicate process that judges understand very well.

REHNQUIST, *supra*.

10. For example, some federal judges—either as individuals or on behalf of the Judicial Conference, which is the federal judiciary's chief policymaking body—have testified before Congress giving their views on legislation. See, e.g., *Hearing on H.R. 4423 and H.R. 3484 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 6–12 (2000) (statement of Judge Emmet G. Sullivan, U.S. District Court for the District of Columbia, Statement on Behalf of the Judicial Conference of the United States) (testifying on behalf of the Judicial Conference in opposition to proposed legislation dealing with the arming of probation officers); *U.S. Sentencing Commission: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 57 (1995) (statement of Jon O. Neuman, Chief Judge, U.S. Court of Appeals for the Second Circuit) (telling Congress that the Guidelines should be modified because they are “too rigid, too detailed, and too cumbersome, and that, in several important respects they reflect ill-advised policy decisions”); *id.* at 66–74 (statement of Emilio M. Garza, U.S. Court of Appeals for the Fifth Circuit) (speaking in favor of the Sentencing Guidelines); *id.* at 75 (statement of J. Harvie Wilkinson, III, U.S. Court of Appeals for the Fourth Circuit) (speaking in favor of the Sentencing Guidelines); see also *Judicial Conference Seeks Restoration of Federal Judges' Sentencing Authority*, 72 U.S.L.W. 2168 (2003) (noting that the Judicial Conference, through Chief Justice Rehnquist, wrote a letter to Senator Patrick Leahy stating its opposition to the PROTECT Act). Judges have also testified before the Sentencing Commission. See, e.g., *Sentencing Commission Hears Testimony on PROTECT Act Downward Departure Mandate*, 73 U.S.L.W. 545 (2003) (noting that Judge David F. Hamilton, Southern District of Indiana, testified before the Sentencing Commission about the importance of departures).

11. See Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552–54 (2003).

they have to be careful not to appear likely to become law violators.<sup>12</sup> But outside the white collar context, there is little activity opposing sentencing increases. Those who will receive the sentences—the offenders—cannot easily self-identify in advance. It is difficult to know *ex ante* who falls into the class of criminals. Not only does it depend on whether someone anticipates committing a crime, but also on whether he or she anticipates getting caught. Presumably, most people underestimate the likelihood that they will be caught and convicted and thereby affected by these rules.

Those most sensitive to issues of sentencing—those who have served or are serving sentences—have little influence. Prisoners are disenfranchised in forty-six states and the District of Columbia.<sup>13</sup> In many states, felons are barred for life from voting.<sup>14</sup> Even when they retain the right to vote, individuals who have been convicted of a crime are not a powerful interest group. The families and communities of these offenders may oppose the harsh sentencing laws, but they currently lack the political pull to present strong opposition.<sup>15</sup> Groups like Families Against Mandatory Minimums, the Western Prison Project, and the Justice Policy Institute aggressively advocate for sentencing reform and alternatives to incarceration, but they do not come close to the lobbying power of traditional targets of regulation.

There is some reason to doubt the permanence of this situation. The tough-on-crime political climate has not been consistent throughout history, so it is possible that sentencing will recede as a central political issue. Moreover, because the current sentencing policies have an overwhelmingly disproportionate effect on certain minority groups, the lobbying dynamic might also begin to change. For example, one in ten African American men

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12. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 776 (1999) (pointing out that “groups might well prefer less-visible means of restraining criminal enforcement”); see also Hugo Hopenhayn & Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J. L. ECON. & ORG. 196, 209 (1996) (noting the asymmetric costs of lobbying when doing so would reveal that the information provider is engaged in illegal activity).

13. See JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH, *THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES I* (1998), available at <http://www.hrw.org/reports98/vote/>.

14. *Id.* (summarizing state policies).

15. After comparing the groups that support criminal procedural rules favorable to the government and the groups that support criminal procedural rules favorable to the accused, Donald Dripps notes that “[y]ou don’t need a calculator to figure out that more will be bid on behalf of the government than will be bid against it.” Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993).

between the ages of twenty-five and twenty-nine is incarcerated;<sup>16</sup> and one in four African American men between the ages of twenty and twenty-nine is under some form of criminal justice supervision (prison, jail, probation, or parole).<sup>17</sup> As a result, representatives in predominately African American districts are facing more pressure to repeal harsh sentencing laws.<sup>18</sup> Because drug sentences in particular have had a disproportionate impact, they are becoming the subject of intense lobbying pressure.<sup>19</sup> Indeed, the drug laws have sparked the formation and attention of several advocacy groups.<sup>20</sup>

But while change might be on the distant horizon,<sup>21</sup> the foreseeable future promises more of the same. And the same means weak opposition to sentencing regulation.

## 2. Pro-Regulatory Forces

Crime differs from traditional subjects of regulation in a second respect. Whereas the entity opposing regulation is a strong lobbyist in the traditional paradigm, criminal sentencing regulation presents a situation where the more powerful lobbying forces advocate additional regulation.<sup>22</sup> Part of this dynamic

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16. See Fox Butterfield, *Study Finds 2.6% Increase in U.S. Prison Population*, N.Y. TIMES, July 28, 2003, at A12.

17. See LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 38 (1998).

18. See *id.* at 37. It is subject to debate whether longer sentences for offenders benefits or harms these communities. Compare RANDALL KENNEDY, RACE, CRIME, AND THE LAW 375 (1997) ("[I]mprisonment is both a burden and a benefit—a burden for those imprisoned and a good for those whose lives are bettered by the confinement of the criminal who might otherwise prey upon them."), with Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1280 (1998) (book review) (arguing that "the cost of so much law enforcement—particularly incarceration—is severe").

19. See, e.g., *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform*, 106th Cong. 144–53 (2000) [hereinafter *Drug Mandatory Minimums*] (statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights) (arguing against mandatory sentencing laws because of their disparate impact on minorities). This is complicated, of course, by the fact that the harm caused by drugs is also disproportionately felt in African American neighborhoods. See WINDLESHAM, *supra* note 17, at 219–20.

20. These include the Drug Policy Alliance, the Sentencing Project, Families Against Mandatory Minimums, and Common Sense for Drug Policy.

21. It is possible that the general public will begin to view these laws as too harsh, especially if they are exposed to powerful narratives of sympathetic defendants receiving substantial sentences. There is evidence that the public is already making a move in this direction. In 1984, 82 percent believed that courts were "not harsh[ ] enough" toward criminals. See DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 136–37 (2001). In 2000 that number dropped to 68 percent. *Id.* Another recent study found that 47 percent of those responding believed too many people are put in jail for drug possession. *Id.* at 129.

22. Of course, there are powerful forces in favor of regulation in other contexts. What sets sentencing regulation apart is the imbalance of power between the pro-regulatory and anti-regulatory forces.

can be explained by the fact that sentencing, unlike other areas of regulation, cannot be left to the market. Sentencing is an exercise of penal power undertaken by legal actors in accordance with legal rules. It is a government exercise by definition. As a result, there is not a viable argument to leave sentencing to the private sector. The battle instead is over how much to sentence.

Perhaps because government interference is a given, one of the most—if not *the* most—powerful lobbying groups in criminal law consists of those charged with exercising the penal power: law enforcement and, in particular, prosecutors. Prosecutors have an incentive to lobby for harsher sentences because longer sentences make it easier for them to obtain convictions through plea bargaining. An increased sentence makes going to trial more costly for the defendant because the defendant faces a greater loss if he or she is convicted.<sup>23</sup> The more risky going to trial becomes, the easier it is for prosecutors to get a plea.<sup>24</sup> As a result, prosecutors lobby for harsher sentences to enhance their position during plea negotiations.<sup>25</sup> Indeed, prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power.

No other group comes close to prosecutorial lobbying efforts on crime issues. A recent survey of staff members of the Senate Judiciary Committee found that “[t]he only area in which . . . paid lobbyists had a limited role was

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23. There could come a point, however, when the sentences become so severe that they harm prosecutorial bargaining power. For example, harsh mandatory punishments with no reductions for cooperation might mean that prosecutors are unable to offer any deal that the defendant finds acceptable.

24. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 97–100 (2003).

25. For example, the congressional record is full of examples of the Department of Justice requesting more stringent sentencing laws because it makes prosecutors' jobs easier. See, e.g., *Child Abduction Prevention Act and the Child Obscenity and Pornography Protection Act of 2003: Hearings Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. 15–17 (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General, Department of Justice) (requesting legislation that would limit downward departures); *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 16–33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) (arguing against a reduction in the penalties for crack cocaine, in part because it would reduce incentives for defendants to cooperate with prosecutors); *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York) (asking for tougher white collar crime penalties); *Drug Mandatory Minimums*, *supra* note 19, at 67 (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep't of Justice) (arguing in favor of mandatory minimum drug laws because they “provide an indispensable tool for prosecutors” by creating an incentive for defendants to cooperate).

standard criminal law issues.<sup>26</sup> In that context, only the Department of Justice was “a regular player.”<sup>27</sup>

Other groups with influence tend to join forces with prosecutors. Those with an economic stake in prison growth—such as rural communities, corrections officer unions, and private prison companies—are strong advocates for longer sentences.<sup>28</sup> Victims’ rights groups are also becoming increasingly powerful.<sup>29</sup>

Thus, unlike most areas of regulation, criminal law features pro-regulatory forces that are strong and unified and face little coordinated opposition.

### 3. The Public Response

Yet another difference between crime and other areas of regulation involves the public’s reaction. In many other regulatory areas, the public is not confident about the best course of action regulatory agencies should pursue. For example, the public might not be sure how much pollution to allow because it is not certain how to balance economic and environmental concerns. Or, if a pharmaceutical company wants to place a new drug on the market, the public might not know how to evaluate the scientific evidence of the drug’s effects and risks. In contexts like these, the public may be content to let the matter rest with experts.

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26. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587–88 (2002).

27. *Id.* at 588.

28. See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 98–101 (1997) (describing the lobbying power of law enforcement officers, correctional officers, rural communities dependant on prison construction, and private prison companies); *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1872–73 (2002) (noting that both the private prison industry and prison guard unions lobby federal and state governments).

Rural communities lobby for prison construction because they think it will create new jobs, though empirical evidence suggests that local residents may not ultimately benefit from the construction of new prisons. See RYAN S. KING ET AL., BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA 4 (2003) (finding “no significant difference or discernible pattern of economic trends between the seven rural counties in New York that hosted a prison and the seven rural counties that did not host a prison”), available at <http://www.sentencingproject.org/pdfs/9037.pdf>.

29. See Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 764, 766 (2002); WINDLESHAM, *supra* note 17, at 142; see also Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California*, 28 PAC. L.J. 243, 246 (1996). Zimring notes that the coalition to put the three-strikes law on the ballot included: some of the crime victim pressure groups in California, the California Correctional Peace Officer’s Association, the prison guard union, which stood to benefit greatly by the expansion of the prison population, and the National Rifle Association, a gun owners group that welcomes punitive sentencing programs as a method of addressing violent crime concerns without inconveniencing gun owners.

*Id.*

When it comes to crime and sentencing, in contrast, the public does not readily perceive the same knowledge deficit. To the extent that sentencing is about values and morals, the role of experts may be irrelevant or at least not obvious. Instead, there seems to be a settled perception that keeping criminals behind bars for as long as possible is a good thing. Because the public does not immediately perceive a cost to this approach (for example, that it loses out on other services when tax dollars are used for longer sentences) or a need for expert advice, it lines up with prosecutors and the tough-on-crime interest groups. In turn, politicians can readily mobilize voters to support these longer sentences.<sup>30</sup> The weaker forces on the other side of the issue struggle to persuade the public that there is a cost to a tough-on-crime approach to sentencing.

At a superficial level, then, this does not seem to be a paradigmatic case where an interest group obtains concentrated benefits by imposing diffuse costs on the public; rather, the public seems to agree that harsher punishments on a concentrated minority lead to diffuse benefits for society.<sup>31</sup>

In sum, the interest group dynamics of sentencing differ in significant respects from other substantive areas of regulation. The regulated entity is ill-positioned to argue on its own behalf, whereas the forces in favor of regulation are extremely powerful and unified. The public, moreover, is easily mobilized to side with the pro-regulatory forces. Sentencing therefore presents a situation where the interests overwhelmingly stack up in favor of more regulation, which in this case means longer sentences for convicted criminals.

#### B. Political Incentives and Capability

Agencies responsible for sentencing ignore these interest group dynamics at their peril. As a result of the interest group dynamics discussed above, elected officials have strong incentives to keep abreast of sentencing commission decisions and to keep tight reins on these agencies. This, too, separates agencies responsible for sentencing from more traditional agencies.

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30. William Stuntz notes that crime has been a major political issue in the states for more than a century. Stuntz, *supra* note 3, at 529.

31. While normally this might not be a cause of concern—indeed, it might be a welcome change to have the interests of powerful groups coalesce with the general public's interests—there are reasons why the electorate's stated preferences might be misleading in this context. See *infra* notes 99–126 and accompanying text.



## 1. Incentives to Monitor

Whereas some have argued that elected officials are indifferent to most agency policies because they are of little interest to their constituents,<sup>32</sup> the public has expressed a relatively high level of concern with crime and sentencing, which creates pressure on elected officials to stay on top of sentencing developments. Elected officials therefore have an incentive either to engage in “police patrol”<sup>33</sup> oversight, or to pay attention to the “fire alarms”<sup>34</sup> raised by the press and public when sentences are perceived as too lenient or a crime problem appears to be getting worse.<sup>35</sup>

## 2. Ease of Monitoring

It is, moreover, easier for politicians to keep tabs on sentencing commissions than on other agencies. Most agencies have the option of implementing policies either through regulations or adjudicative proceedings like enforcement actions. When agencies choose the latter course, it makes it much more difficult for political actors to monitor the agency because the agency can disguise its policy determinations as factfindings in particular

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32. See Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 121 (1996) (noting that, in the case of traditional regulatory agencies, “politicians’ indifference is said to stem from the fact that agency policies are of little interest to their constituents, so trying to change these policies has too little electoral payoff to make the effort worthwhile”).

33. This terminology was coined by Mathew McCubbins and Thomas Schwartz. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). In police patrol oversight, Congress takes a pro-active role in monitoring agencies to ensure that they are complying with their legislative mandates. This could include, for example, requiring agency officials to provide policy updates in congressional committee oversight hearings, mandating that agencies submit reports to Congress with recent activities, or commissioning investigative studies of the agency. *Id.*

34. In fire alarm oversight, Congress relies on interested groups and citizens to monitor the agency’s conduct and keep Congress informed when the agency does something that the affected public does not like. While this type of oversight does not require affirmative congressional action, Congress can make it easier for interest groups and private citizens to keep abreast of agency action by, among other things, affording citizens and groups access to agency documents and requiring the agency to hold public hearings.

35. Note that the fire alarm signals are likely to be asymmetric because of the dynamics discussed in Part I.A. See Hopenhayn & Lohmann, *supra* note 12, at 209–10 (noting that the fire alarms will be asymmetric when information providers face asymmetric costs, which is the case when sending an alarm would reveal that the information provider is engaged in illegal activity or when the media finds it easier to focus on one side of an argument rather than another).

adjudications.<sup>36</sup> For example, the National Labor Relations Board prefers to make policies through adjudication because this approach gives it more freedom from congressional oversight.<sup>37</sup> The FCC similarly uses its adjudicatory licensing proceedings to effectuate its policy goals.<sup>38</sup>

Unlike these traditional agencies, sentencing commissions must make all of their policy decisions through regulations, commentary, or policy statements because they lack enforcement and adjudicatory authority. Sentencing commissions do not adjudicate criminal cases, nor do they have authority to bring enforcement actions against judges, the direct targets of their regulations. Their policies are therefore readily accessible, making it easier for politicians to evaluate them.

### 3. Ease of Legislative Action

Not only do legislators have the incentive and the means to keep abreast of sentencing commissions, but it is also less difficult for legislators to overrule agencies in this context. The legislature can readily marshal the votes to make sentences harsher, and no legislative group has an incentive to block the legislation.<sup>39</sup> This dynamic accounts for the fact that legislators who normally do not overrule Supreme Court statutory interpretation decisions are far more active when it comes to lenient interpretations of criminal laws.<sup>40</sup>

36. See Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 67–71 (describing the way in which policymaking by adjudication is more difficult to monitor).

37. See *id.* at 71.

38. See *id.* at 67–71.

39. Frank Zimring recognized this dynamic more than twenty years ago:

Once a determinate sentencing bill is before a legislative body, it takes no more than an eraser to make a 1-year “presumptive sentence” into a 6-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal.

Franklin E. Zimring, *A Consumer's Guide to Sentencing Reform*, in *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 933, 938 (Franklin H. Zimring & Richard S. Frase eds., 1980).

40. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344 tbl.4 (1991) (documenting that, from 1967–1990, Supreme Court interpretations of criminal laws were overruled more than any other type of decision); *id.* at 362 (noting that Supreme Court cases interpreting criminal laws in favor of state and federal governments “rarely generate even a judiciary committee hearing,” while “cases lost by state and federal governments, which overturn convictions, readily command judiciary committee hearings and often lead to overrides” and explaining that the asymmetry results from the fact that “state and federal law enforcement officials are powerful interests that can command congressional attention, while criminal defendants and suspects are more diffuse, marginalized, and less sympathetic groups”). The exception to this pattern involves white collar criminal defendants in antitrust and tax cases, who have greater lobbying power in Congress. *Id.* at 376.

This is not to say that sentencing agencies do not enjoy some freedom from legislative oversight. Our constitutional system and legislative process make it difficult to enact any new law. There are numerous vetogates to overcome—holdup in committee, the threat of a filibuster, the failure of bicameral houses to agree, presidential veto, and so on. So while it is much easier to get laws imposing harsher sentences passed because there are few interest groups opposing them and politicians may be reluctant to block legislation for fear of looking soft on crime, easier does not mean automatic. As a result, a sentencing commission will enjoy at least some amount of slack to adopt its policies.<sup>41</sup>

But the level of slack is likely to be less than what other agencies enjoy because of the political dynamics discussed above. It might not be clear that a legislature can mobilize a coalition that is sufficiently large to change an environmental or telecommunications policy because powerful interests may be able to get a group of legislators to block the proposed legislation. Sentencing commissions, however, know that the interest group dynamics associated with sentencing make it relatively easy for legislatures to act if sentences are perceived as too lenient.<sup>42</sup> As a result, sentencing agencies are more likely in the first instance to promulgate rules that will meet with legislative approval.<sup>43</sup>

Sentencing commissions are even more vulnerable to political controls because the executive and legislature, regardless of their respective political party, are more likely to agree than in other contexts. Sentencing commissions are unlikely to find one of the branches of government willing to support a more lenient approach. Because the executive and the legislature both benefit from tough-on-crime rhetoric and neither wants to appear weaker than the other (especially in a divided government), sentencing agencies can rarely play the two branches off of one another in an attempt to further the agency's agenda.<sup>44</sup> If anything, the executive and legislative branch battle

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41. See Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995) ("Even when Congress employs every possible strategy to control agency decisions, the possibility of 'bureaucratic drift' . . . remains.").

42. Cf. Hopenhayn & Lohmann, *supra* note 12, at 197 (observing that the Food and Drug Administration is likely to be overly cautious in deciding whether to approve a drug because "[c]ongressional pressures for negative action on new drug applications tend to be intense, while such pressures are close to nonexistent when an application is rejected").

43. See Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance,"* 12 LEGIS. STUD. Q. 475, 488 (1987) ("[T]he very potential for new legislation is itself a mechanism of control.").

44. See Hammond & Knott, *supra* note 32, at 122.

over which one appears tougher.<sup>45</sup> This makes it that much more difficult for an agency responsible for sentencing to be independent of either branch.

Agencies responsible for sentencing therefore experience far greater oversight than agencies responsible for regulating other areas. The interest group dynamics create an environment in which legislators have an incentive to monitor the agencies and in which overruling the agency is relatively easy.

### C. The Accessibility of Criminal Justice

Agencies responsible for sentencing policy differ from traditional regulatory agencies in yet another respect that undercuts their ability to exert independence: The specific subject matter being regulated has an effect on the agency's relation to political actors. In many cases, legislators defer to agencies because the agency possesses specialized information about the regulatory subject that is too difficult or costly for the legislature to obtain.<sup>46</sup> For example, one explanation for the Federal Reserve's striking independence is the complexity of its field of regulation.<sup>47</sup> Regulation that depends on an assessment of scientific knowledge—such as occupational health and safety standards or environmental regulations or new drug approvals—may also prompt a legislature to rely more on an agency's judgment. As a result of the information deficit, the legislature may give the agency more deference.

Sentencing commissions may not have the same informational advantages that other agencies have vis-à-vis the legislature, at least to the extent that the commissions are charged with establishing sentences that are consistent with the purposes of punishment. For example, if the goal of punishment is retribution, it is not immediately clear that an agency is better positioned than a generalist legislator to determine someone's just deserts. Indeed, one might think the opposite is true because legislators represent the moral views of a broader constituency. Even when punishment is acknowledged to have other goals—such as deterrence or rehabilitation—it is not clear that experts greatly illuminate the issues because the existing knowledge is so limited.

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45. See, e.g., Zimring, *supra* note 29, at 248 (noting that the California legislature and Governor were each unwilling to let the other appear tougher).

46. See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 25 (1991) (noting that "[s]ituations in which agents acquire information that is unavailable to the principal pervade public policy-making").

47. See Paul E. Peterson & Mark Rom, *Macroeconomic Policymaking: Who Is in Control?*, in *CAN THE GOVERNMENT GOVERN?* 139, 161 (John E. Chubb & Paul E. Peterson eds., 1989).

Because agencies do not have obvious informational advantages when it comes to sentencing policy, legislators feel freer to make decisions without deferring to experts or seeking out their opinion. Put differently, legislators tend to feel confident making predictions and assessments about criminal justice policy because they may not view it as a specialized field. It seems to be as accessible to a common person as it is to an expert, and so the pressures for deference may not be as great.

In addition, sentencing policy is easily captured in slogans and sound bites, which allow legislators to communicate to the public in simple terms. “Three strikes and you’re out,” and “hard time for hard crime” are the kinds of messages that allow them to rally the electorate. It does not seem much more complicated than the message itself—longer sentences are to be preferred. Economic or environmental policy is not as simply stated, or, if it is, it is more readily seen as shallow. But the public tends not to view crime and sentencing with the same kind of nuance.

All of these factors—the imbalance of interest groups and the public’s reaction; the incentives for legislatures to keep tabs on the agency; the ease with which they can monitor and override the agency; and the accessibility of criminal sentencing policy—suggest that insulation will be more difficult when it comes to the regulation of criminal sentencing than other areas.<sup>48</sup> The presence or absence of traditional control mechanisms might therefore be less revealing in this context because politicians can so easily influence the agency regardless of institutional design.

## II. THE EXPERIENCE OF FEDERAL AND STATE SENTENCING COMMISSIONS

While Part I demonstrated the theoretical differences that set sentencing apart from other subjects of regulation, this part looks to the actual experience of sentencing commissions to see whether and how these theoretical differences have mattered in practice.

As one would expect given the above discussion, sentencing agencies have been, overall, remarkably political. Legislatures have exercised strict

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48. Indeed, these political dynamics and incentives would seem to cut against the formation of an agency—particularly an independent one—in the first instance. Given these forces, one might expect a legislature simply to set sentences for themselves. Part II.A explains in greater detail some of the reasons why legislators may have established agencies despite these factors. See *infra* notes 80–88 and accompanying text. The point here is that when political forces do yield to allow the creation of an agency, they nevertheless remain as impediments to making those agencies independent in practice.

oversight of their activities, and sentencing agencies have seen their proposals ignored or limited time and time again. But the analysis cannot stop with generalizations, because a closer look at the experience of various sentencing commissions reveals that not all sentencing commissions have been equally successful—or unsuccessful, as the case may be.

This part therefore explores the varying experiences of sentencing commissions throughout the country and seeks to identify those attributes that appear to have made a difference in the agency's ability to influence policy outcomes. As the discussion of these agencies shows, and as Part I predicted, creating independent agencies is difficult in this context. On the contrary, if anything, "independence" is an impediment to the effective working of these agencies. In the case of sentencing, the far more effective design choice is one that places the agency in closer contact with the legislature and its preferences.<sup>49</sup> This part shows that this can be done by including legislative members on the commission and by giving the agency authority to produce information that is politically important, such as the costs of sentencing policies.

While this empirical analysis lacks the rigor of a controlled study,<sup>50</sup> it achieves the more limited purpose that is this Article's aim. It shows the relationship between institutional design, politics, and agency influence in the context of criminal sentencing. At the same time, this review of state and federal sentencing commissions demonstrates that the experiment with

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49. The suggestion is not, therefore, that an "executive" agency is to be preferred over what is traditionally called an "independent" or "legislative" agency. Rather, the demarcation emphasized here is between a relatively politically insulated agency and one that has closer ties to the political branches.

50. While a rigorous empirical study analyzing the independence of all sentencing commissions, state and federal, would produce more definitive information than the case study approach discussed here, it is difficult to conduct such a study at present. The primary obstacle is that there is currently not enough available data from each jurisdiction. If independence is to be measured by the agency's ability to resist legislative pressure or to convince the legislature to modify its proposals in light of the agency's expert judgment, as this Article posits, it is necessary to obtain a record of all such legislative and agency proposals for every jurisdiction. I have not found readily available data sets on this question from any state, so it would be necessary to generate this information from scratch for each guideline state. This would obviously be an enormous undertaking. Because many states lack recorded legislative history in any detail and because, as Ronald Wright notes, "[s]entencing commissions often do not leave fingerprints," Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 450 (1998), it is difficult to determine the role sentencing commissions have had on the legislative process, *see id.* (noting that "[i]t is difficult to determine in many states whether sentencing commissions participated" in legislative debates and "what effect the commissions might have had on the legislative outcome"). At the very least, it would be necessary to find individuals with a sufficiently long and reliable institutional memory to document all the relevant legislative proposals. *See id.* at 451 ("[L]ater analysts must depend on conversations after the fact with interested parties." (footnote omitted)). Wright observes that this is "an inquiry unlikely to occur in even a single state, let alone a sufficient number to produce a meaningful comparison." *Id.* at 460 n.9.

sentencing commissions is not the universal failure that some believe it to be.<sup>51</sup> Rather, the experience in some states shows that expert regulation of crime can produce real policy change if it works within the larger political culture.

Subpart A begins the analysis by tracing the history of expert involvement in sentencing, culminating in the sentencing commission movement. The following subparts evaluate the commissions these reformers created. Subpart B analyzes the federal agency responsible for sentencing, the U.S. Sentencing Commission. Subpart C then describes the experience of several state sentencing commissions.

#### A. The Evolving Role of “Experts” and the Rise of the Sentencing Commission

The use of experts in American sentencing policy is not new, but the *role* of experts has changed dramatically—moving from the shadows into the political limelight.<sup>52</sup> Sentencing experts initially made recommendations on how a particular defendant should be sentenced based on that defendant’s prospects for rehabilitation. They were experts in individuation. Although they had influence in individual cases, they largely operated below the political radar because their discretionary decisions were not subject to scrutiny. In the 1970s, legislators and scholars began to see the value of using a permanent body of experts, not to individualize sentences as they had previously done, but to set sentencing policy in the aggregate. The deployment of experts through an agency structure would profoundly change the political dynamics. Expert decisions would become easily observable and address general questions, not case-specific ones. This, in turn, would raise the risk of political intervention. This subpart describes that shift in the use of experts, and why the politicization of sentencing concerned so many sentencing reformers and made an “independent” agency model appear so attractive.

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51. See text accompanying *infra* note 422.

52. An expert for purposes of this Article is defined as someone other than a core participant in the criminal justice process, such as jurors, judges, prosecutors, and defense counsel. The definition excludes the chief executive of a jurisdiction (the president or governor) responsible for pardons or executive clemency, but includes any body delegated authority to make or assist in crafting those decisions. In other words, it is meant to include the use of specialists—either as individuals or as members of agencies—to assist with the administration of some aspect of criminal justice policy. In using the term “expert,” however, I do not mean to suggest that these individuals *actually* possess a certain skill set or body of knowledge. Rather, I am using the term to indicate that the legal system *perceives* them to have specialized knowledge or abilities and therefore makes them an official part of the sentencing process.

# 1. Expertise Individualized: The Early Use of Sentencing Experts

The American criminal justice system has long made use of experts in different capacities. When the penitentiary emerged in the late eighteenth and early nineteenth centuries to replace the use of corporal and public shaming punishments, it was due in part to the efforts of advocates who could be characterized as experts in criminal justice policy.<sup>53</sup> And, of course, individuals developed an expertise in running those institutions.<sup>54</sup> Although these individuals were a key component of the overall movement and central to its administration, they were not part of the formal governmental structure for creating sentencing policy.<sup>55</sup> The influence of these experts depended on their ability to persuade those with sanctioned governmental power.<sup>56</sup>

Experts began to play an official role in sentencing in the nineteenth century when the indeterminate sentencing model<sup>57</sup> took hold and the focus for determining a sentence shifted from the offense committed to the offender and his or her potential for rehabilitation.<sup>58</sup> As the Supreme Court explained, "[t]he belief no longer prevail[ed] that every offense in a like legal

53. See, e.g., HARRY ELMER BARNES, *THE STORY OF PUNISHMENT* 146 (2d ed. 1972) (describing the role of "leading American reformers, most notably Theodore W. Dwight and E.C. Wines of the New York Prison Association, F.B. Sanborn of Concord, Massachusetts, Z.R. Brockway, Superintendent of the Detroit House of Correction, and Gaylord Hubbell, Warden of Sing Sing Prison" in advocating for the adoption of "liberal and progressive innovations" in incarceration policies); *id.* at 205 (discussing the contributions of reformers such as John Howard, Elizabeth Fry, and Dorothea Lynde Dix).

54. See ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 11, 15 (1992) (describing the development of penitentiaries in the late eighteenth and early nineteenth century and the "complex administration" that went along with them); see also BARNES, *supra* note 53, at 133–34 (recounting the use of commissions that were responsible for overseeing prison design and operation in the early 1800s).

55. A different use of experts can be seen in England during the Victorian era. A commission was established in 1833 to recommend sentencing reform for all criminal laws and worked for fifteen years on the project. See Sir Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1290 (1979).

56. Experts continue to play this type of advocacy role today. For instance, defense lawyers frequently use psychologists and other professionals as expert witnesses in sentencing hearings. See, e.g., G. Thomas Gitchoff, *Expert Testimony at Sentencing*, in *CRIMINAL LAW AND URBAN PROBLEMS* 195 (PLI Litig. & Admin. Practice Course, Handbook Series, No. CH-4185, 1989). Experts and advocacy groups also testify before Congress and state legislatures.

57. See FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING 11 (1976) (describing the key characteristics of the indeterminate model, particularly the wide discretion of judges and parole officials).

58. See BARNES, *supra* note 53, at 145–47, 210–11; ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2, at 11; § 7, at 34 (1978). This has been called the "medical model" of sentencing, where "crime is seen as a disease to be cured rather than as an aberration to be punished." Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 226 (1984).



category calls for an identical punishment without regard to the past life and habits of a particular offender.”<sup>59</sup> Instead, sentencing depended on an individualized determination of the defendant’s prospects for rehabilitation and his or her progress during incarceration. The trial judge contributed to this determination by evaluating the defendant’s background and personality to determine what sentence would be appropriate to rehabilitate the defendant. To make this determination, judges needed—and received—broad discretion in making their sentencing determinations.<sup>60</sup> Statutes created wide sentencing ranges, judges were not required to give reasons for their sentencing decisions, and appellate courts did not review the trial judge’s determinations.<sup>61</sup>

The judge, however, was not alone in this process. Experts played an important part in this evaluation.<sup>62</sup> Often times, the judge based his or her sentence on a presentence report prepared by a probation officer.<sup>63</sup>

If a judge determined that a term of incarceration was appropriate for rehabilitation, parole officers would also have input. Under the typical indeterminate sentencing scheme, a judge would not sentence a defendant to a fixed term but instead give the defendant an indeterminate sentence that would consist of a range, say five to fifteen years.<sup>64</sup> The ultimate release date

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59. *Williams v. New York*, 337 U.S. 241, 247 (1949).

60. *Id.*; see also CAMPBELL, *supra* note 58, § 85, at 275–76 (describing the broad range of factors that could be considered by the sentencing judge).

61. S. REP. NO. 98-225, at 48 (1983) [hereinafter *Federal Sentencing Reform Senate Report*] (“[J]udges need not specify the reasons for their sentencing decisions . . .”).

62. While indeterminate systems varied from state to state—and still vary where they remain in use—they shared some essential characteristics, including “very broad legislative ranges of permissible punishments for most offenses, unguided and unreviewable trial court discretion to pronounce sentences within permitted statutory ranges, and appreciable powers (also unguided and unreviewable) vested in parole and corrections officials to determine prison release dates.” Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 540 n.18 (2002).

63. The probation officer would assemble key information for the judge that could include the defendant’s criminal and personal history, work and education experience, and an evaluation of the defendant’s physical and mental condition. See Judge Louis F. Oberdorfer, *Mandatory Sentencing: One Judge’s Perspective*—2002, 40 AM. CRIM. L. REV. 11, 14 (2003). Probation officers also played a role in the sentencing process when the judge determined that the appropriate sentence for rehabilitative purposes involved some period of probation. The probation officer was typically given broad discretion to “judge the progress of rehabilitation in individual cases,” *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973), and to determine the appropriate method for dealing with the defendant, see CAMPBELL, *supra* note 58, § 100, at 321.

64. The explanation for this has been stated as follows:

Although there are many variations of indeterminate sentencing schemes, all have as their underlying premise the belief that since the primary purpose of incarceration is to rehabilitate rather than punish the offender, the length of incarceration time needed to do this cannot be determined at the time sentence is imposed.

CAMPBELL, *supra* note 58, § 25, at 96.

would be determined by parole officials who would be responsible for gauging when an offender serving a sentence was sufficiently rehabilitated.<sup>65</sup> Because the parole determination was so critical to the indeterminate sentencing model, legislatures in many jurisdictions adopting this model created parole boards to make these decisions.<sup>66</sup> Although parole boards varied in their approach, they typically had some sort of hearing to evaluate an individual defendant's progress and to determine if he or she was rehabilitated and ready to be released.<sup>67</sup>

Thus, with the rise of indeterminate sentencing came the appointment of experts into the official government sentencing structure. The birth of the parole board demonstrates that individual professionals were not the only expert participants in the criminal justice process. In many jurisdictions, permanent bodies and commissions were created to assess a particular defendant's case. And over time, some of these parole boards developed internal guidelines to help manage the prison population.<sup>68</sup> In addition to parole boards, some state legislatures created boards to advise the governor in making clemency decisions.<sup>69</sup> The pardon power, too, was vested in committees and agencies in some states.<sup>70</sup>

Whether through individuals or boards, however, the dominant role of the expert in the indeterminate sentencing model was to make an individualized judgment about the defendant. Although an administrative apparatus

65. See, e.g., *Garafola v. Benson*, 505 F.2d 1212, 1217 (7th Cir. 1974) ("A major purpose of any indeterminate sentence provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community."); BARNES, *supra* note 53, at 211–12 ("Almost from the first it has been agreed that the indeterminate sentence must have as a supplementary principle and practice the system of parole . . . [which] requires a high grade of technically trained prison administration."). The ultimate release date would also be influenced by the jurisdiction's use of so-called "good time" credits, which could reduce a prisoner's sentence significantly. See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 218 (1982) (noting that good time credits can reduce a sentence by 50 percent or more).

66. See CAMPBELL, *supra* note 58, § 134, at 412 (observing in the 1970s that "[t]he parole system, as an integral part of indeterminate sentencing, is found in nearly every state in the Union"). The United States Parole Commission was established in 1910. Parole Act, Pub. L. No. 61-269, ch. 387, 36 Stat. 819 (1910).

67. See CAMPBELL, *supra* note 58, § 136, at 416–19 nn.8, 20 (giving examples of parole board practice).

68. See John C. Coffee, Jr., *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

69. See CAMPBELL, *supra* note 58, § 129, at 399 (offering examples, including those states that required a board recommendation before a governor could grant clemency).

70. See *id.* § 131, at 405 (explaining that "in the United States—where governmental authority is deemed inherent in the people rather than the sovereign—it has been held that pardoning authority may be vested by the people in either the executive, a committee, or some designated body").

developed around these experts—with the creation of expert boards came administrative rules to govern their behavior—their main function was to assist in individual cases.

Because experts played their role in the context of individualized, highly discretionary determinations, their analysis was subject to little scrutiny or political oversight. Indeed, there were virtually no legal standards that governed the indeterminate sentencing model, and few actors in this realm provided reasons or opinions for their decisions.<sup>71</sup> As a result, experts and judges in the indeterminate regime faced little scrutiny from appellate judges, politicians, or the public. Their expertise was respected and their decisions received deference on that basis. As Frank Zimring characterized this model: “Shared belief in specialized expertise became a support, not only for the ‘hands-off doctrine’ that insulated correctional officials from judicial review, but also for a broader hands-off tendency that restrained legislatures from second-guessing the powers of the operating branches of the criminal justice system.”<sup>72</sup> Without political pressure, these experts had substantial influence on the sentencing outcome in individual cases.

## 2. Expertise Aggregated: Modern Sentencing Commissions

In the 1970s, the role of experts in sentencing changed when the indeterminate model—and the faith in rehabilitation on which it is based—came under attack. By 1983, when the U.S. Senate issued a report accompanying legislation to abolish indeterminate sentencing at the federal level, it could be fairly stated that “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”<sup>73</sup> Once legislators lost faith in rehabilitation, the almost unlimited discretion given to judges and parole officers no longer seemed defensible.<sup>74</sup>

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71. See Oberdorfer, *supra* note 63, at 14; Schulhofer, *supra* note 4, at 735–36.

72. Zimring, *supra* note 29, at 254.

73. Federal Sentencing Reform Senate Report, *supra* note 61, at 38; see also Coffee, *supra* note 68, at 977 n.1 (citing “seminal works in the recent consensus that the rehabilitative model of sentencing has failed”); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 228 (describing decline of rehabilitative model); Susan E. Martin, *The Politics of Sentencing Reform: Sentencing Guidelines in Pennsylvania and Minnesota*, in THE NATIONAL ACADEMY OF SCIENCES, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 265, 267 (Alfred Blumstein et al. eds., 1983) (noting that reformers on both sides of the political spectrum believed that rehabilitation was ineffectual); Reitz, *supra* note 62, at 549–50 (discussing the decline of rehabilitation as a theory of punishment).

74. This has not been true in every jurisdiction. More than half the states still follow the indeterminate sentencing model. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other*

In jurisdictions that sought reform, dissatisfaction with indeterminate sentencing came from both sides of the political spectrum.<sup>75</sup> The left supported sentencing reform based on a concern that the indeterminate sentencing model generated too much disparity and that minorities and the poor were being disproportionately penalized.<sup>76</sup> The right worried that judges and parole boards were using their discretion to release criminals too early and that the uncertainty of the system was undermining the deterrent and retributive goals of the criminal justice system.<sup>77</sup> Sentencing reformers from both ends of the political spectrum believed that the solution was to set sentencing policy in the aggregate, because they thought that would eliminate the disparity, irrationality, and unpredictability that both sides found so troubling.

As they shifted models, some legislative reformers once again sought assistance from experts. But the expertise needed for the new goals of sentencing was not the same as it was in the prior, indeterminate model. As noted, sentencing experts in the indeterminate regime were believed to be experts in individuation.<sup>78</sup> The new model of sentencing no longer emphasized the individual offender, but instead focused on the need for uniformity and consistency across cases. Reformers nevertheless believed that individuals with specialized knowledge could help with that problem as well. What constituted the relevant expertise in this new paradigm is not immediately clear. It could mean everything from law enforcement to criminology to systems management.

But whomever the reformers envisioned in the role of "expert" in the new regime, they believed there was a benefit to assembling such individuals into a commission. In other words, politicians began to see the benefits of having a regulatory agency that could generate rules for sentencing, just as they had seen the upside of having agencies generate rules for the environment or securities markets. As in these other areas, an alternative to turning to a

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*States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING REP. 69, 69-70 (1999).

75. See Barkow, *supra* note 24, at 88; see also DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES 30 (1988) (describing diverse groups supporting sentencing reform in Minnesota); Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 8 (1993) (describing bipartisan consensus to reform sentencing, with conservatives "object[ing] to lenient probation and parole release decisions" and liberals "argu[ing] that the exercise of discretion by judicial and parole authorities led to unjust disparities and racial bias in the treatment of equally serious offenders").

76. See Donald W. Dowd, *What Frankel Hath Wrought*, 40 VILL. L. REV. 301, 302-03 (1995); Kennedy, *supra* note 2, at 356-57.

77. See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992); Dowd, *supra* note 76, at 303-04.

78. Of course, the collapse of the rehabilitation ideal was based in part on a belief that their expertise was not sufficiently reliable.

regulatory agency would be to have legislators themselves generate these standards, perhaps with subcommittees or legislative task forces providing assistance in drafting the legislation.<sup>79</sup> Because of the political dynamics discussed in Part I, that would seem to be a natural alternative. After all, without strong interest group pressure on both sides of the issue, there is little reason to punt the decision to an agency.

Why, then, would a legislator in favor of sentencing reform want to relinquish control over these decisions to a sentencing commission? The reasons were many. For some, it was the fact that commissions could bring more resources to bear on the question and could adapt to changing circumstances more effectively than a legislature.<sup>80</sup> For others, the use of agencies with specialized expertise proved attractive.<sup>81</sup> Because many of the leading

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79. Some reformers did turn to legislatures for sentencing reform. See Andrew von Hirsch, *The Sentencing Commission's Functions*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 5 (Andrew von Hirsch et al. eds., 1987) (describing early state experiments with legislative determinate sentencing); see also *PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY* 215 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) [hereinafter *PRINCIPLED SENTENCING*] (describing California's experience). California started the trend, and the experience there caused many sentencing reformers to criticize legislature-generated sentencing laws. See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *STAN. L. & POL'Y REV.* 93, 95 (1999) ("California's experience with a legislature-centered sentencing system in the late 1970s confirmed for many reformers that crime-wave politics would often lead legislatures to enact an incoherent, uncoordinated and ever-increasing set of sentences.").

80. See Schulhofer, *supra* note 4, at 738–40 (noting that "[l]egislative attention to the judgments reflected in each statutory rule for computation of sentence is virtually impossible" whereas "[a] sentencing commission would have the time and resources to deal with the complex array of sentencing problems"); see also Feinberg, *supra* note 2, at 297 ("Congress had neither the necessary time nor expertise to develop a complex series of sentencing guidelines . . ."); Frankel & Orland, *supra* note 58, at 228 (noting that an agency would have the resources and flexibility to adapt to changing circumstances); Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 *JUDICATURE* 189, 191 (1995) (arguing that "legislatures are poorly positioned to give sustained attention to the complex workings of the sentencing system as a whole" and that "the tedious business of gathering and assessing data about hundreds or thousands of cases is not likely to find its way onto the legislative agenda"); Ronald F. Wright, *The United States Sentencing Commission as Administrative Agency*, 4 *FED. SENTENCING REP.* 134, 136 (1991) (arguing that Congress thought "[a]n administrative agency . . . would be better able to assimilate empirical information, monitor the system in operation, and account for the system wide effects of any changes to sentences for one crime"); Wright, *supra* note 50, at 436 (noting that legislative resource constraints are "especially pronounced in state legislatures, which do not meet year-round and have more limited staffs").

81. See Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 *ST. LOUIS U. L.J.* 425, 432 (2000) ("The commissions' database and expertise . . . was also expected to promote a more comprehensive, long-term, and fiscally responsible view."); Frase, *supra* note 74, at 71 (observing that "a permanent sentencing commission is now generally seen as an essential component of guidelines" because of its ability to research sentencing practices, and evaluate and prioritize resources); Reitz & Reitz, *supra* note 80, at 191 (noting that the "commission's information base and record of accurate projections allow it to participate in criminal justice policy making as a uniquely credible, informed player").

advocates for change, such as Judge Marvin Frankel, proposed the use of a commission, this might have predisposed some legislators to favor the use of agencies and framed the debate in their favor. Perhaps most importantly, for many reformers, the attraction of an agency model was the political insulation it could provide.<sup>82</sup> Indeed, that latter factor—sentencing commissions' potential for political insulation—was seen as a substantial benefit by almost all of its proponents.<sup>83</sup>

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82. See ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 20 (1985) (noting that "[l]egislatures, when writing specific norms for sentencing, have tended to become embroiled in law-and-order politics"); Frase, *supra* note 81, at 431–32 ("[T]he use of an independent, appointed commission was designed to insulate sentencing policy decisions from short-term political pressures (and the tendency of elected politicians to prefer more punitive policies, so as not to appear 'soft on crime')."); Richard Singer, *In Favor of "Presumptive Sentences" Set By a Sentencing Commission*, 5 CRIM. J.Q. 88, 92 (1977) (noting that a commission could address the "fear that the legislature, as it often has in the past, will either react too harshly and set exceptionally high presumptive sentences in virtually all crimes or that it will allow such leeway for aggravating and mitigating circumstances that it will really reinstitute the current mode of sentencing"); Ronald F. Wright, *Amendments in the Route to Sentencing Reform*, 13 CRIM. JUST. ETHICS 58 (1994) (arguing that the experience of legislative sentencing reform in California, Illinois, and Indiana where "the legislature increased sentence lengths time and again, sometimes for all crimes and at other times for particular crimes that had captured the attention of the public" led other sentencing reformers to search for an alternative "that would not depend so heavily on the legislature"); Wright, *supra* note 4, at 19 (describing reformers who sought to insulate sentencing decisions from the pressures of the political arena).

83. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 119 (1973) ("[L]egislative action tends to be sporadic and impassioned, responding in haste to momentary crises, lapsing then into the accustomed state of inattention."); VON HIRSCH, *supra* note 82, at 20–21 (observing that "a commission could have time to devote to the development of [sentencing] policy and, not being elective, might not be under excessive pressure to adopt posturing stances of toughness"); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 934 (1991) (noting that some sentencing reformers thought that "commissions could serve as buffering agencies, making unpopular sentencing decisions that legislators would avoid"); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice System*, FED. PROBATION, Mar. 1997, at 58, 62 (noting that the employment of the Sentencing Commission "was intended to insulate sentencing policy, to some extent, from the political passions of the day. As an independent, expert agency, the Commission's role is to develop sentencing policy on the basis of research and reason."); Feinberg, *supra* note 2, at 297 (noting that there was concern among sentencing reformers that Congress would be "caught up in the politically volatile issues of law enforcement and crime control" and thus "would be unable or unwilling to avoid the temptation to increase criminal sentences substantially"); Kennedy, *supra* note 2, at 380 (Senator Ted Kennedy, a leading advocate for the development of the Federal Sentencing Commission, urged that it was necessary to have an independent commission to "avoid politicization"); Schulhofer, *supra* note 4, at 740 (arguing in favor of a federal sentencing commission because, although it would be "ultimately accountable to the legislature," it "would be insulated to a degree from the most immediate political pressures"); Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 716 (1993) ("Most proponents of guidelines have seen its capacity to resist short-term emotions and politics as a great strength."); Wright, *supra* note 80, at 136 ("Congress turned to an administrative agency because anti-crime sentiment had routinely led legislators to vote for increased prison terms without paying enough attention to prison capacity, or the actual influence of different sanctions on different offenders.").

These reformers were concerned with increased political pressure because sentencing decisions would be moved from the sub rosa world in which they previously existed, where judicial and expert decisions received almost no scrutiny at all, to a world in which they would become quite visible.<sup>84</sup> The increased exposure to politics would be most pronounced at the federal level, where decision power would be removed from the life tenured, relatively more insulated Article III federal judiciary.<sup>85</sup> But even in jurisdictions with elected judges, sentencing would face greater oversight. Elected judges, as well as appointed judges, faced little political oversight of their sentencing decisions under indeterminate regimes because the ultimate decision rested with the parole board, making it difficult to determine what portion of the sentence was attributable to the judge.<sup>86</sup> And neither the judge nor the parole board faced review of their discretionary judgments.<sup>87</sup> Thus, at both the state and federal level, sentencing decisions would become much more visible and therefore subject to much greater political control. Reformers wanted to mitigate the influence of politics through the use of a buffering agency.

Therefore, for some reformers, the creation of an agency appears to be a critical bargaining term for their vote in favor of sentencing reform. But given the political forces cutting against insulation, one is left to wonder what these pro-agency reformers expected. Were they simply naïve in assuming that a strong, independent agency was feasible in this context? Were they unaware that the tough-on-crime political culture had taken such a strong hold on the process? Or were they willing to take a chance in order to replace the perceived defects of the prior sentencing regime that they believed

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84. Compare Schulhofer, *supra* note 4, at 802 (noting that there are some benefits to low visibility decisionmaking and that putting sentencing decisions into the open could present costs "when the questions mix value-laden elements with empirical assessments that the public is unlikely to appreciate; when public opinion in any event is volatile, unformed, or ill-informed; when the issues are emotionally charged and socially divisive"), with Jacobs, *supra* note 65, at 262–63 (arguing that "[i]deally, the sentencing decisions of legislators, prosecutors, and judges should be visible for public scrutiny").

85. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 325–28 (2002) (describing the relative political insulation of the federal judiciary). *Id.*

86. Moreover, as Bill Stuntz has explained, elected judges do not face the same pressures as their counterparts in the legislative and executive branch. Stuntz, *supra* note 3, at 540–41. For one thing, judicial elections tend not to be as contested. For another, judges often seek to please the professional constituency of lawyers and other judges. As a result, they tend to take into account both sides of an issue to a greater degree than their colleagues in the political branches. *Id.*

87. To the extent reformers also contemplated the abolition of parole, a judge could no longer appear tougher than he or she really was and then rely on parole to take care of it later. See Frase, *supra* note 75, at 30. Even if parole made a comeback in those jurisdictions where it has been abolished, if the same principles of truth-in-sentencing and openness applied, parole board decisions would also be subject to political pressures. See *id.*

were even more troublesome? It is less puzzling to determine what those who opposed the use of an insulated agency might have been thinking when they nevertheless agreed to the creation of a commission. They might have agreed to agencies with traditional hallmarks of independence knowing that those features would do little to impede political control. For them, the creation of an agency might have been functionally equivalent to assigning responsibility to a legislative task force or subcommittee.

In other words, those on the right who wanted more severe and certain punishments might have gotten the better of those on the left who wanted more equality and consistency in punishment while keeping sentencing outside the political fray. The right might have agreed to the formation of an agency on the belief that it would have little power, regardless of whether it had some traditional hallmarks of independence. The left might have hoped that once the agency was created it would stay insulated to some degree from political pressures.<sup>88</sup>

In the end, it is not possible to know with certainty what led a critical mass of reformers to lobby for the use of a sentencing commission and what combination of interests led to its creation. But because a desire for insulation was central in the minds of so many reformers, the next subpart considers that concern in greater detail.

### 3. The Movement for Insulated Commissions

Before describing the actual sentencing commissions legislatures created, it is important to consider why so many legislators and reformers were concerned with shielding sentencing decisions from political pressure and vesting them with what they believed to be relatively insulated expert agencies. After all, as noted above, sentencing decisions differ from other regulatory decisions made by agencies in that they do not require technical or scientific or economic expertise. Instead, sentencing decisions strike at core notions of morality and justice. It would seem that, all else being equal, those decisions should rest as closely with the people as possible.<sup>89</sup> That suggests, in turn, that

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88. Pamala L. Griset, in her study of New York's shift from indeterminate to determinate sentencing, notes that "[w]hile the determinate ideal remained abstract, people with diverse world views could read into it their own preferred meanings." PAMALA L. GRISET, DETERMINATE SENTENCING 83 (1991); *see also id.* at 85 (quoting one New York assemblyman who opined that the left "deluded themselves in thinking . . . they would get through and would come out OK" and that the right had an "accurate perception of what would happen").

89. Cf. Mariano-Florentino Cuéllar, Rethinking Public Engagement in the Administrative State 35 (2004) (unpublished manuscript, on file with author) (arguing that many regulatory decisions do not involve particular expertise but rather policy evaluations).



it might be preferable to have relatively more accountable political representatives make these decisions than unelected sentencing commissions. And if it turns out that the political process leads to tougher sentencing laws, so be it.

The main reason reformers wanted insulation was because they were concerned about the capacity of the political process rationally to address issues of crime and sentencing. By the time Marvin Frankel argued for the development of a sentencing commission in 1973,<sup>90</sup> crime was a key political issue. This process began in the 1960s in response to the sharp increases in the violent crime rate,<sup>91</sup> and a public in search of order in a period of social unrest.<sup>92</sup> Politicians started using crime as a wedge issue, and they became increasingly concerned that they would be perceived as “soft on crime.”<sup>93</sup> Although the strong link between crime and political campaigns emerged in a period of rising crime rates, it has continued even when reported crime rates have declined or leveled.<sup>94</sup>

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90. Frankel is widely recognized as “the father of the Sentencing Commission concept.” Kennedy, *supra* note 2, at 370 n.72.

91. The violent crime rate rose from 161 per 100,000 Americans in 1960 to 191 per 100,000 Americans in 1964. See Gest, *supra* note 29, at 759.

92. See DAVID GARLAND, *THE CULTURE OF CONTROL* 1–26 (2001); see also BECKETT, *supra* note 28, at 30–33 (noting the link between civil rights protests and politicians’ calls for crime control); Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40 (1997) (noting that crime became a significant national political issue in the 1960s, “coincid[ing] with the Republican Party’s aggressive pursuit of Southern voters, characterized by its opposition to civil rights legislation and emphasis on crime control”). This was not, of course, the first moment in history when politicians highlighted crime as an important social issue. See, e.g., *id.* at 29–30 (describing criminal justice initiatives in the early twentieth century). But criminal justice issues were largely dormant during the 1950s before reemerging in the 1960s. See *id.* at 30.

93. Barry Goldwater unsuccessfully attempted to use crime as a national wedge in 1964, but subsequent candidates recognized the potential for this approach. See WINDLESHAM, *supra* note 17, at 24–25; Beale, *supra* note 92, at 40–41; Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 119–20 (James R. Acker et al. eds., 1998). Although Presidents Ford and Carter did not highlight crime in their administrations, it took center stage again with President Reagan and his war on drugs. See BECKETT, *supra* note 28, at 44–55. When George Bush used the infamous Willie Horton campaign advertisement to portray Michael Dukakis as soft on crime for allowing prison furloughs, it became clear that politicians could not expect to win if they were seen as soft on crime. See Berman, *supra* note 79, at 107 (“Over the past twenty-five years, politicians who can lay claim to being the toughest on crime have been regularly rewarded with electoral success.”). Thus, in the 1992 election Bill Clinton quickly distinguished himself from Dukakis by touting his support of the death penalty as governor of Arkansas. See Beale, *supra* note 92, at 42. In his first three campaign ads before the 1996 election, Clinton again focused on crime and his support for the expansion of the death penalty. See Bright, *supra*, at 121. The politicization of crime also increased at the congressional level, see Beale, *supra* note 92, at 42; Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 538–42 (1996), and the local level, see STUART SCHEINGOLD, *THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY* 191 (1984) (citing studies).

94. See BECKETT, *supra* note 28, at 16–23; SCHEINGOLD, *supra* note 93, at 276 (politicization continued apace even as crime rates plateaued in mid-1970s); Alschuler, *supra* note 83, at 929–30 & n.100 (noting increase in incarceration rate during 1980s despite decrease in crime rates for most offenses).

This political climate has produced a spate of ever-harsher sentencing laws. By 1999, "every state and the federal government [had] some type of mandatory sentencing law."<sup>95</sup> And the overall percentage of the population in prison has dramatically increased. From 1980 to 1999 the number of people incarcerated or on parole increased 300 percent.<sup>96</sup> The United States now has more than two million people in prison or jail and an incarceration rate that is the highest in the western world.<sup>97</sup>

Because of the interest group dynamics discussed in Part I, these heavier penalties are resistant to change whereas lighter penalties are vulnerable. As Philip Pettit puts it:

[I]n any period of reduced sentencing, there is bound to be a crime committed sooner or later that would not have been possible had the sentencing remained at earlier levels. And that very fact will prompt the exposure of the crime in the media, the emergence of popular outrage, and the political reaction of calling for a return to earlier, tougher policies. The outrage dynamic is bound to be there, ready to reverse any leniency.<sup>98</sup>

The trend of the past few decades toward harsher sentences does not necessarily reflect majoritarian preferences or rational sentencing policy.<sup>99</sup> To be sure, there are many instances where the harsher penalties *do* reflect considered majority views. Increasing penalties for white collar offenses, drunk driving, domestic violence, sexual assault, civil rights abuses, terrorism, and a variety of other areas might be the most sensible policy call. But to say that there are some crimes for which it may make sense to increase the penalties is not to say that it makes sense to increase the penalties for all crimes or that the level of increase would enjoy broad support among the public if they had full information and time to reflect on the decision.

In particular, there is substantial evidence that casts doubt on whether voters in recent decades are fully informed about criminal justice issues. Cognitive psychology teaches that when voters think of crime and sentencing,

95. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999).

96. See WILLIAM J. CHAMBLISS, *POWER, POLITICS, & CRIME* 5 (1999).

97. See Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 ("There are now 2.1 million Americans in jail or prison."). For data on incarceration rates, see ROY WALMSLEY, *WORLD PRISON POPULATION LIST* (3d ed. 2002), available at <http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf>.

98. Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 437 (2002).

99. See Stuntz, *supra* note 3, at 549, 595; see also Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 81-82 (1988) (noting that criminal procedure is part of a political system and therefore "lacks the disciplinary mechanisms of a well-functioning market").

they tend to think of examples of crimes that are most salient.<sup>100</sup> Because most voters have no direct experience with crime, their impressions are formed largely from the media.<sup>101</sup> Thus, the most heinous crimes that grab headlines tend to come to mind when voters think about which sentences are appropriate, especially if they do not have information about crime from other sources.<sup>102</sup>

The problem is that the media has failed to portray accurately crime and sentencing practices in America. For example, the news media tends to focus its coverage on violent crimes,<sup>103</sup> even though the vast majority of crimes are nonviolent.<sup>104</sup> Moreover, because law enforcement is the media's main source of information on crime, government officials can prompt the media to focus on those areas it wants to highlight.<sup>105</sup> When the Reagan administration launched the war on drugs, for instance, it engaged in a concerted effort to get the media to devote more of its coverage to the drug problem.<sup>106</sup>

As a result, the media's coverage does not necessarily correlate with the actual rate of crime. The Center for Media and Public Affairs conducted a study of television crime coverage in the 1990s and found that the number of crime stories rose 300 percent from 1992 to 1995.<sup>107</sup> Murder stories increased

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100. See generally Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84 (Daniel Kahneman et al. eds., 1982).

101. It is estimated that more than 90 percent of Americans use the media as their primary source of information about crime. See BECKETT, *supra* note 28, at 62; see also Franklin D. Gilliam, Jr. et al., *Crime in Black and White*, in DO THE MEDIA GOVERN?: POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 287, 288 (Shante Iyengar & Richard Reeves eds., 1997) (stating that most Americans get their information about crime through vicarious accounts, and in particular, local television news); Willard M. Oliver, *The Power to Persuade: Presidential Influence Over Congress on Crime Control Policy*, 28 CRIM. JUST. REV. 113, 120 (2003) (noting research finding that 95 percent of study respondents "stated that their primary source for information on crime was the media"). For an excellent discussion of the relationship between the media's portrayal of crime and voters' perceptions, see Beale, *supra* note 92, at 45-64.

102. This may help to explain why rural voters, who have the least direct experience with crime, are the most punitive.

103. See Gregg Barak, *Between the Waves: Mass-Mediated Themes of Crime and Justice*, in POLITICS, CRIME CONTROL AND CULTURE 135-36 (Stuart A. Scheingold ed., 1997); Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 FLA. J.L. & PUB. POL'Y 37, 38 (1997); Gilliam et al., *supra* note 101, at 289-90; Mauer, *supra* note 95, at 15.

104. According to one study, more than half of those incarcerated are serving time for offenses that, "according to public opinion surveys, the general public thinks are 'not very serious crimes.'" CHAMBLISS, *supra* note 96, at 6 (citing JAMES AUSTIN & JOHN IRWIN, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *WHO GOES TO PRISON?* (1987)).

105. See BECKETT, *supra* note 28, at 75-77 (explaining how media reliance on state sources influences the depiction of criminal justice issues).

106. See *id.* at 56-58.

107. *Network News in the Nineties: The Top Topics and Trends of the Decade*, MEDIA MONITOR (Ctr. for Media & Pub. Affairs), July/Aug. 1997, at 2.

by 336 percent from 1990 to 1995.<sup>108</sup> Yet, the murder rate during that time declined by almost 13 percent.<sup>109</sup>

Media coverage of sentences is also misleading, as the media tends to report only those sentences that are in some way unusual. Because it is easier for a journalist to present an emotionally powerful story involving a lenient sentence than it is for the journalist to present a general assessment of incarceration costs or the relationship between longer sentences and the crime rate, particularly lenient sentences are often highlighted.<sup>110</sup> Thus, the public gets a false impression that sentences are lower than they actually are.<sup>111</sup>

Because of the availability heuristic, voters thus tend to focus on violent crimes and lenient sentences because that has been the media's focus.<sup>112</sup> This is not to say that this dynamic is necessarily a permanent one. The past three decades are historically unique in terms of the dramatic increase in incarceration. It is possible that something could ultimately break this cycle. But at least for the foreseeable future, it is reasonable to assume that this dynamic will persist, and that voters will continue to lack full information when they consider criminal justice policy.

The lack of information is significant because when members of the electorate have more information about sentencing decisions and practices, they do not exhibit the zeal for harsher sentences seen in the political arena. "The more exposure people have to nonsensationalistic accounts of real criminal incidents (from court documents rather than media accounts), the

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108. *Id.* at 3.

109. See Mauer, *supra* note 95, at 15. It should be noted that crime statistics themselves may not accurately reflect the prevalence of crime. This is because they are supplied by agencies that have a great deal to gain from inflated crime statistics. The FBI publishes the *Uniform Crime Reports*, an annual summary of crime in the United States compiled from data supplied by local police departments. As William Chambliss recently noted, the FBI tends to present the data "to make the problem of crime seem as threatening as possible." CHAMBLISS, *supra* note 96, at 35. For example, the FBI uses the "crime clock" to show the number of crimes that occur each minute (for example, in 1998, the clock showed a murder every twenty-seven minutes, a forcible rape every six minutes, etc.). See *id.* at 35–36. Even if crime rates stay the same, this number will look more menacing each year as the population grows. The FBI has also singled out for comparison those years that tend to exaggerate the increase in crime—selecting an earlier year in which a particular crime is relatively low, rather than later year in which that crime is relatively high—even though surrounding years do not show the same disparity. See *id.* at 45–46.

110. See Hopenhayn & Lohmann, *supra* note 12, at 210 (noting that media reports can be a source of bias because they tend to focus on simple stories rather than complex information).

111. See Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 101, 122 (1992).

112. See Beale, *supra* note 92, at 57–60 (citing psychological research); Roberts, *supra* note 111, at 112, 137 (summarizing research and noting that "the public are likely to overestimate the frequency of lenient sentences because they are highly available"). Apart from the news, the entertainment industry also paints an unrepresentative image of crime and punishment. See SCHEINGOLD, *supra* note 93, at 62–64.

less punitive they become.”<sup>113</sup> For example, studies comparing the sentences laypersons would impose in particular cases with those actually imposed by judges have found that layperson sentences are less severe, or no more severe, than those imposed by judges.<sup>114</sup> A study of Ohio residents found that, although a majority of those responding supported a three-strikes law, only a small minority believed the life sentence required by the law was appropriate when faced with specific situations.<sup>115</sup> Moreover, even with their existing cognitive biases, the public is more responsive to sentencing reform than politicians seem to presume. Studies have found public support for rehabilitation, sentencing reform, and alternatives to imprisonment.<sup>116</sup>

Politicians, however, do not seem interested in educating the public about sentencing policy and its relationship to crime rates. While political activity on criminal justice policy is not unmoored from reported crime rates,<sup>117</sup> it is also true that politicians respond to the *perception* of rising crime rates created by the media and sensational cases. One reason is the interest group politics discussed above. Another is that politicians are in office for a limited time and therefore do not reap the rewards of policies that require a long time horizon. They must appear to be taking direct action against a perceived crime problem—and harsh sentencing creates the appearance of an immediate response.<sup>118</sup> Long-term social policies or prison education programs do not create that same kind of impression. And, of course, it is much easier to propose dealing with crime through the “simple” solution of harsh sentences than it is to discuss strategies for getting to the root cause of crimes,<sup>119</sup> or to explain the more nuanced issue of

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113. BECKETT, *supra* note 28, at 108.

114. See Roberts, *supra* note 111, at 150, 152 (citing studies).

115. See Brandon K. Applegate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517, 528–30 (1996).

116. See Roberts, *supra* note 111, at 158.

117. Oliver, *supra* note 101, at 127–28 (describing research indicating that, as crime rates rise, Congress responds by holding hearings).

118. Politicians often resort to a “passing parade of abstract symbols.” MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 5 (1964); see also Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 68 (1997) (observing that voters want “immediate responses to their problems, especially crime” and that causes politicians to avoid “stress[ing] the complexity of the problem”). As Dan Shavero has noted, voters accept these symbolic political gestures “because they feel powerless, lack information, cannot accurately assess the effects of a politician or a policy, and are seduced by the emotional content of verbal abstractions.” Daniel Shavero, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 48 (1990).

119. See WINDLESHAM, *supra* note 17, at 77 (quoting President Clinton's Deputy Attorney General, Philip Heyman, who stated that the political climate rewards “toughness more than smartness” because “it takes a little while to explain why one thing's smart and the other thing isn't. It doesn't take any time at all to explain why one thing's tougher than the next.”); Alschuler, *supra* note 83, at

proportionality in sentencing and the need to lower sentences for some offenders.<sup>120</sup> As David Garland has explained, the “get-tough” rhetoric of modern times is a way for politicians to create the illusion of control over social unrest,<sup>121</sup> and it is easily reduced to a sound bite.

In addition, politicians themselves might suffer from a skewed perspective because they must determine criminal justice policies in the aggregate and from an *ex ante* perspective. They therefore “have no context for assessing and passing judgments on the actual persons who will come to violate various criminal prohibitions; they can really only consider criminal offenders as abstract and nefarious characters.”<sup>122</sup>

As a result, politicians have tended to exacerbate the media’s portrayal of criminal justice issues, which, in turn, misleads voters as to actual crime and sentencing rates. Katherine Beckett found support for this kind of cognitive bias in the past few decades. She found that levels of public concern about crime, as measured by opinion polls, “are largely unrelated to the reported incidence of crime and drug use but are strongly associated with the extent to which elites highlight these issues in political discourse.”<sup>123</sup> For example, Beckett found that, “from 1964 to 1974, levels of political initiative on and media coverage of crime were significantly associated with subsequent levels of public concern, but the reported incidence of crime was not.”<sup>124</sup> She similarly found that, “[f]rom 1985 to 1992, political initiative on the drug issue—but not the reported incidence of drug use or abuse—was strongly associated with subsequent public concern about drugs.”<sup>125</sup>

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932 (“[P]oliticians fear endorsing any position that an opponent can characterize as ‘soft on crime’ in a 30-second television commercial.”); Berman, *supra* note 79, at 107 (“Even those legislators who may believe deeper social problems are a root cause of crime are hard-pressed to devise politically viable alternatives to the immediate and seemingly straightforward solution of longer sentences.”). This is not true of all politicians, of course. Some politicians are not up for reelection or come from safe districts where they could more readily seek rational solutions to sentencing policy.

120. See Anthony N. Doob & Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, 39 OSGOODE HALL L.J. 287, 299 (2001).

121. GARLAND, *supra* note 92, at 201–03; see also SCHEINGOLD, *supra* note 93, at 71–77 (discussing the symbolic value politicians obtain by creating the illusion of control over crime); *id.* at 226 (“Punitive responses are liberating because they are so simple. We yearn to believe that seemingly intractable social and personal problems are actually responsive to direct and forceful action.”).

122. Berman, *supra* note 79, at 107; see also Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1298 (1997) (describing the difference between “macro” and “micro” perspectives on sentencing).

123. BECKETT, *supra* note 28, at 15.

124. *Id.* at 23.

125. *Id.*

Thus, there is reason to believe that there are many cases where, because of the interest group dynamics and the lack of public information, sentencing increases are likely to reflect prosecutors' successful lobbying efforts for longer sentences on the books so they can be in a better bargaining position when they negotiate plea deals with defendants. And it is also likely that some increases reflect the mobilization of public fears by entrepreneurial politicians who find it easier to offer longer sentences as a solution to crime and perceived social unrest than to search for sensible, long-term solutions. In those instances, it is not evident that sentencing increases represent rational policy.<sup>126</sup>

For purposes of this Article, it is not necessary to take a position on whether the prevalence of tough-on-crime politics is more likely to represent rational public sentiment than not.<sup>127</sup> Rather, the point of this discussion is more modest. It is merely to show the basis for the reformers' view that the politics of crime could be skewed in one direction and could produce irrational policy in some or many instances.<sup>128</sup> If one believes the politics of crime to be defective

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126. For example, many criminal justice experts—from individual researchers to institutions such as the National Academy of Sciences Panel on the Understanding and Control of Violent Behavior, the Judicial Conference of the United States, and the Federal Judicial Center—have questioned the wisdom of more severe sentencing laws and mandatory minimums. See Beale, *supra* note 92, at 25–29.

127. A concern with voters' rationality and lack of information is not, of course, unique to crime. See generally CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 117–87 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (collection of articles on citizen competence"). See also RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 151 (2003) ("[T]he number and complexity of political issues have grown faster than the public's ability to understand them."). And it is always risky to presume that voters' expressed preferences do not represent what they would "really" want if they just possessed more information. Nevertheless, the imbalanced interest group dynamics of crime and the way information about crime filters through the media suggest that the risk of voter misinformation and manipulation by political entrepreneurs is particularly high in this context. See Benjamin I. Page & Robert Y. Shapiro, *The Rational Public and Beyond*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS, *supra*, at 93, 110 (arguing that even if the public is "rational" by some measures, "collective policy preferences are often distorted, misled, or manipulated away from people's true values and interests"); Norman Frohlich & Joe A. Oppenheimer, *Values, Policies, and Citizen Competence: An Empirical Perspective*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS, *supra*, at 117, 183 (observing that "[f]raming effects may need to take their place alongside aggregation, information, and knowledge problems as a threat to citizen competence").

128. The argument for some degree of insulation from immediate political pressures is hardly novel to the American system. Our constitutional structure is premised on the view that deliberation is valuable and that popular impulses should be tempered by rational reflection. For a model explaining why voters might prefer to delegate decisionmaking to agencies, see David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000). See also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). Perhaps nowhere is this more necessary or valuable than criminal law. It is no accident that the Constitution contains numerous structural devices to ensure rational reflection in this context. These include the prohibition against Bills of Attainder, U.S. CONST. art. I, § 9, cl. 3, and the Ex Post Facto Clause, *id.* § 10, cl. 1. It also includes the jury guarantee. See Barkow, *supra* note 24, at 61–62 (discussing the different perceptions people have as voters and as jurors).

in this way, an agency insulated from this political climate seems to present an attractive option.<sup>129</sup> Sentencing therefore has parallels to other areas where risk regulation by experts is attractive because of a perception of public misinformation.<sup>130</sup> An agency could explore all aspects of a sentencing problem, not just those likely to command the immediate attention of the public.<sup>131</sup>

#### 4. Creating Insulated Commissions

It is one thing to decide that sentencing policy should be set by a commission that is immune from short-term political passions and quite another to make it a reality, particularly given the political dynamics discussed in Part I.<sup>132</sup> As an initial matter, although reformers spoke of creating insulated and independent agencies, it is important to remember that the complete independence or insulation of any agency is not possible because no commission will fall completely outside of political control.<sup>133</sup> The electorate, through their representatives, will continue to have ultimate authority over the commission's decisions.<sup>134</sup>

129. See, e.g., David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 412 (1997) (describing early models of administrative process that "stressed the value of public administrators as guardians of the public interest, technical experts insulated from political influence" and that emerged "out of widespread public distrust of elected politicians during the progressive era"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677-78 (1975) (describing a time when administrators were viewed as apolitical professionals).

130. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-81 (1993); CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW AND THE ENVIRONMENT* (2002); Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 33-64 (1995).

131. See Spence, *supra* note 129, at 445-46 ("When majority opinion runs in favor of 'bad' policy, agency experts ought to be more resistant than politicians to public pressure, not only because of the effects of electoral accountability, but also because bureaucrats' expertise makes them less easily persuaded to the merits of bad policy."). This more expansive consideration of sentencing would include the fiscal and perhaps social costs of more severe sentences. See Schulhofer, *supra* note 4, at 812 n.305 ("At the administrative level, the legislatively authorized penalties are inevitably adjusted according to the resources society has made available; the resource decision thus provides a relatively concrete measure of how serious society is about its preferences for severity.").

132. Those advocating independent sentencing commissions seemed to take for granted that a relatively large degree of political insulation would be possible. See, e.g., Pettit, *supra* note 98, at 444 ("I take it as a given that the penal policy board I envisage is a real institutional possibility.").

133. See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 199 (1982) (noting that it "is not and never has been the case" that independence in the strict sense is possible; rather, "independence" is "used to describe varying degrees of political insulation as well as simply the location of agencies outside the regular executive departments").

134. See Pettit, *supra* note 98, at 448 (drawing a distinction between the argument that "the electorate should be the ultimate arbiter of public policy" from the argument that "the electorate should be the proximate source of public policy").



Indeed, there is an enormous body of literature that identifies the various ways that elected officials exercise control and oversight over agencies.<sup>135</sup> This oversight can take both *ex post* and *ex ante* forms. In the former category, for example, elected officials can control agency policy by punishing the agency when it adopts a policy that the elected officials do not like and by rewarding the agency when it endorses policies with which the elected officials agree. This can be done through budget increases or decreases<sup>136</sup> or, in the case of disfavored agency policies, new legislation overruling the agency. Because elected

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135. For a sampling of this vast literature, see JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?* 32–38 (2002); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755 (1985); Jonathan Bendor et al., *Bureaucratic Expertise Versus Legislative Authority: A Model of Deception and Monitoring in Budgeting*, 79 AM. POL. SCI. REV. 1041 (1985); Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989); Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995); John A. Ferejohn, *The Structure of Agency Decision Processes*, in CONGRESS: STRUCTURE AND POLICY (Mathew D. McCubbins & Terry Sullivan eds., 1987); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG., Special Issue 1990, at 1; Hammond & Knott, *supra* note 32, at 121; Jeffrey S. Hill & James E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J.L. ECON. & ORG. 373 (1991); Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992) [hereinafter Macey, *Organizational Design*]; Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992) [hereinafter Macey, *Separated Powers*]; Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins et al., *Instruments of Control*]; McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG., Special Issue 1990, at 307; Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*]; Moe, *supra* note 43; Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1; Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001); Spence, *supra* note 129; David B. Spence, *Managing Delegation Ex Ante: Using Law To Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999); Craig Volden, *Delegating Power to Bureaucracies: Evidence From the States*, 18 J.L. ECON. & ORG. 187 (2002); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (With Applications to the SEC)*, 44 PUB. CHOICE 147 (1984) [hereinafter Weingast, *Congressional-Bureaucratic System*]; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) [hereinafter Weingast & Moran, *Bureaucratic Discretion or Congressional Control?*].

136. Dan Richman has provided an insightful analysis of how Congress uses the power of the budget to control criminal law enforcement. See Richman, *supra* note 12, at 793–99.

officials always have the power to do this (provided they have the votes<sup>137</sup>), the key to exercising this type of control is keeping tabs on the agency's decisions.

But elected officials need not wait for the agency to act to exercise control over its policies. As Mathew McCubbins, Roger Noll, and Barry Weingast (known collectively as "McNollgast") have pointed out, legislators can also exert *ex ante* influence over subsequent agency decisions through their selection of agency procedures and structures in organic statutes.<sup>138</sup> For instance, Congress can use procedures and the initial design of an agency to "stack the deck" to favor particular interest groups in the agency's decisionmaking process.<sup>139</sup> The burden of proof, for example, can be used to favor one interest over another. Congress can also create cumbersome agency procedures that favor well-organized and well-funded interests.<sup>140</sup> Because procedures must be enforceable to have their desired effect, the legislature can give certain parties an advantage in court.<sup>141</sup> Standing rules, for instance, can be used to give some interests the ability to challenge agency action in court while precluding others from doing the same. And, of course, politicians can rein in agency

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137. This is obviously an important caveat. If an agency is confident that legislation to overrule its decision will not make it through the legislative process, political control of the agency is far more difficult. See Spence, *supra* note 129, at 436 ("[I]t is not uncommon for Congress to be unable to muster a majority in support of an *ex post* legislative response to agency provocation, even when a majority is unhappy with the agency policy.").

138. McCubbins et al., *Instruments of Control*, *supra* note 135, at 243. As Horn and Shepsle point out, these arrangements can also be used "to make it difficult for a subsequent coalition to affect the future flow of benefits and costs." Horn & Shepsle, *supra* note 135, at 504. In other words, these arrangements check not only bureaucratic, but also legislative drift. For a discussion of empirical research testing this theory, see HUBER & SHIPAN, *supra* note 135, at 36–38.

139. See McNollgast, *supra* note 135, at 312; McCubbins et al., *Structure and Process*, *supra* note 135, at 444; Macey, *Organizational Design*, *supra* note 135, at 99–107. As McNollgast point out, "interest groups that are part of today's bargain will advocate structural and procedural safeguards that force the agency to take the interests of today's powerful interests into account tomorrow, even if the agency—or political officials—would prefer not to do so as time unfolds." McNollgast, *supra* note 135, at 312. Jonathan Macey points out that this can be done when the agency is initially established by giving the agency jurisdiction over a single industry group as opposed to multiple groups. Macey, *Organizational Design*, *supra* note 135, at 99–101. Though, as Daniel Richman has pointed out, giving an agency enforcement authority over a single area of criminal justice—such as civil rights or antitrust—might make it easier for the legislature to exercise control over that area of law because it is much more difficult for a legislature to control the broad activities of a U.S. Attorney's Office, particularly if the legislature wants to prevent the prosecution of particular kinds of cases. Richman, *supra* note 12, at 796–98.

140. Jonathan Macey points out that additional procedural requirements might sometimes help relatively more diffuse, less organized groups because they build delay into the system. See Macey, *Separated Powers*, *supra* note 135, at 676.

141. McCubbins et al., *Instruments of Control*, *supra* note 135, at 263; Macey, *Organizational Design*, *supra* note 135, at 102–03.

independence by drafting more detailed legislation, instead of vesting the agency with a broad mandate.<sup>142</sup>

But while a legislature can make certain institutional design decisions that make it easier to control the agency, the converse is also true. Institutional design can also be used to strengthen the independence of an agency. As discussed above, the traditional independent agency is characterized by such features, including membership that is evenly balanced among political parties, serves fixed terms, and can be removed only for good cause. In addition, statutes can be written broadly to give agencies more leeway. Agencies also have more independence when their rules take immediate legal effect without the requirement of additional legislative action. The legislature can also make fire-alarm oversight more difficult, at least for some groups, by closing the agency's proceedings and records to the public.

Reformers would have to use some or all of these features to increase the political insulation of a sentencing commission. The next two subparts explore the different models followed by the federal government and several states. As those subparts demonstrate, designing these agencies to foster greater independence proved to undermine, not enhance, the effectiveness of these agencies.

## B. The Federal Sentencing Commission

The Federal Sentencing Commission provides an illustration of how unworkable and counterproductive the insulated agency model can be when the agency is responsible for sentencing. The supporters of the Sentencing Reform Act claimed that a main goal of the Act was to establish a sentencing commission insulated from political pressure, and its design reflects that in many respects. Yet the U.S. Sentencing Commission is universally recognized to be an ineffectual agency that has done little to change the tough-on-crime politics of sentencing at the federal level.

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142. See, e.g., Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY 337, 360 (George C. Edwards III et al. eds., 1993) (noting that control can be exercised by "specify[ing], in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible to the discretionary judgment of bureaucrats"); Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, LAW & CONTEMP. PROBS., Autumn 1991, at 241, 247 ("Over the past twenty years, it has become apparent to members of Congress who want to influence major policy decisions at EPA that the most effective form of oversight is detailed, prescriptive legislation.").

## 1. Institutional Design

The Sentencing Commission has several institutional characteristics that have been associated with greater independence when used with traditional regulatory agencies. First, like other federal agencies deemed “independent,” the Sentencing Commission members have greater job protection than the members of executive branch agencies. Its members serve a fixed term of years, and they can be removed only for cause. Thus, while the president has some control over the agency through his selection of members,<sup>143</sup> he cannot remove those officials at will if they make decisions with which he does not agree. Second, like other independent agencies, the Sentencing Commission is designed to be relatively bipartisan. Of the Commission’s seven members, no more than four can belong to the same political party.<sup>144</sup> Third, the Sentencing Commission has an additional design feature that makes it even more likely to be insulated from political oversight than other independent agencies: its placement in the constitutional structure. In the federal system, the Sentencing Commission formally resides in the judicial branch.<sup>145</sup>

The most likely reason Congress placed the Sentencing Commission in the judicial branch is to enable judges to serve as members of the Commission. It would raise a significant constitutional question to have judges serving on an executive agency.<sup>146</sup> Yet the proponents of the Federal Sentencing Commission believed that judges’ participation on the commission was necessary.

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143. Congress can also use its control over appointments and reappointments to influence agency policy. See Weingast, *Congressional-Bureaucratic System*, *supra* note 135, at 156; Weingast & Moran, *Bureaucratic Discretion or Congressional Control?*, *supra* note 135, at 769–70; see also Richman, *supra* note 12, at 789–93 (discussing the relationship between confirmation hearings and criminal justice enforcement policies); Calvert et al., *supra* note 135 (describing how the appointment process allows political officials to exert control over agencies).

144. 28 U.S.C. § 991(a) (2000).

145. Although Congress formally designated the Commission a “judicial agency,” it is important to note that it does not decide cases or controversies or otherwise act in a traditional judicial capacity. Thus, it is subject to debate how “judicial” it really is. Nevertheless, the designation is important for the above discussion because this formality allows judges to serve on the Commission and also exempts it from Office of Management and Budget oversight.

146. To be sure, there is something formalistic to the argument that permits judges to serve on a commission that performs precisely the same function, albeit in the judicial branch. But because separation of powers questions often turn on such formalities, this may be a distinction with a difference. Moreover, there is evidence that sentencing reformers were concerned with such questions of separation of powers. See, e.g., PIERCE O'DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* 74 (1977) (noting a preference for a commission with members appointed by all three branches, but conceding such a proposal would raise constitutional questions).

Some wanted judges because they were the prior “regulators” of sentencing.<sup>147</sup> No one else would have comparable expertise. Moreover, having judges on the Commission would help legitimize the Commission’s work. Trial judges who previously had wide discretion to make sentencing decisions would be skeptical of having that power stripped away by a collection of “outside” experts. Having some of their own on the commission could make the substantive decisions a little easier for them to bear<sup>148</sup> and could at least create the appearance that the Commission’s work was the product of something other than politics.<sup>149</sup>

In addition, some reformers favored judges on the Commission because judges would not have the same political pressures as a commission composed of presidential appointees.<sup>150</sup> Indeed, the House of Representatives initially proposed creating a special committee comprised of judges for that reason. As one representative put it, “a presidentially-appointed panel can too easily be dominated by political interests” and might succumb to pressures to “appear[ ] tough on crime.”<sup>151</sup>

Characterizing the Commission as a judicial branch agency could provide greater insulation from political pressure even apart from the fact that it would enable the relatively more insulated judges to serve. Agencies placed in the executive branch fall under the authority of the president (or governor, at the state level). In fact, many scholars justify the legitimacy of federal administrative agencies on the ground that they fall under the authority of

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147. See Kristin L. Timm, Note, “*The Judge Would Then be the Legislator*”: Dismantling Separation of Powers in the Name of Sentencing Reform—*Mistretta v. United States*, 109 S. Ct. 647 (1989), 65 WASH. L. REV. 249, 267 (1990) (noting that the legislative history of the Sentencing Reform Act indicates that Congress believed that sentencing should remain primarily a judicial function); Federal Sentencing Reform Senate Report, *supra* note 61, at 3342 (“Placement of the Commission in the judicial branch is based upon the Committee’s strong feeling that, even under this legislation, sentencing should remain primarily a judicial function.”). Thus, although legislators were dissatisfied with the performance of judges under the indeterminate regime, legislators still wanted judges to play a role in the process of developing guidelines because of their experience.

148. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 255 (1993) (noting that one judge testifying on behalf of the Judicial Conference cautioned the House “that judges might well be reluctant to yield to a commission that was not affiliated closely with the judiciary”).

149. See Timm, *supra* note 147, at 264 (“By mandating judicial service on the Sentencing Commission, Congress imposed the image of judicial impartiality on the political work of the Commission.”).

150. See, e.g., Stith & Koh, *supra* note 148, at 236.

151. Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 231 (1984). The Senate rejected this proposal because they viewed judges as the source of the disparity problem they were trying to solve. See Stith & Koh, *supra* note 148, at 279 (quoting Senator Paul Laxalt).

the president who is, in turn, responsive to the people.<sup>152</sup> Placing sentencing commissions outside the direct authority of the executive thereby removes an additional layer of political pressure.<sup>153</sup> When federal agencies are placed in the executive branch, they are subject to Office of Management and Budget (OMB) review, including cost-benefit analysis.<sup>154</sup> This typically allows the president to exercise greater control over the agency. Even independent agencies that are formally outside the executive branch submit their regulatory plans to OMB. The Sentencing Commission does not face this scrutiny.<sup>155</sup> Thus, the Sentencing Commission can—at least as a matter of design—be seen as even more “independent” than other independent agencies.

It is important to note, however, that the U.S. Sentencing Commission has two design features that are not typical for other independent agencies and that could facilitate political control and oversight. First, Congress provided that the Sentencing Commission’s rules would not apply immediately, but would go into effect after 180 days. This delay gives the legislature greater control than it has in the typical agency scenario

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152. See, e.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 152 (1997); see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23 (1995); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 *N.Y.U. L. REV.* 1239 (1989). For a critique of the use of this fact to justify the legitimacy of administrative agencies, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461, 492–515 (2003).

153. To be sure, the creation of independent agencies can increase political pressure by Congress and special interests. But because, as noted, the president and legislature likely have the same incentives when it comes to sentencing, it seems less likely that judicial branch placement was motivated by a desire to increase congressional control, relative to the executive, of the agency. See William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 *J.L. ECON. & ORG.* 165, 176 (1992) (“Congress can also structure the agency to reduce the president’s power to affect agency preferences; an agency located outside of the executive department (namely, an independent administrative agency) is headed by officials who cannot be removed by the president and who may be more responsive to congressional monitoring.”).

154. See Exec. Order No. 12,291, 3 *C.F.R.* 127–34 (2004); Exec. Order No. 12,866, 3 *C.F.R.* 638–49 (2004); Exec. Order No. 13,258, 3 *C.F.R.* 204–05 (2004). This would be no small undertaking, of course. As Ronald Wright has pointed out, the indirect costs of incarceration are difficult to measure, as are the benefits of deterrence and incapacitation. Wright, *supra* note 4, at 83. And a utilitarian calculus may be inappropriate if punishment is designed to serve different goals, such as retribution. *Id.* For an argument that cost-benefit analysis would be a valuable tool in analyzing criminal law enforcement, see Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 *CAL. L. REV.* 325 (2004). For a discussion of how the president can exercise ex post control over an agency through the budget, see Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 *AM. POL. SCI. REV.* 1094, 1101 (1985).

155. The liberating effect of this exemption, however, is tempered somewhat by the fact that various executive departments review the Commission’s Guidelines on an annual basis under the SRA, 28 *U.S.C.* § 994(o) (2000), and the Commission submits an annual report of its activities to the president, *id.* § 997.

because interest groups have more time to alert and mobilize Congress if they disapprove of a proposed regulation.<sup>156</sup> Second, the Commission is not subject to the arbitrary and capricious review provisions of the Administrative Procedure Act.<sup>157</sup> Without the threat of judicial review of the reasoning behind the agency's regulatory decisions,<sup>158</sup> the Sentencing Commission need not, and does not, build up a factual record that is very detailed, nor does it need to explain how its decision comports with settled law.<sup>159</sup> As Steven Croley has explained, this type of process allows for greater congressional control because it could enable Congress to influence the agency to take

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156. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 44 (2000) (pointing out that a requirement that an agency "seek congressional approval before their decisions become final" would allow for greater congressional control).

157. *United States v. Wimbush*, 103 F.3d 968, 969–70 (11th Cir. 1997); *Wash. Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); see also Wright, *supra* note 4, at 41 (noting that the statutory language of the SRA indicates that, other than the notice-and-comment provisions of § 553, the rest of the APA does not apply to the Commission). The Sentencing Commission does have to follow notice and comment procedures and consult various parties in the criminal justice system in promulgating guidelines. 28 U.S.C. § 994(x). The Act further provides that "the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Id.* § 994(o). The U.S. Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Department of Justice Criminal Division, and a representative from the Federal Public Defenders are to submit annual reports on the Guidelines operation to the Commission. *Id.* In addition, although the Sentencing Reform Act does require the Commission to provide to Congress a "statement of the reasons" for its amendments to the Guidelines, *id.* § 994(p), the Commission often gives cursory explanations or fails to offer any explanation of specific policy decisions, see Luby, *supra* note 4, at 1202 ("The Commission . . . rarely justifies its guidelines, consistently avoids on-the-record decisionmaking, and operates unencumbered by the procedural safeguards that ensure the political legitimacy of other administrative agencies."); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1270 (1997) ("[T]he Sentencing Commission almost never explains the reason behind a particular Guidelines rule."); *id.* at 1271 (describing the Guidelines as a "compilation of administrative *diktats*").

158. Statutory challenges to the Sentencing Commission have been remarkably unsuccessful. Joseph Luby's empirical study of statutory challenges from 1988 through 1997 found that only 13.5 percent of the challenges to the Commission's statutory authority were successful. Luby, *supra* note 4, at 1240–41. Many cases involved the same successful argument in different courts, so if those cases are removed, the failure rate rises to 91.6 percent. *Id.* at 1242. It should be noted that courts have held that the Commission is entitled to *Chevron* deference. See Stith & Koh, *supra* note 148, at 248 n.151 (citing cases). This contrasts with courts' decisions "not to extend *Chevron* deference to prosecutorial agencies, such as the Department of Justice, in part because of their incentives to interpret criminal statutes expansively." Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1517–18 (2000).

159. Indeed, the Commission does not maintain a formal docket for its rulemaking proceedings. See Samuel J. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?*, 4 FED. SENTENCING REP. 137, 139 (1991).

political factors into consideration or otherwise change policies, and the agency does not need to worry that it will be found arbitrary.<sup>160</sup>

Although these two features might make the U.S. Sentencing Commission distinguishable from—and more political than—other independent agencies, for purposes of this Article, the significant point is how other sentencing commissions compare to the Federal Commission on these measures. And, in fact, other commissions either have the same design features or are under even greater control. No other existing commission has the power to enact rules that take effect immediately, and, in fact, many commissions must obtain affirmative legislative approval for their guidelines to take effect.<sup>161</sup> Similarly, other sentencing commissions are also exempted from arbitrary and capricious judicial review.<sup>162</sup> Thus, if anything, the Federal Commission is designed to be more independent than the other commissions in existence.

The composition of the Commission is another noteworthy feature. As discussed, the inclusion of federal judges might suggest greater independence because they enjoy life tenure. But there are additional membership features of the Commission that make it relatively slanted toward prosecutorial interests.

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160. Croley, *supra* note 156, at 44, 51. Moreover, making the process more open and subject to judicial review could potentially allow relatively less organized and less informed groups an opportunity to participate in the rulemaking and then to challenge the Sentencing Commission's decision on appeal if it is irrational. Croley points out that, because groups have different resources and political clout, a more open administrative process works to the relative advantage of those with fewer resources. *Id.* at 35–36. While both Congress and well-funded and politically powerful interest groups could keep abreast of the agency's actions even in the absence of an open proceeding, and thereby seek to influence the decision, less powerful groups may not be able to participate at all in the absence of an open proceeding. *Id.* at 34. This is especially true in the case of the Sentencing Commission, where the Attorney General (or his or her designate) is an ex officio member of the Commission, so federal law enforcement interests have no need for an open process to keep a check on the agency.

161. See, e.g., *infra* notes 251, 275, 320, 326, 343 and accompanying text.

162. See, e.g., *infra* note 206 and accompanying text. One reason for the lack of judicial review of the agency's regulations in the case of sentencing policy might be the fact that the judiciary itself is the subject of a sentencing commission's regulation. When the area being regulated is something other than judicial power, the judiciary itself can be part of the reviewing process and can thereby ensure that the agency sticks to the original legislative deal. Allowing the judiciary strong review powers over sentencing decisions, however, could undermine the substantive policies of the agency, because the judiciary could use that review power to override policies with which it disagrees. It is, therefore, perhaps understandable that legislatures did not create strong judicial review mechanisms over the agency's substantive policies in this context. But regardless of the reason, the consequence is that subsequent legislatures can more easily politicize the agency's decisions even if the legislature that created the sentencing commission wanted to precommit to staying out of the process. If the courts cannot ensure that the agency sticks to the original political deal, the agency can shift its policies on the basis of nothing more than politics. Faced with political pressure, then, that is just what the agency will do. Obviously, this gives the legislature greater power to control and change agency policy based on political winds.



The initial proposal for the Commission would have made it a model of depoliticized expertise. When Marvin Frankel first proposed the idea of a sentencing commission, he suggested that only “people of stature, competence, devotion, and eloquence” serve.<sup>163</sup> In particular, he suggested “lawyers, judges, penologists . . . criminologists, sociologists,” “psychologists, business people, artists, and . . . former or present prison inmates” as ideal commissioners.<sup>164</sup> Under his vision, there would be a “highly prestigious commission or none at all.”<sup>165</sup>

In reality, the Sentencing Commission did not consist of individuals representing a wide array of perspectives and areas of expertise. Instead, the seven-member commission created was heavily tilted toward law enforcement because of the selection mechanisms imposed. The Sentencing Reform Act required that the president first consult with “representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process” before deciding whom to nominate for a seat on the Commission.<sup>166</sup> Many of Frankel’s “experts”—penologists, criminologists, sociologists, and psychologists—were omitted from the named list, as were the groups forming a cross-section of society (the artists, business people, and former and present inmates). The two groups of laypeople named—senior citizens and crime victims—were ones who are the most susceptible to tough-on-crime rhetoric and the politics of fear. Congress, then, did not create an especially balanced consultation process. Nevertheless, defense interests played some role at the initial consultation stage.

The deck was stacked further toward prosecution interests at the selection stage. Under the original Sentencing Reform Act, the president was to select at least three active federal judges from a list of six judges submitted by the Judicial Conference.<sup>167</sup> But the president faced no restraints in his selection of the remaining members except that “[n]ot more than four of the members of the Commission shall be members of the same political party”<sup>168</sup> and all members of the commission (including the judges) were subject to U.S. Senate confirmation.<sup>169</sup> The president has an interest in appointing members favorable to prosecutors, and it is easy to find both Democrats and Republicans to fit that bill. The Senate, for its part, has an interest in approving those nominees and

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163. FRANKEL, *supra* note 83, at 119–20.

164. *Id.* at 120.

165. Marvin Frankel, *Lawlessness in Sentencing*, in *PRINCIPLED SENTENCING*, *supra* note 79, at 226.

166. 28 U.S.C. § 991(a) (2000).

167. *Id.*

168. *Id.*

169. *Id.*

not looking soft on crime. Thus, it is quick work for the president to create a majority in favor of prosecution interests. Moreover, because the legislation also provided that the Chairman of the U.S. Parole Commission and the Attorney General (or his or her designee) would serve as *ex officio*, nonvoting members of the Commission, law enforcement was guaranteed at least some voice in the process. There was no guarantee that other interests would be represented.<sup>170</sup>

And they have not been.<sup>171</sup> Of the twenty-three people who have served as commissioners, thirteen were former prosecutors<sup>172</sup>—and that does not include the *ex officio* members appointed by the Attorney General. Moreover, for much of the Commission's existence, there have been enough former prosecutors on the Commission to form a majority, or close to it, at any one time.<sup>173</sup> And aside from the initial members, the president has rarely appointed

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170. See Berman, *supra* note 79, at 109 (describing Commission deliberations as “prosecutorial[ly] orient[ed]” in part because the Attorney General designee is an *ex officio* member, while the defense bar lacks such representation).

171. See *id.* (characterizing the appointments to the Commission as “reflect[ing] the ‘tough on crime’ philosophy that appointing Presidents and confirming Congresses have eagerly championed”).

172. They are: Stephen G. Breyer (Assistant Special Prosecutor, Watergate Special Prosecution Force); Wayne Anthony Budd (U.S. Attorney, Massachusetts; Associate Attorney General); Judge Julie E. Carnes (Assistant U.S. Attorney, Georgia); Judge Ruben Castillo (Assistant U.S. Attorney, Illinois); Judge Richard P. Conaboy (Deputy State Attorney General); Michael Goldsmith (Assistant U.S. Attorney, Pennsylvania); Michael E. Horowitz (Assistant U.S. Attorney, New York); Judge Sterling R. Johnson, Jr. (Assistant U.S. Attorney, New York; Special Narcotics Prosecutor, New York); Judge Joe Kendall (Assistant District Attorney, Texas); Judge A. David Mazzone (Assistant District Attorney, Cambridge, Massachusetts; Assistant U.S. Attorney, Massachusetts); Judge George E. MacKinnon (U.S. Attorney, Minnesota); Michael E. O'Neill (Special Assistant U.S. Attorney, Washington, D.C.); Judge William W. Wilkins, Jr. (Solicitor, 13th Judicial Circuit, South Carolina). Judge Kendall and Judge Johnson were also police officers, Kendall for six years and Johnson for eleven.

173. The initial group of seven commissioners was arguably the most diverse in Commission history. In addition to three members with prosecutorial experience, it also included three academics and an individual who served as both a member of the U.S. Parole Commission and as a prison warden. When three of those members were replaced in 1990, four of the seven commissioners serving were former prosecutors. Two of the replacements were former prosecutors (Judge Mazzone was a prosecutor for five years, and Judge Carnes was an Assistant U.S. Attorney in Georgia for twelve years) and one (Michael Gelacek) worked for the U.S. Senate. The next time new members were added to the Commission, in 1994, there was again a majority of former prosecutors serving on the Commission. Of the four additions in 1994, one (Judge Deanell Tacha) was a U.S. Court of Appeals judge who previously served as a director of a legal clinic and on the faculty at a law school and the rest (Judge Richard Conaboy, Michael Goldsmith, and Wayne Anthony Budd) were all former prosecutors. The Commission did not have seven active commissioners again until 1999. Of the seven new commissioners in 1999, four (Michael O'Neill, Judge Castillo, Judge Kendall, and Judge Johnson) were former prosecutors. As of November 2004, four of the seven voting members on the Commission have prosecutorial experience.

individuals from academia with expertise in criminology, penology, economics, or sociology. Few commissioners have had experience as defense lawyers.<sup>174</sup>

Although this composition may make the commission look more politicized (toward prosecutorial interests) than other agencies, other sentencing commissions have allowed more direct political influence by including legislative membership. Thus, because the relevant comparison is other sentencing commissions, the Federal Commission, on the surface, would appear to be a model of less politicization and more independence than the other sentencing commissions.

## 2. The Role of Politics

When the Supreme Court upheld the Sentencing Commission against separation of powers challenges in *Mistretta v. United States*,<sup>175</sup> it characterized the agency as an “expert body”<sup>176</sup> engaged in an “essentially neutral endeavor.”<sup>177</sup> The image of the Sentencing Commission as an independent agency, divorced from politics, was a strong one.

In fact, however, despite this description and the institutional characteristics described above, the Sentencing Commission was a highly politicized agency from the outset. Then-Judge Stephen Breyer, one of the initial members of the Commission, wrote that the Commission reached certain compromises in its initial set of guidelines because “the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a ‘political’ body.”<sup>178</sup> Michael Tonry has put it more starkly: “The U.S. commission . . . made no effort to insulate its policies from law-and-order politics and short-term emotions.”<sup>179</sup>

This sensitivity to political pressures seems to explain many of the Sentencing Commission’s more controversial decisions. For example, political pressure might explain the Commission’s decision to key its drug sentences

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174. Although the Commission has had thirteen federal judges serve as commissioners, nine of them formerly worked as prosecutors. Recent amendments to the Sentencing Reform Act likely will only exacerbate the tilt in favor of political power and law enforcement interests. Congress recently amended § 901 to restrict the president to appointing *no more than* three judges, so the Commission is even more readily politicized.

175. 488 U.S. 361 (1989).

176. *Id.* at 412.

177. *Id.* at 407.

178. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8 (1988); see also Zimring, *supra* note 29, at 256 (“[T]he new sentencing commission quickly acquired a reputation for blowing in the political winds.”).

179. MICHAEL TONRY, SENTENCING MATTERS 63 (1996).

to Congress' mandatory minimum sentences in the Anti-Drug Abuse Act.<sup>180</sup> Political pressures may also be responsible for the Commission's decision not to place too much reliance on the congressional directive to minimize the likelihood that the guidelines would result in a level of incarceration that would exceed the federal prison capacity.<sup>181</sup> In their comprehensive evaluation of the legislative history of the Sentencing Reform Act, Kate Stith and Steve Koh point out that "[t]his provision was dear to liberal reformers who sought to reduce society's reliance on imprisonment as the archetypal criminal punishment."<sup>182</sup> The Commission, however, did not make much of this provision and developed guidelines with no concern for their effect on prison population.<sup>183</sup> One can surmise that the Commission concluded that Congress was not very concerned with prison capacity or these stark numbers.

It is also likely that the Commission had Congress' preferences in mind when it proposed its substantive amendments to the guidelines. Of the hundreds of sentencing amendments proposed by the Commission, all but a

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180. The 1986 Anti-Drug Abuse Act mandated penalties substantially higher than the past judicial practice. See William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 319 (1993). As Michael Tonry has explained, the Commission could have set its guidelines at the levels it believed were appropriate without regard to the mandatory minimums Congress enacted. Those mandatorys would simply trump the guidelines when invoked. Michael H. Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENTENCING REP. 355, 358 (1992). Instead, however, the Commission decided to set its guideline sentences for drug sentences with the 1986 Act, as opposed to prior judicial practice, as its baseline. See Wilkins et al., *supra*, at 319–20. According to Michael Tonry, "[t]he commission apparently decided that the U.S. Department of Justice and the most law-and-order members of the U.S. Congress were its primary constituency, and it established and attempted to enforce policies that pleased that constituency." Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUST. 137, 179 (1993) [hereinafter Tonry, *Sentencing Commissions*].

181. 28 U.S.C. § 994(g) (2000) provides:

The Commission, in promulgating guidelines . . . shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

*Id.* In the case of imprisonment, the Commission is charged with formulating guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." *Id.*

182. Stith & Koh, *supra* note 148, at 242.

183. See Berman, *supra* note 79, at 109 ("The Commission has never allowed considerations of existing prison capacities to limit decisions to lengthen sentences, and as a result federal prisons have been operating at over 150 percent capacity throughout the Guidelines era."). In the first ten years of the Sentencing Guidelines' existence, the federal incarceration rate increased 119 percent—a rate 25 percent greater than the average increase in the incarceration rate in the nation as a whole. See Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S.*, OVERCROWDED TIMES, Dec. 1999, at 1, 12. And attempts to enforce this provision in court have not met with success. See Luby, *supra* note 4, at 123 & n.280 (citing cases).

handful of those amendments involved increases in sentences.<sup>184</sup> These Commission actions seem to reflect an agency finely attuned to the political preferences of its overseers.

On those occasions when the Commission tried to exercise independence and temper the congressional trend toward increasingly longer sentences, Congress dismissed the Commission out of hand. The two biggest policy initiatives by the Commission—lessening the disparity between crack and powder cocaine sentences and eliminating mandatory minimums—were political disasters for the Commission.

In 1991, in response to a congressional request for information on the effectiveness of mandatory minimum punishments,<sup>185</sup> the Commission issued a special report to Congress detailing the inconsistencies between mandatory minimums and a guideline regime.<sup>186</sup> The report explained that judges and prosecutors often see these mandatory penalties as unjust and therefore seek to evade them. As a result of not being applied uniformly, the report reasoned, the mandatory penalties often lead to disparity.<sup>187</sup> The report also warned of too much uniformity, because defendants who are not similarly situated often receive the same minimum punishment.<sup>188</sup> The Sentencing Commission's

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184. See *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed? Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. 60 (2000) [hereinafter *Are the Guidelines Being Followed?*] (statement of Carmen D. Hernandez, National Ass'n of Criminal Defense Lawyers) (stating that, as of 2000, the Commission had amended the Guidelines approximately 600 times but less than twelve of those changes involved reductions in penalties); see also Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 319–20 (1989) (describing 1989 amendments to increase sentencing ranges in the fraud guidelines as based not on rational evaluation but on “political arguments about a supposed public uproar—or at least a media uproar—about the particular types of offenses in question”). Congress provoked this to some extent by pointing out in the Sentencing Reform Act that “[t]he Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.” 28 U.S.C. § 994(m).

It is therefore not surprising that Congress allowed virtually all of these amendments to go through. And it also helps explain why the Senate had only two oversight hearings on the Sentencing Commission from the date of the guidelines' inception until 2000. See *Are the Guidelines Being Followed?*, *supra*, at 1–2 (statement of Senator Strom Thurmond).

185. See, e.g., Act of Nov. 29, 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4789, 4845–46.

186. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM REPORT].

187. *Id.* at 47–54.

188. *Id.* at 26–29. For an elaboration of the disparity created by mandatory minimums, see Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

concerns have been echoed by nearly every expert to consider the issue.<sup>189</sup> Congress, however, rejected the Commission's analysis and continues to pass mandatory minimums unabated.

The Commission's second substantial failure was its proposal in 1995 to amend the guidelines to equalize the punishment for crack and powder cocaine.<sup>190</sup> Congress established the hundred-to-one ratio between powder and crack cocaine in 1986.<sup>191</sup> In 1993, when the Congressional Black Caucus introduced legislation to eliminate the disparity between crack and powder cocaine sentences, Congress requested a study by the Commission instead of voting on the amendment. The Commission responded in 1995 and proposed eliminating the disparity in a set of guidelines amendments.<sup>192</sup> Congress rejected the proposed amendments.<sup>193</sup>

These two examples are not the only ones that exemplify the tight political controls over the Commission and the lack of deference. Although Congress has sometimes asked for the Commission's input on pending legislation,<sup>194</sup> it has often acted on its own. The same legislative session that

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189. See Berman, *supra* note 79, at 100 ("Nearly every commentator to have addressed the issue, including Supreme Court Justice Stephen Breyer in a widely reported speech . . . has called for the abolition of Congress' mandatory sentencing provisions.").

190. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

191. The original impetus for the higher crack penalty was basketball star Len Bias' well-publicized death, which was initially thought to be caused by an overdose of crack cocaine. An autopsy later revealed that Bias had overdosed on powder cocaine, but the correction did not garner any media attention and Congress had little interest at that point in equalizing the penalties it created.

192. See WINDLESHAM, *supra* note 17, at 220. In particular, a majority of the Commission recommended reducing the sentences for crack so they would correspond to the sentences for powder cocaine, thus producing a one-to-one ratio. See *id.* If the crack offense involved associated violence, the four commissioners in favor of the report recommended sentencing enhancements. See *id.* Three commissioners dissented because they believed that crack-related offenses should be punished more severely than those involving powder cocaine, though the dissenters also would have narrowed the differential from the hundred-to-one ratio. Indeed, they did not discuss a ratio greater than five-to-one. U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 20 (1995) (statement of Richard P. Conaboy, Chairman, United States Sentencing Commission).

193. Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1, 2(a)(1)(A), 109 Stat. 334; see also H.R. REP. NO. 104-272, at 4 (1995). Although Congress rejected the Commission's proposed ratio, it asked the Commission to consider other possibilities. *Id.* Congress requested another report, this time making clear to the Commission its view that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." WINDLESHAM, *supra* note 17, at 220. The Commission responded by proposing sentences that would lead to a five-to-one ratio. See Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENTENCING REP. 197, 196 (1998).

194. See Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations 2003: Hearing Before the Senate Comm. on Appropriations, 107th Cong. 169 (2002) (statement of Diana E. Murphy, Chair, U.S. Sentencing Commission) (noting that "Congress often asks the Commission to provide

produced the Sentencing Reform Act creating the Sentencing Commission also generated new laws imposing mandatory sentences without the Commission's input.<sup>195</sup> Congress passed additional mandatory sentencing laws while the Sentencing Commission was still creating the initial set of guidelines.<sup>196</sup> Congress therefore wasted no time in demonstrating that it would exercise its own judgment without regard for the Commission's views.

And "Congress has assumed a more active role in the federal sentencing system" since the Commission's founding, according to Orrin Hatch, a long-time ranking Republican member of the Senate Judiciary Committee.<sup>197</sup> Congress has repeatedly superseded the Commission by passing legislation with mandatory minimum sentences or higher penalties<sup>198</sup> or with directions

expert testimony at congressional hearings" and that "[e]ach year the Commission also informs Congress's legislative deliberations by responding to hundreds of congressional requests for assistance," including "requests for federal sentencing and criminal justice data, analyses of proposed legislation and how it may impact the guidelines, explanations of guideline operation, technical assistance in drafting legislation, and Commission publications and resource materials").

195. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 503(a), 98 Stat. 1976, 2069 (codified as amended at 21 U.S.C. § 860) (mandatory penalties for drug offenses near schools); *id.* § 212(a)(2), 98 Stat. at 1992 (codified as amended at 21 U.S.C. § 3561(b)(1)) (mandatory sentences for specified felonies); *id.* § 1005(a), 98 Stat. at 2138 (codified as amended at 18 U.S.C. § 924(c)) (mandatory minimum for crimes involving firearms). Kenneth Feinberg has explained that mandatory minimum legislation "became part of federal law only because the political consensus that gave rise to the guidelines initiative faltered and eventually split in favor of enhanced political rhetoric and grandstanding to determine which political party would be labeled 'tougher on crime.'" Feinberg, *supra* note 2, at 303.

196. See, e.g., Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456-57 (1986); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1105(a), 100 Stat. 3207, 3207-11.

197. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 198 (1993).

198. See, e.g., Anti-Drug Abuse Act of 1986 § 1105(a) (mandatory minimums); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4181, 4377 (mandatory minimums); *id.* § 6371, 102 Stat. at 4370 (codified as amended at 21 U.S.C. § 844) (providing a mandatory minimum sentence of five years for possessing more than five grams of crack); Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4789, 4862 (directing the Commission to increase offense level for bank fraud convictions and drug offenses involving minors); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70001(2), 108 Stat. 1796, 1983 (codified as amended at 18 U.S.C. § 3559) (federal "three-strikes" statute); Child Pornography Protection Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-30 (codified as amended 18 U.S.C. § 2251(d)) (mandatory penalties for child pornography); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 708(a), 110 Stat. 1214, 1296 (codified as amended at 18 U.S.C. § 844) (raising penalties for the destruction of government property); Illegal Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(b)(3), 110 Stat. 3009, 3009-565 (codified as amended at 8 U.S.C. § 324) (mandatory penalties for smuggling illegal aliens and directing the Commission to raise penalties for immigration offenders); Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663, 114 Stat. 1241, 1242-43 (codified as amended at 29 U.S.C. § 994) (directing the Commission to provide for increased penalties for the manufacture, importation,

to the Commission to change its guidelines to provide for increased sentences.<sup>199</sup> Congress has also rejected other Commission proposals to lower the guideline levels for certain offenses.<sup>200</sup>

A recent example of the Commission's lack of political influence is the PROTECT Act.<sup>201</sup> The PROTECT Act makes some of the most fundamental changes in federal sentencing law since the Sentencing Reform Act, yet Congress did not even so much as consult the Commission before its adoption.<sup>202</sup> And, as with so many other pieces of sentencing legislation since the Sentencing Commission's creation, the PROTECT Act dictates upward adjustments for specific offenses.<sup>203</sup>

Thus, despite all the design traits that would suggest more independence, the Commission has not been as independent and influential as many reformers hoped.<sup>204</sup>

Of course, it is possible that without the Sentencing Commission, Congress would have enacted even longer sentences or passed even more mandatory minimums. But there are two reasons to doubt that the situation would

exportation and trafficking of Ecstasy); Cyber Security Enhancement Act of 2002, Pub. L. No. 107-296, § 225, 116 Stat. 2135, 2156 (requiring the Commission to review its guidelines to "ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described").

199. See Wright, *supra* note 4, at 77-78 & n.350 (listing statutes instructing the Commission to increase sentences); see also Brief of Respondent at 17, *United States v. Booker*, 543 U.S. 2005 (No. 04-104) (noting that Congress "directed the Sentencing Commission to amend the Guidelines more than fifty times since 1987").

200. See, e.g., Hatch, *supra* note 197, at 197 (describing Congress' rejection of a guideline amendment in 1991 that would have lowered the offense level for child pornography crimes).

201. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

202. The Act, among other things, prevents downward departures by judges when a defendant is convicted of specified sex crimes and offenses against children. H.R. CONF. REP. NO. 108-66, at 58-59 (2003); Barkow, *supra* note 24, at 114 & n.362. It amends the Sentencing Reform Act to require de novo review of all downward departures. PROTECT Act § 401(d)(2). Previously, departure decisions were reviewed under the more deferential abuse of discretion standard announced in *Koon v. United States*, 518 U.S. 81 (1996). The PROTECT Act further sought to limit downward departures by directing the Commission to promulgate "appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced." PROTECT Act § 401(m)(2)(A). The Act further requires that all downward departures be reported to the House and Senate Judiciary Committees, along with the names of the trial judges who are issuing the departures. *Id.* § 401(l)(2)(A). These limitations on downward departures are designed to restrict judicial leniency—yet the Commission did not report to Congress that leniency was a problem, nor did Congress ask for the Commission's views.

203. See, e.g., PROTECT Act § 103(a)-(b) (increasing maximum and minimum penalties for sexual abuse of children); *id.* § 104(a)(1) (directing the Sentencing Commission to amend the Guidelines to increase the base offense level for kidnapping); *id.* § 106 (creating "Two Strikes You're Out" law for sex offenses against children).

204. See Berman, *supra* note 79, at 109 ("More often than not, the Commission has been content to follow Congress' lead (which . . . will almost invariably be more punitive), rather than provide an independent voice and perspective on sentencing policy.").



have been different without the Commission. First, the sheer sweep of congressional action in sentencing since the Commission's creation leaves little room for still further legislation. Congress has addressed virtually all of the hot-button issues of the day with sentencing increases, from drugs to child abduction to securities fraud. It is difficult to think of any high-profile crime that Congress left alone. Second, there is no direct evidence that the Commission has had a moderating effect. In those instances where the Commission tried to exert influence and get Congress to change course, it failed. And in many other instances where Congress took action on sentencing, there is no evidence that the Commission was consulted. If the Commission has had a moderating influence, it has been so slight as to be imperceptible.

The Sentencing Commission has failed to live up to the expectations of many who believed that it would provide rational reflection, divorced from political impulse. Although it has many hallmarks of independence, that model proved unsuccessful in this context. Thus, if one looked only to the Federal Commission, the prospect of an agency having an influence on political decisionmakers would indeed appear to be bleak. But, as the next section will explain, it would also be misleading. For other agencies—and other models of agency design—have been more successful.

### C. State Commissions

The state experience with sentencing commissions is far more complex than the federal experience. Although state agencies have not been immune from political pressure, some have used politics to their advantage and influenced political decisionmakers. This section explores the circumstances under which this has occurred and the design features that appear to have played a role.

#### 1. Minnesota

Minnesota created the first sentencing commission in the country in 1978, and its guidelines followed in 1980.<sup>205</sup> Its history and relationship with the state political branches paint a different picture than the federal experience.

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205. For a description of the politics behind the sentencing reform movement in Minnesota and the creation of a Minnesota Commission, see Martin, *supra* note 73, at 268–71.

a. Institutional Design

The design features of the U.S. Sentencing Commission and the Minnesota Commission are quite similar. They were both designed to rationalize sentencing and eliminate disparity; they were both excused from administrative procedure act requirements;<sup>206</sup> they were both protected from at-will removal of membership by the executive; and they were both subject to waiting periods before their rules take effect.<sup>207</sup>

There is a design difference, however, between the Minnesota Sentencing Guidelines Commission and the U.S. Sentencing Commission: the composition of its membership. The Minnesota Commission represents a wider array of interests. It originally consisted of nine members: a justice of the state supreme court, two district judges, a public defender, a county attorney, two corrections officers, and two members of the public.<sup>208</sup> Today the list of members has expanded to eleven.<sup>209</sup> One new addition is a third member of the public (and one of those public members must be the victim of a felony crime); the other is a peace officer.<sup>210</sup> The members serve four-year terms.<sup>211</sup>

Although the Minnesota Commission membership was modified to give law enforcement greater representation, the current membership still represents a broader array than the U.S. Sentencing Commission. The diversity of representation may facilitate the consideration of more points of view, especially those that do not get a full airing in the political process.

Aside from membership differences, though, the Minnesota and the U.S. Commission are strikingly similar in terms of design. Yet, as the next subpart explains, their respective histories are very different.

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206. Minnesota limits the applicability of its state administrative procedure act to the Commission's promulgation of guidelines. MINN. STAT. § 244.09(5) (2002) (noting that "sections 14.001 to 14.69 [of the Minnesota Administrative Procedure Act (APA)] do not apply to the promulgation of the sentencing guidelines"). The only requirements from the state APA that apply to the Commission are the procedures for promulgating rules. *Id.*

207. The Minnesota Commission's rules take effect after seven months if the legislature does not block them. The 1978 legislation creating the Minnesota Commission gave the legislature veto power over the initial set of guidelines the Commission proposed. See Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345, 355 (1993). In 1984, the legislature subsequently amended the Commission's enabling legislation to provide that all Commission-initiated amendments to the guidelines or other modifications resulting in reduced sentences or the early release of an inmate had to be submitted to the legislature by January 1 of any given year and would not become effective until August 1 of that year. MINN. STAT. § 244.09(11).

208. See Frase, *supra* note 207, at 345 (citing 1978 Minn. Laws 723 art. I, § 9).

209. MINN. STAT. § 244.09(2).

210. The Minnesota legislature further amended the law to replace one of the district judges with a court of appeals judge and to replace the Corrections Board representative with a probation or parole officer. *Id.*

211. *Id.* § 244.09(3).

b. The Role of Politics

The Minnesota Commission recognized at the outset the importance of its relationship to the political branches, even though one of the goals in creating the Commission was some insulation from short-term political pressure.<sup>212</sup> Dale Parent, the first director of the Minnesota Sentencing Guidelines Commission, points out that it “viewed guideline development as a political task.”<sup>213</sup> The Commission immediately appreciated that it would have to satisfy the interest groups concerned with criminal justice, the legislature and executive, and the media.<sup>214</sup> As Parent puts it:

[The] commission . . . had to face political realities: the guidelines would be stillborn if a majority of legislators opposed them. The commission simultaneously had to identify and nurture its supporters and convert or neutralize its critics. To do so, it needed to know who the players were and where they stood on various issues. It needed a forum in which it could both receive and convey information. The commission therefore invited all affected interests and organizations to come before it to be heard and to participate in guideline development.<sup>215</sup>

Its first chair was a skilled lobbyist who kept in close contact with the legislature to lobby on behalf of the Commission and its work product.<sup>216</sup> In addition, instead of issuing a general notice to the public and waiting to see who would comment or come to public meetings, the Commission proactively targeted interested groups and individuals and used direct mail to encourage their participation.<sup>217</sup> For example, the Commission invited public defenders from various counties, state and county corrections officials, and law enforcement representatives.<sup>218</sup>

This attention to political maneuvering served the Minnesota Commission well for many years. During its first decade of existence, the state legislature largely deferred to the Commission's judgment. That judgment

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212. See Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 282 (1993).

213. Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1775 (1992).

214. See Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 730 (1991); see also Martin, *supra* note 73, at 283 (observing that the Minnesota Commission “sought to develop interest group participation as a way of gaining support and accommodating potential opponents”).

215. Parent, *supra* note 213, at 1776.

216. See PARENT, *supra* note 75, at 136.

217. See Parent, *supra* note 213, at 1776.

218. See *id.*

produced guidelines that generally increased sentences for violent offenses from the previous indeterminate regime<sup>219</sup> and made it less likely that those convicted of nonviolent property offenses would be sent to prison.<sup>220</sup>

But it appears that no Commission can expect to exercise dominance over sentencing. In Minnesota, the state legislature continued to play a primary role in establishing sentencing policy. In 1981, the legislature passed a mandatory minimum for weapons offenses.<sup>221</sup> The biggest changes, however, came at the end of the 1980s. A series of high-profile homicides occurred in Minnesota in the late 1980s, and the legislature responded by pressuring the Commission to increase penalty levels for violent crimes, which it did.<sup>222</sup> The Minnesota Commission's changes were not sufficient for the legislature, however, so it passed "get tough" measures of its own.<sup>223</sup> It enacted mandatory minimum sentences for various offenses,<sup>224</sup> and gave judges additional authority to sentence defendants to the statutory maximum term without regard to the guidelines' rules on departure.<sup>225</sup> The legislature even amended the Commission's organic statute to make "public safety" the primary factor in the consideration of sentencing policy and warned the Commission that resource constraints should not override that goal.<sup>226</sup>

219. See Frase, *supra* note 75, at 28–29.

220. See *id.*; Frase, *supra* note 207, at 356. Minnesota enjoyed a slower growth rate in prison population than other jurisdictions that lacked guidelines. See Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 WAKE FOREST L. REV. 329, 331 (1993).

221. See Frase, *supra* note 212, at 287.

222. See von Hirsch & Greene, *supra* note 220, at 331; see also Frase, *supra* note 207, at 359 (noting that the Commission responded to legislative pressure following the "crime wave of '99" by "proposing an increase in prison durations for violent crimes").

223. See Frase, *supra* note 212, at 292.

224. See Frase, *supra* note 207, at 360 (describing the Minnesota 1989 Omnibus Crime Bill, which included "life without parole for certain first-degree murderers, mandatory maximum terms for other recidivist murderers and sex offenders, minimum prison terms for certain drug crimes, and increased statutory maximums for other violent and sex crimes").

225. See *id.* at 361.

226. Tonry, *Sentencing Commissions*, *supra* note 180, at 175; see also Frase, *supra* note 207, at 361 (pointing out that 1989 legislation specified that "the Commission's 'primary goal' in setting sentencing guidelines should be *public safety*—correctional resources and current practices would remain as factors, but these factors would no longer be taken into 'substantial consideration'"). In the early 1990s, the legislature again took sentencing matters into its own hands. Another wave of high profile crimes occurred, and the Minnesota Supreme Court ruled that the state's sentences for crack and powder cocaine were so disparate as to violate the state constitution. The legislature responded by enacting new laws that raised powder cocaine penalties to equal crack penalties, and by passing certain "get tough" laws for sex offenders. See *id.* at 362–63. The legislature's 1992 legislation, however, also included provisions for expanded treatment, education, and social service programs. See Frase, *supra* note 212, at 293.

Richard Frase observes that the “punitive trend” in Minnesota slowed from 1993 to 2003, though the legislature continued to increase the penalties for some offenses.<sup>227</sup> For example, although the Minnesota Commission concluded that the penalties for first-degree criminal sexual conduct did not need to be modified, the legislature overruled that determination and increased the sentences by statute.<sup>228</sup>

Although this history shows that the Minnesota Commission was never fully insulated from politics, there is evidence—largely absent from the federal context—that the Commission had a moderating effect. Scholars who have studied extensively the Minnesota Commission and its history point out that the Commission’s presence repeatedly mitigated the legislature’s immediate instinct to raise penalties. Put another way, although sentences were increased in light of political pressures, the increases could have been much higher without the Commission’s resistance. For example, Andrew von Hirsch and Judith Greene point out that, although the Minnesota Commission was not independent enough to stop the political pressures toward increased sentences in violent crimes, it was able to use its influence to keep sentences lower for nonviolent offenses.<sup>229</sup> This quid pro quo enabled the Minnesota Commission to limit the increase in the state’s prison population despite the increase in violent crime sentences.<sup>230</sup> Thus, von Hirsch and Greene conclude that, “[i]n the absence of the Commission, matters in Minnesota almost certainly would have been much worse than they are today.”<sup>231</sup> Richard Frase also observes that “although many severe penalties have been added since 1980, others were rejected or scaled back when the legislature realized the cost.”<sup>232</sup> This occurred, moreover, “even in periods of the most intense law-and-order sentiment.”<sup>233</sup>

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227. Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. (forthcoming 2004) (manuscript at 45–47) (describing the penalty increases).

228. *Id.* (manuscript at 47) (citing 2000 Minn. Laws ch. 311, art. 4, sec. 2; 2002 Minn. Laws ch. 381, sec. 2).

229. von Hirsch & Greene, *supra* note 220, at 337.

230. *Id.* at 333; see also Frase, *supra* note 207, at 359 (noting that increases for violent offenses in the wake of the crime wave of 1988 were paired with reductions for prison terms for property offenders in order to keep overall sentences within the existing prison capacity). Moreover, as Richard Frase points out, increasing the sentences of violent offenders “was originally the Commission’s policy, not the Legislature’s, and it would seem to be the most rational use of scarce and expensive prison space.” Frase, *supra* note 75, at 31.

231. von Hirsch & Greene, *supra* note 220, at 334; see also Alschuler, *supra* note 83, at 934 (noting that the sentencing commission in Minnesota “probably . . . had some moderating effect” on the legislature).

232. Frase, *supra* note 227 (manuscript at 51–52).

233. *Id.*

The key to the Commission's success at moderating political pressure was the Commission's concern with keeping the prison population below capacity.<sup>234</sup> The Minnesota legislature instructed the Commission to take prison capacity into account in drafting its guidelines because the legislature was concerned with the growth of its prison population.<sup>235</sup> Thus, the political climate was already sensitive to resource constraints. The state Commission then read this provision aggressively to require that its guidelines not result in a level of imprisonment that would exceed 95 percent of state prison capacity.<sup>236</sup> Minnesota was the first state to adopt this policy,<sup>237</sup> and it was initially met with some resistance by judges, prosecutors, and police.<sup>238</sup>

Over time, the impact statement has had a profound impact on the Commission's ability to persuade the political branches to adopt its proposals. Dale Parent observed that the Commission's endorsement of this approach led those involved with and interested in its decisionmaking "to view their task as one of distributing punishment under conditions of scarcity."<sup>239</sup> They no longer viewed imprisonment as a free limitless good, but "a scarce and expensive resource, which had to be allocated rationally."<sup>240</sup>

Perhaps most importantly, the Commission's use of capacity as a constraint on its sentencing policies "shielded the commission from political pressure to toughen sentences."<sup>241</sup> For example, Parent describes the final month of the drafting process in which the Commission was heavily lobbied by powerful interest groups—police, prosecutors, and victims rights groups—to increase sentences for particular crimes, but the Commission successfully resisted by citing capacity constraints.<sup>242</sup>

234. See, e.g., Frase, *supra* note 75, at 36; von Hirsch & Greene, *supra* note 220, at 341 (applauding the Minnesota Commission's interpretation of its statutory mandate to require a "firm capacity constraint"); Parent, *supra* note 213, at 1784; Tonry, *Sentencing Commissions*, *supra* note 180, at 183.

235. See MINN. STAT. § 244.09(5) (2002) ("In establishing . . . the sentencing guidelines . . . [t]he commission shall consider current sentencing and release practices [and] correctional resources, including but not limited to the capacities of local and state correctional facilities."); MARC MAUER, RACE TO INCARCERATE 58 (1999); see also Frase, *supra* note 207, at 349 (listing as one of the legislature's goals "to recognize while pursuing the above goals that punishment—especially incarceration—is expensive and that overcrowding of facilities and other resources must be avoided, even if this means a failure to fully achieve all other punishment goals").

236. Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 10 FED. SENTENCING REP. 46, 47 (1997).

237. See Parent, *supra* note 213, at 1784.

238. See *id.* at 1785.

239. *Id.* at 1786.

240. *Id.*

241. *Id.* at 1787.

242. *Id.*

To effectuate its concern with capacity, the Commission developed sophisticated computer models to estimate prison populations under different sentencing options.<sup>243</sup> The legislature began asking the Commission to provide it with “prison population impact statements” on proposed legislation.<sup>244</sup> Thus, not only did the Commission use its analysis to make guideline determinations, but its impact statements informed legislative enactments as well. As Richard Frase puts it, “this ‘early warning system’ is a key ingredient in forcing elected officials to admit and take responsibility for the costs of politically-motivated sentencing proposals.”<sup>245</sup>

Its ability to generate resource impact statements has given the Minnesota Commission, unlike its federal counterpart, a great deal of influence.<sup>246</sup> It has also helped Minnesota to avoid prison overcrowding, which has been a serious problem in other states.<sup>247</sup> During “a period when national jail and prison populations were going through the roof, and crime rates were increasing rapidly in Minnesota, sentencing severity under the guidelines remained remarkably stable.”<sup>248</sup>

Thus, the Minnesota Commission shows that the agency model holds promise for those reformers seeking to create a buffer between short-term popular impulse and sentencing policy. It succeeded by working closely with political actors, not by working independently. Even though it possesses some design characteristics of independent agencies, the key to the Minnesota Commission’s success appears to be those attributes that put it in close contact with the legislature. Specifically, the agency’s strong lobbying efforts and the political appeal of its impact statements enhanced the agency’s influence.

## 2. Washington

The Washington Sentencing Commission grew out of the state’s Sentencing Reform Act of 1981.<sup>249</sup> Although the legislature wanted the ongoing, expert advice of a commission, it did not seek to insulate the Commission in the same way other jurisdictions did. Rather, from the outset, the legislature saw the Washington Commission as an advisory body, with the legislature

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243. See Frase, *supra* note 207, at 351.

244. Parent, *supra* note 213, at 1787.

245. Frase, *supra* note 75, at 38.

246. See *infra* notes 375–420 and accompanying text (describing the importance of cost considerations at the state level and contrasting the politics at the federal level).

247. See Frase, *supra* note 212, at 334.

248. Frase, *supra* note 75, at 30–31.

249. For background on this act and the initial set of guidelines, see David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 82–92 (2001).

maintaining primary responsibility for sentencing.<sup>250</sup> Washington therefore presents a case study of how an agency can have greater influence through legislative contacts than through features designed to promote independence.

a. Institutional Design

The Washington legislature's desire to keep control over sentencing is evident in the structural design of the Washington Commission. When the Washington Commission recommends its guidelines, they lack the force of law until the legislature affirmatively acts to approve them.<sup>251</sup> Whereas the power of inertia (and the need to get agreement among all political actors) favors the agency in Minnesota, the opposite is true in Washington. Without the power to promulgate legally binding rules on its own, the Commission's power must come from its ability to persuade and override legislative inertia.

The Commission makes that determination with the input of a large number of individuals. The Washington Commission is comprised of twenty voting members who, with the exception of the ex officio members, serve three-year terms.<sup>252</sup> It includes a corrections official, two defense attorneys, a director of financial management, an official responsible for juvenile corrections, the chair of the indeterminate sentence review board (which is akin to a parole board), four judges, one representative from law enforcement, two prosecuting attorneys, one elected official of a county government, one elected official of a city government, one person who administers juvenile court services, and four members of the public (including one crime victim or

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250. See David Boerner, *The Role of the Legislature in Guidelines Sentencing in "The Other Washington,"* 28 WAKE FOREST L. REV. 381, 382, 387 (1993) (characterizing the Washington Commission "as an agent of the Washington Legislature, not as an independent actor," and "serving in a purely advisory capacity"); Boerner & Lieb, *supra* note 249, at 84 ("The commission was to serve a valuable role by crafting details and providing policy advice, but the legislature intended to control sentencing policy.").

251. WASH. REV. CODE § 9.94A.850(5)(c) (2003). There is an exception if the governor declares a prison capacity emergency. *Id.* § 9.94A.870; see also Boerner, *supra* note 250, at 387 n.30 (describing this as the only exception). The Washington Commission is therefore less insulated than a commission like Minnesota's. See Leonard Orland & Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. COLO. L. REV. 837, 841 (1993); see also Boerner, *supra* note 250, at 382 (pointing out the fact that the legislature must approve the guidelines for them to become law as one example of greater legislative power in Washington than in other states).

252. WASH. REV. CODE § 9.94A.860(1), (3)(a). In the initial enabling legislation, the commission had fifteen members. See Roxanne Lieb, *Washington State: A Decade of Sentencing Reform*, in SENTENCING REFORM IN OVERCROWDED TIMES 20, 21 (Michael Tonry & Kathleen Hatlestad eds., 1997).



a crime victims' advocate).<sup>253</sup> In addition, the Commission has four nonvoting members, two appointed by the Speaker of the state House of Representatives and two appointed by the president of the Senate.<sup>254</sup>

Unlike the Minnesota and the Federal Commission, the Washington Commission is required by law to exercise its duties in conformance with the state administrative procedure act.<sup>255</sup> But because the Commission does not produce legally binding guidelines, the significance of these procedural restraints is diminished. To the extent state APA limitations require agencies to follow the legislature's precommitment to a particular policy and the rule of law, those constraints are meaningless when the agency's rules cannot be enacted without approval by the current legislature.

#### b. The Role of Politics

It should come as no surprise, given the intent of the legislature and the agency's structure, that the Washington Commission has been subject to great political control. Unlike other state sentencing commissions, which have been delegated authority to make fundamental policy decisions about sentencing, the Washington Sentencing Commission has not been given much power to exercise its own judgment.<sup>256</sup>

As the Washington Sentencing Guidelines Commission reports, since the state legislature enacted the Commission's recommended sentencing guidelines into law in 1983, "[t]he Legislature has amended the Sentencing Reform Act in almost every legislative session, resulting generally in the lengthening of sentences, and citizen initiatives have also resulted in the imposition of longer prison terms."<sup>257</sup> Its citizens used ballot initiatives to pass the nation's

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253. WASH. REV. CODE § 9.94A.860(1).

254. *Id.* § 9.94A.860(4).

255. *Id.* § 9.94A.850(6) ("The commission shall exercise its duties under this section in conformity with chapter 34.05 RCW [the state administrative procedure act]."). Washington's Board of Prison Terms and Paroles and its successor, the Indeterminate Sentencing Review Board, are not subject to the state's administrative procedure act. See *In re Whitesel*, 763 P.2d 199, 203 (Wash. 1988).

256. See Boerner, *supra* note 250, at 388–90 (describing the fundamental policy decisions made by the legislature).

257. SENTENCING GUIDELINES COMM'N, STATE OF WASH., THE SENTENCING REFORM ACT AT CENTURY'S END 7 (2000), available at [http://www.sgc.wa.gov/SPR\\_Report.pdf](http://www.sgc.wa.gov/SPR_Report.pdf); see also *id.* app. A (memorandum from David L. Fallen, Executive Director, Caseload Forecast Council, Impact of Criminal Justice Legislation on Washington State's Adult Inmate Population). In some instances, these changes were passed without the endorsement of the Commission; in others, the Commission—often at the urging of its prosecutor members—supported the increases. See, e.g., Boerner & Lieb, *supra* note 249, at 99 (noting that the commission did not take a position on legislation eliminating the waiver of prison for first-time drug offenders); *id.* at 100 (stating that in 1988 the "commission's

first three-strikes law and to enact a "Hard Time for Armed Crime" measure, which increased sentences for firearms-related offenses.<sup>258</sup> The legislature passed a multitude of additional laws that increased sentences.<sup>259</sup>

Despite this history, and even though the Washington Commission lacks some of the same design characteristics of independence found in the Minnesota Commission and the U.S. Sentencing Commission, there is evidence that the Washington Commission influenced the legislature's decisions.<sup>260</sup> The main source of its influence appears to be the information it provides about prison resources. Like the Minnesota Commission, the Washington Commission is required to take prison resources into account. The Washington Commission was formed at a time when the state prison system was overcrowded and subject to court order.<sup>261</sup> One of the legislature's primary goals in establishing a commission and a guidelines system was to become better informed about its incarceration resources and expenditures. It therefore directed the state Commission to make frugal use of the state's resources, to "project whether the implementation of its recommendations" would exceed its current correctional capacity, and if so, to prepare "an additional list of

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prosecutors convinced the group" to increase sentences for certain drug offenses); *id.* at 100–01 (noting that the prosecutor's office in King County convinced Commission to support changes to sex offense penalties).

258. SENTENCING GUIDELINES COMM'N, *supra* note 257, at 13 n.11. The three-strikes initiative was promoted by a conservative think tank and passed with more than 75 percent of the vote. See Boerner & Lieb, *supra* note 249, at 105. The same sponsors promoted the "Hard Time for Armed Crime" initiative, which the legislature adopted because of perceived widespread support. See *id.* at 106–07.

259. They included: laws that expanded the list of prior offenses that would be included in the offender's criminal history score; laws that eliminated the first-time offender waiver for drug dealing offenses; laws that reclassified to a higher offense level (and therefore raised the sentences for) drug offenses, residential burglary, vehicular homicide, reckless endangerment, rape of a child, and unlawful possession of a firearm. SENTENCING GUIDELINES COMM'N, *supra* note 257, app. A; see also Boerner, *supra* note 250, at 393–417 (describing the 1987 and 1989 amendments for drug offenses, the 1989 amendments for burglary offenses, the 1988 amendments for sex offenses against children, and the 1990 amendments for general sex offenses). The legislature also passed a two-strikes law for sex offenders and a 2001 law that treats the sentencing guidelines term for sex offenders as the minimum term and allows the Indeterminate Sentence Review Board to extend the defendant's sentence. SENTENCING GUIDELINES COMM'N, STATE OF WASH., A COMPREHENSIVE REVIEW AND EVALUATION OF SENTENCING POLICY IN WASHINGTON STATE: 2000–2001, at 4–5, 12, available at [http://www.sgc.wa.gov/SRA Review Final Draft 121701.doc](http://www.sgc.wa.gov/SRA%20Review%20Final%20Draft%20121701.doc). The average prison sentence length grew from 37.8 months in fiscal year 1989 to 44.2 months in fiscal year 1999, SENTENCING GUIDELINES COMM'N, *supra* note 257, app. B fig.3, and the incarceration rate grew from 236.3 per 100,000 residents in 1982 to 424.7 per 100,000 residents in 2000, despite the lack of a corresponding increase in crime. SENTENCING GUIDELINES COMM'N, *supra*, at 5–6.

260. For example, the legislature accepted all of the Commission's recommendations from 1983 to 1986. See Boerner & Lieb, *supra* note 249, at 98.

261. See Boerner, *supra* note 250, at 388.

standard sentence ranges which are consistent with correction capacity.”<sup>262</sup> The Commission is also required to report biennially on the capacity of state and local facilities.<sup>263</sup> As David Boerner, the Washington Sentencing Guidelines Commission Chairman, has noted, this “ensured that [the legislature] would retain the final judgment regarding whether increases in prison population, with the concomitant consequences of increased capital and operating expenses, were to be permitted.”<sup>264</sup>

In recent years, the Washington Commission has provided the legislature with cost projections that have undoubtedly played at least some part in the legislature’s willingness to roll back the length of certain sentences. For example, the legislature’s approval of drug sentencing reform and alternative treatment programs can be tied to a concern with prison overcrowding.<sup>265</sup>

While many political factors coalesced to produce these sentencing reforms,<sup>266</sup> it seems that the Commission played a pivotal role. The state legislature asked the Commission in 2001 “to review current sentencing law and to . . . ‘consider studies on the cost-effectiveness of sentencing alternatives, as well as the fiscal impact of sentencing policies on state and local government.’”<sup>267</sup> The Commission responded by reporting that prison and jail capacity were exceeded and recommended “expanded use of cost-effective community corrections programs.”<sup>268</sup> The reforms enacted by the legislature followed that report and have a projected cost savings of \$45 million per year.<sup>269</sup> David Boerner states that “[t]he fiscal crisis has brought together the

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262. WASH. REV. CODE § 9.94A.850 (2003).

263. *Id.* § 9.94A.850(2)(h)(ii). For an example of these reports, see EDWARD M. VUKICH, STATE OF WASH., CORRECTIONAL CAPACITY IN WASHINGTON STATE: STATUS REPORT 2001, available at [http://www.sgc.wa.gov/Capacity Report - Final Draft 013102 \(Revised\).pdf](http://www.sgc.wa.gov/Capacity%20Report%20-%20Final%20Draft%20013102%20(Revised).pdf).

264. Boerner, *supra* note 250, at 388.

265. The Commission, for instance, recommended in a 1996 report to the legislature that “offenders should be given more opportunities to improve themselves.” SENTENCING GUIDELINES COMM’N, *supra* note 257, at 18. The Offender Accountability Act, enacted in 1999, responded to that suggestion by allowing judges to insist on rehabilitative treatment for some offenders and to consider the risk an offender will pose to a community in determining whether an offender should be placed under community supervision, in jail, or in prison. *Id.* at 4, 18. The Commission has called the 1999 reforms “the most fundamental [changes] since the adoption of the Act.” SENTENCING GUIDELINES COMM’N, *supra* note 259, at 4. In 2003, a bipartisan group in the legislature agreed to reduce sentences for drug offenders. See Butterfield, *supra* note 97. The legislature also agreed in 2003 to increase good time credits. See *id.*

266. See Butterfield, *supra* note 97 (noting the role played by Norm Maleng, a conservative Republican who backed the legislation, and quoting one of his aides as saying that “It was a little like Nixon going to China when Norm went down to the Legislature to persuade them to support this”).

267. SENTENCING GUIDELINES COMM’N, *supra* note 259, at 3.

268. *Id.* at 26, 42–52.

269. See Butterfield, *supra* note 97.

folks who think sentences are too long with the folks who are perfectly happy with the sentences but think prison is costing too much.”<sup>270</sup>

Thus, the Washington Commission’s lack of structural independence has not impeded its influence. On the contrary, it appears that the Commission has benefited from its ties to the legislature, and its impact statements have had a mitigating effect. The Commission notes that the shift to guidelines “allow[s] for better prediction of correctional costs,” which in turn obliges the legislature “to make the necessary investments to pay for “any proposed statutory change.”<sup>271</sup> According to the Commission’s chair and a former member of its staff, the presence of the guidelines and the Commission “moderate[s] the public’s punitive passion, not by attempting to deny it, but by channeling it more narrowly than would otherwise have happened.”<sup>272</sup> Thus, the agency’s lack of independence has been more of an asset than a liability. Its ties to the legislature and its ability to generate information that appeals to that body have allowed it to have a fair amount of influence.

### 3. North Carolina

The North Carolina Sentencing and Policy Advisory Commission was established in 1990, and the legislature adopted its recommended guidelines in 1993. The North Carolina Commission is regarded as one of the country’s more successful commissions. Indeed, it has been called “the exemplar of smart political and rational reform.”<sup>273</sup> Like Minnesota and Washington, it has been successful by maintaining contacts with the legislature and by producing resource impact statements.

#### a. Institutional Design

The North Carolina Sentencing and Policy Advisory Commission is required to monitor the criminal justice system in the state and make recommendations to the legislature.<sup>274</sup> As in Washington, it is up to the legislature to adopt the

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270. *Id.*

271. SENTENCING GUIDELINES COMM’N, *supra* note 257, at 7; *see also id.* at 10 (noting that the switch to determinate sentencing improves prison population forecasts because the prior system of “case-by-case decisions of judges and of the Board of Prison Terms and Paroles did not follow any predictable pattern”).

272. Boerner & Lieb, *supra* note 249, at 116.

273. DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 7 (2002), available at [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf).

274. N.C. GEN. STAT. § 164-43 (2003).

North Carolina Commission's recommendations.<sup>275</sup> The Commission also reviews "all proposed legislation which creates a new criminal offense"<sup>276</sup> and any "proposed changes in the classification of an offense or changes in the range of punishment or dispositional level for a classification,"<sup>277</sup> and it gives the legislature its opinion on those changes. Again, the ultimate decision remains with the legislature, making the North Carolina Commission structurally less independent than the Minnesota Commission or the U.S. Sentencing Commission.

While its relationship with the legislature is similar to the Washington Commission's relationship with its legislature, a unique feature of the North Carolina Commission is its sheer size. At thirty members,<sup>278</sup> North Carolina has one of the largest sentencing commissions, as well as one of the most diverse. Virtually every conceivable interest is represented, and the judicial, executive, and legislative branches all play a role in making appointments. For example, the chief justice of the North Carolina Supreme Court appoints a sitting or former judge to serve on the Commission, as well as a criminal defense lawyer. The governor appoints, among others, a member of the public (who is not a lawyer) and an academic with a background in criminal justice or corrections policy who is recommended by the University of North Carolina.<sup>279</sup> There are six legislators who serve on the Commission,<sup>280</sup> as well as a rehabilitated former prison inmate,<sup>281</sup> the president of the conference of District Attorneys, the president of the Sheriff's Association, and a host of others.<sup>282</sup>

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275. *Id.* (describing the Commission's reporting duties).

276. *Id.* § 164-43(e).

277. *Id.* § 164-43(g).

278. *Id.* § 164-37. The original Commission was twenty-three members.

279. The governor also appoints a member of the North Carolina Bar Association. The lieutenant governor appoints a member of the North Carolina Victim Assistance Network, and another member whom the lieutenant governor can choose without restriction. *Id.*

280. The Speaker of the House appoints three members of the House of Representatives, and the president of the Senate appoints three members of the Senate. The president of the Senate also appoints a representative of the North Carolina Community Sentencing Association. *Id.*

281. The chairman of the Commission appoints the rehabilitated former prison inmate and another member who is to come from the Justice Fellowship Task Force. *Id.*

282. The Commission also includes the following people (or their designee): the chief judge of the North Carolina Court of Appeals, the secretary of Correction, the secretary of Crime Control and Public Safety, the chairman of the Parole Commission, the president of the Conference of Superior Court Judges, the president of the District Court Judges Association, the president of the North Carolina Association of Chiefs of Police, the president of the North Carolina Association of County Commissioners, the Attorney General, the president of the Association of Clerks of Superior Court North Carolina, and a representative of the Department of Juvenile Justice and Delinquency Prevention. *Id.*

The terms of the Commission members also vary. The terms of the original members expired on 1997, and subsequent members serve two-year terms. While most members cannot be removed except for good cause, members appointed by the legislative branch can be removed without cause.<sup>283</sup> The Commission therefore represents a blend of independent and politically accountable members and a wide array of viewpoints.

b. The Role of Politics

The presence of a commission in North Carolina, as in Minnesota and Washington, has produced a moderating effect on sentencing policy. Kevin Reitz suggests that the North Carolina Commission has had a salutary effect because it:

has brought the state's prison populations under control, has shifted the use of prison bed-space toward violent offenders and away from property offenders, has incorporated a range of intermediate sanctions into guideline provisions, has lobbied successfully for increased funding for intermediate sanctions, and has established political credibility within the state legislature and the state as a whole.<sup>284</sup>

Like these other states, the North Carolina Commission's influence stems in large measure from its ability to use expert forecasting models to highlight the costs of legislative choices. In making recommendations to the legislature, the Commission is charged with considering, among other things, "[t]he available resources and constitutional capacity of the Department of Correction, local confinement facilities, and community-based sanctions."<sup>285</sup> The legislature further insists that the Commission "include[,] with each set of sentencing structures[,] a statement of its estimate of the effect of the sentencing structures on the Department of Correction and local facilities, both in terms of fiscal impact and on inmate population."<sup>286</sup> If the Commission's recommendations would result in populations that exceed current capacity, it is required to "present an additional set of structures that are consistent with that capacity."<sup>287</sup>

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283. *Id.* § 164-38.

284. Reitz, *supra* note 183, at 11; *see id.* at 13 (noting that, in the period after cases sentenced under preguidelines law started to dissipate from the system, the incarceration rate declined).

285. N.C. GEN. STAT. § 164-42(b)(5).

286. *Id.* § 164-42(d).

287. *Id.* The enabling legislation also charges the Commission with making policy recommendations, including an assessment of the cost-effectiveness of the state's use of correctional systems. *Id.* § 164-42.1(a)(4). In 2001, the legislature passed an additional law requiring the Commission "to study and review the State's sentencing laws in view of the projected growth in the prison

The Commission's estimates have been quite accurate—to within 1 percent of the actual prison population.<sup>288</sup> And the legislature, in turn, has relied on these projections. Ronald Wright, who chronicled the history of sentencing reform in North Carolina from 1980 to 2000, concluded that “[o]ver the last twenty years, money became the universal solvent of sentencing disputes in North Carolina.”<sup>289</sup> The chairman of the Commission and a member of its staff similarly report that “the cost of punishment has been of major significance in shaping policy.”<sup>290</sup>

From the outset, the Commission was to “serve as a ‘vital link’ between sentencing policy and the available corrections resources.”<sup>291</sup> The Commission was formed in the wake of overcrowded prison conditions that produced a class action lawsuit contending that the conditions amounted to cruel and unusual punishment.<sup>292</sup> The lawsuit, in Wright’s description, “created an urgent need to control overall prison population.”<sup>293</sup> The legislature responded in the short term by passing an act that required the number of prisoners to be kept under a specified prison cap, and that authorized release of prisoners to remain under the established ceiling.<sup>294</sup> The legislature looked to the creation of a sentencing commission to create a long-term solution and to curb the costs of prison expansion.<sup>295</sup>

The legislature’s concern with costs became more apparent as the Commission was deliberating to produce its first set of recommended guidelines. A fissure had developed in the Commission. One group believed it was the Commission’s job “to remove politics from sentencing and to leave funding and other issues of political expediency to the legislature.”<sup>296</sup> That group proposed guidelines that would require the legislature to build a large number of new prison beds. Another group wanted to avoid prison expansion

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population by 2010.” 2001 N.C. Sess. Laws § 25.8(a). To these ends, the legislature ordered the Commission to “develop a correctional population simulation model” and to “make the model available to respond to inquiries by any State legislator, or by the Secretary of the Department of Correction.” N.C. GEN. STAT. § 164-40(a). The Commission is also charged with developing a model for juvenile facilities. *Id.* § 164-40(b).

288. See Judge Thomas W. Ross & Susan Katzenelson, *Crime and Punishment in North Carolina: Severity and Costs Under Structured Sentencing*, 11 FED. SENTENCING REP. 207, 210 (1999).

289. Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 41 (2002).

290. Ross & Katzenelson, *supra* note 288, at 212.

291. Wright, *supra* note 289, at 55.

292. *Id.* at 49.

293. *Id.* at 50.

294. *Id.* at 50–51.

295. *Id.* at 53–54.

296. Ronald F. Wright & Susan P. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 WAKE FOREST L. REV. 421, 450 (1993).

beyond reasonable growth and tailored their guidelines accordingly.<sup>297</sup> One of the Commission members, who was also a member of the state Senate, endorsed this latter view and warned the other members that the legislature would be interested in costs and that guidelines requiring extensive cost outlays would not pass.<sup>298</sup> Ultimately, a majority of the Commission opted for an approach constrained by resource considerations. The Commission reported its conclusions to the legislature, with a group of Commissioners filing a minority report outlining the divide among the Commissioners about the role of costs, and the minority group stating its position that the legislature should create more prison beds.<sup>299</sup>

The legislature responded to this divide by making clear that it was interested in sentencing policies that took costs into account. The legislature insisted that the Commission submit at least one proposal that would not require prison expansion beyond existing resources.<sup>300</sup> In addition, the legislature added new members to the Commission—two from the state Senate and two from the state House.<sup>301</sup> The legislature therefore sent a signal that it was interested in costs and, with the addition of the new members, that it did not want the Commission's decision to be divorced from its political preferences.<sup>302</sup>

The Commission responded by using its computer models "to produce two plans for the legislature to choose from, one with more severe sentences, and another with slightly less severe sentences that would forestall the need to build new prisons for a few more years."<sup>303</sup> Given this information, the legislature opted to take the cheaper alternative of less severe sentences.<sup>304</sup> Wright notes that part of this stems from the legislature's desire to save money for other priorities, such as education and health,<sup>305</sup> and also from the state's "rhetorical tradition of praising fiscal conservatism."<sup>306</sup>

This is not to say that the legislature avoided tough-on-crime politics. In the wake of highly publicized crimes in 1994, legislators introduced hundreds of new crime bills and ultimately passed a three-strikes law, a gun enhancement law, and legislation imposing higher penalties for rape. But even in these

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297. See *id.* at 450–51; Wright, *supra* note 289, at 70–72.

298. See Wright & Ellis, *supra* note 296, at 451.

299. See *id.* at 451–53.

300. See Wright, *supra* note 289, at 73.

301. See Wright & Ellis, *supra* note 296, at 453–54.

302. See *id.* at 456 (noting that a majority of the Commission responded "to the now unmistakable signals from the legislature (reinforced by the six commissioners from the legislature) that very little new spending would be feasible").

303. WILHELM & TURNER, *supra* note 273, at 8.

304. See *id.*

305. Wright, *supra* note 289, at 75.

306. *Id.* at 80.



instances, the Commission's fiscal impact statements prompted the legislators to amend the legislation so that the new sentencing laws would require 2000 new prison beds over ten years instead of the 20,000 beds the original proposals would have required.<sup>307</sup> A similar dynamic took place in 1995. The legislature increased sentence lengths for some of the more serious offense categories by 16 percent.<sup>308</sup> Again, however, the legislature moderated its initial proposals after seeing the Commission's fiscal impact statements.<sup>309</sup> When one Republican leader moved to repeal the fiscal impact statement requirement because of his concern that the legislature was ignoring the benefits of long-term crime reduction, other Republicans convinced him of the value of the statements.<sup>310</sup>

Thus, while the Commission hardly stopped the legislature's drive to increase sentences—indeed, the prison system in North Carolina expanded and in 2001 the legislature authorized the building of three new prisons<sup>311</sup>—it is likely that the growth would have been even more dramatic in the absence of the Commission's cost assessments.<sup>312</sup>

#### 4. Other States

The previous subparts focused in some detail on the experience of Minnesota, Washington, and North Carolina both because there is more available information on their experiences and because in many ways they represent the panoply of experiences seen in other states with surviving sentencing commissions.<sup>313</sup> But to avoid a concern with selection bias, this section briefly

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307. See *id.* at 81–82; see also Ronald F. Wright, *Three Strikes Legislation and a Sinking Fund Proposal*, 8 FED. SENTENCING REP. 80, 81 (1995) (discussing the legislature's selection of a three-strikes option that was less drastic than other proposals because of the legislature's concern with costs).

308. See N.C. SENTENCING & POL'Y ADVISORY COMM'N, REPORT ON STUDY OF STRUCTURED SENTENCING PURSUANT TO SESSION LAW 2001-424, SECTION 25.8, at 1 (2002), available at <http://www.nccourts.org/courts/CRS/Councils/spac/Documents/finalreport-2002.doc> [hereinafter NCSPEC MAY 2002 REPORT].

309. See Wright, *supra* note 289, at 83.

310. See *id.*

311. See NCSPEC MAY 2002 REPORT, *supra* note 308, at 1.

312. See Wright, *supra* note 289, at 90. In 1980, North Carolina's incarceration rate was the highest in the country; after its sentencing reform measures were adopted, its incarceration rate dropped to 31st highest in the country. See WILHELM & TURNER, *supra* note 273, at 8.

313. For example, like Minnesota, Washington and North Carolina, many states have insisted on a resource impact assessment. See Frase, *supra* note 74, at 70 (listing, among others, Delaware, Oregon, Kansas, Arkansas, Ohio, and Missouri); see also BUREAU OF JUSTICE ASSISTANCE, DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 44–45 (1996) (describing the resource impact requirements in Arkansas, Delaware, Florida, Kansas, Louisiana, Minnesota, North Carolina, Ohio, Oregon, Tennessee, Utah, Washington, and the federal system), available at <http://www.ncjrs.org/pdffiles/strsent.pdf>.

discusses the experience other states have had with sentencing commissions to illustrate their similarities and differences with the states explored in greater detail.<sup>314</sup>

a. Other States With Commissions and Presumptive Guidelines

Oregon and Kansas have sentencing commissions that have adopted presumptive sentencing guidelines similar to those in Minnesota, Washington, and North Carolina.<sup>315</sup> Although the Oregon and Kansas commissions are similar in key respects, they have had very different histories.

In 1987, the Oregon legislature created a State Sentencing Guidelines Board, which was a subgroup of an existing state body, the Criminal Justice Council, to propose sentencing guidelines.<sup>316</sup> This Board established a very open process. It held seven public hearings after proposing its guidelines, and approximately eighty people testified.<sup>317</sup> The Board made some modifications in light of this testimony, and the legislature adopted the guidelines in 1989. Today, the body responsible for guideline amendments is the Oregon Criminal Justice Commission,<sup>318</sup> which shares some traits in common with the commissions discussed thus far. Like many other commissions, its members include legislators, though the nine-member body is not as diverse as some of the other commissions discussed.<sup>319</sup> Like the commissions in Washington and North Carolina, its guideline amendments must be approved by the legislature.<sup>320</sup> Moreover, like Minnesota, Washington, and North Carolina, the Oregon

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314. The guidelines produced by the states also differ. For example, the level of appellate review of trial court guideline decisions differs significantly among states. For a wonderful, in-depth analysis, see Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997). The scope of guideline coverage also varies. See Frase, *supra* note 74, at 71–72 (describing states that regulate misdemeanors as well as felonies and those that include intermediate sanctions). An analysis of each state's sentencing guidelines is beyond the scope of this Article.

315. Presumptive guidelines create presumptions in favor of particular sentences, and judges must explain their reasons for departing from these standards. Appellate courts can review the judges' decisions. See Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 200–01 (1998) (defining presumptive sentencing guidelines).

316. See Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. DAVIS L. REV. 695, 699 (1992).

317. See Kathleen M. Bogan, *Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground*, 35 CRIME & DELINQ. 467, 478 (1990).

318. OR. REV. STAT. § 137.667 (2003).

319. The nine-member Oregon Criminal Justice Commission includes one nonvoting member from the state Senate and one nonvoting member from the state House. *Id.* § 137.654. The current Commission does not contain any defense lawyers. The current membership is available at <http://www.ocjc.state.or.us/CJCMN.htm>.

320. OR. REV. STAT. § 137.667.

Commission is required to “take into consideration . . . the effective capacity of state and local corrections facilities.”<sup>321</sup> Indeed, observers have noted that one of the main reasons for the creation of the sentencing commission in Oregon was the legislature’s concern with prison overcrowding and its desire to curb prison population growth.<sup>322</sup>

Despite some similarities with the Minnesota, Washington, and North Carolina commissions, political pressures in Oregon—especially the ballot initiative process—have made the Oregon Commission far less influential. Oregon, like Washington, is a western state with a long history of ballot initiatives. But the use of the ballot initiative to change sentencing policy has been far more frequent in Oregon, to the point that it has been characterized as the “primary force in Oregon sentencing policy, easily eclipsing the state’s sentencing guidelines.”<sup>323</sup> As a result, the Oregon Criminal Justice Commission has had a limited impact on state sentencing policy.

Kansas provides an example of a state commission that has had greater success influencing political decisionmakers, yet its commission is structurally similar to Oregon’s. Like the Oregon Commission, members of the state Senate and House serve as members of the Kansas Commission. Of the seventeen members, four come from the legislature.<sup>324</sup> And although they originally served in a nonvoting capacity, the legislature amended the law in 1997 to give them voting power.<sup>325</sup> In addition, the Commission has power only to recommend guidelines, not to have them take effect in the face of legislative inaction.<sup>326</sup>

This design has served the Kansas Commission well. It has had an influence with political decisionmakers, largely with its resource impact statements. Like Oregon and North Carolina, Kansas created its commission in the shadow of overcrowded prisons<sup>327</sup> and as a result, directed the agency to consider correctional

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321. Kirkpatrick, *supra* note 316, at 695 n.1 (citing 1987 OR. LAWS ch. 619, § 2(2)(b)).

322. *E.g.*, Bogan, *supra* note 317, at 469–70; Kirkpatrick, *supra* note 316, at 697.

323. Boerner & Lieb, *supra* note 249, at 108; *see also* Judy Greene, *Oregon Modifies Mandatory Minimum Laws but Increases Prison Capacity by 125%*, OVERCROWDED TIMES, Aug. 1997, at 3 (noting that one ballot initiative, Measure 11, sets mandatory minimum sentences that override the guidelines for “many serious felonies”).

324. KAN. STAT. ANN. § 74-9102(b) (2002). Judges, prosecutors, defense lawyers, a corrections official, a parole board official, two members of the public (one of whom must be a member of a racial minority group), a director of community corrections, and a court services officer also serve on the seventeen-member Commission. *Id.* § 74-9102.

325. Robert J. Lewis, Jr., *The Kansas Sentencing Guidelines Act*, 38 WASHBURN L.J. 327, 358 (1999).

326. KAN. STAT. ANN. § 74-9101.

327. *See* David J. Gottlieb, *A Review and Analysis of the Kansas Sentencing Guidelines*, 39 U. KAN. L. REV. 65, 68 (1991). Indeed, Kansas was facing federal court orders and litigation because of its overcrowded conditions. *See* William J. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 KAN. J.L. & PUB. POL’Y 693, 697 (2002).

resources in formulating its guidelines.<sup>328</sup> The Commission also prepares fiscal impact and correctional resource statements when the legislature proposes new criminal legislation.<sup>329</sup> Its statutory mandate requires it to “identify and analyze the impact of specific options to reduce prison population” when its forecasts predict that “the state’s prison population will exceed capacity within two years.”<sup>330</sup>

This early warning system has enabled the legislature to consider at least some of the costs of sentencing proposals before adopting them. As Daniel Wilhelm and Nicholas Turner point out, this puts the legislature in a politically more comfortable situation because it does not put elected officials “in the sometimes politically perilous position of having to request ‘options to reduce prison population’ or formulate those options themselves.”<sup>331</sup> In 2000, this early warning system prompted the adoption of legislation designed to reduce the prison admission of low-level, nonviolent offenders, which was enough to delay the construction of a new correctional facility.<sup>332</sup> Similarly, in 2003, the state legislature enacted a bill that diverted nonviolent drug offenders to treatment options.<sup>333</sup> The Commission’s data and a concern for fiscal restraint both played a role in bringing about the legislation.<sup>334</sup>

To be sure, legislators in Kansas, like those in other states, have not always heeded the “early warning.” As one observer notes, “[t]here have been years in which legislators were confronted with the dramatic long-term consequences of their decisions on future prison population, and yet they ignored that information and lengthened sentences without making plans for handling increased numbers of inmates.”<sup>335</sup> But although political pressures have pushed toward higher sentences on some occasions, on others, the Commission has changed the legislature’s mind with its resource impact information.<sup>336</sup>

328. KAN. STAT. ANN. § 74-9101(b).

329. *Id.* § 74-9106.

330. KAN. SENTENCING COMM’N, 2002 LEG. REPORT 2, *reprinted in* 15 FED. SENTENCING REP. 32 (2002).

331. WILHELM & TURNER, *supra* note 273, at 9.

332. *Id.*

333. See JON WOOL & DON STEMEN, VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES?: SENTENCING AND CORRECTIONS REFORMS IN 2003, at 12 (2004) (describing state sentencing reforms), *available at* [http://www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf).

334. See *id.* at 13. Since the Commission’s guidelines went into effect in 1993, Kansas’ prison population has grown at a rate lower than the national average—its growth rate has been 38 percent compared to 54 percent nationwide. See WILHELM & TURNER, *supra* note 273, at 8.

335. Rich, *supra* note 327, at 710; see also Lewis, *supra* note 325, at 355 (suggesting that “the Kansas Legislature has taken direct punitive action against the Commission after it recommended something the legislature did not want to hear”).

336. Rich, *supra* note 327, at 711. The Commission also provides the legislature with additional information, such as public attitudes about sentencing and the experience in other states

Thus, the experience of Kansas and Oregon demonstrates that structural design features seem to matter little when the agency is responsible for sentencing. These commissions share design traits in common, but their different histories show that success depends more on political forces.

b. Commission States Without Guidelines

Some states currently have commissions, but they have not yet adopted a system of sentencing guidelines. There are typically not enough interactions with these agencies and their respective legislatures to provide a meaningful evaluation of their independence. But even the limited experience in these states parallels the findings in the states already discussed because they show how important politics are to the agency's success.

For example, both Massachusetts and Oklahoma have commissions that cannot get their proposed guidelines enacted because there is insufficient political support. Both states have focused on establishing relatively independent commissions instead of creating commissions with strong political connections and political power. The Massachusetts Sentencing Commission, established in 1994, is located in the judicial branch, like the Federal Commission.<sup>337</sup> It has a diverse membership,<sup>338</sup> though no legislative members, and those members serve long terms without fear of removal without cause. Oklahoma similarly has a diverse membership without legislators, and its members serve five-year terms.<sup>339</sup> As in the other states discussed so far, the experience of the commissions in Oklahoma and Massachusetts confirms that sentencing agencies are not able to use independence to their advantage in a way that traditional regulatory agencies can.<sup>340</sup> Neither commission has been able to get its guidelines approved.

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with different sentencing proposals. See, e.g., KAN. SENTENCING COMM'N, REPORT TO THE KANSAS LEGISLATURE 6-7 (2003), available at <http://www.openminds.com/indres/KansasPrison.pdf>.

337. MASS. GEN. LAWS ch. 211E, § 1(a) (1999).

338. The Massachusetts Commission has nine voting members who serve six-year terms and includes two assistant district attorneys, an assistant attorney general, two private defense lawyers, one public defender, and three judges. *Id.* § 1(a)-(b)(1). The six nonvoting members consist of the following (or their designee): the commissioner of corrections, the commissioner of probation, the secretary of public safety, the chairman of the parole board, the president of the Massachusetts Sheriffs Association, and a victim witness advocate. *Id.* § 1(a).

339. OKLA. STAT. tit. 22, § 1503 (2003). Oklahoma's Commission has fifteen members, including two judges, two defense lawyers, four legislators, two prosecutors, a director of State Finance, a crime victim, the director of the state Bureau of Investigation, a gubernatorial appointee, and the director of the Indigent Defense System. *Id.* § 1502(A).

340. One obstacle for the commissions in both states is the fact that their proposed guidelines must be affirmatively enacted by the legislature to take effect. Each commission has offered proposals to their respective legislatures, but they have not garnered sufficient support. But although this design feature

Similarly, whereas other commissions have found resource impact analysis to be beneficial, neither the Oklahoma Commission nor the Massachusetts Commission has been able to capitalize on comparable powers.<sup>341</sup> Again, the key is the political climate. Neither the Oklahoma nor the Massachusetts legislatures appear to place enough weight on fiscal concerns to take the leap to adopt their respective commission's proposed guidelines.<sup>342</sup>

### c. Rejected Sentencing Commissions

Many states have experimented with state commissions only to reject them later. These experiences further confirm the highly politicized nature of sentencing.

Florida, for instance, had a permanent sentencing commission that succeeded in getting its initial set of guidelines adopted in 1983, but the Florida Commission and its guidelines were repealed in 1998. Florida's Commission shared many of the design features of the more successful state commissions. Like Washington and North Carolina, the Florida Commission lacked the authority to pass legally binding guidelines. The legislature had to enact the

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makes it more difficult for these agencies, Washington, North Carolina, and Kansas have demonstrated that this design feature is not insurmountable if the political will is there.

341. MASS. GEN. LAWS ch. 211E, § 2(6)(A); OKLA. STAT. tit. 22, §§ 1508, 1516 (2003).

342. In Massachusetts, the state House of Representatives proposed a bill in 2001 that modified the Commission's proposal, largely by requiring longer prison sentences and limiting the use of alternatives to incarceration. But a key committee in the state Senate did not report the bill because of its concern with the fiscal impact of the changes. See Honorable Robert A. Mulligan, Mass. Sentencing Comm'n, *Sentencing Guidelines Legislation 1* (2003) (on file with author).

In addition to Oklahoma and Massachusetts, there are other jurisdictions that have recently established sentencing commissions or are still formulating their initial set of guidelines. This group includes Alabama, New Mexico, and Washington, D.C. Other states have also established study commissions. See WOOL & STEMEN, *supra* note 333, at 9 (listing states). Their interactions with political actors have been too limited to provide a basis for analysis. The Georgia Commission on Certainty in Sentencing arguably would have fallen into this category as well. The Commission, established by executive order in 1999, Georgia Exec. Order No. B-22-0336-2001 (1999), drafted proposed guidelines in 2002. Although some political actors in the state are still considering the guidelines, the governor closed the Commission's office in February, 2003. See Richmond Eustis, *Sentencing Guidelines Not Dead Yet*, FULTON COUNTY DAILY REP., Apr. 3, 2003.

I have also omitted an analysis of Alaska because, although representatives from various Alaska state agencies have formed a group that makes recommendations to the legislature regarding sentencing policy, see ALASKA CRIMINAL JUSTICE COUNCIL, RECOMMENDATIONS OF THE ALASKA CRIMINAL JUSTICE COUNCIL 88-103 (2003), available at [http://www.ajc.state.ak.us/\\_download/cjc2.pdf](http://www.ajc.state.ak.us/_download/cjc2.pdf); ALASKA CRIMINAL JUSTICE COUNCIL, INTERIM STATUS REPORT OF THE ALASKA CRIMINAL JUSTICE COUNCIL 36 (2002), available at [http://www.ajc.state.ak.us/\\_download/finalCJCReport.pdf](http://www.ajc.state.ak.us/_download/finalCJCReport.pdf), it does not have a formal, permanent body that has authority to recommend sentencing policy. See Richard S. Frase, *Sentencing Guidelines Are "Alive and Well" in the United States*, in SENTENCING REFORM IN OVERCROWDED TIMES, *supra* note 252, at 12, 13.

Commission's proposals for them to have legal effect.<sup>343</sup> And like so many other state commissions, it had a diverse membership, including legislators.<sup>344</sup> Although it was not initially charged with considering prison resources, the legislature eventually required the Commission to take costs into account<sup>345</sup> because it was dissatisfied with Commission proposals that were too expensive.<sup>346</sup>

Despite these commonalities with other state commissions that have survived, the politics in Florida precluded the Commission's success. Although the politicians in the legislature supported tougher sentences, they were also fiscally conservative. The Florida corrections system was overcrowded and underfunded, and the legislature was unwilling to raise taxes to fund the Commission's proposals, which included increases for some sentences.<sup>347</sup> In the end, the Commission and the guidelines failed in Florida because of a political impasse in the legislature. The legislature wanted both to increase sentences and to keep prison costs at a minimum, and the Commission was not able to solve this intractable problem. It is hard to imagine any institutional design mechanism that could enable an agency to survive such a political climate.<sup>348</sup>

Other commissions also failed because they lacked political support. This was true in a variety of states and with commissions of varying institutional designs.<sup>349</sup> In all these states, the political will did not exist to support

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343. See Wright, *supra* note 82, at 59.

344. The Florida Commission's seventeen members included two members from both the state Senate and House of Representatives, five judges, a victim advocate, two prosecutors, a corrections official, a public defender, an attorney recommended by the president of the Florida bar, and two people of the governor's choice. FLA. STAT. ANN. § 921.001(2)(a) (West 2001).

345. The legislature passed a bill in 1988 that required the Commission to "take into consideration the existing sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities . . ." *Id.* § 921.001(3)(a).

346. See ROGER HANDBERG & N. GARY HOLTEN, *REFORMING FLORIDA'S SENTENCING GUIDELINES: BALANCING EQUITY, JUSTICE, AND PUBLIC SAFETY* 48-51 (1993).

347. See *id.* at 50, 55; Alschuler, *supra* note 83, at 935.

348. Today, Florida's guidelines have force only as a floor. Judges have complete discretion to sentence defendants between the guideline sentence and the statutory maximum, and they need to give reasons for their sentence only when it falls below the recommended guidelines term. See Frase, *supra* note 74, at 70.

349. Failed commissions include Michigan's diverse, nineteen-member commission, which included eight members of the legislature, see Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 MICH. B.J. 652, 652 (June 2000); Tennessee's commission, which performed resource-impact assessments, TENN. CODE ANN. § 40-37-203 (1990); New York's commission, which lasted long enough to propose guidelines, but the legislature never passed them, see GRISSET, *supra* note 88, at 145-72; and South Carolina's commission, which failed to get judicial support, *id.* at 42. In addition, the Maine and Connecticut commissions never developed guidelines. See TONRY, *supra* note 179, at 28. Texas, Montana, and Nevada also created permanent government bodies charged with recommending sentencing rules, but those states did not adopt sentencing guidelines. Wright, *supra* note 50, at 439 tbl. 1; see also Frase, *supra* note 81, at 446. Louisiana and Wisconsin implemented guidelines but later repealed them, *id.*, although Wisconsin is currently considering guidelines again, see *infra* note 351.

the sentencing commission. Thus, regardless of the agency's structural design or composition, they could not survive.<sup>350</sup> These agencies provide an important lesson: Although some design characteristics can help an agency operate in a political environment, ultimately, the politics themselves play the most important role in the agency's success.

d. Commission States With Voluntary or Nontraditional Guidelines

Several states—Arkansas, Delaware, Maryland, Missouri, Utah, Virginia, and Wisconsin—have sentencing commissions that have promulgated voluntary guidelines instead of legally binding or presumptive guidelines.<sup>351</sup> Trial judges can follow these guidelines at their option, and their decisions whether to follow them are not subject to appeal. Pennsylvania's sentencing guidelines also can arguably be included in this category.<sup>352</sup>

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350. See Andrew von Hirsch, *The Enabling Legislation*, in THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 79, at 62, 82 (explaining that the "political style" of a jurisdiction plays a large role in whether or not a commission will succeed, and pointing out that New York's commission failed in part because the participants involved in sentencing reform were concerned with political self-interest more than the broader merits of the proposals being considered).

351. ARK. CODE ANN. § 16-90-803 (Michie 2001) (describing voluntary presumptive standards in Arkansas); MD. CODE ANN., CRIM. PROC. § 6-211(b) (2001) (noting that the Maryland sentencing guidelines are voluntary guidelines "that a court need not follow"); VA. CODE ANN. § 17.1-801 (Michie 2003) ("General Assembly of Virginia . . . has determined that it is in the best interest of the Commonwealth to develop, implement, and revise discretionary sentencing guidelines."); WIS. STAT. ANN. § 973.30(1)(c) (West 2003) (stating that the Wisconsin Sentencing Commission is charged with "adopt[ing] advisory sentencing guidelines for felonies"); *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) ("[T]here is no constitutional or statutory right in Delaware to appeal a criminal punishment on the sole basis that it deviates from the SENTAC sentencing guidelines."); Deanell Reece Tacha, *Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471, 473 (1997) (noting that "Missouri guidelines are advisory rather than mandatory"); Utah Sentencing Comm'n, *Frequently Asked Questions*, at <http://www.sentencing.utah.gov/FAQ.htm> (explaining that "[t]he guidelines are not mandatory" in Utah). This is Wisconsin's second go-round with a sentencing commission. The first Commission was also charged with adopting voluntary guidelines, but it was disbanded in 1994 when a legislative audit found that it was not cost effective to have the Commission. See Telephone Interview with Michael Connelly, Director, Wisconsin Sentencing Commission (Mar. 12, 2004). When South Carolina established its Commission, it was charged with the development of advisory sentencing guidelines. S.C. CODE ANN. § 24-26-20 (Law. Co-op. 2003). It, too, has ceased receiving funding and has been disbanded.

352. Although Pennsylvania's guidelines are not, on their face, voluntary, the Pennsylvania Supreme Court has given them an interpretation that renders them advisory. See *Commonwealth v. Devers*, 546 A.2d 12, 18–19 (Pa. 1988) (holding that, if the trial judge has "been fully informed by the presentence report, the sentencing court's discretion should not be disturbed"); see also *Commonwealth v. Sessoms*, 532 A.2d 775, 780–81 (Pa. 1987) ("[T]he legislature has done no more than direct that the courts take notice of the Commission's work" because the guidelines "cannot, without more, be given the effect of law, either as legislation or regulation, so as to by themselves alter the legal rights and duties of the defendant, the prosecutor, and the sentencing court.").



Sentencing commissions that promulgate voluntary guidelines may not face the same political pressure as commissions that pass binding guidelines. Because the guidelines are not binding, they might not have the same impact on judicial behavior or prison population,<sup>353</sup> and political actors might not make the effort to “overrule” guidelines that make little practical difference. In addition, because the rules are not binding, interest groups may pay less attention to them either because they do not have a significant impact on actual practice or because they are not perceived to have such an effect. As a result, the experience of commissions in these states is not as informative if the goal is determining what design features matter.

But to the extent these voluntary guidelines have an influence on the behavior of judges,<sup>354</sup> politicians may have an incentive to override even these voluntary guidelines.<sup>355</sup> Accordingly, some of the same institutional and political dynamics discussed above might apply to these commissions as well.

In fact, there is some evidence in “voluntary” guideline states of politicized commissions and a failure of an insulated design to give the agency additional power. Pennsylvania’s commission, for example, has some features that promote independence, but it has been ineffectual. Similar to the Federal Commission and the Minnesota Commission, the Pennsylvania law

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353. See Reitz, *supra* note 183, at 8–11.

354. There is evidence that voluntary guidelines have had an impact on the decisions of trial judges. See Barkow, *supra* note 24, at 119. For example, the Virginia Criminal Sentencing Commission reports a compliance rate of 79.4 percent for fiscal year 2003. VA. CRIMINAL SENTENCING COMM’N, 2003 ANNUAL REPORT 16 (2003), available at [http://www.vcsc.state.va.us/2003Annualreport\\_pdf.pdf](http://www.vcsc.state.va.us/2003Annualreport_pdf.pdf).

The Arkansas sentencing guidelines show relatively high compliance rates for some offenses. For example, judges complied with the guidelines more than 50 percent of the time for Murder I, Robbery, Manufacture of Controlled Substances, Residential Burglary, Theft of Property, Battery II, Forgery, and various other offenses. ARK. SENTENCING COMM’N, BIENNIAL REPORT 2001–2002, at 19–28 (2003), available at [http://www.arkansas.gov/asc/2002\\_biennial.pdf](http://www.arkansas.gov/asc/2002_biennial.pdf). The compliance rate for various low-level offenses was 100 percent in 2001. *Id.* at 28. In contrast, however, the compliance rate for rape was 0 percent in 2001 for the twenty-two cases reported (81.8 percent of the sentences were lower than the guidelines, 18.2 percent were higher). *Id.* at 20. Maryland reports that in 2001, judges complied with the state’s voluntary guidelines in 50.9 percent of the cases. MD. STATE COMM’N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 7 (2002), available at <http://www.msccsp.org/publications/ar2002.pdf>. Compliance is higher in Maryland for property offenses (68 percent) than drug offenses (41.8 percent). *Id.* at 9 fig.3. Compliance also varies by geographic area, with the district that includes Baltimore complying with the guidelines in only 30.7 percent of all cases in 2001, compared with compliance rates in other districts ranging from 59.4 percent to 72.4 percent. *Id.* at 8 fig.2.

355. See, e.g., ABRAHAM BENMOSHE ET AL., ISSUES IN MARYLAND SENTENCING—JUDICIAL COMPLIANCE WITH THE MARYLAND SENTENCING GUIDELINES: REVIEW AND RECOMMENDATIONS (2001), at [http://www.msccp.org/publications/issues\\_compliance.html](http://www.msccp.org/publications/issues_compliance.html) (observing that the fact that the Maryland guidelines have not been revised since their inception explains some of the downward departures by judges, but noting that legislators might oppose revising the guidelines in a downward direction because of political concerns).

is structured to allow the guidelines to take effect unless the legislature acts to reject them. The Pennsylvania Commission is arguably even more independent because the period of time during which its state legislature can disagree—and during which groups can mobilize against the commission's proposals—is shorter. Specifically, the Commission's guidelines become law ninety days after the guidelines are submitted to the legislature unless the legislature passes a concurrent resolution to reject the guidelines.<sup>356</sup>

But because legislative inertia is easily overcome in sentencing, this feature ends up having little significance. Indeed, the Pennsylvania legislature rejected the Commission's initial set of guidelines because, in the legislature's view, the sentences were too lenient and the ranges were too narrow.<sup>357</sup> The Pennsylvania Commission responded with tougher guidelines, which the legislature approved.<sup>358</sup>

Other states with voluntary guidelines have been more successful than Pennsylvania, and in those states, the commissions have sought to work within their political environment. As in states with presumptive guidelines, some voluntary guideline states have commissions that have used resource impact statements to their advantage.<sup>359</sup>

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356. 42 PA. CONS. STAT. § 2155(b) (2004). In addition, like other commissions analyzed so far, it has a diverse membership, including legislators. Its eleven members consist of four judges (appointed by the Chief Justice of Pennsylvania), two state senators (appointed by the president of the Senate), two state representatives (appointed by the Speaker of the House), a district attorney, a defense attorney, and a professor of law or criminologist (all appointed by the governor). *Id.* § 2152. Its members serve two-year terms.

357. See VON HIRSCH, *supra* note 82, at 64.

358. See Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 699 (1995). Many subsequent revisions to the Pennsylvania guidelines have been approved by its general assembly, see *Commission Marks 25th Anniversary*, MONITOR (Pa. Comm'n on Sentencing), Fall 2003, at 1, available at <http://pcs.la.psu.edu>, and some of them have moderated calls for tough-on-crime responses, see John Kramer & Cynthia Kempinen, *The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines*, 8 FED. SENTENCING REP. 74, 78 (1995) (describing 1994 revisions to the guidelines "that were moderate and balanced" despite a political climate in which the gubernatorial candidates did not want to look soft on crime and the district attorneys were lobbying for harsher sentences). But despite some successes at moderation, there is also abundant evidence of strong political oversight. Many of the approved amendments were prompted by legislative requests. See *id.* at 74 (describing legislative requests for sentencing revisions). And, just as in other states, its legislature has continued to pass mandatory minimum sentences and three-strikes laws despite the presence of the Commission. See Jodeen M. Hobbs, Comment, *Structuring Sentencing Discretion in Pennsylvania: Are Guidelines Still A Viable Option in Light of Commonwealth v. Devers?*, 69 TEMP. L. REV. 941, 958 & n.149 (1996). And the Commission itself has proposed sentence increases to appease the political demands. See Martin, *supra* note 73, at 285–87.

359. For example, the research coordinator for the Arkansas Sentencing Commission notes that the legislature has taken into consideration its prison impact reports and some of its proposals have been revised in light of this information. Telephone Interview with Wanda Hayes, Research Coordinator, Arkansas Sentencing Commission (Mar. 12, 2004). The Virginia Criminal Sentencing

Thus, although states with voluntary guidelines do not present as reliable a picture of the influence of agency design as states with binding, presumptive guidelines for the reasons stated above, the trends in these states nevertheless seem to support the overall pattern seen in states with presumptive guidelines.<sup>360</sup> It is not insulation that gives these agencies power. The key

Commission also performs prison impact analyses and has proposed changes in sentencing based on the cost-savings those changes can produce. For example, when the Virginia Commission recommended statewide implementation of nonviolent offender risk assessment that would divert more of those offenders away from prison and to alternative programs, it emphasized the cost savings of those programs. VA. CRIMINAL SENTENCING COMM'N, 2002 ANNUAL REPORT 6 (2002) (noting that the pilot program produced a net fiscal benefit of \$1.5 million and that statewide benefits could approach \$3.7 to \$4.5 million), *available at* [http://www.vcsc.state.va.us/annualreport\\_2002.pdf](http://www.vcsc.state.va.us/annualreport_2002.pdf). The legislature allowed the Commission's recommendation to take effect, although it should be noted that the legislature initially prompted the Commission to investigate the feasibility of such a program, so there was some political interest in adopting such a program even before the Commission reported its recommendation. See VA. CRIMINAL SENTENCING COMM'N, *supra* note 354, at 65.

For a sampling of resource impact statements in states with voluntary guidelines, see, e.g., ARK. CODE ANN. § 16-90-802(d)(6)(A)–(B) (Michie 2001) (stating that the Arkansas Sentencing Commission is charged with the task of “determin[ing] the feasibility, impact on resources, and budget consequences of any proposed or existing legislation affecting sentence length” and providing this information to the legislature before adoption); MD. CODE ANN., CRIM. PROC. § 6-213(a) (2001) (stating that the “Commission shall use a correctional population simulation model to help determine the State and local correctional resources that: (1) are required under current laws . . . and (2) would be required to carry out future Commission recommendations” and noting that “[i]f the recommendations of the Commission for changes in legislation would result in State and local inmate populations exceeding the operating capacities of available facilities, the Commission shall present additional sentencing model alternatives consistent with these capacities”); VA. CODE ANN. § 17.1-803(8) (Michie 2003) (providing that the Commission shall “[m]onitor felony sentence lengths, crime trends, correctional facility population trends and correctional resources and make recommendations regarding projected correctional facilities capacity requirements and related correctional resource needs”); *id.* § 30-19.1(4) (stating that the Commission is required to prepare fiscal impact statements for proposed legislation that might result in increased imprisonment); WIS. STAT. ANN. § 973.30(1)(h) (West 2003) (stating that the Commission has a duty to “[a]ssist the legislature in assessing the cost of enacting new or revising existing statutes affecting criminal sentencing”). Before the legislature stopped funding its operation, the South Carolina Commission was also charged with conducting resource analysis. S.C. CODE ANN. § 24-26-20(4)–(7) (Law. Co-op. 2003) (charging Commission with “develop[ing] and recommend[ing] policies for preventing prison and jail overcrowding,” “examin[ing] the impact of statutory provisions and current administrative policies” on overcrowding, and preparing reports and research on strategies to reduce overcrowding).

360. I have omitted a discussion of the Ohio sentencing scheme. Ohio has a commission that fits the model discussed above in many respects. Like North Carolina's commission, Ohio's is large. It has thirty-one members: eleven judges, three prosecutors, three defense lawyers (one is the state public defender), a representative from the bar association, a sheriff, two police chiefs, a crime victim, a county commissioner, a mayor, four members of the legislature, the director of rehabilitation and correction, the director of youth services, and a superintendent of the highway patrol. OHIO REV. CODE ANN. § 181.21(A) (West 2002). And like many other commissions, it is required to analyze the impact of its sentencing policies, *id.* §§ 181.23(A)(7), 181.24(C), and any bills proposed by the legislature that create new crimes or change criminal penalties for existing offenses, *id.* § 181.25(A)(3). But it is difficult to analyze the relationship between its Commission and political actors in the state because its Commission has left most concrete sentencing decisions to the Ohio courts. The Ohio

variable for sentencing commission success lies with the politics of the jurisdiction and design features that allow the agency to work within, not outside, that political culture.

### III. INSTITUTIONAL DESIGN AND THE ADMINISTRATION OF CRIME

The comparison between the federal and the state experience with sentencing commissions offers several valuable lessons. Although rigorous empirical analysis in the future may yield more definitive information about the relationship between institutional design, politics, and criminal justice policy, the case studies discussed above produce strong evidence to support some important preliminary observations.

Subpart A discusses the first such lesson, which is that political pressures in criminal justice are strong enough to overcome any institutional design of insulation, thus making criminal justice a unique subject of agency regulation. We have seen a variety of commission models employed in the states and in the federal government, yet despite their different structures, they are all remarkably politicized and operate under strong oversight.

Subpart B pursues the second important conclusion that one can draw from these case studies: Despite the strong political oversight, sentencing commissions have been used successfully to curb immediate political impulses. While the Federal Commission has had little influence and is justifiably seen as unsuccessful in this regard, many of the states have had greater success in influencing political actors. Subpart B therefore explores the design features that have allowed these agencies to succeed. In particular, it discusses the value of having strong legislative ties and requiring resource impact statements.

#### A. The Power of the Politics of Crime

As Part I explained, given the political dynamics associated with criminal sentences, one would not expect institutional characteristics

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Commission adopted basic guiding principles that trial judges must follow, but it did not establish a numerical sentencing grid with prescribed ranges. So, to take but one example, the Ohio plan insists that sentences "shall not impose an unnecessary burden on state or local governmental resources," but it does not quantify this in any respect. Rather, what constitutes an unnecessary burden is to be determined in a common law fashion by courts. See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1, 18-19 (2002). Because the Ohio plan consists largely of these "nearly unassailable concepts," *id.* at 58, the Commission has not staked out the kind of positions with which political actors can disagree.

designed to promote independence to make a substantial difference in terms of an agency's ability to have an influence on policy. And, indeed, the federal and state experiences show that agencies responsible for regulating criminal justice issues are under enormous political pressure, regardless of their design.

For example, although traditional agency theory suggests that making guidelines effective without legislative approval would give sentencing commissions more power vis-à-vis commissions that must have their guidelines affirmatively passed by the legislature, the actual experience of the federal and state commissions suggests there is no consistent relationship. Some states, like New York and South Carolina, confirm the prediction; their legislatures had to act affirmatively to approve guidelines and never did.<sup>361</sup> The Massachusetts and Oklahoma commissions are similarly waiting for legislative approval of their proposed guidelines. But Washington, North Carolina, and Kansas have the same requirement, and they have successfully influenced their legislature. The suggestion is not that this is a helpful feature. It obviously is not. The point instead is that this kind of design difference is of marginal effect because political actors can easily overcome inertia even when explicit disapproval is required.

Similarly, commissions with the ability to pass guidelines absent legislative objection have failed to show much independence. The guidelines promulgated by the U.S. Sentencing Commission take effect unless the legislature affirmatively acts to disapprove. Yet the Federal Commission has been consistently and repeatedly undermined by Congress since its inception, even with this power. The experience in some states has been similar. Both the initial Wisconsin Commission<sup>362</sup> and the Pennsylvania Commission had this power, yet the Wisconsin Commission ceased receiving funding from its legislature and the Pennsylvania Commission saw its initial guidelines overruled by the legislature.<sup>363</sup>

Whether sentencing commissioners serve fixed terms also seems to make little difference. In the case of traditional regulatory agencies, the hallmark of so-called independent commissions is for-cause removal protections for the agency heads. Almost all sentencing commissioners enjoy this job security;

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361. See von Hirsch, *supra* note 350, at 72.

362. WIS. STAT. § 973.012 (repealed 1995).

363. See Susan E. Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21, 68, 74 (1984). Ronald Wright has similarly found that whether a legislature must affirmatively enact a commission's recommendations or whether the commission itself has amendment power makes little difference. Wright, *supra* note 82, at 61. This is also true in the context of three-strikes laws. Wright, *supra* note 50, at 440.

yet they are hardly independent if independence is measured by their freedom from political control. Nor does it seem to matter whether the commissioners represent both political parties. This, too, is common, yet agencies with such balanced commissioners still face intense political oversight.

The bottom line is that it is largely up to legislatures to determine how much influence sentencing commissions will have, and features designed to promote independence are of little consequence in this context. Time and again, and regardless of the agency's structure, legislatures have increased sentences and passed mandatory minimum sentences even with opposition from their commissions.<sup>364</sup> Put another way, just as the discussion in Part I predicted, sentencing commissions are largely at the mercy of their political patrons, and independent design characteristics offer the commissions little protection.

#### B. Using Institutional Design to Harness the Politics of Crime: Lessons From State and Federal Sentencing Commissions

Although independence is not a successful model in this context, it is not the case that institutional design does not matter. Instead, the key is using design features that improve and increase the agency's contacts with the legislature.

##### 1. Forming Legislative Connections

The more successful state commissions have in common strong ties to their respective legislatures and a diverse commission membership. This subpart seeks to explain how these factors work together.

As Part I explained, the politics of sentencing at the legislative level are one-sided. Many state commissions—unlike the Federal Commission—seem to represent an effort to correct this imbalance by having a large and diverse membership on their commissions, including a variety of voices that typically get muted in the legislative process. These voices include those of defense lawyers and those concerned with the rationality and costs of sentencing.<sup>365</sup>

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364. And, as Ronald Wright observes, "states with commissions are just as likely to pass [three-strikes] laws as states without commissions." Wright, *supra* note 50, 431.

365. "Most state sentencing commissions include judges, prosecuting and defense lawyers, corrections officials, public members, and sometimes legislators, making these panels much more broadly representative than the federal commission." Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995); see also MD. CODE ANN., CRIM. PROC. § 6-204 (2001) (stating that the nineteen-member Commission includes judges, a defense lawyer, members of the state Senate, members of the state House of Delegates, a representative from law enforcement, a

In theory, this could enable the commission to consider sentencing issues from a variety of perspectives that might otherwise be ignored and could therefore bring a layer of reflection into the policy debate over sentencing.<sup>366</sup> In addition, when the various interests represented on a commission agree, they could increase their influence with the legislature by combining forces.<sup>367</sup> By coordinating their requests, they could present the legislature with a coherent package. When the legislature knows all the relevant groups agree, it is more likely to adopt the package. Moreover, by placing a variety of interests on the commission, the legislature sets up a structure that allows these different interests to have regular contact with the legislature. This could allow the commission's constituent members to develop a rapport with key legislative members and therefore enhance their influence.

By itself, however, diversity of membership is insufficient. Precisely because these groups have little pull in the political arena, there is no reason to expect that legislatures will defer to their judgment simply because they are sitting on an agency. Something more needs to be done to get the legislature to pay greater attention to diverse voices.

One way to facilitate legislative support is to include members of the legislature on the commission so that they are exposed to these alternative viewpoints. While traditional regulatory theory would suggest that the inclusion of political actors on a commission would detract from the agency's independence and power, in the criminal justice arena, legislative membership might have the opposite effect. Including politicians on the commission

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representative from a victims' advocacy group, two representatives of the public, a representative of local correctional facilities, and an expert in the field of corrections); UTAH CODE ANN. § 63-25a-301(2) (2003) (stating that membership includes members of the state legislature, officials from corrections, pardons and parole, judges, defense lawyers, prosecutors, professionals who assist in the rehabilitation of offenders, members of the public "who exhibit sensitivity to the concerns of victims of crime and the ethnic composition of the population"); see, e.g., *supra* notes 208-210, 252-254, 278-282 and accompanying text.

366. The current draft of the American Law Institute's proposed changes to the Model Penal Code sentencing provisions comments on the value of "bringing together . . . many knowledgeable and responsible stakeholders from throughout the criminal justice system and from the public at large." MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 3, at 44) (2004). This "roundtable function" "provides opportunities for consensus-building on important policy issues" that are otherwise in "scarce supply" in the political process. *Id.* at 44-45. And, in fact, the proposed draft suggests broad representation on the commission. *Id.* at 67-68.

367. For example, if a commission wants to recommend an intermediate sanction program as an alternative to incarceration, it can package all the relevant programs into a single funding request. By coordinating in this way, each member of the commission is in a stronger position vis-à-vis the legislature than if the member submitted a funding request for an individual program in isolation. I am grateful to Ronald Wright for this example and for the larger point about the advantage of combining forces.

exposes them to perspectives they might otherwise not hear, and it also gives the commission advance notice of the political viability of its proposals.

Because the commission must face that political reality eventually, this notice can help the commission forge positions that are more likely to be adopted by the legislature. While the commission might not be able to get its original or ideal package through the legislature, knowing about concerns *ex ante* can help the commission maximize its influence.<sup>368</sup> Moreover, having legislators on the commission who agree with the ultimate proposal can prove very valuable when the full legislature considers the commission's recommendations because the commission will have advocates in the assembly. The presence of legislative and other political members on the commission can help the commission persuade political actors outside the commission of the wisdom of the agency's policies.

As discussed above, many state sentencing commission enabling statutes require legislators to serve as members of the commission.<sup>369</sup> The inclusion of these political actors reflects the reality that legislatures are not willing to give commissions complete control over sentencing. Indeed, recall that while the initial members of the North Carolina Sentencing and Policy Advisory Commission were deliberating to produce their initial set of proposed guidelines, the legislature amended the enabling legislation to add four new members from the legislative branch (two senators and two representatives) in order to "enforce a sense of political reality as the commission completed

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368. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 3, at 70) ("The current draft opts to include a group of legislators, balanced across party lines, on the theory that the commission needs to have close communications with lawmakers and a realistic view of how commission recommendations will fare in the legislative process."). This is no guarantee, of course. Some states, such as Pennsylvania, have legislative members on their commission, but their commissions still lack influence.

369. See, e.g., *supra* notes 280, 319, 324 and accompanying text; see also MD. CODE ANN., CRIM. PROC. § 6-204(a)(9)–(10) (stating that the nineteen-member Commission includes two members of the state Senate, including at least one member of the Senate Judicial Proceedings Committee, and two members of the House of Delegates, including at least one member of the House Judiciary Committee); MO. ANN. STAT. § 558.019(6) (West 2004) (stating that of the eleven members, one is appointed by the Speaker of the House and one by the president pro tem of the Senate); UTAH CODE ANN. § 63-25a-301(2) (stating that of the twenty-seven members, two members shall come from the House of Representatives and two from the Senate); VA. CODE ANN. § 17.1-802 (Michie 2003) (stating that the seventeen-member Virginia Criminal Sentencing Commission includes three persons appointed by the Speaker of the House and two persons appointed by the Senate Committee of Privileges and Elections); WIS. STAT. ANN. § 15.105(27) (West 2003) (Commission includes one majority party member and one minority party member from each house of the legislature). Other states have legislative members serving as nonvoting members. See, e.g., ARK. CODE ANN. § 16-90-802(b)(2) (Michie Supp. 2001); WASH. REV. CODE § 9.94A.860(4) (2003).



its work.”<sup>370</sup> Yet in North Carolina and many other states with legislative members, sentencing commissions have been able to overcome immediate political responses to crime.

In order for a commission to bring some apolitical judgment and rational reflection to its task, it seems that the number of politicians must remain relatively small compared to the other members of the commission. If a commission is dominated by—or heavily laden with—politicians, the body becomes indistinguishable from a legislative committee and may not have enough diversity of perspective to bring about the desired mitigating effect on immediate political impulses. For example, in South Carolina, six of the thirteen members of the South Carolina Sentencing Guidelines Commission were politicians.<sup>371</sup> Given this high percentage of political membership, it is perhaps to be expected that the South Carolina Commission ultimately failed to prove its independent worth and was disbanded.

Commission membership must therefore strike a balance between the diversity of viewpoints that can produce an “expert” perspective on sentencing and the need to be highly attuned to the political landscape. The more diverse the commission membership, the more likely that the commission will be able to maximize its influence. Further research should seek to explore the optimal mix, but it seems possible to draw at least a tentative conclusion that instead of seeking isolation from political actors, commissions should be closely linked with them.

A formal connection with the legislature through commission membership may not be necessary.<sup>372</sup> The commission could get advance legislative input informally, through contacts between the legislature and members of the commission.<sup>373</sup> The exclusion of legislators from the Minnesota Commission, for example, “might have been politically disastrous,” according to Susan Martin,

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370. Wright, *supra* note 289, at 73.

371. S.C. CODE ANN. § 24-26-10(A)(3)–(4) (Law. Co-op. 2002).

372. And, in fact, there may be legal impediments to placing legislators on a commission. For example, the United States Sentencing Commission could not include legislative membership without running afoul of separation of powers doctrine. Pursuant to the Supreme Court’s separation of powers analysis in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991), a federal agency cannot include agents of Congress if it exercises executive or judicial power. The separation of powers analysis may be similar in states that place the commission formally in the judicial branch.

373. Looking at the experience of the Minnesota Commission, Richard Frase has observed: “At the very least, some commission members must have significant political experience and connections—as did the first chair of the Minnesota Commission—for the commission to be effective initially and over the long term.” Frase, *supra* note 207, at 369.

"but several members had sufficiently strong personal ties to legislative leaders and experience in lobbying the legislature to avoid problems."<sup>374</sup>

At some level, though, it is critical that the commission maintain strong ties to political actors—either formally through legislative membership on the commission or informally through close contacts—because of the highly politicized nature of criminal justice policy.

Building the legislative bridge will help increase the odds that these diverse voices get a legislative ear, but it is not sufficient to give the agency influence. Regardless of the commission's membership, ultimately the commission's recommendations must be politically palatable—to the legislators on the commission or to the key political actors in the general assembly. Thus, diversity of voices does not mean diversity of politically salient proposals. Instead, these voices will be ignored by their legislative contacts unless they can sell their proposals on political terms. The next subpart considers one approach that appears to have some success.

## 2. Providing Politically Valuable Information

A common theme that emerges from the experience of the more successful state commissions is that their generation of resource impact assessments and other correctional and sentencing data can be persuasive with legislatures.<sup>375</sup> Thomas Marvell conducted a study of guideline states<sup>376</sup> and found that those states with prison capacity impact requirements<sup>377</sup> experienced slower prison

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374. Martin, *supra* note 73, at 276; see also *id.* at 277 (describing the political connections of the Minnesota Commission's chair).

375. Some sentencing reformers, such as Stephen Schulhofer, predicted that a sentencing commission or sentencing guidelines regime "would enable criminal justice planning agencies to predict, within useful limits, the effect on cost and prison population of any given penalty structure" and that this could mitigate the dangers of making sentencing decisions highly visible. Schulhofer, *supra* note 4, at 804. These impact statements become especially important when states abolish parole and lose that back-end safety valve. See Frase, *supra* note 207, at 372 ("[A] prison capacity constraint becomes essential because parole no longer operates as a 'safety valve' to relieve prison overcrowding and to counter political pressures that escalate penalties unreasonably.").

376. Marvell studied states with presumptive guidelines that were effective by 1990 and included in that group: Delaware, Florida, Michigan, Minnesota, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin. Marvell, *supra* note 358, at 701. Marvell characterized these states as "presumptive" because judges must give reasons for departing from the guidelines. *Id.* at 701–02. As noted above, however, Delaware and Wisconsin had commissions at that time that employed voluntary guidelines, if one bases voluntariness on whether the trial court's decisions were subject to appellate review. See *supra* note 351 and accompanying text.

377. Marvell included Minnesota, Florida, Washington, Tennessee, Oregon, and Delaware in this category, and listed Pennsylvania, Michigan, and Wisconsin as states without such a requirement. Marvell, *supra* note 358, at 698–99.

population growth than the nation generally and than those states without impact statements.<sup>378</sup>

Sentencing commissions, then, can generate information that can have an influence. The information is different from the kind of expertise seen under the indeterminate model. No longer is the key knowledge based on what an individual defendant might do or his or her prospects for rehabilitation. Nor, for that matter, is this new model of expertise especially grounded in the purposes of punishment. The commissions are not selling—and the legislatures are not buying—particular theories of deterrence or rehabilitation or claiming that a particular criminological theory reduces crime. Instead, the model of expertise that appears to have the biggest impact is one that is based on “system expertise”<sup>379</sup>: a rational use of overall penal resources and the containment of the penal population.<sup>380</sup>

The amount of influence this information has will, of course, be based on politics.<sup>381</sup> As the legislatures themselves asked for these impact statements, they expressed a desire to consider this information at the outset.<sup>382</sup> Moreover, legislatures care about these impact statements not necessarily because of an interest in rationalizing sentencing policy per se. If they were dealing with a budget surplus or a rapidly rising crime rate, the legislatures might not care as much about rationalizing prison resources if they see a greater

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378. *Id.* at 703–04. A follow-up evaluation by Kevin Reitz came to similar conclusions. Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S.*, in *PENAL REFORM IN OVERCROWDED TIMES* 31 (Michael Tonry ed., 2001); see also Frase, *supra* note 81, at 437 (observing that “there is considerable evidence that sentencing guidelines can help to avoid prison overcrowding and the kinds of dramatic (and very expensive) escalation in prison populations” and that “guidelines jurisdictions which emphasized resource-management goals have also had low average annual growth rates”); Reitz & Reitz, *supra* note 80, at 193 n.28 (noting that jurisdictions that tried to control prison incarceration rates through guidelines have met with uniform success).

379. I am grateful to David Garland for this terminology.

380. David Garland has offered a sociological explanation for why this information has more currency. As he has explained, in the period since the 1960s, government attention shifted from finding the causes of crime to addressing the effects of crime. David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 *BRIT. J. CRIMINOLOGY* 445, 447 (1996). In addition, there has been a “widespread movement towards a more managerialist, business-like ethos which emphasizes economy, efficiency and effectiveness in the use of criminal justice resources.” *Id.* at 455. The state, then, has become increasingly interested in making punishment more cost-effective.

381. These commissions therefore serve a function somewhat similar to the function served by the Sunshine Commissions of the early Progressive era. They provide information to the relevant political actors and hope to persuade those actors with the power of the information itself.

382. Thus, as Thomas Marvell cautions, the association between impact statements and a decline in prison growth “does not necessarily imply causation, and the slowdown in some states may have resulted from broad efforts to reduce prison population growth, rather than solely from the guidelines.” Marvell, *supra* note 358, at 707.

benefit from get-tough rhetoric.<sup>383</sup> And in fact, there are numerous examples from the states where a legislature engaged in what Richard Frase calls “credit-card-sentencing policy,” in which the legislature enacts severe penalties without any concern for whether the state has the necessary resources to shoulder the increased sentences.<sup>384</sup> Moreover, some states, such as Tennessee and Florida<sup>385</sup> failed to create strong commissions despite giving them a mandate to consider costs.

But where the legislature has a reason to care about costs, these impact statements can have tremendous influence. In particular, state legislatures are interested in these resource impact statements when they face budget pressures, especially if crime rates are stable or declining.<sup>386</sup> Forty-nine states are required by state law to have balanced budgets.<sup>387</sup> Get-tough policies mean that criminal justice expenditures eat up more and more of their budgets,<sup>388</sup> and as the budgets themselves grow smaller, they need to find a way to reduce rising prison populations and their concomitant costs.<sup>389</sup>

Prison capacity can be stretched only so far before the courts intervene,<sup>390</sup> so something has to give. Legislators are often reluctant to raise taxes

383. See Boerner & Lieb, *supra* note 249, at 95 (observing that “the legislative debate on crime and the need to toughen sentences was not tempered by concerns about prison crowding” when the state had excess capacity); Frase, *supra* note 75, at 39–40 (describing the trend in the early 1990s that legislatures showed less concern for prison capacity); Reitz, *supra* note 183, at 13 (noting that sentencing guidelines and impact models “may be used with equal facility to push sentencing severity up or down”); Wright, *supra* note 50, at 452–53 (states with sentencing commissions charged with providing fiscal impact statements to legislatures did not influence legislatures to reject three-strikes laws to any greater extent than states without such commissions).

384. Frase, *supra* note 207, at 367.

385. See *supra* notes 345–349 and accompanying text.

386. See ROBIN CAMPBELL, VERA INST. OF JUSTICE, DOLLARS & SENTENCES: LEGISLATORS’ VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 10–12 (2003) (noting that the budget crisis, combined with reduced public concern about crime, has led to current reforms in sentencing), available at [http://www.vera.org/publication\\_pdf/204\\_398.pdf](http://www.vera.org/publication_pdf/204_398.pdf).

387. See David Lubecky, *The Proposed Federal Balanced Budget Amendment: The Lesson From State Experience*, 55 U. CIN. L. REV. 563, 564, 568–71 (1986) (giving overview of state balanced budget provisions).

388. See CHAMBLISS, *supra* note 96, at 125–26 (observing that, between 1973 and 1993, nationwide expenditures on corrections increased by 1200 percent and noting that now “for the first time in U.S. history more money is being spent on criminal justice than on primary and secondary education”).

389. See *Budget Deficits Forcing Changes in Sentencing, Lawmakers Say*, CRIM. JUST. NEWSL., Oct. 1, 2003, at 3, 3 (noting that state legislatures are amenable to curtailing strict sentencing practices because of budget shortfalls).

390. For example, a 1988 survey found that prisons and jails in forty states were subject to “major court orders” addressing overcrowded conditions. WINDLESHAM, *supra* note 17, at 55. The National Prison Project in 1995 listed thirty-three jurisdictions “under court order for overcrowding or conditions in at least one of their major prison facilities.” *Id.* at 168. Nine jurisdictions had their entire penal system subject to judicial oversight. *Id.*

to build more prisons,<sup>391</sup> and “back-door” solutions such as accelerated release and furloughs are unpopular and often unwise.<sup>392</sup> Creating more rational sentencing policy on the front end becomes an attractive option.

Recent fiscal crises in many states provide a prime illustration. As state budgets have tightened,<sup>393</sup> some state politicians have been willing to reassess their tough-on-crime policies.<sup>394</sup> In the current climate of fiscal austerity, state legislatures have passed laws eliminating mandatory minimum sentences and authorizing treatment alternatives instead of incarceration for some drug offenders.<sup>395</sup> In the words of one state legislator, “[i]t is no longer fiscally possible, no matter how conservative you are, to incarcerate people and spend \$150,000 each on them when a fraction of that money would probably get them free of their habit and in productive society.”<sup>396</sup> Or, as another state representative put it, “[w]hether or not you think everybody in jail deserves to be there, it’s another issue when you’re weighing that against the stuff that makes you popular, like roads and schools.”<sup>397</sup> In Michigan, for example, the repeal of mandatory minimum drug sentences was projected to save the state \$41 million<sup>398</sup>—money that can be used on other projects. Moreover, because these changes free up existing prison beds, they make prison space available for more serious offenders.<sup>399</sup>

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391. “Even those people who favor being tough on crime don’t want to find the money to build more prisons and go back on their pledge of no new taxes . . . . So they are choosing between the lesser of two evils.” Butterfield, *supra* note 97 (quoting John Vratil, a Republican who chairs the Kansas State Senate Judiciary Committee).

392. See CAMPBELL, *supra* note 386, at 5 (describing roundtable discussion of state legislators where discussants “expressed fears of a political backlash should any [former inmate on early release] commit a headline-making offense”); Richard S. Frase, *supra* note 365, at 178 (describing the problems with “back-door” solutions).

393. As of the middle of 2002, thirty-three states had spending in excess of their revenue projections and forty states were proposing spending cuts. See WILHELM & TURNER, *supra* note 273, at 1, reprinted in 15 FED. SENTENCING REP. 41, 41 (2002).

394. See WOOL & STEMEN, *supra* note 333, at 1 (describing state sentencing reforms).

395. See Butterfield, *supra* note 97 (describing recent reforms in Kansas, Washington, and Michigan). Other states are changing sentencing policy by allowing prisoners to earn early release through good time credits or relaxing rules on parole violations. See *id.*; see also Marc Mauer, *State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?*, 15 FED. SENTENCING REP. 50, 50 (2002) (describing reforms in Louisiana, Washington, Hawaii, Connecticut, Mississippi, and North Dakota).

396. CAMPBELL, *supra* note 386, at 8.

397. *Budget Deficits Forcing Changes in Sentencing, Lawmakers Say*, *supra* note 389, at 4 (quoting Connecticut Rep. Michael Lawlor).

398. See Butterfield, *supra* note 97.

399. See CAMPBELL, *supra* note 386, at 5 (citing a Connecticut state legislator’s observation that victims’ rights groups supported the elimination of mandatory minimum sentences for drug offenders “because they recognized that keeping small-time urban drug offenders in jail longer diverted money that might be spent incarcerating violent criminals”); *id.* (quoting a Texas legislator as stating that “[e]very 19-year-old first-time offender who sleeps in a prison bed in a prison that’s full denies me an opportunity to put an armed robber in a bed”).

Sentencing commissions are neither necessary nor sufficient for this dynamic to operate. With regard to the latter: even in the current climate of fiscal pressures, states with sentencing commissions may not care enough about costs to change their policies. For example, Oregon seems uninterested in making significant changes to its sentencing policies despite their high costs.<sup>400</sup> With regard to the former: that sentencing commissions are not critical to this development is best demonstrated by the fact that states without commissions have also rolled back some of their tough-on-crime policies.<sup>401</sup> Moreover, there are other bodies, such as corrections boards, that could provide information on prison resources.<sup>402</sup>

But sentencing commissions are uniquely positioned to facilitate the process.<sup>403</sup> Sentencing commissions typically create sentencing guidelines, and the more predictable the sentencing guidelines, the more reliable the forecasts.<sup>404</sup> Many states have developed sophisticated statistical forecasting

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400. See *id.* at 7.

401. See RYAN S. KING & MARC MAUER, SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 3 (2002) (detailing changes in sentencing in 2001 in various states, including those without sentencing commissions), available at <http://www.sentencingproject.org/pdfs/9091.pdf>; WILHELM & TURNER, *supra* note 273, at 5–6 (discussing legislative reforms in states with and without sentencing commissions in response to fiscal pressure); Butterfield, *supra* note 97 (describing sentencing reforms in states without commissions, such as New York and Colorado); see also Wright, *supra* note 50, at 431 (noting that noncommission states have placed limits on the scope of three-strikes laws just as commission states have).

402. See, e.g., Alschuler, *supra* note 83, at 936 (arguing that “[a]n agency operating at the ‘back end’ of the criminal justice system could better determine the extent to which resource limitations require the release of inmates who have not fully served their ‘just’ sentences”); Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723, 724 (1993) (“The goal of matching sentences to resources can best be implemented through administrative mechanisms at the back end of the criminal justice system, not through front-end sentencing guidelines.”); Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 686 (1993) (noting that the “allocation of correctional resources and prioritization regarding their use . . . tends to be the primary concern of corrections administrators”).

403. As Kay Knapp points out, sentencing commissions take into account both the concern with achieving front-end sentencing discretion and the concern with resources because they can include judges and prosecutors, who will have an interest in the former, as well as corrections administrators, who will be concerned with the latter. Kay A. Knapp, *A Reply to Professor Alschuler*, 64 U. COLO. L. REV. 737, 740 (1993). Knapp further argues that sentencing commissions have an advantage because they typically go hand-in-hand with generating sentencing guidelines, which in turn make sentencing more predictable and therefore generate more reliable predictive data about prison resources. *Id.* In addition, focusing on costs at the front end enables expert judgment to influence the decision about whether someone should be incarcerated at all—the “in-out” decision. See von Hirsch, *supra* note 79, at 7; see also WILHELM & TURNER, *supra* note 273, at 6–7 (observing that sentencing commissions in North Carolina, Virginia, and Kansas have been “[c]entral” to each state’s ability to manage their corrections growth and “balance demands for public safety, fairness, and fiscal accountability”).

404. See PARENT, *supra* note 75, at 41 (noting that successful prediction of future prison population levels requires that “the number of future admissions and the duration of their confinement

methods and resource-management technology that allow commissions to monitor and control the use of prison resources.<sup>405</sup>

Indeed, many sentencing commissions were created precisely because the legislature wanted a body that could analyze the resource effects of various sentencing policies.<sup>406</sup> Almost every state to adopt a guideline system since the middle of the 1980s has opted to require some version of an impact statement,<sup>407</sup> and the American Bar Association (ABA) Model Sentencing Act also requires impact analysis.<sup>408</sup> The current Model Penal Code sentencing provisions state that the sentencing commission "should see that . . . the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state."<sup>409</sup>

State legislatures and the ABA have endorsed impact statements because they have proven to be effective in cutting costs by slowing incarceration rates and prison overcrowding.<sup>410</sup> "Improved data permits more accurate prison population forecasts, and more informed sentencing policy formulation."<sup>411</sup> As Kevin Reitz, the ABA Sentencing Reporter, has noted, "[m]any commissions have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever-greater stock in their forecasts, affording the commissions

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must be predictable" and that such prediction is therefore difficult under indeterminate sentencing); WILHELM & TURNER, *supra* note 273, at 7 ("Because guideline sentences offer greater uniformity and predictability, they are a powerful tool for projecting, planning for, and, therefore, controlling prison populations.").

405. See Reitz, *supra* note 62, at 577–78; see also WILHELM & TURNER, *supra* note 273, at 8 (observing that North Carolina's forecasting model was accurate within 1 percent of its prediction).

406. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 313, at 34 ("Several States with guidelines indicated that the problem of crowding became so severe that it drove the creation of a sentencing commission and capacity-linked sentencing guidelines."); Frase, *supra* note 74, at 71; see also Greg Rogers, *Criminal Sentencing in Colorado: Ripe for Reform*, 65 U. COLO. L. REV. 685, 693 (1994) (arguing that the impetus for the creation of a sentencing commission and sentencing guidelines in Colorado would be monetary concerns).

407. See Frase, *supra* note 74, at 71; Frase, *supra* note 81, at 432.

408. The American Bar Association (ABA) wrestled with the question of whether to include consideration of resource constraints in its model standards, with some arguing that "the sentencing system should be designed without concern for cost, and that courts should impose the 'just' or 'necessary' sentence in all cases without consideration of whether the facilities or dollars will be available to carry out the sentences imposed" and others arguing that "existing resources [should] fix an absolute ceiling beyond which total sentences should not go." Reitz & Reitz, *supra* note 80, at 193–94. Ultimately, the ABA concluded that "it is in every state's interest to coordinate resource and policy decisions." *Id.* at 194.

409. Reitz, *supra* note 62, at 578.

410. See Frase, *supra* note 74, at 71; see also Jon Sorensen & Don Stemen, *The Effect of State Sentencing Policies on Incarceration Rates*, 48 CRIME & DELINQ. 456, 463–64 (2002) (noting that "[s]entencing guidelines were associated with a lower prison admission rate, 147, in states with presumptive sentencing guidelines versus 185 in those states with none or voluntary guidelines").

411. Frase, *supra* note 74, at 75.

a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations.”<sup>412</sup>

Impact statement requirements standing alone, of course, are no panacea.<sup>413</sup> The legislature must be concerned with the information they contain. There is no greater example of this than the federal experience. The Sentencing Reform Act contains a provision ordering the Federal Commission to “take into account the nature and capacity of the penal, correctional, and other facilities and services available”<sup>414</sup> and to minimize the likelihood that the federal prison population will exceed the capacity of federal prisons.<sup>415</sup> Yet this statement has had almost no impact on sentencing policy and has done nothing to curb the skyrocketing incarceration rate in federal prisons. Part of the reason for the lack of influence might be the fact that the U.S. Sentencing Commission generates resource-impact studies only after it has written its sentencing rules. Thus, as Richard Frase points out, the impact statement in that instance becomes merely “a warning to the legislature to expand prison capacity in order to accommodate the new rules.”<sup>416</sup> But even more fundamentally, the main reason these statements have had little effect is that the federal government is relatively unconcerned with costs even when it has the information. Incarceration costs are a tiny portion—less than 1 percent—of the federal budget, so Congress need not worry much about the fiscal impact of its get-tough policies.<sup>417</sup> Spending more on prisons does not impede Congress from acting in other areas.

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412. KEVIN R. REITZ, A PROPOSAL FOR REVISION ON THE SENTENCING ARTICLES OF THE MODEL PENAL CODE 31, available at <http://www.ali.org/ali/MPC02Revision.htm>; see also MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 3, at 118) (2004) (“Experience has shown that a commission’s capacity to generate credible impact projections can have profound effects on policy formation, not only within the commission itself, but at the legislative level as well.”); *id.* at 119 (“Over the past two decades, there have been numerous examples of punishment laws that were not enacted, or were recalibrated before enactment, as a result of information supplied in sentencing commissions’ correctional impact projections.”).

413. Impact statement requirements will also fail to have an influence on the political process if the agency cannot produce them because they are underfunded or understaffed.

414. 28 U.S.C. § 994(g) (2000).

415. The federal legislation mandates that the sentencing guidelines “shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” *Id.* In contrast, the Minnesota enabling legislation merely requires the state commission to “consider” prison capacity. See von Hirsch & Greene, *supra* note 220, at 341.

416. Frase, *supra* note 74, at 71. Indeed, the Senate Report accompanying the legislation states that this provision “is not intended . . . to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing.” Federal Sentencing Reform Senate Report, *supra* note 61, at 3358.

417. In addition, as Bill Stuntz and Dan Richman point out, Congress also knows that states end up picking up the tab for most crimes and that only a small subset of crimes will ultimately end up in federal court. Because that subset is likely to consist of the worst cases, Congress legislates on the belief that it is making sentencing policy for the worst cases. This makes it more likely that



Incarceration costs make up a larger portion of state budgets—on average 6 percent but 10 percent or more in some states<sup>418</sup>—so longer sentences might mean that a state has to cut another program or forego spending money on something else. States, in other words, care about the costs of sentencing policies in a way the federal government does not. That concern can provide “[a] political foundation for using prison capacity as a constraint on the allocation of punishment,”<sup>419</sup> which, in turn, can set the stage for a rational discussion of sentencing policy. As noted above, the public and legislators tend to think of sentencing in terms of equity and justice, not expertise. That is why deference to an expert agency is not immediately apparent. Conducting an impact analysis of sentencing policy forces legislators and the public to consider not only the moral question of sentencing and how it will affect individual cases and crimes, but also the larger question of how to make rational, economic use of scarce prison resources in the aggregate.

A sentencing commission is well positioned to consider the aggregate effects of all sentencing laws and to make sure that the specific sentencing decisions add up to an overall, sensible policy. It can monitor the sentences for every crime and project the impact on prison resources. The permanent sentencing body thus becomes a *de facto* interest group for cost concerns and system-wide rationality. It can highlight the opportunity costs of using prison cells for one crime instead of another and can emphasize the costs and benefits of various options. When a political actor is concerned with costs, sentencing commissions and the data they produce can provide just the political cover politicians need to temper public outcry. Politicians can use the information to avoid soft-on-crime attacks and to highlight the need for fiscally conservative policies.<sup>420</sup>

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Congress would invest more resources than its state counterparts for similar crimes. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. (forthcoming 2005).

418. National Conference of State Legislatures, *State Budget Actions 2003*, available at [http://www.captc.org/pubpol/Budget/State\\_Budget\\_Actions\\_2003.pdf](http://www.captc.org/pubpol/Budget/State_Budget_Actions_2003.pdf).

419. PARENT, *supra* note 75, at 205.

420. The information places legislators in a better position “to resist knee-jerk, lock-em-up responses to short term public hysteria over particular crimes.” Frase, *supra* note 365, at 179. Reitz states:

In a number of guideline states, legislatures have drawn back from the enactment of mandatory provisions, or have narrowed such provisions before enactment, when presented with impact projections under the proposed laws. Sentencing commissions have opposed such legislation, sometimes successfully, on the additional ground that rigid mandatory penalties hamper the commissions’ abilities to match aggregate sentencing patterns to available correctional resources, or to set priorities for the use of those resources.

REITZ, *supra* note 412, at 32.

Because sentencing commissions serve the same functions as other interest groups, they are most successful when they are designed in a manner that reflects this reality. It might be tempting to try to create an independent commission that is above the political fray, but it is simply not possible when it comes to administering crime. The political dynamics will not allow it, as the experience of the various commissions demonstrates. Instead, the key is to place the commission in the middle of the political thicket—with legislative membership or strong legislative contacts—and to give it the power to produce the information that sells in this context. It is a different agency model, but it is more appropriate for this very different political environment.

### CONCLUSION

When policymakers turned to the agency model to reform sentencing laws, they had many reasons, among which was the desire to insulate sentencing decisions from the pressures of tough-on-crime politics. These reformers did not desire insulation for the sake of insulation. Rather, they were trying to avoid what William Stuntz has identified as the pathological politics of criminal law—a dynamic that pressures political actors in the legislative and executive branch to continue to escalate sentences without considered reflection on whether an increase is good long-term public policy.<sup>421</sup>

Although a review of the federal and state experience with sentencing commissions demonstrates that agencies responsible for sentencing are highly susceptible to political controls, regardless of institutional design, many of these agencies nevertheless succeeded in resisting the constant push of politics to increase sentences without much reflection. The agencies did not do this by operating below the political radar. Rather, they had design features that enabled them to maintain close contacts with political actors and to use the resource-based information they assembled about sentencing policy to persuade legislators. In other words, they were able to communicate with political actors and show them how rational sentencing policy could be politically attractive. They worked within the political cauldron, not outside it, and they achieved a measure of success.

This is not a universal story of success, of course. Many sentencing commissions never got off the ground, and many others failed to amass the necessary political support. The Federal Commission—by far the most studied among scholars—has been a notable failure that, unfortunately, has prompted some to conclude that the agency model has little to offer criminal justice reform.

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421. Stuntz, *supra* note 3, at 510.

This Article seeks to dispel that myth by describing some of the success experienced in the states and analyzing the design factors that contributed it. These case studies show that an agency model offers promise for those reformers seeking to rationalize criminal justice and correct some of the perceived deficiencies in the political process. While criminal justice regulation poses additional hurdles that are not present in other contexts, the experience of many state commissions shows that those obstacles can be overcome in some instances and that agencies offer promise in this area as in so many others.

But successful use of agencies in criminal justice requires that the agencies be designed to operate successfully in the highly politicized world of criminal justice. Truly independent agencies are not possible in the current political climate. Instead, the agency is more likely to be successful if it is enmeshed in the political environment and reads the political signals properly. This can be done by enlisting political actors as commission members or liaisons, and by using impact statements and cost data to bring an element of rationality and long-term thinking into the debate.

This analysis of state and federal sentencing commissions thus leads to three broader conclusions about the regulation of criminal justice. First, it shows that the questions of institutional design and political control that have long interested scholars in other fields are well worth exploring in the criminal justice context. Criminal justice policy is shaped by expert agencies, yet we know very little about their institutional characteristics and the political dynamics that control them. Because those dynamics differ in significant respects from other regulatory contexts, it is important to give particular attention to these agencies.

Second, this analysis shows that the use of agencies in criminal law may be a more appealing option than is commonly perceived. William Stuntz, for example, has concluded that “expert-driven criminal law” is “unattractive.” “Based on our experience with expert commissions and sentencing over the last twenty years, depoliticizing criminal law seems at best unpromising; it is as likely to aggravate the system’s current pathologies [toward increased severity and over-criminalization] as it is to mitigate them.”<sup>422</sup> Although there is much truth to Stuntz’s observations of the federal experience with a

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422. *Id.* at 511–12. Other commentators have also expressed skepticism at the use of agencies in criminal law. See, e.g., Alschuler, *supra* note 83, at 929–38 (arguing that sentencing commissions easily succumb to “law and order” politics); Beale, *supra* note 92, at 65 (arguing that it is “doubtful” that criminal sentences could be set by an agency that is more isolated from political pressures because “[t]here are strong political incentives for elected officials at the state and federal level to retain control of criminal justice policy and to employ the crime issue to increase their own political support”).

sentencing commission, he did not attempt, nor did he claim to analyze, the use of criminal justice agencies in all jurisdictions. The experience in some states shows that expert regulation of crime can produce real policy change and temper the tendency toward irrational impulse in criminal sentencing policy.

Third, the value of structural agency independence, at least in the context of criminal sentencing and perhaps in other areas as well, has been overestimated. The common view is that more independence translates into more power over policy decisions. But this study of sentencing commissions shows that the story is much more complicated. Agencies can influence policy not merely through structural features of independence, but also by acting as interest groups for particular positions. The information generated by agencies can be a valuable and persuasive political tool. Like any other interest group, the agency can best use this information to achieve its ends if it has strong political connections. That is precisely the case with criminal sentencing, and it is likely true in many other areas of criminal justice as well.