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Fifty Years of American Sentencing Reform: Nine Lessons

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Major turbulence in American sentencing policy began 50 years ago, more or less. At the latest, it began in 1975, when Maine abolished parole release and became the first determinate sentencing state since the early 1930s. Earlier dates are also plausible. Don M. Gottfredson and Leslie T. Wilkins began foundational work on parole guidelines in the mid-1960s. Their efforts led successively to the US Parole Board's path-breaking release guidelines, the first voluntary sentencing guidelines in Vermont and Colorado, and presumptive guidelines in Minnesota and elsewhere. Another possibility is 1969, when, in *Discretionary Justice*, Kenneth Culp Davis, America's leading administrative law scholar, disparaged the lack of basic fairness in the criminal justice system. Or 1971, when the American Friends Service Committee's *Struggle for Justice* decried racial injustice and sentencing disparities and blamed indeterminate sentencing. Or 1973, when Judge Marvin Frankel's *Criminal Sentences: Law without Order* condemned judicial "lawlessness" and proposed creation of an administrative agency to set standards for sentencing. National newspapers and public affairs journals seldom review scholarly books on specialized subjects. These they did.

Sentencing reform was in the air. There was wide agreement about the problems. Judges had unreviewable authority to set sentences and parole boards to release prisoners. Among the results, critics contended, were idiosyncratic and racially biased decisions, unjust and unwarranted disparities, and procedural unfairness. Support for change was bipartisan. Civil liberties, civil rights, and prisoners' rights groups, and political liberals

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generally, focused on disparities, unfairness, and racial bias. Police and prosecutors' organizations, and political conservatives generally, focused on unwarranted leniency, inconsistency, and insufficient emphasis on crime prevention.[1]

The result was a law reform explosion that rivaled the nineteenth-century inventions of the reformatory, the prison, parole, probation, and the juvenile court. Together they constituted the indeterminate sentencing systems that critics disdained. Since 1975, American jurisdictions have established statutory sentencing standards; enacted mandatory minimum sentence, truth in sentencing, and life without parole laws; created parole and sentencing guidelines systems; and abolished parole release. Together those initiatives constitute determinate sentencing.

Big differences distinguish indeterminate from determinate sentencing. The former extended broad authority to officials so they could make individualized decisions in every case; the latter narrowed or eliminated officials' discretion. Supporters of indeterminate sentencing viewed offenders as malleable and their crimes as products of adverse social and environmental conditions. Many supporters of determinate sentencing viewed human nature as fixed and crimes as products of immorality, greed, and lack of self-discipline. Indeterminate sentencing rested on the idea that most offenders should and can be rehabilitated, and the incorrigible few incapacitated. Determinate sentencing rests on the idea that the primary purpose of sentencing is to assure that offenders receive the punishments they deserve.

The new policies and institutions involved fundamental changes in traditional ways of doing business. They coincided with enormous expansion of government and foundation support for criminal justice research and correspondingly large increases in the numbers of university departments and scholarly specialists in criminology. No one knows how many research projects, evaluations, and PhD theses on sentencing and corrections have been completed in the past 50 years. Tens of thousands is a realistic estimate.

[1] Rothman (1971, 1980) provided the classic historical accounts of the origins, operations, and chronic problems of indeterminate sentencing. Besides the seminal works mentioned in the text, a number of influential liberal (e.g., Morris 1974; Dershowitz 1976; von Hirsch 1976) and conservative (e.g., Fleming 1974; van den Haag 1975; Wilson 1975) books offered overlapping critiques of indeterminate sentencing but proposed substantially different solutions. The richest accounts of the left/right, due process/crime control coalitions favoring the shift to determinate sentencing describe early changes in California (Messenger and Johnson 1978; Parnas and Salerno 1978) and Pennsylvania and Minnesota (Martin 1984).

Given the scale and diversity of the changes, and the proliferation of efforts to assess their effects, we should know a great deal about what works, what doesn't, and in each case why. We know less than we should, but we know a lot. Nine lessons, summarized in table 1, stand out.

TABLE 1
Sentencing Reform, Nine Lessons

1. Sentencing Guidelines	Presumptive sentencing guidelines developed by sentencing commissions are the most effective means to improve consistency, reduce disparity, and control corrections spending.
2. Mandatory Sentences	Mandatory sentencing laws should be repealed, and no new ones enacted; they produce countless injustices, encourage cynical circumventions, and seldom achieve demonstrable reductions in crime.
3. Federal Sentencing	Federal sentencing guidelines have been remarkably unsuccessful; they should be rebuilt from the ground up.
4. Racial Disparities	Black and Hispanic defendants are more likely than whites and Asians to be sentenced to imprisonment, and for longer; presumptive sentencing guidelines reduced racial disparities initially and over time, but most states do not have presumptive guidelines.
5. Predicting Dangerousness	Use of predictions of dangerousness to determine who is imprisoned and for how long is unjust; predictive accuracy has improved little in 50 years, and current methods too often lengthen prison terms of people who would not have committed violent crimes.
6. Case Processing	Efforts to standardize sentences and eliminate disparities in a state or the federal system cannot succeed; distinctive practices and norms, diverse local cultures, and practical and political needs of officials and agencies assure major local differences in sentencing practice.
7. Punishments	Many community correctional programs can reduce reoffending, improve offenders' and their families' lives, and compared with imprisonment reduce public expenditure; imprisonment increases reoffending, damages prisoners and their families, and wastes enormous amounts of money.
8. Parole Release	Except in the handful of states that have effective systems of presumptive sentencing guidelines, parole release is an essential component of a just and cost-effective sentencing system in the United States.
9. Luck and Leadership	Some sentencing systems and policies are demonstrably superior to others. Whether they are successful often depends, alas, on auspicious circumstances and the involvement of unusually effective leaders.

1. Sentencing Guidelines.—*Presumptive sentencing guidelines developed by sentencing commissions are the most effective means to improve consistency, reduce disparity, and control corrections spending.*

Judge Frankel proposed the establishment of specialized administrative agencies, now usually called sentencing commissions, to develop, promulgate, monitor, and, as needed, revise presumptively applicable guidelines for sentencing. He reasoned that legislatures lack the specialized knowledge, staff continuity, and attention spans needed to do those things well and are too vulnerable to day-to-day political and media influence. He expected appellate courts to review contested sentences and gradually to develop a "common law of sentencing" to deal with difficult kinds of cases.

What Judge Frankel proposed worked. Commissions in Kansas, Minnesota, North Carolina, Oregon, and Washington created presumptive guidelines systems that established sentencing standards for typical cases, made the process fairer and more consistent, reduced disparities, including by race and gender, and managed prison population sizes and correctional spending. They accomplished these things in somewhat different ways and more and less successfully, but showed that presumptive guidelines can remedy many of the problems of indeterminate sentencing. Richard Frase (2019, p. X), summing up the most exhaustive and authoritative survey of guidelines experience ever published, observes, "The preguidelines regime of unstructured, highly discretionary sentencing is unacceptable. Guidelines offer the only proven sentencing reform model."

Frankel's was but one of six contending sentencing reform proposals in the 1970s.[2] None of the five others proved effective. Most were abandoned. The first was creation, under judicial leadership, of voluntary guidelines based on research documenting prior sentencing patterns. The logic was that judges would want to observe local conventions once they knew what they were. The second, an alternative to voluntary guide-

[2] Blumstein et al. (1983) and Tonry (1996, 2016) through their respective dates summarize the major changes in American sentencing laws and policies and their effects. On sentencing guidelines generally, see Frase (2013, 2019). On the 1970s experience with judge-led voluntary guidelines, see Gottfredson, Wilkins, and Hoffman (1978), Kress (1980), Rich et al. (1982), and Carrow et al. (1985). On sentencing information systems, see Doob (1990) and Miller (2004). On sentencing councils, see Zeisel and Diamond (1975). On sentence appeals without guidelines, see Zeisel and Diamond (1977). Shane-Dubow, Brown, and Olsen (1985) and Austin et al. (1994) provide broader overviews of sentencing policy changes, including adoption of mandatory sentence laws, through their respective dates.

lines, was to establish computerized "sentencing information systems" that judges could consult to learn how they and their colleagues had previously dealt with particular kinds of cases. They were quickly abandoned everywhere they were tried. The third, adopted in Arizona, California, Colorado, Illinois, Indiana, and North Carolina, was to amend criminal codes to specify recommended sentences for typical cases. No other state enacted a "statutory determinate sentencing law" after 1979, and Colorado and North Carolina repealed theirs. The fourth, without guidelines, was to create sentence appeal systems, sometimes involving appellate courts and other times involving "sentencing councils" composed of trial judges. The fifth was for sentencing commissions rather than judges to develop voluntary sentencing guidelines systems.

Except for Judge Frankel's presumptive sentencing guidelines, none of those efforts demonstrably improved consistency, reduced racial and other disparities, or effectively controlled correctional resource planning and spending. The early voluntary guidelines and sentencing information systems failed because, as Anthony Doob observed after evaluating information systems, "Judges do not, as a rule, care to know what sentences other judges are handing down in comparable cases" (1989, p. 6). The early appeal systems failed because of "lawlessness." In the absence of standards indicating what sentence should ordinarily be imposed, there was no basis for deciding whether a particular one was appropriate or not. Some sentences were overturned, but on the ad hoc bases that they were too severe or inappropriate under the circumstances. Those rationales are not generalizable and provided little guidance for subsequent cases.

Evaluations of the early voluntary guidelines systems in Colorado, Vermont, Maryland, and Florida uniformly concluded that they had no discernible effects on sentencing disparities. Nonetheless, most of the 16 current state systems are voluntary (now usually called "advisory"). No subsequent research has shown that the newer voluntary systems have reduced disparities compared with sentencing patterns before their adoption. Proponents argue that they improve consistency for two reasons: newly appointed judges without prior sentencing experience are socialized into the idea that the guidelines express local conventions, and over time the guidelines become points of reference around which "going rates" take shape and charging and plea bargaining take place (Ulmer 2019).

Every American state should establish a sentencing commission and direct it to develop presumptive guidelines, as the recently approved *Model Penal Code—Sentencing* proposes (Reitz and Klingele 2019). Auguries are not promising, however, at least in the short term. The newest of the presumptive guidelines systems, in Kansas and North Carolina, took effect in 1993 and 1994. Practitioners generally oppose major law reforms for fear of the unknown, judges oppose presumptive guidelines for fear they will lose discretion, and prosecutors oppose them for fear they will lose plea bargaining leverage. Frase (2019, p. X), on the rationale that half a loaf is better than none, observes, "But even if we can eventually agree on what an ideal guidelines system should look like, some jurisdictions will be unable or unwilling to adopt all of its features. In some, an incomplete system may be 'as good as it gets.' Such guidelines may be better than if there were no guidelines at all."

2. Mandatory Sentences.—*Mandatory sentencing laws should be repealed, and no new ones enacted; they produce countless injustices, encourage cynical circumventions, and seldom achieve demonstrable reductions in crime.*

Mandatory sentencing laws are a fundamentally bad idea.[3] From eighteenth-century England, when pickpockets worked the crowds at hangings of pickpockets and juries refused to convict people of offenses subject to severe punishments, to twenty-first-century America, the evidence has been clear. Mandatory minimum sentences have few, if any, discernible deterrent effects and, because of their rigidity, result in unjustly harsh punishments in many cases and willful circumvention by prosecutors, judges, and juries in others. In our time, when plea bargaining is ubiquitous, mandatories are routinely used to coerce guilty pleas, sometimes from innocent people (Johnson 2019).

In the 1950s, the American Bar Foundation undertook the most extensive research ever conducted on day-to-day operations of American crim-

[3] The classic summaries of the historical evidence are Michael and Wechsler (1940) and Hay (1975). The most comprehensive studies of day-to-day use of mandatories were carried out in the 1950s for the American Bar Foundation and published in the 1960s (Newman 1966; Dawson 1969). I have several times summarized the 1950s–90s case studies (e.g., Tonry 2016) and other countries' limited experience (Tonry 2009, 2012). The authoritative surveys of research on deterrent effects are National Academy of Sciences reports (Blumstein, Cohen, and Nagin 1978; Travis, Western, and Redburn 2014). Comprehensive recent surveys of the evidence include Chalfin and McCrary (2017) and Tonry (2018*b*).

inal courts. They learned that prosecutors applied mandatories selectively and that judges and juries refused to convict when penalties seemed too severe. Frank Remington, who directed the project, observed in 1969, "Legislative prescription of a high mandatory sentence for certain offenders is likely to result in a reduction in charges at the prosecution stage, or if this is not done, by a refusal of the judge to convict at the adjudication stage. The issue . . . thus is not solely whether certain offenders should be dealt with severely, but also how the criminal justice system will accommodate to the legislative charge" (1969, p. xvii). A large number of sophisticated case processing studies in the 1970s, 1980s, and 1990s reached the same conclusion.

The evidence on deterrent effects is equally damning. Countless authoritative surveys, in many countries, have concluded that mandatories' deterrent effects are modest at best. National Academy of Sciences reports in 1978 and 2014 serve as contemporary bookends. The 1978 Panel on Research on Deterrent and Incapacitative Effects concluded, "In summary . . . we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence" (Blumstein, Cohen, and Nagin 1978, p. 7). The 2014 Committee on the Causes and Consequences of High Rates of Incarceration similarly observed that "knowledge about mandatory minimum sentences has changed remarkably little in the past 30 years. Their ostensible primary rationale is deterrence. The overwhelming weight of the evidence, however, shows that they have few if any deterrent effects. . . . Existing knowledge is too fragmentary [and] estimated effects are so small or contingent on particular circumstances as to have no practical relevance for policy making" (Travis, Western, and Redburn 2014, p. 83).

Contemporary research thus confirms long-standing cautions against enactment of mandatory sentencing laws. Their use to coerce guilty pleas is new and distinctive to our times. Even innocent defendants are sorely tempted to plead guilty and accept probation or a short prison term rather than risk a mandatory 10- or 20-year sentence. The late Harvard Law School professor William Stuntz observed that "outside the plea bargaining process" prosecutors' threats to file charges subject to mandatories "would be deemed extortionate" (2011, p. 260). Federal Court of Appeals Judge Gerald Lynch similarly observed that prosecutors' power to threaten mandatories has enabled them to displace judges from their traditional role: It is "the prosecutor who decides what sentence the defendant should be given in exchange for his plea" (2003, p. 1404). American sentencing

has become more severe in recent decades; prosecutors bear much of the responsibility (Johnson 2019).

This is a uniquely American problem. Nothing similar occurs in any other developed country. It has two causes. One is that American prosecutors are elected or appointed by elected politicians; elsewhere they are nonpartisan career civil servants. The second is that, under US constitutional law, prosecutors' day-to-day decisions are almost never subject to judicial review. American prosecutors have the same interests and motives, however, as other elected politicians to curry favor with the electorate and the media. In recent "tough-on-crime" decades, prosecutors have favored severe punishments.

This is not how things are supposed to work. Until mandatory sentencing laws proliferated, prosecutors filed charges and presented evidence, judges with or without juries decided whether the evidence justified a conviction, and judges imposed sentences. This division of labor made sense and remains the norm in other Western countries.

American prosecutors are adversaries. Their aims are to achieve convictions and, often, severe punishments. Mandatory sentencing laws increased their power to do both. Offers to dismiss charges subject to mandatories are often too good to refuse; that is why many fewer cases go to trial than in earlier times. In tried cases resulting in convictions, judges have no legally legitimate way to do anything but impose at least the mandated punishment.

Prosecutors in other countries are expected, like judges, to focus equally on conviction of the guilty and exoneration of those whose guilt cannot be proven. American prosecutors are seldom so evenhanded. Their adversary role and foreseeable identification with victims make personal animus toward many defendants likely and psychologically understandable. Personal political interests, especially in controversial or notorious cases, exacerbate those tendencies. Those are reasons why judges, not prosecutors, should set sentences. Good judges should be above the battle—unemotional, impartial, and motivated to do justice. That may sometimes be difficult, but good judges try. Because of the coercive power of mandatories, the avenging prosecutor often displaces the neutral judge.

Every authoritative law reform organization that has examined American sentencing in the last 50 years has proposed elimination of mandatory minimum sentence laws. These included, in earlier times, the 1967 President's Commission on Law Enforcement and Administration of Justice, the 1971 National Commission on Reform of Federal Laws,

the 1973 National Advisory Commission on Criminal Justice Standards and Goals, the 1979 Model Sentencing and Corrections Act proposed by the Uniform Law Commissioners, and the American Bar Association's 1994 Sentencing Standards. The American Law Institute's *Model Penal Code—Sentencing* offered the same recommendation in 2017 (Reitz and Klingele 2019).

3. Federal Sentencing.—*Federal sentencing guidelines have been remarkably unsuccessful; they should be rebuilt from the ground up.*

The federal guidelines were the most controversial and disliked sentencing reform initiative in American history. Within 2 years of their taking effect, more than 200 federal district judges invalidated the guidelines and declared all or part of the Sentencing Reform Act of 1984 unconstitutional. In *Mistretta v. United States*, 488 U.S. 361 (1989), however, the US Supreme Court rejected the lower courts' holdings. Little changed until the Court in *U.S. v. Booker*, 543 U.S. 220 (2005), reversed course, declaring major parts of the 1984 act unconstitutional after all and converting the guidelines from "mandatory," as the federal sentencing commission called them, to "advisory."

The federal guidelines' failure is ironic; prospects for success could not have been better. Senate Bill 2699, introduced by Senator Edward Kennedy in 1975, was the first legislative proposal for a sentencing commission anywhere. The bill, developed by Yale Law School faculty in collaboration with Judge Frankel, quickly obtained bipartisan support; the Senate approved it several times. When the 1984 act took effect, the future looked rosy. The commission had a staff of 70 (state commissions had five to 10), a correspondingly large budget, and the good fortune that Kay A. Knapp, director of the successful Minnesota commission, signed on as executive director.

After that, it was all downhill. The initial commission was poorly led and faction-ridden. Knapp was forced out within months. The commission made no effort to learn from the experiences of existing commissions in Minnesota, Pennsylvania, and Washington. Most importantly, although Frankel viewed administrative agencies' partial insulation from political influence as a key element—and benefit—of his proposal, the commission and key commissioners openly pursued personal and partisan political ends. The "tough-on-crime" politics of the 1980s displaced the original goals of reduced disparities and greater fairness.

Detailed discussions of how and why the guidelines proved so unsuccessful and unpopular are available elsewhere.[4] They were too severe, too complex, and too detailed. Most sitting federal judges hated them. The guidelines nearly eliminated the use of probation as a federal sanction. Half of federal offenders received probation before the guidelines took effect; 7 percent did in 2017. The commission's unprecedented "relevant conduct" policy required sentencing judges to take account of alleged crimes that were not prosecuted or that resulted in acquittals.

Federal judges in recent years have imposed sentences that fall within applicable guideline ranges about half of the time. Paul Hofer (2019), in the most exhaustive analysis to date of federal sentencing data, concludes that sentencing disparities, including racial disparities, are probably greater now than before the guidelines took effect. The existence of numerous mandatory sentencing laws in the federal system is part of the explanation, but the US Sentencing Commission deserves most of the blame.

The federal guidelines are not salvageable. Fundamental problems result from decisions made when they were initially developed. The US Sentencing Commission's guidelines are much too detailed. They divide offense severity into 43 categories; most states use eight to 12. They attempt to micromanage judges' decisions concerning the pertinence of offenders' personal characteristics and backgrounds; state guidelines simply identify aggravating and mitigating characteristics judges may take into account, among others, when they believe it appropriate. They authorize probationary sentences for only 5–7 percent of federal offenders; states authorize use of probation for any offender not subject to a mandatory minimum sentence law. Finally, they direct judges to increase sentences on the basis of "relevant conduct" whether or not it was proven at trial or admitted, including conduct occurring in crimes of which the offender was acquitted. No state guidelines contain a comparable provision.

Those provisions are straitjackets. Just, fair, and accountable sentencing will remain an impossible dream in federal courts until they are repu-

[4] Stith and Cabranes (1998) and Tonry (1996, 2016) provide the fullest historical accounts including detailed discussions of the federal guidelines' major provisions, their rationales, and the controversies they generated. US Supreme Court Justice Stephen Breyer (1988, 1999) provided spirited apologia.

diated. If and when that happens, state experience can guide a new commission in creating a new system of federal guidelines.

4. Racial Disparities.—*Black and Hispanic defendants are more likely than whites and Asians to be sentenced to imprisonment, and for longer; presumptive sentencing guidelines reduced racial disparities initially and over time, but most states do not have presumptive guidelines.*

Racial and ethnic disparities in sentencing and imprisonment continue to be an American dilemma.[5] They have been common throughout American history. Racial disparities among prison inmates in the twentieth century increased slowly through the 1970s and then rose rapidly through the early 1990s. At the peak, the imprisonment rate for black Americans was eight times higher than the white rate. In our time, black and Hispanic offenders, compared with whites, are more likely to receive prison sentences, and for longer. In jurisdictions with sentencing guidelines, minority defendants receive mitigated sentences less often than whites and are more likely than whites to receive sentences at the top of the applicable guideline range. Minority offenders are less likely to be sentenced to community punishments than whites or to receive early release from prison.

The explanations are complex and simple. The first simple one is that judges react differently to minority offenders. In earlier times, racial bias and stereotyping were major reasons. In our time, implicit racial biases and no doubt some invidious bias remain part of the problem. The second simple explanation is that deeply disadvantaged backgrounds more often characterize minority offenders than whites. Many judges believe disadvantaged offenders are especially likely to reoffend and thus should be punished more severely.

The complex reasons involve the nature of American sentencing laws. Legislatures enacted laws that mandated especially severe sentences for crimes of which disproportionately large numbers of minority offenders are convicted. The mandatory minimum sentence, three-strikes, dangerous offender, truth in sentencing, and life without parole laws enacted in the 1980s and 1990s targeted violent and drug crimes. Relatively more

[5] Classic early sources include Du Bois (1899), Sellin (1935), and Myrdal (1944). Tonry (1995, 2011) and Travis, Western, and Redburn (2014, chap. 2) provide comprehensive overviews of knowledge concerning racial disparities in imprisonment since 1970. The best surveys of research on sentencing disparities through their respective dates are Mitchell (2005), Baumer (2013), Spohn (2015), and King and Light (2019).

minority than white people commit violent crimes—though the difference is declining. Making punishments more severe for violent crimes necessarily affected more minority than white offenders. Some might argue that concern about victims of violence justifies harsher punishments. Others disagree, noting the effects on minority offenders of discrimination, police practices, and structural disadvantage.

There is no equivalent debate to be had about drug crimes. Minority citizens neither use illicit drugs nor engage in trafficking more than whites. They are, however, much more likely to be arrested, prosecuted, and convicted. The reasons are that police drug enforcement targets inner-city neighborhoods, that minority citizens are vastly—eight to 10 times—more likely than whites to be stopped on the street, and that prosecutors less often divert minority arrestees from prosecution. Racial profiling is a big part of the story.

Critics of American drug policy note that governmental responses to the crack and heroin outbreaks of the 1970s, 1980s, and 1990s emphasized arrests and harsh punishments that disproportionately ensnared minority citizens. Responses to the recent methamphetamine and heroin epidemics, mostly involving white users and sellers, emphasize treatment, education, and other public health and social welfare solutions. Go figure.

The disparate effects of seemingly neutral laws on members of racial and ethnic groups are a major cause of racial disparities in imprisonment. The classic example, which filled federal prisons with black prisoners, was the 100-to-1 law that punished low-level sellers of 5 grams of crack, mostly black, as severely as major sellers, mostly white, of 500 grams of powder cocaine. It is now an 18-to-1 law and continues to punish blacks more severely than whites. Similar laws survive in many American states. Few mandatory sentencing laws for violent and drug crimes have been repealed or substantially narrowed. As long as they survive, racial disparities will remain endemic.

Disparities have slightly declined. The black/white difference in imprisonment rates in recent years has been about 4:1 (higher for males). This resulted partly from major declines in prosecutions for drug crimes. The news about racial and ethnic disparities in sentencing is good and bad. The good part is that they have declined in jurisdictions with strong guidelines systems (King and Light 2019). The bad part is that only a few jurisdictions have strong guidelines. Elsewhere business continues as usual.

There are some easy partial solutions to the racial disparities problems. One is to repeal all mandatory minimum sentence and similar laws. They are the principal drivers of mass incarceration and of racial disparities in imprisonment. The second is to create enforceable mechanisms to prohibit racial profiling. The third is to double and redouble efforts to educate police, prosecutors, judges, and other officials about explicit and implicit bias. It is humanly understandable, even if regrettable, that officials react with greater empathy toward people whose lives they understand, but it is fundamentally unjust. The fourth is to undertake racial impact studies throughout the criminal justice system to learn whether laws, policies, and practices do disproportionate damage to members of particular groups and to reconsider the justifiability of those that do (Reitz and Klingele 2019).

5. Predicting Dangerousness.—*Use of predictions of dangerousness to determine who is imprisoned and for how long is unjust; predictive accuracy has improved little in 50 years, and current methods too often lengthen prison terms of people who would not have committed violent crimes.*

Use of predictions of dangerousness has proliferated throughout the criminal justice system from bail to prison release.[6] They have no morally justifiable role to play in sentencing (Tonry 2019). They do have appropriate correctional uses in classifying offenders for admission to treatment programs. Three sets of problems bedevil use of predictions in sentencing.

First, they are seldom very accurate. Violence is rare, even among known offenders. Predicting rare events is inherently difficult. As a result, violence predictions are more often inaccurate than accurate. Norval Morris (1974) and John Monahan (1981) in influential early syntheses concluded that predictions of future violence were wrong two-thirds of the time. "'Dangerousness,'" Morris wrote, "must be rejected for [sentencing], since it presupposes a capacity to predict future criminal behavior quite beyond our present technical ability" (1974, p. 62). Locking up

[6] Particularly insightful analyses of ethical and technical issues by proponents of use of predictions include Monahan and Skeem (2016), Monahan (2017), Berk et al. (2018), and Berk (2019). The leading meta-analyses of research on the accuracy and reliability of violence prediction instruments are Campbell, French, and Gendreau (2009), Yang, Wong, and Coid (2010), and Fazel et al. (2012); they offer remarkably similar conclusions.

three people predicted to be violent when only one will be is, he said, deeply unjust.

The technology of violence prediction is vastly more sophisticated than it was four decades ago. One might expect that violence predictions today would be vastly more accurate. They aren't.

The most influential meta-analysis on violence prediction analyzed research on the nine most commonly used instruments. It concluded that positive violence predictions are correct, on average, 42 percent of the time (Fazel et al. 2012; Fazel 2019). Morris, recall, was troubled that only one-third of positive predictions (two of six) were correct. Forty-two percent accuracy, put differently, is two of five. The false positives are disproportionately black and other minority offenders (Angwin et al. 2016). As in Morris's time, substantially more than half of people predicted to be violent in our time will not be.

Two leading meta-analyses explicitly conclude that positive predictions of violence are too inaccurate to be used in sentencing:

> Because of their moderate level of predictive efficacy, they should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy, such as preventive detention. (Yang, Wong, and Coid 2010, p. 761)

> These tools are not sufficient on their own for the purposes of risk assessment. . . . The current level of evidence is not sufficiently strong for definitive decisions on sentencing, parole, and release or discharge to be made solely using these tools. (Fazel et al. 2012, pp. 5, 6)

The second problem concerns variables used in prediction instruments. Most use characteristics such as youth and gender that are per se unjust. Like eye color or height, they are matters over which individuals have no control and for which they are not morally responsible. Gender in most settings is simply not an acceptable basis for distinguishing between people. Nor is youth. Common practice in all Western countries, consistently with findings of recent neurological and developmental research, calls for treating young offenders more sympathetically than adults, and less severely.

All prediction instruments incorporate socioeconomic variables such as marital status, employment record, education, and residential stability that are not the state's business. These are quintessentially personal choices;

people in free societies are entitled to make those decisions for themselves and not to suffer because of the choices they make. On all of these socioeconomic factors, minority offenders fare less well than whites. Their use causes and aggravates invidious disparities.

The third problem is that all prediction instruments incorporate criminal history variables that are inflated for black and other minority offenders by racially biased and disparate practices and racial profiling (Starr 2014). Group differences in some criminal history variables—including age at first arrest, custody status, and numbers of prior arrests, convictions, and punishments—result in substantial part from racial profiling and police targeting of poor and minority neighborhoods and individuals. Young black and Hispanic people are arrested at younger ages than whites, and more often. Schools expel more minority than white students for conduct problems and refer more to the police. Police drug enforcement targets substances sold by minority drug dealers and places where they sell them. All of these practices exaggerate the criminal records of minority individuals compared with other people.

Use of predictions of dangerousness in sentencing thus cannot be justified either empirically or morally. To many people, however, it is intuitively plausible. It expresses sympathy toward hypothetical future victims and disdain for people believed—usually incorrectly—to be likely to be violent. What to do?

The best answer is to abandon use of violence predictions in sentencing. Prevention of crime is an important public policy goal, but so are justice, fairness, and equal treatment. Each derives from fundamental ideas about human dignity. Each should limit the exercise of state power over individual lives. Predictive sentencing, by contrast, sacrifices the lives of individuals in order to protect hypothetical victims.

Law and order politics and prevailing emotionalism may make elimination of preventive sentencing unachievable. A less morally justifiable but more saleable option is to establish limits on increments of additional punishment that can be imposed, for example, sentences to confinement not more than 20 or 30 percent longer than would otherwise be ordered.

Monahan (2017) and the *Model Penal Code—Sentencing* propose use of predictions as a basis only for mitigation of sentences and never for aggravation. BUT—a big but—Monahan's proposal can work only if there are strong meaningful limits on sentencing severity, from which the mitigated sentence offers a reduction. This might be achievable in the handful of jurisdictions with presumptive sentencing guidelines systems. Oth-

erwise, and elsewhere, nothing would stop judges and prosecutors from using predictions to reduce sentences for low-risk offenders and increase them for high-risk offenders.

6. Case Processing.—*Efforts to standardize sentences and eliminate disparities in a state or the federal system cannot succeed; distinctive practices and norms, diverse local cultures, and practical and political needs of officials and agencies assure major local differences in sentencing practice.*

It is impossible to micromanage sentencing decisions successfully throughout a state or the federal system. Sentencing will be fairer, more just, and more rational when legislators and other political officials acknowledge this. Those who were judges, prosecutors, or defense lawyers earlier in their careers know it even if for political reasons they act as if they do not. Only uninformed and naive people believe, and disingenuous people claim to believe, that any criminal law will be consistently and mechanically applied. Exceptions are inevitable and sometimes are the norm. The inexorable implication is that sentencing laws should provide frameworks for decision making and presumptions about decisions, but never more than that.

There are three reasons. The first is that almost all judges, prosecutors, defense lawyers, and correctional officials take their jobs seriously. Circumstances of criminal offenses and characteristics of offenders, offenses, and victims vary enormously. Decent practitioners know this and want to make, or be involved in making, decisions that are sensible and just under the particular circumstances, even if applicable laws direct them to make decisions that are neither sensible nor just. This is why three centuries of experience and a half century of social science research show that mandatory sentence laws are never applied consistently. Sometimes prescribed punishments that everyone involved believes to be palpably unjust are imposed; often they are not.

The second is that criminal court processes are local. State and federal legislatures enact criminal laws, but local officials apply them. They live and work in particular places that have distinctive histories, norms, traditions, and political, religious, and legal cultures. That is why big cities, small towns, suburbs, and rural areas differ in the severity of the punishments their courts impose generally and in particular kinds of cases. That is why punishments are and long have been far more severe in southeastern than in northeastern states. Stereotyped examples involve compar-

isons of sentences for theft of lobster traps in Maine or cattle in Nebraska with sentences for those crimes elsewhere. Those examples, though, can trivialize a general phenomenon.

Officials in culturally and religiously conservative communities are likely to regard drug, sexual, and violent crimes differently than officials in big cities. Officials in rural courts, who know the people whose cases they process and where caseloads are small, tend to operate differently than officials in anonymous urban settings. Judges, prosecutors, and other officials usually reflect prevailing attitudes and beliefs; people new to a community quickly become socialized into the local culture. Prosecutors often say their overriding goal is to reflect local values in their office's work. What, therefore, local practitioners believe to be just and sensible outcomes in individual cases varies from place to place.

The third is that sentencing is a process and not simply a product of judicial idiosyncrasies. Prosecutors control charging and most dismissals. Judges control case processing. Judges, prosecutors, and defense counsel interact regularly and develop well-understood conventions and "going rates" that inform plea bargaining and predict sentences. All of them work within institutions that have limited resources, policy priorities, and standard ways of doing business. People who regularly ignore established conventions and others' institutional interests do not usually get along. It is business as usual for most cases. Notorious crimes are different, but they are a minuscule fraction of any court's caseload.

There is nothing new about any of this. It explains the history and research findings concerning mandatory sentencing. Social scientists studying courts document it.[7] An early political science literature on "local legal culture" demonstrated the interplays of local norms, going rates, institutional interests, and personal idiosyncrasies. A criminology literature on "focal concerns" emphasized practitioners' needs, and wishes, to reconcile public safety, offenders' moral responsibility, and practical institutional interests. A sociology literature on "inhabited institutions" takes those analyses further to explore interactions among institutions, of individuals within institutions, and resulting interplays.

[7] The classic works on local legal culture are Blumberg (1967), Eisenstein and Jacob (1977), and Eisenstein, Flemming, and Nardulli (1988). Steffensmeier, Ulmer, and Kramer (1998) and Kramer and Ulmer (2009) are foundational to the focal concerns literature. Kramer and Ulmer (2009) integrate the theories and literatures on focal concerns and local legal cultures. Ulmer (2019) canvasses the inhabited institutions literature that attempts to explain how and why local differences matter.

The bottom line: Courts are local, the people who work in them are local (or soon socialized into local norms), nearly all victims are local, and most offenders are local. Laws in books are statewide or national. Laws in action are local. When law in books conflicts with law in action, small wonder that local norms usually come out on top.

That does not mean that policy changes cannot shape sentencing outcomes. Passage or repeal of a mandatory sentence law will alter sentencing patterns, though not consistently. Increases and decreases in sentences specified in presumptive sentencing guidelines, or in other guidelines that have become part of the local legal culture, will affect sentencing outcomes. All else being equal, most practitioners want to comply with applicable laws and rules. Plea bargaining takes place in the shadow of the law or guidelines. The more, however, that laws or guidelines call on practitioners to behave in ways they believe to be unjust or unnecessary, the less likely they will pay attention.

7. PUNISHMENTS.—*Many community correctional programs can reduce reoffending, improve offenders' and their families' lives, and compared with imprisonment reduce public expenditure; imprisonment increases reoffending, damages prisoners and their families, and wastes enormous amounts of money.*

The case for greater use of community punishments is a no-brainer.[8] Compared with confinement in a jail or prison, they cost less, are less likely to lead to future offending, and are more humane. They do less collateral damage to the lives and futures of offenders and their loved ones. They can be scaled to the seriousness of crimes for which they are imposed. Well-managed, well-targeted, and adequately funded programs achieve lower reoffending rates. Other Western countries use community punishments much more, and imprisonment much less, than do American jurisdictions.

[8] Cullen, Lero Jonson, and Mears (2017) and Tonry (2018*a*) provide up-to-date surveys of knowledge concerning community punishments and their effects. Morris and Tonry (1990) and MacKenzie (2006) tell the story through their respective dates. Travis, Western, and Redburn (2014) contains authoritative summaries of knowledge concerning the effects of imprisonment on prisoners, their families, their communities, and public safety. Nagin, Cullen, and Lero Jonson (2009) and Cullen, Lero Jonson, and Nagin (2011) demonstrate that, all else being equal, imprisonment makes future offending by released prisoners more, not less, likely.

There are many effective community punishment programs. These include victim-offender mediation; diversion from prosecution conditioned on payment of fines, making restitution, or participating in treatment programs; fines for nontrivial crimes; suspended prison sentences; community service; and diverse forms of supervision and community-based treatment.

Unconditional discharges following conviction and unsupervised probation are important options. In neither instance do convicted offenders escape punishment. Anyone convicted of crime has endured fear and anxiety. All experience demeaning assembly line case processing. Many spend time overnight in jail awaiting a preliminary hearing. Many remain in jail until their cases are resolved. As the title of a classic 1979 book by Malcolm Feeley declared, for many *The Process Is the Punishment*.

Unconditional discharges and unsupervised or nominally supervised probation should be the defaults. Otherwise, probation agencies will waste scarce resources supervising low-risk offenders. Researchers have repeatedly shown, and most corrections officials believe, that resources are best devoted to working with higher-risk offenders. Reducing their likelihood of reoffending is more cost-effective and pays greater crime prevention dividends.

For offenders for whom supervision makes sense, well-managed, well-targeted, and adequately funded community programs can reduce reoffending. Many hundreds of evaluations show that participants in community punishments, at worst, do no worse than comparable people sentenced to confinement do. That last finding means that, except for the small percentage of unusually dangerous people, the vast sums spent on imprisonment are—from a crime-prevention perspective—wasted.

A steadily accumulating literature confirms the observation two centuries ago by John Howard, the first prominent English prison reformer, that prisons are "schools for crime." All else being equal, people sentenced to imprisonment are more, not less, likely to reoffend. There is nothing surprising about this. Imprisonment immerses people in inmate subcultures and exposes them to the deviant values of chronic offenders. Many prisons are brutal and brutalizing places to which prisoners must accommodate for self-protection. Almost all prisons are resource-poor and unable to provide adequate drug, mental health, and other treatment, vocational training, and education programs that can help prisoners lead law-abiding lives later on.

Imprisonment worsens prisoners' physical and mental health and shortens their life expectancies. The resulting stigma and collateral legal consequences foreclose opportunities and access to resources that make their later lives more difficult, their employment prospects worse, and their lifetime earnings less. Imprisonment damages and often impoverishes prisoners' families and children.

Nothing I have written here is new, controversial, or likely to surprise knowledgeable professionals or other well-informed people. Most of it has been known for decades, some for centuries.

8. Parole Release.—*Except in the handful of states that have effective systems of presumptive sentencing guidelines, parole release is an essential component of a just and cost-effective sentencing system in the United States.*

Parole release has been the missing component of American sentencing reform since the late 1970s.[9] Its absence has been a huge loss. Well-designed and managed parole systems provide important capacities. They can establish and implement rational, evidenced-based release policies. They can even out disparities in the lengths of prison sentences judges impose. They can attempt to address prison overcrowding and control corrections costs by adjusting release standards. They can tailor supervision and conditions to individual parolees' needs. Not least, they give prisoners hope of an early release and motivation to achieve it.

The usefulness of parole release has been ignored for 40 years. In 20 states and the federal system, it was abolished. A few states later re-established it. In states that retained parole release, parole boards stopped performing their traditional roles.

In retrospect, parole's problem is that important developments occurred during a transition period. Parole release guidelines were a harbinger of the sentencing reform movement, a response to concerns about inconsistency, lack of official accountability, and racial and other dispar-

[9] The literature on parole release is scanty except for recidivism studies (e.g., Petersilia and Rosenfeld 2008). Few researchers or policy analysts have been interested since it fell out of favor. Petersilia (1999) is the most comprehensive survey of parole policy issues. Gottfredson, Wilkins, and Hoffman (1978) document early parole reforms and the development of evidence-based release guidelines. Arthur D. Little, Inc. (1981) reports the results of an evaluation of the first, largely successful, parole guidelines systems.

ities that undermined indeterminate sentencing. That is why I described their development in the introduction as one plausible beginning of modern sentencing reform efforts. To many critics, however, parole release was the paradigm institution of indeterminate sentencing. Ironically, evaluations showed that the best early parole guidelines systems successfully reduced disparities and improved accountability. That evidence made no difference. Oregon, Minnesota, and the federal system abandoned successful parole guidelines systems in the 1980s.

After the mid-1980s, parole boards became highly risk averse; most still are. Few, if any, tried to control prison populations. The percentages of prisoners released fell sharply. Average times served before release increased. The numbers held until their sentences expired ballooned. The numbers returned to prison for breach of conditions skyrocketed.

Elected officials deserve most of the blame. Especially during the tough-on-crime period from 1980 to 2000, but also more recently, governors made it clear they did not want to be associated with "parole leniency." In one of the best-known incidents, liberal Democratic Massachusetts governor Deval Patrick demanded that the entire parole board resign after a notorious crime by a parolee; releases under the new board, headed by a conservative former prosecutor, plummeted. Notorious crimes by parolees are inevitable, however, even in the best system. Auto accidents and bathtub slips are also inevitable, but no one suggests we should stop using cars or bathing. In earlier times in US history, governors and parole boards expressed deep sorrow about crimes by parolees. Life went on.

Parole boards can do a number of things better than any alternative. Modern prediction instruments, for example, include "dynamic" factors, things that treatment programs can change and that make future success on and after parole more likely. Judges cannot know about those future changes when they impose sentences.

Parole boards can use release guidelines to even out disparities, especially gross ones, in sentences judges impose. In almost all states, no other mechanism exists to do that. Except for a handful of states with presumptive sentencing guidelines, meaningful systems of appellate sentence review are nonexistent. Even in that handful of states, successful appeals are rare. Part of the reason is that prosecutors often require defendants to waive any appeal rights as a condition of a plea bargain.

Parole boards cannot prevent prison overcrowding in periods like the 1980s and 1990s, when imprisonment rates doubled and redoubled, but they can ameliorate the increases. In stable periods, their ability to ad-

vance release dates can make the difference between operating within a system's capacity and exceeding it. This was a standard function of parole release in earlier times. Even earlier, governors commonly used their pardon powers to control the size of the prison population.

No plausible arguments have been made against parole release. No other institution can release people because they have changed in important ways or can even out sentencing disparities. Demagogic arguments against parole release center on "leniency," but demagoguery is morally irrelevant. Romantic arguments are made that judges, not bureaucrats, should determine sentences, but that ignores three realities. Judges seldom know much about defendants; they rarely receive comprehensive presentence investigation reports. They know less about individuals than parole authorities can. In any case, prosecutors through their charging and bargaining decisions, not judges, control most sentences for moderately serious and serious crimes. And, as a practical matter, unjust decisions by judges are usually irremediable.

It is possible that parole release authority is unnecessary in states that have presumptive sentencing guidelines. That could be true, but only if meaningful opportunities exist to appeal sentences. Given that prosecutors have the same powers in those states as everywhere else and that successful appeals are rare, meaningful appeal opportunities are unlikely.[10] A solution is for parole boards and sentencing commissions to promulgate identical guidelines. If judges impose sentences from within the applicable guideline ranges, parole boards would seldom have reason to release prisoners early. If judges impose sentences longer than the applicable range indicates, parole boards would normally set a release date within the range.

A critic might fairly say that I have described aspirations for parole release rather than accomplishments (e.g., Frase 2019). Parole boards have long been demoralized, underfunded, and risk averse. Parole board members are too often political appointees, serving at the governor's pleasure,

[10] The *Model Penal Code—Sentencing* offers a number of proposals to reinvigorate sentence appeals, including authorizing appellate judges to overturn disproportionately severe sentences (including those resulting from mandatory sentence laws) and to take a "second look" at the need for continued confinement of prisoners who have served 15 or more years (Reitz and Klingele 2019). The code has not, however, been enacted anywhere and does not address the problem that prosecutors often insist that defendants waive appeal rights as a condition of plea bargains.

and often lack appropriate professional expertise. Those things were not true in the best parole systems in the 1970s and need not be true in the future. Blueprints are available to guide development and reinvigoration of parole boards so that they can operate systems for implementing rational evidence-based release policies, reducing disparities in sentences judges impose, and ameliorating prison overcrowding (Rhine, Petersilia, and Reitz 2017).

9. Luck and Leadership.—*Some sentencing systems and policies are demonstrably superior to others. Whether they are successful often depends, alas, on auspicious circumstances and the involvement of unusually effective leaders.*

On a cosmic report card, the sentencing reform movement of the last half century deserves a low or failing grade. The initial aims were to reduce disparities, make processes fairer, and in Judge Frankel's terms bring the rule of law to sentencing. Credible evidence of reduction in disparities exists only for a few initiatives and a few states. During the tough-on-crime period, the 1980s and 1990s, the aims of mandatory minimum and similar laws were ostensibly to reduce crime and increase "uniformity." They had few, if any, crime reduction effects and increased disparities. Proliferation of mandatory minimums and resulting increases in prosecutorial power have made processes less fair, sentences less consistent, and efforts to improve fairness, consistency, and accountability less successful.

In most places, the rule of law is no more evident today in sentencing than it was 50 years ago. The core elements are established and knowable rules, fair procedures, impartial decision makers, and opportunities for review of initial decisions. Of these, only the requirement of an impartial decision maker is generally satisfied. Less than a third of states have sentencing guidelines. Most cases everywhere are resolved by plea bargaining, a process few would describe as fair, transparent, or accountable. Appeals of sentence are meaningfully available only in four or five jurisdictions, and they are not common there. Even that picture is a bit rosy. Many guidelines systems have had few or no general effects on sentencing in general or on disparities.

Table 2 summarizes major changes in state sentencing systems since 1970; the federal government enacted all of them. Three patterns stand out. Legislatures enacted many more mandatory minimum sentence and

TABLE 2
Major State Sentencing Reforms

Initiative	Total	Pre-1970	1970–79	1980–89	1990–99	2000–2009	Post-2009
Mandatory minimums[a]	50	Unknown	49	Many	Many	Some	A few
Three-strikes[b]	27	None	None	None	24	3	
Truth in sentencing[c]	29	1	None	2	26		
Life without parole	49	7	12	11	16	4	
Sentencing commission[d]	16	None	2	9	10 [−4]	1 [−1]	[−1]
Presumptive guidelines	5	None	None	4	3	[−2]	
Any state guidelines[d]	19	None	None	10	10 [−1]	2 [−1]	[−1]

SOURCE.—Three-strikes: Chen (2008); truth in sentencing: Sabol et al. (2002); sentencing commissions and sentencing guidelines: Frase (2019, table 1); life without parole: Ogletree and Sarat (2012); mandatory minimums: Shane-Dubow, Brown, and Olsen (1985); Tonry (2016, table 2.2).

[a] After 1979, innumerable mandatory sentence laws were enacted and amended, making decadal counts nearly impossible. The 1970–79 laws mostly required 1- or 2-year sentence enhancements, often for use of a gun in the underlying crime.

[b] Earlier habitual offender laws, mostly enacted in the 1920s and 1930s, targeted chronic property offenders; people sentenced to imprisonment were usually eligible for parole release.

[c] Jurisdictions qualifying for prison construction funds under the federal Violent Crime Control and Law Enforcement Act of 1994.

[d] Totals refer to status in 2018 and include District of Columbia. Annual accounts show adoptions and in brackets repeals. Totals are adoptions less repeals.

similar laws than sentencing guidelines laws, mostly in the 1980s and 1990s. Except in Michigan in 2003 for most drug offenses, no significant mandatory minimum sentence laws have been repealed. By contrast, a quarter of all sentencing commissions went out of business, two of the seven presumptive guidelines systems were converted to voluntary systems, and three of the 22 guidelines jurisdictions terminated their use.

Table 2 understates the fragility of sentencing commissions. A number created in the 1980s failed to develop guidelines, and several, most famously in New York, were unable to persuade legislatures to approve their proposals (von Hirsch, Knapp, and Tonry 1987; Griset 1991).

Table 2 explains the failing or near-failing grade on the cosmic report card. However, some sentencing policy initiatives have worked reasonably well and a few jurisdictions in recent decades, most famously California, have pulled back from the worst excesses of the tough-on-crime period. Four lessons can be drawn.

First, some policy initiatives can make sentencing fairer, more predictable, and more consistent. The presumptive sentencing guidelines systems in Minnesota, North Carolina, Oregon, and Washington reduced sentencing disparities, including racial disparities, achieved compliance with changed policies, established meaningful systems of appellate sentence review, and improved corrections systems' planning and budgeting. Those things probably also happened in Kansas, but there is less evidence. North Carolina's guidelines reduced prison population growth more successfully there than occurred in any other state. Some of the voluntary guidelines systems, notably in Delaware, Pennsylvania, and Virginia, are widely said to have achieved legitimacy in judges' eyes and to have improved consistency in those states (though sophisticated evaluations have not demonstrated this). Those three states have institutionalized competent commissions that regularly revise their guidelines, maintain extensive data systems, and provide impact projections concerning proposed legislation. So, some successes.

Second, it is vastly harder to achieve the political support needed to enact sentencing commission legislation and to develop, promulgate, and oversee implementation of successful guidelines than it is to enact mandatory sentence and similar laws. That is not surprising. Proponents of those laws tend to have little compassion or concern for offenders, not to think or much care about implementation issues, and to have personal, political, and ideological objectives in mind. Enactment of the proposed laws achieves those objectives. The supporting rhetoric often insists that the goal is to prevent victim suffering; who could possibly be against that?

That so few mandatory sentence laws have been repealed is also not surprising. Their human costs are borne by offenders. State and local agencies pay any operations costs. There is no easy way to show that a particular law is ineffective, especially to politicians who distrust research findings and know intuitively that deterrence and incapacitation work.

Vocal opposition comes from civil liberties and ex-prisoners groups, defense lawyers, and sometimes judges, but they carry less weight than police and prosecutors, victims' organizations, and conservative activists.

Sentencing and parole commissions, by contrast, are continuing targets. Individual judges, prosecutors' organizations, and victims' groups usually oppose their creation and favor their expiration. They require state funding, and opponents can propose to save money by closing them down. Unlike a mandatory sentence law, a guidelines commission can be palpably ineffective. The leadership may be politically ineffective, important constituencies may disapprove policy choices, and the guidelines may fail to achieve legitimacy in practitioners' eyes.

Third, despite all that, some guidelines systems have succeeded and survived. Some other major reform initiatives, notably California's "Realignment" to date, have succeeded. There are few policy histories of successful sentencing initiatives.[11] All stress the commitment of politically savvy leaders and unusually able senior staff. In Oregon, longtime Republican Attorney General Hardy Myers supported the enabling legislation for the commission and guidelines and ran continuous political interference. In Washington, Republican District Attorney Norm Maleng of King County (Seattle) was the godfather; his former deputy David Boerner (later the commission's longtime chair) and executive director Roxanne Lieb made the trains run on time. Judge, then Justice, then Chief Justice Douglas Amdahl provided the political weight in Minnesota and commission executive directors Dale Parent and Kay Knapp produced a first-rate product. Judge Thomas Ross as commission chair did the heavy lifting in North Carolina. And so on.

Unusually effective individuals were also behind the successful parole guidelines systems. The federal prototype resulted in part from a decade's work by Don M. Gottfredson and Leslie T. Wilkins, formerly head of corrections research in the UK Home Office, and in part from the support of Maurice Sigler, chair of the Federal Parole Board. The key person in developing Oregon's successful parole guidelines was Parole Board chair Ira Blalock. In Minnesota, it was the parole board's chief executive, Dale Parent. Parole guidelines, however, were easier. All of these people worked at a time when indeterminate sentencing was taken

[11] Martin (1984), Parent (1988), and Frase (2005) tell the Minnesota story; the Washington story, Boerner and Lieb (2001); North Carolina, Wright (2002); Pennsylvania, Martin (1984) and Kramer and Ullmer (2009).

for granted. Parole abolition was on no one's agenda, judges and prosecutors had no reason to oppose parole reforms, criminal justice policy was not highly politicized, and reducing disparities and improving efficiency were uncontroversial ambitions.

The most dramatic sentencing reform story of our time is California's work in progress Realignment. The story Robert Weisberg (2019) tells includes many important players—prison reform litigators who kept at it for two decades, determined activist groups who launched successful referenda, three federal district court judges who stayed the course—but centers on Governor Jerry Brown. During two terms as governor, Brown repeatedly spent political capital, successfully managed the legislature, and stimulated referenda that made the difference. Realignment is not perfect and may in the end fail, but for now California sentencing is in better shape than it has been for 40 years. You will have to read the story to learn the details.

Fourth, prevailing ways of thinking change. As recently as the 1960s, few people challenged indeterminate sentencing. Emphasizing rehabilitation of offenders made sense to almost everyone. The American Law Institute's *Model Penal Code* (1962) and three high-profile national commissions in 1967, 1971, and 1973 endorsed it wholeheartedly.[12] That is a major reason why parole commissions had easier law reform jobs than sentencing commissions. The latter came into being after indeterminate sentencing imploded but also when tough-on-crime politics was in full swing: rehabilitation and sympathetic concern for offenders were out; deterrence, incapacitation, and do the crime, do the time were in. That Hardy Myers, Norm Maleng, Doug Amdahl, and Tom Ross superintended substantial guidelines successes during that period is in retrospect remarkable. They marched their commissions into the prevailing winds and somehow overcame the political obstacles on which most sentencing commissions foundered.

The tough-on-crime period is not completely past, but its influence is waning. Liberal and conservative movements, the ACLU and Right on Crime, and totemic liberal and conservative activists, George Soros and the Koch brothers, find law reform common cause. Legislatures mostly stopped enacting new mandatory sentence laws two decades ago. Some

[12] President's Commission on Law Enforcement and Administration of Justice (1967), National Commission on Reform of Federal Criminal Laws (1971), and National Advisory Commission on Criminal Justice Standards and Goals (1973).

legislatures have whittled away at them though not yet repealed them. That shift in the zeitgeist may partly explain California's successes. Changes may be possible in many states that were not able to make them one or two decades ago. If so, lessons have been learned about what does and does not work that may be helpful if fairness, consistency, and accountability reappear on sentencing reform agendas.

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