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Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation

Rachel E. Barkow* and Kathleen M. O'Neill**

One of the most significant modern developments in criminal law is the birth of the sentencing commission. Approximately one-third of the states and the federal government have established agencies with a mandate to recommend the appropriate sentencing ranges for their respective jurisdiction's many crimes. While these commissions vary in structure and in the amount of discretion they possess,¹ they share in common considerable influence on the penal policies of their respective jurisdictions. In jurisdictions as diverse as Minnesota, North Carolina, Washington, and Alabama, sentencing commissions have altered sentencing policy and spearheaded legislative reforms.²

The creation of these commissions presents a puzzle. The conventional wisdom is that legislatures delegate policymaking to agencies in order to avoid having to choose among the claims of competing constituents.³ By creating an agency and delegating to it the authority to make policy decisions, the legislature can shift the blame to the agency when those

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1. For a description of the institutional design of several prominent sentencing commissions, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 757–98 (2005). For a catalog of the scope of the guidelines these commissions have produced, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194–208 (2005) [hereinafter Frase, *Unresolved Issues*] and Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 71–72 (1999) [hereinafter Frase, *Guidelines in Minnesota*]. For an analysis of the appellate review of trial court sentencing decisions that exist in states with guidelines, see generally Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997).

2. Barkow, *supra* note 1, at 775–77, 780–82, 784–87 (discussing the role of sentencing commissions in Minnesota, North Carolina, and Washington); William H. Pryor Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943, 951–55 (2005) (describing the impact of the Alabama Sentencing Commission); Ala. Sentencing Comm'n, *Alabama Sentencing Commission Achieves Success: Sentencing Reform Legislation Enacted 1–2 (July 2003)*, available at <http://sentencingcommission.alacourt.gov/Publications/ASC%20Achieves%20Success%20NASC%20Article%207-03.doc>.

3. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 32 (1999); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 88–94 (1993).

decisions harm the interests of a powerful group or the general public.⁴ This seems to be an accurate description of what motivates the creation of most regulatory agencies because these agencies are, in fact, making difficult policy choices that benefit particular groups and interests at the expense of other groups and interests or the public at large.⁵ The theory cannot, however, explain the creation of sentencing commissions in recent decades. The politics of crime in this period has not been characterized by readily apparent conflicting demands of powerful groups and the electorate. On the contrary, all of the powerful political groups and the electorate have lined up on the same side: They all seem to support tougher sentencing laws.⁶ Given this alliance of interests, legislators do not have the same incentives to delegate sentencing decisions to agencies. Instead, legislators would presumably want to keep authority over sentencing laws for themselves because by increasing sentences they get the support of the public and the powerful groups.⁷

Yet many state legislatures have found it preferable to relinquish some sentencing authority to commissions that have varying degrees of independence. And they have done so even as the political climate continues to reward harsher legislative pronouncements on crime, and there seems to be little demand for lower sentences.

What accounts for the development of sentencing commissions in this political climate? Why do some states form sentencing commissions while others do not? Borrowing from political science and administrative law scholarship and analyzing a data set of American jurisdictions with and without sentencing commissions from 1973 to 2000, this Article explores political and economic factors that could prompt a legislature to delegate some of its responsibility for setting punishments to a sentencing commission even when the political climate rewards legislators for passing tougher sentencing laws themselves. Understanding this dynamic sheds light on the future of the sentencing commission and guidelines movement and, more broadly, on the role of agencies in criminal law.

The Article begins in Part I by exploring some of the reasons why legislators might establish sentencing commissions. Proponents of commissions have cited the perceived benefits of having a designated agency

4. *Id.*

5. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 67–91 (2d ed. 1979) (describing interest group dynamics in agriculture, commerce, and labor); Barkow, *supra* note 1, at 723–24 (describing the interest group dynamics that characterize most regulatory fields).

6. Barkow, *supra* note 1, at 724–30 (analyzing the politics of sentencing and noting that the powerful groups and the public have, in recent decades, joined forces to support tougher laws).

7. Sentences have increased markedly in recent decades. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003*, at 424–25 tbl.5.23 (Ann L. Pastore & Kathleen Maguire eds., 2004), available at <http://www.albany.edu/sourcebook/pdf/t523.pdf>.

with the time, energy, and expertise to devote to sentencing matters.⁸ The relative political insulation of commissions has also been highlighted as one of its chief advantages.⁹ While these concerns were undoubtedly perceived as important, it requires more explanation to understand why legislators would prefer an insulated body of experts setting sentencing policy when the political climate seems to reward legislators who themselves appear to be taking action on crime policy. It is not, in other words, immediately apparent why legislators would tout agency independence or expertise in the area of sentencing, a subject that seems well-suited to legislative oversight.¹⁰ Part I therefore considers whether economic concerns, such as rising corrections expenditures and incarceration rates, might also prompt state legislatures to establish commissions to enable them to avoid making funding decisions that, although popular in the short-term, would create financial obstacles for other legislative goals. We also consider various political variables that might make delegation particularly attractive, including a narrow partisan margin, divided government, the party in control of the legislature and executive branch, and whether judges are elected.

These political and economic hypotheses explaining why states may adopt sentencing commissions are amenable to quantification and statistical analysis. Part II performs various statistical tests to determine the extent to which any of these hypotheses are successful in predicting when states will adopt sentencing commissions or guidelines. We find that various political and economic factors – specifically those factors that are rooted in a concern with the costs of longer sentences and incarceration – play a significant role in predicting when states will adopt sentencing commissions or guidelines. The relationship between sentencing commissions and costs is most obvious in our findings that corrections as a large percentage of state expenditures and a high incarceration rate are positively correlated with the presence of sentencing commissions. But a concern with costs also explains some of the statistically significant political variables as well. A narrow partisan margin in the legislature has a strong relationship with the formation of sentencing commissions, and the correlation is most readily explained by the fact that, in the absence of the commission, each party would face enormous pressure to engage in a race to appear tougher than the other but would ultimately suffer the consequences of a strained budget when it was the party in power. Similarly, we find a positive relationship between elected judges and sentencing commissions. This result can be explained by the fact that a legislature is more likely to be concerned that elected judges, as opposed to

⁸ Barkow, *supra* note 1, at 742-43 (noting that some reformers supported commissions because they “could bring more resources to bear on the question and could adapt to changing circumstances more effectively” whereas others liked “the use of agencies with specialized expertise”).

⁹ *Id.* at 744-45 and n.83.

¹⁰ *Id.* at 734-35 (pointing out that “agencies do not have an obvious informational advantage when it comes to sentencing policy”); *id.* at 745-46 (questioning why reformers believed in agency independence in a political climate that seemed to cut against insulation).

appointed judges, will be particularly responsive to the demands of the electorate for longer – and therefore costlier – sentences. We also find that a Republican House is positively correlated with the presence of sentencing commissions, which likewise might be explained by the Republican Party’s traditional concern with fiscal constraint. In addition to these factors, we find that divided government at the state level decreased the possibility of adopting and maintaining sentencing commissions.

We also find relationships with statistical significance between many of our variables and the adoption of sentencing guidelines. A narrow partisan margin, a Republican House, a Democratic governor, elected judges, a high incarceration rate, and corrections as a large percentage of expenditures are positively correlated with the presence of sentencing guidelines.

Our analysis of the data therefore shows that the political and economic factors identified in Part I play a significant role in the development of sentencing commissions and guidelines. Together they emphasize the central role of cost concerns in motivating legislators to embrace sentencing commissions and guidelines.

While this is a valuable finding, it is also important to emphasize that these factors, while significant, still provide an incomplete picture of the political dynamics. Part III explores factors that cannot easily be empirically tested but that also have proven crucial to the success or failure of sentencing commissions. Among these, the commission’s expertise, the importance of a jurisdiction’s political culture, and the leadership of key individuals pushing sentencing reform cannot be overlooked in the story of any agency’s development and success.

I. Why Sentencing Commissions?

The political climate of recent decades has been characterized by ever-harsher sentencing laws. Legislated punishments for most crimes have increased, not decreased, and more punishments have become mandatory instead of discretionary.¹¹ Legislators have embraced these laws because being seen as “tough on crime” bears positive election results.¹²

11. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278–79 (2005) (discussing trends in the past four decades for harsher and more mandatory sentences, including increases in sentence lengths and incarceration rates); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 11 (1999) (discussing the “major shift in sentencing philosophy and practice, as sentencing moved in a more determinate and more punitive direction,” including a vast increase in mandatory sentencing laws).

12. See Barkow, *supra* note 1, at 730–35 (discussing the political incentives for tougher sentencing laws); Sarah 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, 40–44 (1997) (detailing how the crime issue has influenced political strategy since the 1960s); Mauer, *supra* note 11, at 12 (noting that the political symbolism of being “tough on crime” is “a primary goal of harsh sentencing policies”).

Curiously, during the same time period that legislators have learned that passing tougher sentencing laws reaps political rewards with the electorate and key interest groups, they have also relinquished some of their authority to legislate on sentencing matters. Specifically, many jurisdictions have witnessed legislators give some of their legislative authority over sentencing lengths to commissions. After Marvin Frankel proposed the idea of a sentencing commission with the authority to create sentencing guidelines in the early 1970s,¹³ states began turning the idea into a reality. In 1978, Minnesota became the first state to establish a sentencing commission, and the state adopted the Commission's proposed guidelines in 1980.¹⁴ Thirty-four jurisdictions followed Minnesota's lead and created some kind of sentencing commission. These commissions were either permanent or temporary, but they shared in common a mandate to evaluate existing sentencing laws and propose sentencing reforms.¹⁵ Many of these commissions proposed sentencing guidelines that were subsequently adopted by the jurisdiction's legislature,¹⁶ and in most cases the commissions remain

13. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 118–24 (1972).

14. Susan E. Martin, *The Politics of Sentencing Reform: Sentencing Guidelines in Pennsylvania and Minnesota*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 265 (Alfred Blumstein et al. eds., 1983).

15. These jurisdictions include those noted as having commissions in Table 1, *infra*, as well as New Jersey, the District of Columbia, and the federal government. Frase, *Unresolved Issues*, *supra* note 1, at 1196 tbl.1 (documenting commissions in the District of Columbia and at the federal level); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1029 (2005) (noting that New Jersey recently created a sentencing commission but does not yet have guidelines). We include all those commissions created with a mandate to reform sentencing policy in the state and to consider the adoption of sentencing guidelines. These commissions vary in institutional design and responsibility, and it is important to consider these differences. For the purposes of this Article, however, we are interested in the less refined question of when a commission with any kind of sentencing authority is established. Future research can explore the relationship between political and economic factors and the adoption of a particular institutional design. For a descriptive account of the relationship between institutional design and the political influence of sentencing commissions, see Barkow, *supra* note 1, at 757–812 (discussing the institutional factors that have made commissions more persuasive with legislatures). While we have verified our list of states against other published accounts of sentencing commissions, enabling legislation, and commission websites, it is possible that our information may not be complete. As Richard Frase points out, “[d]ocumenting the current status, provisions, and impact of state guidelines systems—or even their initial or continued existence—is a challenging task.” Frase, *Unresolved Issues*, *supra* note 1, at 1195 n.19. We have therefore provided the sources on which we rely for our commission information. Our information on sentencing guidelines and their effective dates comes from Richard Frase's excellent summary. *See id.* at 1196 tbl.1. Table 1 provides sources for our information on when commissions have been established in a particular state and when, if relevant, the commission was abolished. *See infra* Table 1. These are the dates that form the basis of our empirical analysis in Part II.

16. Some of the guidelines are legally binding and enforced by appellate review, whereas others are voluntary, and judicial decisions to follow or ignore them are not subject to appeal. Richard Frase lists the guidelines in Utah, Maryland, Delaware, Virginia, Arkansas, Missouri, Wisconsin, and the District of Columbia as voluntary. Frase, *Unresolved Issues*, *supra* note 1, at 1198. Some guidelines have also changed character over time. *See, e.g., id.* at 1204 (noting that guidelines in Florida have less force than when initially promulgated). Even in jurisdictions with voluntary guidelines, the guidelines have had an effect on judicial behavior, so allowing sentencing

in place to oversee the guidelines and recommend changes as necessary.¹⁷ In other states, commissions proposed guidelines that the legislature rejected, and in many cases the commission no longer exists.¹⁸ Some other states have commissions but have not yet adopted guidelines.¹⁹ The Maine, Texas, and Connecticut sentencing commissions recommended against the adoption of guidelines.²⁰ In sum, although they varied in their success and staying power, at one point or another at least thirty-two states²¹ have had a sentencing commission of some kind, and eighteen states have adopted sentencing guidelines.²²

A. *The Delegation Puzzle*

The existence of these commissions is difficult to explain based on the commonly accepted view among administrative law scholars of when delegation occurs. Under the conventional view, legislators delegate policy-making decisions to agencies in order to avoid choosing among competing,

commissions to promulgate these guidelines is also an example of delegation. Barkow, *supra* note 1, at 795 & n.354.

17. See Frase, *Unresolved Issues*, *supra* note 1, at 1196 tbl.1 (listing all jurisdictions with guidelines, including the District of Columbia and the federal government). Alaska, Florida, Michigan, and Tennessee adopted sentencing guidelines but abolished their commissions. *Id.* at 1197; Frase, *Guidelines in Minnesota*, *supra* note 1, at 70. Wisconsin and South Carolina abolished their initial sentencing commissions, but both states have since reestablished them. See 1994 S.C. Acts 497, § 63A 10 (repealing the 1993 legislative repeal of the sentencing commission); WIS. SENTENCING COMM'N, ANNUAL REPORT 2004, at 4–5 (2004), available at <http://wsc.wi.gov/docview.asp?docid=1662> (describing the creation, duties, and membership of the Wisconsin Sentencing Commission). Utah, Maryland, Michigan, and Virginia adopted guidelines and only later established permanent sentencing commissions. Frase, *Unresolved Issues*, *supra* note 1, at 1203; *infra* Table 1 (listing states with commissions and guidelines in existence by the year 2000).

18. In Colorado, Montana, and New York, for example, the legislature never enacted guidelines and commissions no longer exist.

19. These states include Alabama, Louisiana, Massachusetts, New Jersey, New Mexico, Oklahoma, and South Carolina.

20. Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 n.1 (1995).

21. In addition to the state commissions in Table 1, the District of Columbia and the federal government also have sentencing commissions. See U.S. SENTENCING COMM'N, AN OVERVIEW OF THE U.S. SENTENCING COMMISSION 1–2 (2005), available at http://www.ussc.gov/general/USSCoverview_2005.pdf (chronicling the history of the Sentencing Commission); D.C. Sentencing Comm'n, Sentencing Recommendations, http://acs.dc.gov/acs/cwp/view,a,3,q,589375,acsNav_GID,1664,acsNav,33149,asp (same). Georgia also had a sentencing commission, though it was established by executive order and not by legislation. See *infra* note 79.

22. The District of Columbia and the federal government have also adopted guidelines. See D.C. SENTENCING COMM'N, 2005 PRACTICE MANUAL: THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA VOLUNTARY SENTENCING GUIDELINES FOR PLEAS AND VERDICTS ENTERED ON OR AFTER JUNE 14, 2004, (2005), available at http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/practice_manual_body.pdf.

powerful interest groups.²³ By delegating policymaking authority to an agency, the legislator can take credit when the agency does something that pleases a group and can deflect blame when the agency takes action against a powerful group.²⁴

In criminal law, however, the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power. Individuals affected by longer sentences are politically anemic in most contexts.²⁵ To be sure, proposals regarding increased penalties for regulatory and white collar crimes might be the target of organized and effective lobbying because industry groups worry about blurred lines between permissible and criminal behavior,²⁶ but most criminal sentences affect groups and individuals that have no organization looking out for their interests *ex ante*.²⁷ Very few groups and individuals care about the sentences for violent, street, and drug crimes. Those who do—for instance, family members of individuals serving long sentences and the criminal defense bar—have little political pull because they lack financial resources and do

23. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–32 (1980) (“[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, ‘take the inevitable political heat.’”); EPSTEIN & O’HALLORAN, *supra* note 3, at 32 (“[L]egislators prefer to delegate to bureaucrats whenever the policy in question has concentrated benefits and dispersed costs and make policy themselves when the opposite is true.”); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 32–33 (1982) (noting that candidates adopt a strategy of ambiguity and establish agencies to “alleviate[] the candidate’s need to take a stand on an issue prior to the commission’s or agency’s study”); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 517 (1988) (noting that delegation occurs because “legislators who want to avoid controversial or indeterminate decisions as to which interest groups to favor can forfeit vast amounts of discretion (and thus responsibility and accountability) to administrative agencies”).

24. SCHOENBROD, *supra* note 3, at 10 (“[D]elegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents.”).

25. See Barkow, *supra* note 11, at 1282 (“[T]he direct targets of sentencing policy—judges and convicted criminals—have little political weight.”).

26. These groups must be careful in their lobbying efforts, however, to avoid the appearance of condoning illegal activity. See Hugo Hopenhayn & Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J.L. ECON. & ORG. 196, 209 (1996) (“If a social activity is illegal, people may nevertheless engage in this activity; but they will be reluctant to provide information about favorable or adverse experiences since the provision of information reveals their illegal behavior.”); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 776 (1999) (noting that groups have to be careful in arguing for limitations in criminal statutes because “[t]hese arguments can sound perilously close to admissions that a group plans to pursue an antisocial or immoral course of conduct”). For a description of other contexts where those opposing criminalization have lobbied successfully, see Darryl K. Brown, *Rethinking Overcriminalization* 15–17 (ExpressO Preprint Series, Working Paper No. 995, 2006), available at <http://law.bepress.com/expresso/eps/995>.

27. Barkow, *supra* note 11, at 1282.

not speak for a large number of voters.²⁸ As for the offenders themselves, they often lack the right to vote,²⁹ lack organization, and, because they typically come from disadvantaged backgrounds, lack funding to engage in education or lobbying campaigns.³⁰ Legislators need not worry about displeasing them because there is little these groups can do to harm their chances of reelection.

The other group affected by sentencing legislation—the judiciary—similarly lacks political power. While some judges oppose mandatory sentencing laws and increased penalties, judges do not uniformly agree on these issues, which limits their ability to speak as a cohesive group.³¹ Moreover, even those judges who do oppose increased and mandatory sentences often have to worry about their own elections. Among appointed judges who oppose harsher sentencing laws, those appointed for terms rather than life must be careful not to displease their political benefactors if they want to seek reappointment. Judges with life tenure may not worry about the effect lobbying will have on their political future, but they may be concerned with the appearance of impropriety if they get too involved in the political process. And even when judges agree on a course of action and are of the view that they will not pay a political cost for making their views known, they cannot offer politicians much more than their views. They cannot promise to mobilize voters or funds.³²

In contrast, those who favor longer sentences and mandatory punishments are numerous and powerful. For starters, the vast majority of voters has been easily mobilized to support tougher criminal laws in the past few decades.³³ As crime rates increased in the 1960s and 1970s, voters

28. While it is possible that, over time, these groups will gain strength as the number of individuals serving sentences increases and the social impact grows—particularly because sentencing laws have a disproportionate impact on certain minority groups—these groups did not wield political power during the period in which sentencing commissions formed and currently do not have much influence on the political process. Barkow, *supra* note 1, at 727 (noting that “while change might be on the distant horizon, the foreseeable future promises more of the same”).

29. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 85 (2004) (noting that every state but two prohibits felons from voting while they are incarcerated).

30. For a longer discussion of the political weakness of those who oppose longer sentences, see Barkow, *supra* note 1, at 724–26 (describing the problems that convicts have in lobbying for shorter sentences, including the inability to self-identify in advance and the frequent lifetime disenfranchisement of felons).

31. Their disagreement may come from different ideologies or from the fact that trial judges and appellate judges do not have the same institutional interests with respect to sentencing. For example, many trial judges would presumably favor more discretion, while appellate judges might prefer greater oversight power over trial judges. *Id.* at 724 n.8.

32. *Id.* at 724–25.

33. *See id.* at 730 (characterizing the voting public as easily mobilized to support longer sentences because voters have a “settled perception that keeping criminals behind bars for as long as possible is a good thing”).

looked to harsher criminal punishments for greater security.³⁴ Even as crime rates leveled or decreased, voters continued to respond to calls for increased sentences in the wake of highly publicized crimes and the daily barrage of crime stories on the news.³⁵ It remains true that appearing soft on crime is politically dangerous.

It is not just the dispersed public that favors longer sentences. Organized groups also lobby for increased and mandatory penalties. Prosecutors have an interest in calling for longer, mandatory terms because it gives them more bargaining power to obtain pleas and cooperation from those charged with crimes.³⁶ Victims' rights groups also pursue longer terms of incarceration, and these groups can easily mobilize voters with powerful anecdotes of convicted criminals who were released after relatively short periods of time and who went on to re-offend.³⁷ Private prison companies, corrections officer unions, and rural communities also have an interest in seeking longer terms because they have an economic stake in the expansion of prisons.³⁸ One of the most powerful lobbying forces in politics, the National Rifle Association, has also supported increased sentences for violent offenders because it views these penalties as an alternative to the regulation of firearms.³⁹

34. *Id.* at 747 (noting that tough-on-crime politics responded to a sharp increase in the violent crime rate in the 1960s); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 524–25 (2001) (recognizing that legislators in the 1960s imposed harsher punishments in response to skyrocketing crime rates); DAVID GARLAND, *THE CULTURE OF CONTROL* 1-26, 201-203 (2001) (arguing that the get-tough politics of crime in recent years is designed to create illusion of control and social order).

35. See TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 266–68 (2001) (indicating that media reports tend to exaggerate the extent and danger of crime); Barkow, *supra* note 11, at 1280 (claiming that the public is easily mobilized to support longer sentences because of the media's "if it bleeds, it leads" philosophy"); Barkow, *supra* note 1, at 747–50 (explaining that most people's impressions of crime are generated by the media and that when determining which sentences they wish to enact, voters tend to think of the most heinous headline-grabbing crimes); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 120 (1992) (citing an empirical study finding that subjects who read a media account of a sentencing were more than three times as likely to think that the sentence was too lenient than subjects who read summaries of actual court documents); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1251 (2005) (detailing the decline in crime rates that has occurred since 1994).

36. Barkow, *supra* note 1, at 728 & n.25 (citing examples of prosecutor lobbying).

37. LORD WINDLESHAM, *POLITICS, PUNISHMENT, AND POPULISM* 142 (1998); Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 764, 766 (2002).

38. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 99–101 (1997) (commenting on the political power of private prison companies, corrections officers, and rural communities); *Developments in the Law—A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1872–73 (2002) (describing lobbying by private prison companies and correctional unions).

39. See 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) (noting that the NRA was part of the coalition that put a three-strikes law on the ballot in California—a coalition that included victims' right groups and a correctional officer union—because the NRA

On the surface, then, there would seem to be no reason under the conventional political account for legislators to delegate the authority to make sentencing policy to a commission. Legislators can reap political rewards by increasing penalties without worrying about angering any powerful interest group or alienating the public. While legislators often delegate to reduce their workload to free up time for tasks that directly please constituents,⁴⁰ one would expect sentencing to be one of the subjects that legislators would prefer to retain under their control because it offers positive political returns with the general public and powerful constituent groups.⁴¹ These political dynamics provide an explanation for why legislatures in many jurisdictions have not turned to the agency model.⁴²

But that does not explain why other state legislatures *are* delegating this authority to sentencing commissions. Some other factor or factors must be overcoming legislative disincentives to relinquish sentencing responsibility to someone else.⁴³ One possibility – endorsed by legislators themselves – is

“welcome[d] punitive sentencing programs as a method of addressing violent crime concerns without inconveniencing gun owners”); see also Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 370–72 (2001) (describing the NRA’s support of Project Exile, a program designed to shift prosecution of gun crimes from state to federal court).

40. EPSTEIN & O’HALLORAN, *supra* note 3, at 30; Aranson et al., *supra* note 23, at 21. This is particularly valuable for state legislators, who often sit on a part-time basis and have a limited staff. See, e.g., John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228 (1993) (“[M]any state legislatures meet for only short and intermittent sessions, and the legislators themselves are often only part-time politicians with other livelihoods that require attention. State legislative staffs are smaller and less regimented than their federal counterparts.”); Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL’Y 429, 436 (1998) (observing that state legislatures “do not meet year-round and have more limited staffs”).

41. See EPSTEIN & O’HALLORAN, *supra* note 3, at 9 (“Legislators will prefer to make policy themselves as long as the political benefits they derive from doing so outweigh the political costs; otherwise, they will delegate”); Aranson et al., *supra* note 23, at 57 (“[A] greater reliance on precise legislative enactments and the legal system should occur where regulatory beneficiaries are diffused and those who bear the burdens are concentrated”).

42. See Andrew von Hirsch & Andrew Ashworth, *Structuring Sentencing Discretion*, in PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 215 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (describing the California legislature’s control of sentencing reform); Andrew von Hirsch, *The Sentencing Commission’s Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3, 5–6 (Andrew von Hirsch et al. eds., 1987) (describing legislative sentencing reforms); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1102 n.78 (2005) (describing states with presumptive sentencing statutes, which are guidelines designed by the legislature). Legislative control over sentencing reform has been criticized. 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.”).

43. Or, as David Epstein and Sharyn O’Halloran put it, legislators who create sentencing commissions must “feel that delegation will increase their electoral opportunities relative to policy making” EPSTEIN & O’HALLORAN, *supra* note 3, at 49.

that legislators form sentencing commissions on the belief that agencies are uniquely qualified to set sentencing policy because they have the necessary independence and expertise.⁴⁴ Before public choice theory offered an explanation of delegation grounded in interest group dynamics and legislative incentives, this expertise model of agencies held sway.⁴⁵ While political scientists have shown the expertise model to be simplistic and incomplete,⁴⁶ it remains true that agencies can develop specialized knowledge of a field that is superior to the generalist legislature—a quality that might be attractive to legislators.⁴⁷ And, in fact, many reformers who pushed for the creation of sentencing commissions highlighted the fact that these agencies could bring to bear on sentencing policy expertise and the ability to process mass quantities of information about sentencing practices.⁴⁸ Thus, regardless of the immediate electoral pressures and interest group pressures, a legislator might want a sentencing commission because he or she believes that it will create better policies in the long-run. For the same reasons, legislators might want commissions because they are relatively insulated from political pressures.

Although these explanations may have some force, they are incomplete. First, although expertise is likely an important part of the story, sentencing is not the kind of technical subject that the public is likely to view as the province of experts.⁴⁹ And, in fact, the proliferation of legislation setting

⁴⁴ See *supra* TAN 8-10.

⁴⁵ David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 412 (1997); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677–78 (1975).

⁴⁶ David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99 (2000); Stewart, *supra* note **Error! Bookmark not defined.**, at 1702–11.

⁴⁷ See EPSTEIN & O’HALLORAN, *supra* note 3, at 213 (finding that “informationally intense policies are delegated at higher rates”); RANDALL B. RIPLEY & GRACE A. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 17 (3d ed. 1984) (noting that Congress delegates to reduce its workload because “[t]he sheer volume and technical complexity of the work are more than Congress, with its limited membership and staffing, can manage alone”); Aranson et al., *supra* note 23, at 21 (noting that one justification for delegation is that it allows “specialists [to] decide matters about which Congress is not knowledgeable”).

⁴⁸ See Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 228 (1984) (highlighting the fact that an agency would have the necessary resources to adapt laws over time); Frase, *Guidelines in Minnesota*, *supra* note 1, at 71 (commenting that “a permanent sentencing commission is now generally seen as an essential component of guidelines” because of its research capabilities); Reitz & Reitz, *supra* note 69, at 191 (arguing that a “commission’s information base and record of accurate projections allow it to participate in criminal justice policy making as a uniquely credible, informed player”); Ronald F. Wright, *The United States Sentencing Commission as an Administrative Agency*, 4 FED. SENT’G REP. 134, 136 (1991) (noting that Congress believed that a sentencing commission “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”); Huber et al., *supra* note 76, at 332 (noting that “it might be in the legislature’s interest to let an agency develop policy, since agencies are staffed with experts who may know more than the legislature about the policy area and about the link between policy actions and outcomes”).

⁴⁹ Barkow, *supra* note 1, at 734-35.

sentencing policy without commission or judicial input belies the claim that sentencing is widely or consistently perceived as a topic on which legislators must defer to experts.⁵⁰ Second, it is not clear why a legislator would choose an independent commission when the political climate rewards legislative action that is tougher on sentencing. What motivates the legislator to choose to tie his or her hands in such an environment? While producing good long-term policies is certainly laudable, it is a fact of modern politics that politicians tend not to be reelected unless they produce or appear to produce results by the next election.⁵¹ A more sophisticated theory of delegation is therefore needed to explain the circumstances under which legislators take a longer-term view and place greater weight on agency expertise and insulation instead of leaving these decisions with the legislature or retaining an indeterminate sentencing model where discretion is delegated to judges and parole boards.⁵²

B. Reasons to Delegate

The decision by legislatures to delegate is most often explained either as serving a desire to avoid choosing sides between powerful interest groups, or as a means of adopting programs that bestow concentrated benefits on a particular group by distributing costs among the public.⁵³ But these are not the only reasons legislatures delegate.

Legislatures might also delegate power because retaining it would create a harmful race to the bottom that could compromise other legislative goals. For example, legislators cede authority over interest rate policy to the Federal Reserve in part because retaining such power would create the risk that politicians would pander too much to constituent demands for short-term economic relief that might create harmful long-term consequences for the

⁵⁰ Barkow, *supra* note 11, at 1278-1279 (observing that mandatory sentencing laws have been adopted in all jurisdictions, and most have three-strikes laws as well). The lack of legislative deference generally is further supported by the fact that, when Epstein and O'Halloran categorized laws by subject matter to identify those areas in which Congress gives the most discretion to agencies, the criminal code was an area characterized by relatively little discretion. See EPSTEIN & O'HALLORAN, *supra* note 3, at 199 tbl.8.1 (putting the average discretion of the criminal code at 12.66%, placing it among those areas with relatively little discretion as compared to, for example, occupational safety, education, the environment, consumer protection, health, foreign trade, foreign aid, and space).

⁵¹ Barkow, *supra* note 11, at 1281 (noting that politicians "tend not to find it worthwhile to propose long-term solutions that will address the root causes of crime but that will not yield tangible solutions before the next election cycle").

⁵² Many legislatures have retained indeterminate sentencing, which amounts to a delegation of sentencing authority to judges and parole boards. Reitz, *supra* note 42, at 1103 n.79. To the extent that legislatures delegate to judges instead of retaining sentencing authority for themselves, this too is a puzzle in light of the politics of crime. Therefore some of the hypotheses suggested here for why legislatures delegate to commissions would apply to judges as well. To the extent that there are different rationales for delegation to a commission instead of a judge, we consider them *infra* notes 76-78 and accompanying text.

⁵³ See *supra* notes 23-24 and accompanying text.

economy.⁵⁴ A similar dynamic might be at play in the creation of sentencing commissions. As noted, there are no immediate costs to passing laws mandating longer sentences except to those who receive the sentences, their families and social networks, and perhaps to the judges who mete out the punishment.⁵⁵ Because criminal defendants are among the weakest—if not the weakest—of all political groups, and because judges have also exercised little political power, there is little to stand in the way of ever-harsher laws. But over the long-term these laws could produce harmful results for the general public because increased prison terms require large capital expenditures to maintain facilities and personnel for incarceration, not to mention the significant social costs of mass incarceration. While longer terms of incarceration might make fiscal sense for many offenses and offenders, at some point the money spent on additional prison terms would be better spent on alternatives to incarceration.⁵⁶ The political process might not allow reasoned consideration of these options,⁵⁷ however, so a commission might be better suited to explore policies that will yield the best long-term results.⁵⁸ Delegation in this context can therefore provide a “means to escape from legislative excesses”⁵⁹ and can allow more reasoned

54. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 496 (16th ed. 1998) (“The Fed’s independence allows it the leeway to undertake policies, such as fighting inflation, that have little popular support. The elected branches will not always sacrifice their offices for long-run economic welfare.”); see also Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 522–33 (2000) (discussing the Federal Reserve’s history of independence and reasons to insulate monetary policy from political influence); Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Power*, 55 KYKLOS 289, 296 (2002) (describing legislators’ incentives to delegate power in various circumstances, and noting frequent delegation of monetary policy to independent central banks). Another example of this kind of delegation might be international trade, where legislators have incentives to pass protections for virtually all industry groups because they are politically popular domestically but where the overall effects ultimately harm the public. See EPSTEIN & O’HALLORAN, *supra* note 3, at 223 (noting that the 1930 Smoot-Hawley Tariff Act had so many protections that it created an overall negative result).

55. See *supra* notes 25–30 and accompanying text.

56. Barkow, *supra* note 11, at 1291–92.

57. *Id.* at 1292–95 (describing shortcomings in the political process that frustrate consideration of the costs of sentencing policies); see also *id.* at 1281 (explaining that politicians may not have incentives to propose long-term solutions to crime that yield fiscal benefits in the future because they need to produce tangible results by the next election).

58. Cf. Aranson et al., *supra* note 23, at 35 (noting that individual citizens might not have the appropriate incentives to research particular dangers or solutions, so that “[b]y establishing and maintaining an agency, Congress is delegating not merely legislative tasks but also the election-related task of searching out new opportunities to improve citizens’ welfare”).

59. EPSTEIN & O’HALLORAN, *supra* note 3, at 224; see also Aranson et al., *supra* note 23, at 25 (“[D]elegation helps to ‘depoliticize’ the problem under review . . .”). This dynamic may explain why many reformers who favored sentencing commissions highlighted their desire to remove sentencing decisions from immediate political pressures. For a sampling of reformers who argued in favor of sentencing commissions because of the political insulation it could provide, see Barkow, *supra* note 1, at 744 & nn.82–83.

consideration of alternatives that would improve long-term social welfare and free up resources to pursue other legislative goals.

Under this theory of delegation one would expect a sentencing commission to be particularly attractive when fiscal concerns of incarceration are salient, such as when incarceration rates are increasing or, when the percentage of the state budget devoted to corrections activities rises.⁶⁰ One might also expect that forming a commission would be most advantageous when there is close electoral competition between the parties in the state legislature because in the absence of the commission, each party would face enormous pressure to engage in a race to appear tougher than the other but would ultimately suffer the consequences of a strained budget when it was the party in power.⁶¹ The commission would allow each party to diffuse some of that pressure and pursue other agenda items. For the same reasons, close electoral competition may also cause legislatures to retain commissions even as the party in control changes.⁶² One would expect that parties would be particularly sensitive to the long-run dynamics when electoral competition is close because the prospect of losing power in the future is more likely than when one party is dominant.

Although both Democrats and Republicans face the competing electoral pressure to be fiscally responsible and to appear tough on crime, the Republican platform is more commonly associated with having both of these as explicit goals.⁶³ If this is true, one might expect that jurisdictions with Republican governors would be more likely to adopt commissions because these governors might have stronger incentives than Democratic governors to

60. Epstein and O'Halloran have found that generally "during times of tighter fiscal constraints Congress is less willing to delegate." EPSTEIN & O'HALLORAN, *supra* note 3, at 135. That is, they found that "with less federal money to go around, legislators do focus more intensely on getting direct benefits to favored constituents and less on programs that give the executive wide latitude over spending patterns." *Id.* But because the pressures for spending are so great with regard to crime, one might expect the opposite dynamic in this context—particularly because commissions have proven to be effective at managing fiscal resources. Barkow, *supra* note 11, at 1286–87; see also Frase, *Unresolved Issues*, *supra* note 1, at 1205 (observing that every guideline system adopted since 1983 "has included resource impact assessments in some form," and noting that "resource management became the most important reason for adopting guidelines and a sentencing commission").

61. Cf. Barbara Geddes, *A Game Theoretic Model of Reform in Latin American Democracies*, 85 AM. POL. SCI. REV. 371, 387 (1991) (noting that civil service reforms occur in a system of two parties when the parties are approximately equal).

62. Terry Moe has explained that, in a two-party system, each knows that whatever reforms it adopts while in power can be destroyed by the other when it assumes power. He notes that "[t]he party in government will refrain from subverting the structures it inherits from its opponent as long as the opponent does the same when it is in power." Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. SPECIAL ISSUE 213, 246 (1990).

63. Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 512–14 (2005) (describing Republicans as "tough on crime"); Jeff Gill & James A. Thurber, *Congressional Tightwads and Spendthrifts: Measuring Fiscal Behavior in the Changing House of Representatives*, 52 POL. RES. Q. 387, 389–95 (1999) (describing partisan differences in ideology and votes on fiscal policy).

avoid a costly race for longer sentences that would require tax increases or cuts in popular education or transportation expenditures to avoid a budget shortfall. A commission might represent the best way for a fiscally-minded governor to control expenditures on incarceration because the governor lacks control over the prosecutors who make the key charging and plea bargaining decisions;⁶⁴ those prosecutors typically answer to district attorneys who are not under the control or supervision of the governor.⁶⁵ In addition, because Republicans have typically been associated with taking tougher positions on criminal justice issues, their commitment to fighting crime is less likely to be questioned if they propose a sentencing commission as an alternative to continued legislative oversight over sentencing.⁶⁶

Another factor that might affect the creation of a sentencing commission is how a legislature views that option in relation to the alternatives. Legislators have various options with regard to regulating a field. They can do nothing, they can pass legislation that specifies what is to be done so that implementation is ministerial, or they can pass legislation of a more general nature and let a delegate give the general policies more specific content.⁶⁷ Doing nothing is not a viable option when it comes to sentencing because it is an area that, by its very nature, requires state intervention: it cannot be left to private actors, and so sentencing always requires state action as an initial matter. And as long as sentencing laws need to be updated and changed, some state institution must continue to take action. Every jurisdiction has amended its sentencing laws in some respect, and beginning in the 1970s most jurisdictions were of the view that sentencing required not just isolated amendments but a more drastic overhaul, either in the form of determinate sentencing or increased sentencing ranges.⁶⁸

64. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (observing that 95% of state prosecutors are chosen in local elections).

65. Cf. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2073, 2129–32 (2000) (observing that prosecutors “fail to pay their own way when they seek death sentences” which leads to the “overproduction” of such sentences); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 22, 30 (Harvard Law Sch., Public Law Working Paper No. 120, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284 (noting that district attorneys are elected by local voters from their city or county and receive funding from them, not the state).

66. This has been analogized to the “Nixon going to China” phenomenon. Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (noting how one aide described the efforts of his boss, a conservative Republican who supported sentencing reform legislation, as “a little like Nixon going to China”).

67. Aranson et al., *supra* note 23, at 55 (describing options).

68. Some criticized indeterminate sentencing for creating disparities, while others bemoaned excessive leniency. See Donald W. Dowd, *What Frankel Hath Wrought*, 40 VILL. L. REV. 301, 302–04 (1995) (“On the left, it was asserted that the exercise of discretion by the judges and the parole boards had resulted in unequal justice, oppressing the poor and minority races. . . . On the right, critics called for more and more mandatory sentences to punish and deter. . . . Even those who supported individualized sentencing and had faith in the rehabilitative goal were concerned with the gross and irrational disparity that too often occurred.”); Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 8 (1993) (noting that conservatives “objected

The second option—having the legislature enact legislation that specifies how each case is to be sentenced—is not practicable because of resource constraints. Specifying punishments at a finer level of detail than broadly worded offenses requires a great deal of time and effort, and legislators lack those resources, particularly when they have other priorities.⁶⁹ These resource demands are even greater when one considers the need to amend sentencing laws as circumstances change and new information is obtained about sentencing and offender practices. Unless a legislator wants to recommend one-size-fits-all mandatory punishments for all offenses regardless of circumstances—which, even in an era of mandatory minimum sentences, no legislature has been willing to do—the law will allow some room for discretion.⁷⁰

At that point, legislators must choose where to delegate the discretion that remains in the law. In the usual scenario, a legislature that wants to delegate authority for administering a law typically chooses between the executive branch or some kind of independent agency.⁷¹ David Epstein and Sharyn O’Halloran have found that Congress delegates more discretion to the executive during periods of unified government (i.e., when the party controlling the legislature and the executive branch are the same) and to independent agencies during periods of divided government (i.e., when the party controlling the legislature and the executive branch are different).⁷²

to lenient probation and parole release decisions” and liberals “argued that the exercise of discretion by judicial and parole authorities led to unjust disparities and racial bias in the treatment of equally serious offenders”); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 228–30 (noting that “liberals and conservatives alike increasingly regarded the rehabilitation model as a failure”); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–28 (1993) (describing disparity and leniency as the concerns that motivated Members of Congress to enact the Sentencing Reform Act). Michael Tonry highlights five subjects—“race relations, proceduralism, civil liberties, rehabilitation, and lenient judges”—as the motivators for sentencing reform. Tonry, *supra* note 35, at 1246.

69. See Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA’s New Sentencing Standards*, 78 JUDICATURE 189, 191 (1995) (“[L]egislatures are poorly positioned to give sustained attention to the complex workings of the sentencing system as a whole. . . . [T]he tedious business of gathering and assessing data about hundreds or thousands of cases is not likely to find its way onto the legislative agenda.”); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 738 (1980) (“Legislative attention to the judgments reflected in each statutory rule for computation of sentence is virtually impossible.”).

⁷⁰ The amount of discretion vested in agencies might vary depending on whether the state legislature is highly professional or less professional. For example, a study of the relationship between divided government and the discretion of bureaucrats responsible for administering Medicaid found that the legislature was more likely to use statutory controls when legislators were more professionalized. John D. Huber et al., *Legislatures and Statutory Control of Bureaucracy*, 45 AM. J. POL. SCI. 330, 339 (2001).

71. The judiciary is also an option. The Sherman Act, for example, is often seen as a delegation to the judiciary to administer antitrust policy. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44–46 (1985). But for most regulatory areas, the choice is between executive and independent agencies.

72. EPSTEIN & O’HALLORAN, *supra* note 3, at 131–33, 154–55.

Thus, in most instances, choosing an independent agency can be seen as a rejection of delegation to the executive branch. Under this model, one might think that sentencing commissions are more likely to be created during periods of divided government because, as between the two options, sentencing commissions more closely resemble independent agencies than executive agencies. Sentencing is traditionally viewed as a judicial function, so it would raise separation of powers concerns if the executive had the authority to remove members of a sentencing commission.⁷³ As a result, the members of most sentencing commissions serve for terms of years and cannot be removed at will by the executive, the chief characteristic of independent agencies.⁷⁴

There are, however, at least two reasons why sentencing commissions do not fit comfortably within the typical executive versus independent agency model. First, many sentencing commissions are more properly characterized as legislative agencies than as independent agencies. They often contain legislative members and are closely supervised by the legislative branch.⁷⁵ In addition, they often rely on the legislative branch to pass their proposed regulations in order for them to become binding law.⁷⁶ As a result, the relationship between divided government and sentencing commissions might not mirror those between divided government and traditional independent agencies. It makes sense that legislators would opt for either legislative or independent agencies over executive agencies in times of divided government because they would prefer to avoid giving authority to an executive agency controlled by their rival party. But the executive might be less willing to agree to delegation to a legislative agency than an independent agency; thus, it might not be the case that legislatures are more likely to successfully delegate authority to sentencing commissions under divided government. Second, because the executive agency model is not a viable option for sentencing commissions in light of the separation of powers problems it raises, legislatures do not face a choice between an independent or legislative agency and an executive agency in the context of sentencing. Instead, if legislators feel that they do not have the time or

73. See *Mistretta v. United States*, 488 U.S. 361, 391 n.17 (1989) (“[H]ad Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had . . . united the power to prosecute and the power to sentence within one Branch.”).

74. See, e.g., Barkow, *supra* note 1, at 722 (explaining that Minnesota commissioners serve four-year terms); *id.* at 784 (describing terms of North Carolina commissioners).

75. *Id.* at 779–82 (noting that the Washington Commission contains nonvoting members from the state legislature and describing close legislative supervision); *id.* at 783 (observing that six legislators serve on the North Carolina Sentencing and Policy Advisory Commission); *id.* at 788 (noting that the Oregon commission contains legislators); *id.* at 802 n.369 (listing several commissions with legislative membership, including commissions in Arkansas, Maryland, Missouri, Utah, Virginia, and Wisconsin).

76. See *id.* at 778, 782–83, 788, 791 (noting that guidelines require legislative approval in various states, including Washington, North Carolina, Oregon, Massachusetts, and Oklahoma).

resources to specify all relevant sentencing policies,⁷⁷ the choice is between an independent or legislative commission and the judiciary.

A commission might be particularly attractive in the context of sentencing because judges are the very actors legislators are trying to control. That is, sentencing legislation not only aims to regulate the behavior of would-be defendants, but it also tells judges what they must do when faced with someone convicted of a specific offense. Under the indeterminate sentencing regime that dominated all jurisdictions before the 1970s (and that still exists today in many places), judges possessed broad authority to sentence defendants within a wide statutory range.⁷⁸ Parole officials also exercised authority over sentencing in these indeterminate regimes, though their authority was derivative of judicial authority. Specifically, while parole officials determined an offender's ultimate release date, the judicial sentence set the parameters within which parole officials operated.⁷⁹ Thus, when legislators opted to disturb this status quo, they pointed to the need to exercise greater control over judges and, to a lesser extent, parole officials. Some worried that the discretion exercised by judges and parole officials produced inequality and arbitrariness, whereas others were concerned that it bred excessive leniency.⁸⁰ Regardless of the specific worry, legislative reformers shared the sentiment that judicial power needed to be checked. As a result, once the decision to cabin judicial discretion over sentencing is made, commissions represent the only viable option for delegating authority if legislators cannot make the decisions for themselves because of time constraints or other limitations.

Given this concern, one might expect commissions to crop up in those jurisdictions where judges have the greatest discretion and face the least oversight.⁸¹ It is important to note, however, that there is some tension

77. This may occur because legislators would prefer to spend more time with casework and fundraising, among other things. See BRUCE CAIN ET AL., *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* 57 (1987) (asserting that “[t]he crucial component of constituency service is casework”).

78. See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 385–86 (2005) (describing this approach to sentencing guidelines).

79. Frase, *Unresolved Issues*, *supra* note 1, at 1223 (“In some parole retention states, the judge’s sentence determines the minimum prison term before parole eligibility, while in other states it determines the maximum or the recommended term.”). Accordingly, legislatures are still delegating authority to judges under an indeterminate model, even if that authority is shared with parole officers.

80. See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 655–56 (2005) (describing concern with unpredictable and disparate sentences); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–6 (1988) (citing two concerns that motivated congressional action: that prisoners were not serving their full sentences and that sentences for similar crimes varied too widely).

⁸¹ Relatedly, one might expect sentencing commissions to be more likely in those jurisdictions where legislatures abolish parole because some institution or body would need to exercise systematic control over prison resources, and judges, who decide issues on a case-by-case basis, are

between this hypothesis and the theories related to cost concerns. If a legislator is concerned with exercising control over judges because judges are not responsive enough to the public's demands, then the need for a commission would be greatest when judges are appointed instead of elected. If, in contrast, a legislator is concerned that judges are too responsive to the electorate's demands for tough-on-crime policies without regard to costs, then a legislator might be more likely to delegate when judges are elected instead of appointed.

II. Testing the Delegation Theories

Most of the hypotheses discussed in Part I are amenable to quantification and statistical analysis to see if they are, in fact, successful at predicting when states will adopt sentencing commissions.⁸² Subpart A begins by describing the sentencing commission data we have assembled to test our hypotheses. Subpart B explains the measures we use to test each hypothesis. Subpart C summarizes our findings.

A. *The Data*

To determine the conditions under which jurisdictions create and maintain sentencing commissions, we have assembled in Table 1 a list of all the jurisdictions that formed sentencing commissions before 2000.⁸³ We include the year the commission was created and, if relevant, the year in which its statutory authorization expired or was otherwise repealed.⁸⁴ For purposes of our analysis, we define a commission broadly to include any agency created by legislative mandate that has the authority to adopt or recommend changes in the jurisdiction's sentencing policy and whose membership includes some individuals who are not part of the legislative branch.⁸⁵ This is a somewhat crude definition of a commission because it overlooks substantial variation among the commissions in terms of institutional design; however, this definition focuses on the key attribute that most interests us, which is legislative delegation of some policymaking

ill-equipped to take care of those system-wide concerns. Sentencing commissions could therefore be used to replace parole boards in performing this oversight.

82. The expertise hypothesis is one that is not as amenable to testing, and we do not test it here.

83. Although additional jurisdictions have created sentencing commissions since 2000, we limit our study period to 2000 because that is the last year for which we have information on all of the variables we are testing. We did include some information on commissions and guidelines created after 2000 in table 1 where it was available, but information on commissions or guidelines after 2000 is not included in the data analysis.

84. The commissions in South Carolina and Wisconsin were repealed and recreated, so we have included multiple dates for those jurisdictions. A useful resource for researching state sentencing commissions is the website of the National Association of State Sentencing Commissions, <http://www.ussc.gov/states/nascaddr.htm>.

85. We have therefore excluded the Georgia Commission on Certainty in Sentencing because it was created by an executive order and not by the legislature. Barkow, *supra* note 1, at 792 n.342.

authority to non-legislators. If an agency has power to propose sentencing reforms it will likely influence the scope and shape of the political debate, even if it does not have a mandate to promulgate legally binding rules. Indeed, although most state sentencing commissions have the power only to make recommendations and not to pass legally binding guidelines or rules, many have had considerable influence on state sentencing policy.⁸⁶

But because we define commission expansively, it is possible that some of these commissions were created without a strong sense that any of their proposals would be adopted or that their decisions would carry weight. In other words, the mere creation of a commission might not signal much delegation at all, particularly if it was not created as a permanent body and its only task was to recommend sentencing legislation that relied on legislative approval for its adoption. To help identify more substantial delegation, we therefore also consider the relationship between the variables we identify and the presence of sentencing guidelines. Sentencing experts consider the promulgation of sentencing guidelines to be the most important contribution of a commission and the one with the largest influence on policy development,⁸⁷ so considering guidelines as well as commissions will give a richer picture of what kind of delegation is taking place.⁸⁸ Table 1 therefore notes, if relevant, when guidelines operated within a jurisdiction.

86. *Id.* at 771–98.

87. See AM. LAW INST., MODEL PENAL CODE: SENTENCING REPORT 109–10 (2003) [hereinafter ALI REPORT], available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf (discussing the influence of sentencing guidelines on trial courts and legislative decision-making); Frase, *Unresolved Issues*, *supra* note 1, at 1206 (discussing the “strong . . . agreement that sentencing guidelines need to be developed” as well as their impact on legislative policy).

88. This is not to say that the legislature does not have significant authority over the content of the guidelines. On the contrary, in many jurisdictions guidelines do not take effect unless they are passed as legislation. Barkow, *supra* note 1, at 778, 782–83, 788–89 (describing commissions in North Carolina, Washington, Oregon, and Kansas).

Table 1: Sentencing institutions across states

State	Years of sentencing commission	Years of guidelines
Alabama	2000 ⁸⁹	
Alaska	1990–1993 ⁹⁰	1980–present ⁹¹
Arkansas	1993–present ⁹²	1994–present ⁹³
Colorado	1989 ⁹⁴ –1994 ⁹⁵	
Connecticut	1979–1980 ⁹⁶	
Delaware	1984–present ⁹⁷	1987–present ⁹⁸
Florida	1982–1998 ⁹⁹	1983–present ¹⁰⁰
Kansas	1989–present ¹⁰¹	1993–present ¹⁰²
Louisiana	1987–present ¹⁰³	
Maine	1983–1984 ¹⁰⁴	
Maryland	1996–present ¹⁰⁵	1983–present ¹⁰⁶
Massachusetts	1994–present ¹⁰⁷	

89. Ala. Sentencing Comm’n, About the Alabama Sentencing Commission, <http://sentencingcommission.alacourt.gov/about.html>.

90. ALASKA SENTENCING COMM’N, 1990 ANNUAL REPORT TO THE GOVERNOR AND THE ALASKA LEGISLATURE 2 (1991), available at <http://www.ajc.state.us/Reports/sent90.pdf>.

91. ALASKA SENTENCING COMM’N, *supra* note 90, at 21; Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 776 (1998).

92. Ark. Sentencing Comm’n, About Us, <http://www.state.ar.us/asc/about.html>.

93. *Id.*

94. Greg Rogers, *Criminal Sentencing in Colorado: Ripe for Reform*, 65 U. COLO. L. REV. 685, 696 (1994).

95. Kevin R. Reitz & Alice Donnelly Madden, *The Reactions of Criminal Justice Professionals to a Law Review Symposium*, 69 U. COLO. L. REV. 1217, 1228 n.24 (1998).

96. SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 47–48 (1985).

97. Supreme Court of Del., Administrative Directive 76 (Sept. 15, 1987), available at <http://www.state.de.us/cjc/PDF/ad%20min%20seventy%20six.pdf>.

98. *Id.*

99. FL. CORRECTIONS COMM’N, 2000 ANNUAL REPORT 205–08 (2000), <http://fcc.state.fl.us/fcc/reports/final00/sections11-14.pdf>.

100. *Id.* at 208–09.

101. Kan. Sentencing Comm’n, Mission of the Kansas Sentencing Commission, <http://www.accesskansas.org/ksc/misksc.htm>.

102. *Id.*

103. 1987 La. Sess. Law Serv. 158 (West) (codified as amended at LA. REV. STAT. ANN. § 15:322 (2005)).

104. Me. Sentencing Guidelines Comm’n, Final Report of the Maine Sentencing Guidelines Commission: Established by the 111th Legislature, <http://www.state.me.us/spo/sp/commission/exerpts.php>.

105. Md. State Comm’n on Criminal Sentencing Policy, Origin and Purpose, <http://www.msccsp.org/commission/origin.html>.

106. Md. State Comm’n on Criminal Sentencing Policy, Guidelines Overview, <http://www.msccsp.org/guidelines/overview.html>.

State	Years of commission	Years of guidelines
Michigan	1994–2002 ¹⁰⁸	1984–present ¹⁰⁹
Minnesota	1978–present ¹¹⁰	1980–present ¹¹¹
Missouri	1993–present ¹¹²	1997–present ¹¹³
Montana	1995–1997 ¹¹⁴	
Nevada	1995–present ¹¹⁵	
New Mexico	2003–present ¹¹⁶	
New York	1983–1985 ¹¹⁷	
North Carolina	1990–present ¹¹⁸	1994–present ¹¹⁹
Ohio	1990–present ¹²⁰	1996–present ¹²¹
Oklahoma	1994–present ¹²²	

107. Mass. Court Sys., Overview of the Massachusetts Sentencing Commission, <http://www.mass.gov/courts/admin/sentcomm/mscoverview.html>.

108. Patrick Affholter & Karen Firestone, Mich. State Senate, An Update on the Development of Statutory Sentencing Guidelines, <http://www.senate.michigan.gov/sfa/Publications/Notes/1998Notes/Maap98pa.html>.

109. *Id.*

110. Minn. Sentencing Guidelines Comm'n, History and Overview of the Sentencing Guidelines, http://www.msgc.state.mn.us/Text%20Only/what_are_the_guidelines.htm.

111. *Id.*

112. Mo. Sentencing Advisory Comm'n, Statutory Goals, <http://www.mosac.mo.gov/MOStatute558.019.htm>.

113. Frase, *Unresolved Issues*, *supra* note 1, at 1196 tbl.1.

114. Susan Barth Fox, Mont. State Legislature, Policies on Good Time and the Effects on Sentencing Practices: History and Survey Results (May 1998), http://leg.state.mt.us/textonly/publications/research/past_interim/cor_rpt3.asp.

115. The Nevada sentencing commission runs through at least 2000 (the end of our data analysis), but may not still be in existence because the status of the sentencing commission as of 2005 is uncertain. *See* Frase, *Unresolved Issues*, *supra* note 1, at 1197 n.28 (stating that the status of the sentencing commission, as of 2005, is uncertain); *Featured States: Florida and Nevada*, SENTENCING COMM'N NEWS (Nat'l Assoc. of Sentencing Comm'ns, Wash. D.C.) May 1997, at 13, 14–15, *available at* <http://www.ussc.gov/states/newsm97.pdf> (reporting the starting date of the commission).

116. Press Release, Criminal and Juvenile Justice Coordinating Council, State of New Mexico, New Mexico Criminal and Juvenile Justice Coordinating Council Announces the Establishment of The New Mexico Sentencing Commission (March 31, 2003), *available at* <http://nmsc.state.nm.us/download/n03312003.pdf>.

117. PAMALA L. GRISET, DETERMINATE SENTENCING 152, 167–68 (1991) (noting the final date of commission's report as 1985 and describing how legislative attempts to get guidelines enacted in 1985 and 1986 failed).

118. N.C. Court Sys., Sentencing and Policy Advisory Commission, <http://www.nccourts.org/Courts/CRS/Councils/spac>.

119. *Id.*

120. Supreme Court of Ohio, Ohio Criminal Sentencing Commission—Enabling Act, http://www.sconet.state.oh.us/Sentencing_Commission/enabling_act.html.

121. Supreme Court of Ohio, Ohio Criminal Sentencing Commission, http://www.sconet.state.oh.us/Sentencing_Commission/overview.asp#four.

122. 1994 Okla. Sess. Law Serv. 355 (West) (codified as amended at OKLA. STAT. tit. 22, § 1501 (2001)).

State	Years of commission	Years of guidelines
Oregon	1987–present ¹²³	1989–present ¹²⁴
Pennsylvania	1978–present ¹²⁵	1982–present ¹²⁶
South Carolina	1982–1985, ¹²⁷ 1989–present ¹²⁸	
Tennessee	1985–1995 ¹²⁹	1989–present ¹³⁰
Texas	1991–1993 ¹³¹	
Utah	1983–present ¹³²	1979–present ¹³³
Virginia	1994–present ¹³⁴	1991–present ¹³⁵
Washington	1981–present ¹³⁶	1984–present ¹³⁷
Wisconsin	1983–1995, ¹³⁸ 2002–present ¹³⁹	1985–1995, ¹⁴⁰ 2003–present ¹⁴¹

123. Barkow, *supra* note 1, at 788.

124. *Id.*

125. MICHAEL TONRY, SENTENCING MATTERS 28 (1996).

126. *Id.* at 30.

127. ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 24 (1987) (noting that the commission’s proposed guidelines did not pass in 1985).

128. S.C. CODE ANN. § 24-26-10 (Supp. 2005). In 1993, the legislature passed 1993 S.C. Acts 181, § 1617(C), which provided for the repeal of the Commission in July 1994; however, before the repeal took effect, the legislature passed 1994 S.C. Acts 497, § 63A, which amended 1993 S.C. Acts 181 so as to prevent termination of the Commission.

129. TENN. CODE ANN. § 4-29-215 (1995) (terminating the Tennessee Sentencing Commission that was created by the Tennessee Legislature in § 40-37-102 of the Tennessee Code in 1985).

130. TENN. CODE ANN. § 40-35-101 (2005) (noting that the Tennessee Sentencing Commission’s 1989 sentencing reform legislation continues to provide guidelines for the sentencing of criminal offenses).

131. Michele Deitch, *Giving Guidelines the Boot: The Texas Experience with Sentencing Reform*, 6 FED. SENT. R. 138, 138 (1993) (explaining that the Texas Legislature created the “Punishment Standards Committee” in 1991 to reform sentencing, and that the Committee dissolved in 1993 when its efforts resulted in major sentencing reform legislation).

132. Frase, *Unresolved Issues*, *supra* note 1, at 1196.

133. *Id.*

134. VA. CODE ANN. § 17.1-800 (2006) (original version at VA. CODE ANN. § 17-232 (1994)); VA. CRIM. SENTENCING COMM’N, 2005 ANNUAL REPORT 7 (2005), *available at* <http://www.vcsc.state.va.us/2005FULLAnnualReport.pdf>.

135. VA. CRIM. SENTENCING COMM’N, *supra* note 133, at 10.

136. Wash. State Sentencing Guidelines Comm’n, Sentencing Guidelines Home Page, <http://www.sgc.wa.gov/>.

137. Wash. State Sentencing Guidelines Comm’n, History of Sentencing Reform Act, Powers and Duties of Commission, http://www.sgc.wa.gov/Informational/About_SGC.htm.

138. JOE FONTAINE, SENTENCING POLICY IN WISCONSIN: A HISTORICAL OUTLINE 3 (2005), <http://wsc.wi.gov/docview.asp?docid=3968>; Wisconsin Historical Society, <http://www.wisconsinhistory.org/libraryarchives/erp/1996rep/sentcomm.asp>.

139. *Id.* at 4.

140. *Id.* at 3.

141. *Id.* at 4.

B. *Hypotheses and Tests*

We offered several hypotheses in Part I about when a legislature might delegate authority to a sentencing commission, and this section establishes some empirical tests to see how important, if at all, these factors are in the creation and maintenance of a sentencing commission. We also examine the relationship between these factors and the establishment and maintenance of sentencing guidelines.

One possible factor that might be driving the delegation of authority to a commission is a concern that the legislative process will produce penalties that are too costly in the long-term because the political process is focused on short-term considerations. This theory suggests that a sentencing commission would be most desirable when the fiscal concerns associated with incarceration are salient.

We test this hypothesis using a number of different variables. First, we consider two economic variables that measure state spending on corrections. One variable is the percentage of state expenditures devoted to corrections activities. If a state has a relatively high level of expenditures on corrections, it might have an incentive to delegate authority to a commission in order to impose a cap on those expenditures. The second variable is the yearly change in the percentage of the budget devoted to corrections activities, or, in other words, the rate of change in corrections expenditures as a percentage of total expenditures. If a state's expenditures on corrections are rising quickly as a percentage of overall spending—even if they are rising from a low baseline—the legislature might also have an incentive to rein in this growth.

Second, we also look to criminological variables related to incarceration rates. Specifically, we consider a jurisdiction's incarceration rate, which measures the number of prisoners per 100,000 population. One might expect high incarceration rates to tax the capacity of prisons within the state,¹⁴² making sentencing commissions more attractive. Additionally, as with the economic variables measuring the cost of expenditures on corrections, we might also imagine that both high levels and high growth rates in the incarceration rate may be likely to correlate with the adoption of sentencing institutions. Therefore, we also consider the jurisdiction's change in incarceration rates over time. All four of these variables (percentage of state

142. Of course, it would be better to measure prison capacities directly, rather than using the incarceration rate as a proxy; however, prison capacities are not available reliably on a year-by-year basis across all fifty states. For those years in which they are available, the statistics show that nearly every state is at or above the official maximum capacity of its prisons. See Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, BUREAU JUST. STATS. BULL., Nov. 2004, at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf> (indicating that twenty-two states were above their highest rated capacity, another twenty were above 90% of their highest rated capacity, and the state with the lowest percentage of used capacity had filled 73% of its maximum capacity; the average state was operating its prisons at 116% of the prison system's lowest rated capacity). Under these conditions, we might expect any increase in the incarceration rate to tax a state's prison capacity.

expenditures on incarceration, the rate of change in corrections expenditures, the incarceration rate, and the rate of change in the incarceration rate) are measured on an annual basis for each state in the years they are available from 1973 to 2000.¹⁴³

Part I also notes that these cost concerns might be most pressing under certain political conditions.¹⁴⁴ Sentencing commissions may be a response to close electoral competition between parties in state legislatures because they provide a way for politicians in the legislature to bind their hands by taking sentencing out of future electoral campaigns. We hypothesize that the need for this type of commitment mechanism would be highest where the partisan composition of the state legislature is nearly equal, so that a few losses or gains for either party might change the balance of power in the legislature. When the partisan margin is large, the gain or loss of a few seats is not nearly as important to the power of the majority party, so the need to keep certain items out of the electoral arena is less critical. In order to test this hypothesis, we have gathered data on the partisan margin¹⁴⁵ in each chamber of each state's legislature from 1973 to 2000.

We also point out in Part I that Republicans might influence the choice to create a sentencing commission.¹⁴⁶ In particular, Republican governors might be more likely than Democratic governors to adopt either sentencing commissions or sentencing guidelines because of the party's pledge to be tough on crime while being fiscally conservative. Thus, where data are available from 1973 to 2000, we consider the relationship between sentencing commissions and the party of the governor. We also consider whether a Republican-controlled lower house of the legislature is more likely

143. We begin our data collection in the year 1973 because that is a reasonable, albeit conservative, estimate of when the idea of creating a sentencing commission entered the political consciousness in the wake of the 1972 publication of Judge Marvin Frankel's influential book on sentencing institutions, *Criminal Sentences, Law Without Order*. See FRANKEL, *supra* note 13 (proposing sentencing commissions to develop sentencing guidelines). An alternative starting date is 1978, when Minnesota created the first sentencing commission. Running the regressions for the period 1978–2000, we find no significant differences from the regressions for 1973–2000. Though coefficients change slightly, none of the variables that were statistically significant in the 1973–2000 regression changes its sign in the 1978–2000 regression. Also, there are no substantial changes in terms of the significance levels of these statistically significant variables across the two regressions. As noted above, *supra* note 83, our data collection ends in 2000 because it is the last year for which we have data for all states on all variables.

144. See *supra* text accompanying notes 40–58.

145. The partisan margin is computed as the absolute value of the difference between the number of seats held by Democrats and the number of seats held by Republicans, divided by the total number of seats in the chamber, and multiplied by 100. In the regression analyses that follow, the partisan composition of the house alone is used, as the partisan composition of house and senate are highly correlated; regressions were run using the senate instead of the house and the results are comparable.

146. See *supra* note 63 and accompanying text.

to adopt sentencing institutions.¹⁴⁷ We also test whether divided state government (where the governor is of a different party than the party that controls the legislature) leads to more delegation, as Epstein and O'Halloran's work on delegation to independent commissions during periods of divided government would suggest.¹⁴⁸ As we note in Part I, there are reasons to be skeptical this pattern will hold when it comes to sentencing commissions.

In addition, as we note above, the choice to delegate to a commission (and to create guidelines) represents in some sense a decision to choose a commission instead of a judge.¹⁴⁹ The reason this might occur, we hypothesize, is that the legislature has difficulty controlling judges.¹⁵⁰ We therefore might expect states with appointed judges to be more likely to institute sentencing institutions. While elections may check the behavior of elected judges, appointed judges will be harder for legislatures to control.¹⁵¹

147. We do not include the upper house numbers because they are highly correlated with the lower house numbers. The correlation coefficient between the upper house and the lower house is 0.84, meaning that we can explain 84% of the variation in the partisan margin in the house with partisan margin in the senate. In other words, almost all of the information contained in one is already contained in the other. Another way to test if they are different from one another (or whether including them both would just be like including two measures of the same underlying phenomenon, like including a measure of length in inches and also including the length in centimeters) is to run a simple t-test. Running the t-test, we find that they are not significantly different at the 99% level. If we include both in the regression, the partisan margin in the house is significant and the partisan margin in the senate is not and none of the values of significance levels for any of the other variables changes if it is included. If we run the regressions excluding partisan margin in the house and including partisan margin in the senate, we get basically the same results as if we had used partisan margin in the house—also indicating that the two are interchangeable rather than complementary.

148. See *supra* text accompanying note 72.

149. See *supra* notes 78–**Error! Bookmark not defined.** and accompanying text. We mentioned in note __ that there might be a positive relationship between the presence of sentencing commissions and the abolition of parole because a sentencing commission could be viewed as a replacement for the parole authority's management of prison resources. Accordingly, we looked at those jurisdictions that have abolished parole to see whether abolition is positively correlated with the presence of a sentencing commission and guidelines. We used the list of jurisdictions that have abolished discretionary parole and the year in which they did so from JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 66–67 tbl.3.1 (2003). Using this information, we find the relationship to be positive and statistically significant. It should be noted that, while the abolition of parole is positively and significantly correlated with the presence of a sentencing commission, parole was in many cases abolished *after* the adoption of a sentencing commission. Most frequently, parole abolition and the adoption of sentencing guidelines took place at the same time. Thus, because the same factors that prompt sentencing commissions appear to drive the abolition of parole and because the abolition of parole is not itself a driver of sentencing commission formation, we have not included it as a separate variable in our analysis. It is possible, however, that abolition of parole could be a factor in a jurisdiction's decision to maintain a commission.

150. We look at lower level court judges in this data set because they are the ones with responsibility for sentencing. Indeed, in those states without guidelines, their sentencing decisions are largely unreviewable by other judges. Barkow, *supra* note 1, at 739.

¹⁵¹ As noted above in Part I, however, it is also possible that a concern with costs might, in contrast, make legislators more concerned when judges are elected.

Thus, the manner in which judges are chosen in each state has been collected and coded for each year from 1973 to 2000.¹⁵²

C. Results

The data set consists of 1,372 observations, one for each state for each year from 1973 to 2000.¹⁵³ Each observation is a state-year. Table 3 in the appendix provides an overview of the data we collect on these variables, including each variable's statistical mean (its average value in the sample) and several measures of its variation (its overall range of values): the minimum and maximum values of the variable in the sample and the standard deviation.¹⁵⁴ But because we are primarily interested not in the range of values of these variables in themselves, but rather in the relationship between these variables and sentencing institutions, it is useful to focus on whether and how the values these variables take on differ across state-years in which sentencing institutions are in place. We consider the basic relationships in section II(C)(1) and then perform a multiple regression analysis in section II(C)(2).

1. *The Basic Data.*—Figures 1 to 3 look at data for sentencing commissions and depict bar charts comparing the average value of each variable across state-years with and without sentencing institutions. Figure 1 focuses on the political and judicial variables. It demonstrates that partisan margins are, on average, much smaller in state-years in which sentencing commissions operate than in state-years in which they do not. In addition, it appears that it is slightly more likely that commissions will operate in state-years in which Republicans control the governorship. Sentencing commissions are also more likely in states where legislatures are controlled by Republicans and judges are elected. Divided government does not appear to differ substantially across states with and without sentencing commissions.

152. In coding this data, three basic patterns of judicial selection became apparent. Most states either appoint or directly elect judges; however, some states appoint judges who then face reelection in every subsequent term after their first appointed term. Still other states have a mixture of appointed and elected judges in different counties. In the statistical analyses, these three categories are broken into two: elected and appointed. In one version of the regression, we include the mixed cases in the elected category; in another version, we include the mixed cases in the appointed category. No statistically significant difference occurs based on the coding of the mixed cases; therefore, only one version of the judicial election variable is reported in the regression results.

153. That is twenty-eight years of data for each of forty-nine states; Nebraska is not included in the data set because state-level candidates are not party-affiliated for much of the period, thus eliminating the observations from all regressions including the key political variables.

154. The standard deviation is the square root of the total variance in the values for the variable. The larger the standard deviation, the wider the range of values the variable takes on; the smaller the standard deviation, the more narrow is the range of values that the variable takes on.

Figure 1: Political and judicial variables and sentencing commissions

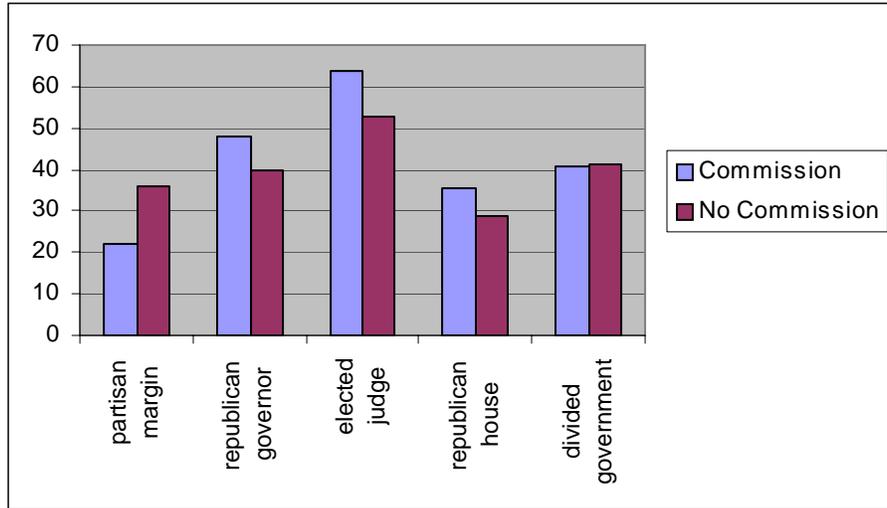


Figure 2 depicts the relationship between sentencing commissions and state expenditures on corrections. Sentencing commissions seem slightly more likely in state-years where the proportion of corrections as a percentage of overall expenditures is higher. There is, however, a markedly lower average growth of corrections as a percentage of overall expenditures in state-years in which a commission is operating. Because we count each year in which a state utilizes a sentencing commission as a positive outcome rather than just the single year in which a sentencing commission is adopted, it is likely that this finding represents the effects of sentencing commissions on corrections expenditures as a percentage of overall expenditures rather than the other way around.¹⁵⁵

155. We consider this in greater detail in our statistical analysis. *See infra* section II(C)(2).

Figure 2: Corrections expenditures and sentencing commissions

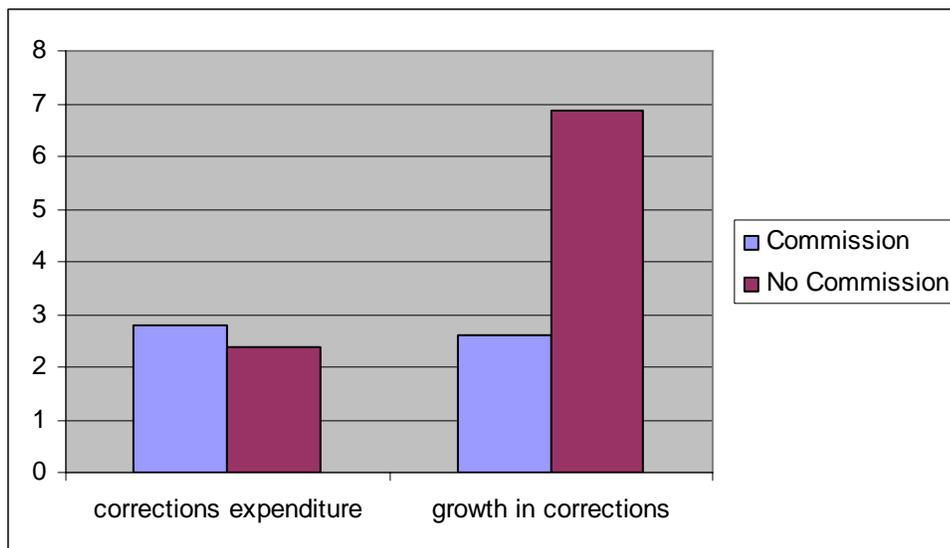
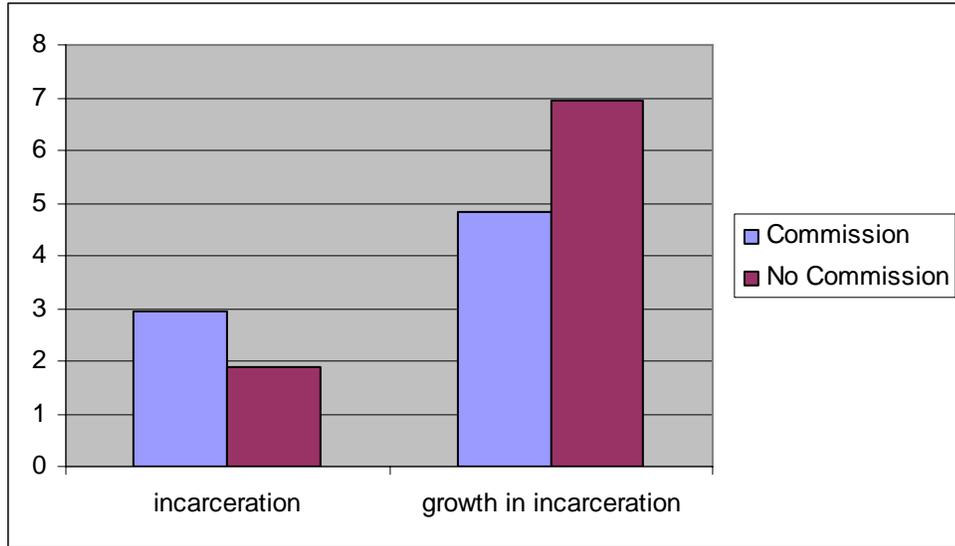


Figure 3 presents data bearing on the relationship between incarceration rates and sentencing commissions. It shows higher rates of incarceration in state-years in which sentencing commissions are in operation, but lower growth rates of incarceration in state-years in which sentencing commissions are in operation. This, too, seems likely to reflect reverse-causation, where the sentencing commission has a dampening effect on growth rates.¹⁵⁶

156. We will take a closer look at this relationship in section II(C)(2). See *infra* notes 168–169 and accompanying text.

Figure 3: Incarceration rates and sentencing commissions



Figures 4 to 6 present the same data for states with and without sentencing guidelines. Comparing the bar charts for commissions and guidelines, we find similar patterns across both types of sentencing institutions.¹⁵⁷

157. Although it appears that the growth in incarceration rate is higher in state-years with sentencing guidelines in place than it is in state-years with sentencing commissions in place, this difference disappears once we control for other factors in the multi-variate regressions. Likewise, the presence of guidelines seems unaffected by the presence of a Republican governor, while the presence of commissions seems more common with a Republican governor; in the multi-variate regressions, the first relationship is statistically significant at the 10% level and negative (guidelines are more common when the governor is a Democrat) while the latter is positive and not significant (commissions are positively but not significantly correlated with the presence of a Republican governor).

Figure 4: Political and judicial variables and sentencing guidelines

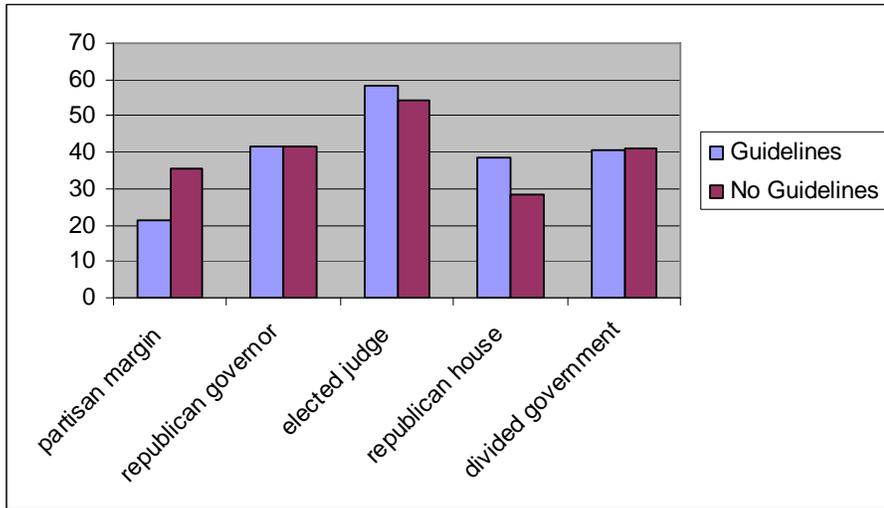


Figure 5: Corrections expenditures and sentencing guidelines

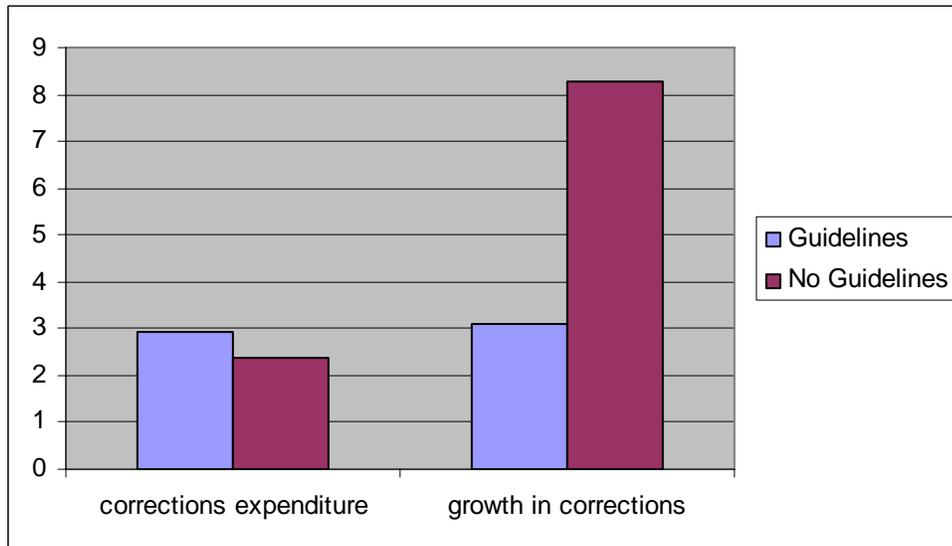
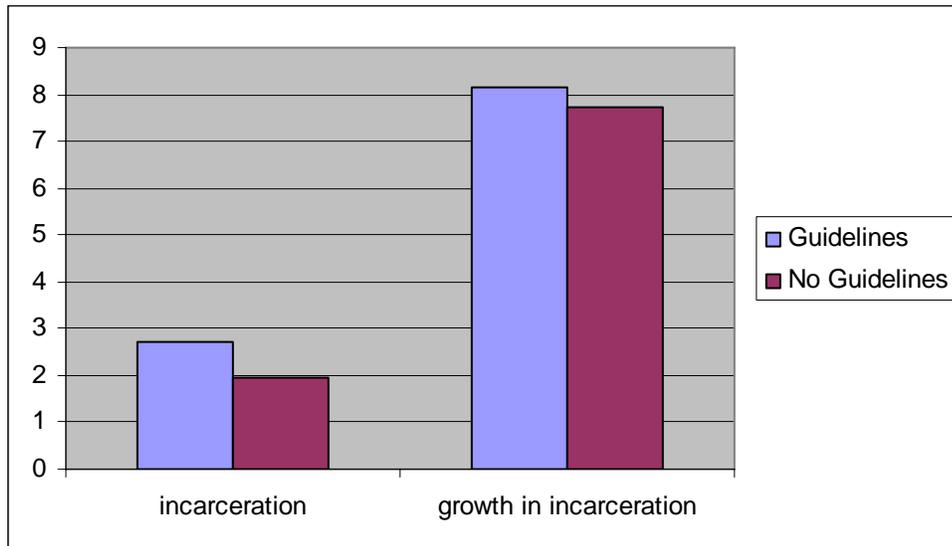


Figure 6: Incarceration rates and sentencing guidelines



These bar charts give us some sense of when and where the adoption of sentencing institutions might be most likely; however, each represents only a partial look at the phenomenon in which we are interested. Accordingly, we use multiple regression analysis in the next part of the inquiry to explore how each of the variables interacts in shaping the possibility that a sentencing institution is adopted in each state and in each year.

2. *Statistical Analysis.*—Before talking about the results of our analysis, it is important to explain our methodology. The outcome variables we are interested in analyzing—the decision to adopt a sentencing commission or sentencing guidelines—occur in a single year, and we model this as a dichotomous choice. Certainly there are fine-grained differences in the types of sentencing commissions and sentencing guidelines adopted by different states; however, statistical analysis is a blunt instrument for distinguishing between these differences and so we count each adoption of a sentencing commission as a positive outcome and each failure to adopt a sentencing institution as a null outcome. Given the dichotomous nature of this outcome, we employ logistic regression.¹⁵⁸

Since we are exploring the decisions of states to adopt sentencing institutions over time, there is a question of whether to code only the year in which a sentencing institution is first chosen as a positive instance of the

158. For a general description of the logit model and when it is appropriate, see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 846 (4th ed. 2002), and for a comparison of the logit model to other discrete regression models, see GARY KING, *UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE* 97–115 (1989).

outcome variable (coding every subsequent year as a null outcome), or whether to code each year that a state chooses *or continues to uphold* a sentencing institution as a positive instance of the outcome variable. If we consider only the year in which the institution is first chosen as a positive outcome, we risk undercounting the significance of the independent variables in maintaining the sentencing institution over time. As Table 1 makes clear, sentencing institutions are not set in stone; there are many instances in which sentencing institutions have been discontinued within this data set. On the other hand, if we count each year in which a sentencing commission endures as a positive outcome, we risk overcounting the significance of the independent variables in sentencing adoption as there is certainly some inertia that keeps these institutions in place.¹⁵⁹ Since our main goal is simply to understand which factors do and do not contribute to the adoption of sentencing commissions (rather than to formulate a precise prediction of when these institutions are likely to occur), we run the regressions using both versions of the outcome variable and compare these outcomes, looking particularly for evidence that the sign of the coefficients remains stable across specifications of the regression equation.

The independent variables (the input variables) also raise questions about the correct form our data should take for running the regressions. In particular, our variables of interest change at different rates. Economic values and incarceration rates are reported on an annual basis; the party of the governor and the partisan margin change only every two to four years; the method for selecting judges differs across states, but does not often differ within states, from year to year. The regressions we report in the body of this paper use annual observations of every variable.¹⁶⁰

Before exploring the results of the statistical analysis, it is useful to remind ourselves exactly what kind of results would support the theories we are testing here. There are three primary items of interest in examining the statistical results: (1) the direction of the relationship between each independent variable and the probability of adopting or maintaining a sentencing institution; (2) the size of the effect of each variable on the probability of adopting or maintaining a sentencing institution; and (3) the statistical certainty with which we believe the direction and size of the effect are generated by a real relationship between the variable and the outcome (as opposed to being related just by chance). As a general rule, the larger the

159. In addition, the basic idea behind regression analysis is that each observation is independent of others; since this is panel data, that assumption is clearly violated here. We are able to minimize this problem using a fixed effects model, controlling both for year fixed effects and state fixed effects. See *infra* app.tbls.3 & 4 and accompanying text.

160. Since some variables change only every two years, or remain rather stable over time, we ran regressions on biannual data. Running regressions with the biannual data produces results that closely mirror the results we report; the regressions looking only at state-by-state variation do not produce very useful results, as one might expect given the great deal of temporal variation that is taken out to run these regressions.

coefficient (which measures the size of the relationship between the variable and the existence of the sentencing institution) and the smaller the standard error, the more support the theory being tested gains. Table 2 sets out the hypothesized relationship between each sentencing institution and each independent variable (whether positive or negative) in column 2 (Hypothesis). The table also summarizes the sign of the coefficient on each variable in each of four regression analyses; the column headings for columns 3 to 6 indicate the names of the dependent variables in each regression. Regressions are run using only the year in which each sentencing institution is adopted as a positive value and, alternatively, counting each year that each sentencing institution is maintained as a positive value.

Table 2: Hypothesized direction of effect and outcomes in regressions

Variable	Hypothesis	Year commission adopted	Year with commission	Year guidelines adopted	Years with guidelines
Partisan margin	-	-	-***	-**	-***
Republican governor	+	-	+	-	-*
Republican house	+	-	+*	+	+***
Divided government	+ ¹⁶¹	-	-*	-	-
Elected judges	- ¹⁶²	+	+***	+	+**
Corrections as % of expenditures	+	+	+**	+	+***
Growth in corrections as % of expenditures	+ ¹⁶³	-	-	+	-**
Incarceration rate	+	+	+***	-	+*
Growth in incarceration rate	+ ¹⁶⁴	+	-***	-	-**

¹⁶¹ For ease of visual display, we hypothesize a positive relationship for purposes of testing based on the existing political science research on the relationship between delegation and divided government. But, as Part I makes clear, the relationship is decidedly more complicated in the case of sentencing commissions because they are not typical executive or independent agencies. It is not at all clear that we would expect to find a positive relationship given these differences with sentencing commissions.

¹⁶² While we would expect elected judges to be negatively correlated with sentencing commissions given stated legislative concerns with controlling otherwise uncontrollable judges, it is also possible to hypothesize that elected judges might need greater control if legislators are more concerned with the costs of sentencing increases demanded by short-term election cycles.

¹⁶³ Because growth in corrections might be affected by the commission or the guidelines, it is possible that this relationship will change after commissions and guidelines are established. That is, while this is what we would expect in the year these institutions are adopted, because we also count each year in which a state utilizes a sentencing commission as a positive outcome rather than just the single year in which a sentencing commission is adopted, it is likely that sentencing commissions and/or guidelines will have a dampening effect on corrections expenditures as a percentage of overall expenditures.

¹⁶⁴ As in the case of growth of corrections expenditures, *supra* note [163], it is possible that growth in incarceration rates will be affected by the presence of commissions and guidelines, and that these institutions will reduce the incarceration rate, producing a negative relationship over time.

Comparing column 2 (Hypothesis) with the outcomes in columns 3 through 6, we find that most of the variables have the expected effects. The system of asterisks (* representing significance level at or above 90%; ** representing significance level at or above 95%; and *** representing significance level above 99%) indicates whether or not the relationship is statistically significant. In most cases, the sign of the coefficient is stable across hypothesis and outcome columns and is significant in the regressions that count years in which the sentencing institution is adopted and maintained as positive realizations of the dependent variable. In those trials where only the year in which the institution is adopted is counted as a positive outcome, almost no variables attain statistical significance. In addition, many of the other variables retain the expected sign on the coefficient, indicating that most of our predictions are borne out, more or less, in the data.

Tables 4 and 5 in the appendix provide a more specific look at these relationships, presenting indicators of both the size and statistical significance of the findings.¹⁶⁵ The coefficients describe the relationship between the variables and the sentencing institution,¹⁶⁶ dividing the coefficient by the value of the standard error creates a T-statistic, which measures the certainty with which we can say that the relationship between the input variable and the outcome variable is not generated by chance.¹⁶⁷ In addition to the standard logit results, Tables 4 and 5 also report regressions controlling for state and year fixed effects. In essence, state fixed effects control for time-invariant factors that might cause some states to be more likely to adopt sentencing institutions than other states, even after controlling for the other political, economic, and incarceration variables. Likewise, using year fixed effects controls for any time-trending in the adoption of sentencing institutions, taking out any influence on the results that particular

165. Table 4 presents the results using the more generous coding of the dependent variable, that is, where we measure all state-years that a state adopts or continues to uphold a sentencing institution as a positive instance of the outcome variable. Regression results for the more restrictive coding, where only the year in which a sentencing institution is adopted is coded, can be found in Table 5 in the appendix.

166. Unlike linear regression, the relationship is not easy to intuit from the results. In linear regression, the coefficient on partisan margin for years with a sentencing commission (-0.030) would indicate that for every additional percentage of control gained by the larger party in the state legislature relative to the smaller party, the probability of adopting or maintaining a sentencing commission would decline by 0.030 percent. The functional form for logistic regression describes an S-curve ranging between 0 and 1 and therefore requires a bit more work to translate coefficients into substantive effects. The functional form for logistical regression is: $Y = 1/(e^{-X\beta})$ where Y represents the outcome variable (either the sentencing commission or the sentencing guidelines), X represents a vector of variable values (political, economic, and criminological), and β represents the vector of coefficients that links the variables to the outcomes. If the value of one variable were to change—for example, if the partisan margin were to go from thirty percentage points to five percentage points—the impact on the outcome variable would be $1/e^{-(30-5)\beta}$. We will return to this point shortly; however, the main thing to keep in mind is that the coefficients are not intuitively useful to understanding the relationship between the variables and outcomes.

167. The higher the value of the T-statistic, the greater statistical significance of the result. T-statistics above 2.5–3 indicate a high level of statistical significance.

events in any given year might have had on the propensity of each state to adopt a sentencing institution.

Putting aside the economic factors associated with correction expenditures and incarceration rates for a moment, we find the following statistically significant relationships with sentencing commissions: narrow partisan margins in state legislatures increase the chances of adopting or maintaining sentencing commissions, as does the election of judges and a Republican majority in the legislature. Divided government makes the adoption and maintenance of a sentencing commission less likely.

We find several statistically significant variables related to sentencing guidelines. Specifically, we find that narrow partisan margins, Democratic governors, a Republican house, and elected judges all increase the likelihood of adopting and maintaining sentencing guidelines.

As for economic factors, we also find statistically significant results. As we hypothesized, we find that, as the percentage of expenditures on corrections increases, so too does the probability of adopting or maintaining sentencing commissions and guidelines. Also as expected, we find that higher incarceration rates have a positive effect on the use of sentencing commissions and the use of guidelines.

When we control for fixed effects, we still find statistically significant results. We find a narrow partisan margin and a high incarceration rate are positively correlated with sentencing commissions. We also find that a narrow partisan margin, a Democratic governor, a Republican house, greater expenditures on corrections, and a high incarceration increase the likelihood of sentencing guidelines.

There are two findings related to the growth rates of both correction expenditures and incarceration rates that require further exploration. We find that the growth of corrections expenditures as a percentage of total expenditures has a negative relationship with the adoption or maintenance of sentencing commissions and guidelines, although the effect is not statistically significant for sentencing commissions. Similarly, the growth of incarceration rates has a negative relationship with both sentencing commissions and guidelines. While these relationships might reflect the fact that lower growth rates are prompting the adoption of a sentencing commission or guidelines, this seems more readily explained by the fact that once a sentencing institution is adopted, it may lead to lower growth rates in incarceration and corrections expenditures.¹⁶⁸ Indeed, the fact that the significance levels decline for these variables when we control for year fixed

168. This comports with other research finding that sentencing guidelines are correlated with lower rates of prison growth. Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 707 (1995); Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time*, 50 CRIME & DELINQ. 395, 396 (2004); Jon Sorensen & Don Stemen, *The Effect of State Sentencing Policies on Incarceration Rates*, 48 CRIME & DELINQ. 456, 469 (2002).

effects supports the hypothesis that causation may be running from the adoption of the sentencing institution to the decline in incarceration and the decline in growth rates of corrections as a percentage of expenditures and not the other way around. In other words, these latter two findings may be explained by the success of an operating sentencing institution.

In order to get a better understanding of the relationship between these growth rates and sentencing institutions, we compare the coefficients and T-statistics for the growth rates of corrections expenditures and incarceration rates across the regressions that include only the years in which sentencing institutions are adopted and the regressions that include years of adoption as well as maintenance. In so doing, we find the following pattern: For sentencing commissions, the coefficient on growth of corrections is negative across both data sets, but the significance level of the variable rises in the data set that includes maintenance. In other words, there is not a statistically significant relationship between higher growth rates and the formation of a sentencing commission in either case, but once a commission is formed, the growth rates themselves go down further. For sentencing guidelines the same pattern is true for the variable measuring growth in incarceration rates. While there is no statistically significant relationship between growth in incarceration rates and the adoption of sentencing guidelines, those rates decrease more rapidly once the guidelines take effect and the effect becomes statistically significant. As for the growth in corrections expenditures, sentencing guidelines are more likely to be formed when that rate is increasing—although the effect is not statistically significant—and once the guidelines go into effect, the growth in corrections expenditures becomes negative and significant.¹⁶⁹ The same pattern holds between the growth of incarceration rates for sentencing commissions. These findings suggest that sentencing institutions act to curb growth rates of incarceration and corrections expenditures rather than the inverse (declining growth rates leading to the adoption and maintenance of sentencing institutions).

Now that we know which variables are statistically significant, it may be useful to use a few examples to illustrate the size of the impact that the statistical variables have on the probability of adopting or maintaining a sentencing commission. In order to translate the coefficients into effects on the outcome variables, one can choose values for each variable in the model and then vary one of the variables to show the effect of the change. Because the logistic function is nonlinear, the outcome will differ significantly depending on what values one chooses. For example, if we imagine a state with a Republican governor, Republican house (undivided government), elected judges, a partisan margin of thirty, and all incarceration and corrections expenditures held constant at their means, the probability of that

169. Put another way, the relationship between sentencing guidelines and the growth in corrections expenditures is positive and insignificant in the adoption-only data set, and it becomes negative and significant in the data set including maintenance.

state having a sentencing commission is roughly 32%. If we leave everything alone and change just the partisan margin, decreasing it to just five, the probability rises to 50%. This suggests not only that partisan margin is statistically significant, but that changes in its value have large effects on whether or not a state is likely to adopt or maintain a sentencing commission. If we return partisan margin to thirty (creating a 32% probability of adopting or maintaining a commission) and then change the elected judges to appointed judges, the probability of adopting or maintaining a sentencing commission drops from 32% to just 20%, suggesting that the election of judges also has a substantively large impact on our outcome variable. The values for Republican governor, Republican house, and divided government interact, so that there are four permutations possible. The baseline example has a Republican governor, Republican house, and undivided government and the probability of a commission under those conditions, along with the assumptions regarding all other variables in the baseline, is 32%. Holding all else constant, if we pair the Republican governor with a Democratic house (yielding divided government), the probability falls to 21%. When the governor is a Democrat, if the house is Democratic (and therefore under unified government), the probability is 25%; if the house is Republican (and therefore under divided government), the corresponding probability is 26%.

Turning to the economic and incarceration variables, if we start from the original baseline assumptions (creating the baseline probability of 32%) and then raise the percentage of corrections expenditures in total expenditures by about one percentage point from its mean of 2.48 to 3.48, the probability of a sentencing commission when the partisan margin is thirty is about 37%. This seems like a small effect: one percentage point change in the percentage of corrections expenditures as a percent of total expenditures only increases the probability of adopting or maintaining a sentencing commission by five percentage points (from 32% to 37%). Finally, beginning from the original baseline, if we increase the incarceration rate from its mean of 211 in the baseline case to 251 (an increase of roughly 20%), the probability rises to 36%. As in the case of corrections expenditures, large changes in incarceration rates are required to generate a substantial effect on the probability of adopting or maintaining a sentencing commission.¹⁷⁰

170. A final thing to note about this regression before moving on to interpreting the substantive results is the pseudo- R^2 statistic. This statistic represents the percentage of the variation in the underlying relationship between the outcomes and the input variables that is explained by the regression. There is a lot of variety in the decision whether to adopt a sentencing institution across states and over time. This statistic tells us that, even using all of the variables at our disposal—political, economic, and criminological—we are only able to explain about 13% of the overall variance in guidelines outcomes and 15% in commission outcomes. This is a small percentage, but it is not surprising when using a logit model, which restricts outcomes to dichotomous values. It suggests that there are a variety of other factors that must also be explored to understand why and when some states adopt sentencing institutions in some years while others do not. We will explore some of these additional factors in Part III.

In sum, we find a statistically significant relationship between several of our variables and the adoption of sentencing commissions and guidelines. The big story that emerges is the role of cost concerns in prompting the formation of commissions and guidelines. A narrow partisan margin, a Republican house, elected judges, a high incarceration rate, and corrections as a large percentage of expenditures all make the creation of a sentencing commission more likely, and all of these factors suggest that cost constraints are motivating legislative decisions to turn to sentencing commissions. A similar story explains the relationship between the adoption of sentencing guidelines and a narrow partisan margin, a Republican house, elected judges, a high incarceration rate, and corrections as a large percentage of expenditures..

The strength of costs is perhaps best illustrated by the positive correlation between elected judges and both commissions and guidelines. We hypothesized that a legislature might be more likely to vest some policy-making responsibility in a sentencing commission when judges were subject to fewer controls. Accordingly, we noted that we might find a stronger correlation between appointed judges and commissions than between elected judges and commissions because elected judges are more likely to be influenced by the same electoral demands that apply to legislatures. Under this reasoning, elected judges would be more likely to do what legislatures wanted them to do, reducing the need to turn to a commission. In fact, the data show the opposite: there is a stronger correlation between elected judges and sentencing institutions (commissions and guidelines) than between appointed judges and these institutions.

Legislative concerns with costs could account for this finding. As noted above, a legislature might delegate authority in order to avoid political pressure to spend too much money on corrections. If fiscal concerns drive delegation, then perhaps a legislature would be more inclined to turn to commissions instead of judges when the judges themselves are susceptible to those same political pressures. That is, elected judges might face the same pressure to impose long sentences,¹⁷¹ which in turn would result in greater state expenditures on sentencing. As a result, legislatures might feel a stronger need to control the sentencing decisions of elected judges and delegate more responsibility to a commission.¹⁷² This finding – along with so many others – therefore supports the hypotheses in Part I that costs are a main driver of the decision to turn to commissions and guidelines.

171. There is support for this view. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 46 AM. J. POL. SCI. 247, 248 (2004) (studying criminal cases in Pennsylvania in the 1990s and finding that judges become more punitive as reelection approaches).

172. The fact that we find a statistically significant relationship between expenditures on corrections and the adoption and maintenance of sentencing guidelines lends support to this theory.

In the next Part, we consider in greater detail the results that do not fit neatly into the story about costs. In particular, we explain the negative relationship between divided government and the formation of commissions and the positive relationship between Democratic governors and sentencing guidelines. We also explore relationships unlikely to be uncovered by statistical tests.

III. Beyond Political Economy

We found a relationship between many of our hypothesized factors and the adoption and maintenance of sentencing commissions and guidelines, but these explanations cannot account for all the variation among states with and without commissions and guidelines. In addition, we found results that contradict some of the hypotheses discussed in Part I. This Part considers the counterintuitive results and discusses some other factors that could be driving the decision to delegate.

Although most of the statistical results supported our predictions, there were two findings in the data that require more explanation.¹⁷³ First, it is necessary to revisit the relationship between divided government and the adoption and maintenance of sentencing commissions in order to explain the negative relationship we find. Although we hypothesized that there might be a positive relationship on the basis of Epstein and O'Halloran's work, we also noted that the question of delegation in sentencing is not the typical one analyzed by Epstein and O'Halloran and that the result might be more complicated.¹⁷⁴ Because the delegation of authority to an executive agency is not a viable option, we anticipated that the more important factor might be the legislature's (and executive branch's) evaluation of how delegation to a commission compares with delegation to a judge. Accordingly, divided versus unified government might not be as relevant. While this might explain the lack of a positive relationship between divided government and sentencing institutions, it does not account for a statistically significant negative relationship between divided government and sentencing commissions. This seems best explained by the fact that many sentencing commissions are not as independent as the typical independent agency, so that they might not appeal to a divided government. The executive officeholder, for example, might view them as too closely aligned to the legislative branch and might be less inclined to support them if he or she believed that they would be particularly beneficial to the party in control of the legislature.

Second, we find a negative relationship between the presence of a Republican governor and sentencing guidelines, or, to put the matter

173. While the growth rate factors also contradicted our hypothesis, we explain above that this is due to the fact that we are looking at years in which institutions are maintained and not just the years that they are adopted. Once an institution is established, it has an effect on these growth rates.

174. See *supra* text accompanying notes 64–75.

conversely, a positive relationship between a Democratic governor and sentencing guidelines. This is not what we would have predicted given the Republican party's traditional position on fiscal restraint. It also stands in tension with the positive relationship we find between a Republican house and commissions and guidelines. It is possible that, for some reason, Republican governors do not agree that guidelines promote fiscal restraint, though that is belied by our findings on the negative relationship between guidelines and the growth of incarceration rates and the growth in corrections as a percentage of expenditures. It is also possible that fiscal restraint is fading as an important Republican Party position, or is at least not a uniform one among Republican officeholders. It is also likely that some other factor dissuades governors (and, for that matter, legislators) from adopting guidelines. This calls attention to the fact that the political economy story is not the complete one, and that we have to pay attention to personal, professional, and cultural dynamics as well.

In that vein, one factor to reconsider is the role of expertise. We noted that this could be a factor in the legislature's decision whether to delegate, but we could not design a way to test this hypothesis. It is possible that it is motivating part of the decision to delegate. But in thinking about a desire for expertise, it is necessary to consider what in the political culture would make expertise attractive that is not accounted for by the factors addressed above.

One key ingredient, particularly when we are thinking about what prompts the creation of a commission in the first instance, is the leadership of key state political entrepreneurs in pushing for a commission or guidelines and in creating an environment where the legislature has confidence in these institutions. While larger institutional factors are both relevant and important—as Part I theorizes and Part II attests—it is important not to overlook the power of the individual actor in a political story. And when it comes to the creation of sentencing commissions, there is no shortage of stories regarding key movers making the difference in whether a commission is born.

Perhaps the best way to illustrate the importance of this factor is to contrast the experience of Minnesota with that of New York. The Minnesota Sentencing Commission is often highlighted as being as close to the Platonic ideal of a sentencing commission and guideline system as political reality is likely to allow.¹⁷⁵ Richard Frase, the leading authority on sentencing in Minnesota, has emphasized that “[t]he successful design, implementation, and evolution [of the Minnesota guidelines] owe much to the extraordinary vision, talent, and energy of the initial commission members and staff and

175. See, e.g., Blake Nelson, *The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions*, 10 LAW & INEQ. 217, 222 (1992) (“The Minnesota Sentencing Commission represents one of many possible types of sentencing commissions and the one that has been most heralded and emulated as a model.”).

their successors.”¹⁷⁶ The Commission’s first chair, Jan Smaby, was particularly adept at negotiating the politics of sentencing.¹⁷⁷ Smaby sought out input from all interested groups in devising sentencing guidelines.¹⁷⁸ This open process gave the commission valuable information about the concerns of the main interest groups and helped the commission create a package of guidelines that could meet everyone’s approval.¹⁷⁹ From the outset, moreover, the Minnesota Commission focused on research and tied its proposed guidelines to the state’s existing prison resources.¹⁸⁰ As a result, its guidelines have helped the state legislature to adjust its sentencing policies in light of fiscal demands.¹⁸¹ These choices by key decisionmakers helped the commission to get its initial reforms through the legislative process and to maintain its continued importance.

New York’s sentencing commission, in contrast, lacked the same kind of political leadership. In her careful study of the New York State Committee on Sentencing Guidelines, Pamala Griset notes that the legislature that created the commission did not share a common conception of what sentencing reform in New York should entail, making leadership on the commission all the more important in coming up with a compromise.¹⁸² Instead, however, the commission was fractured from the outset and suffered from internal divisions. Nine of the commission’s fourteen members supported defense-oriented positions, which put them at odds with key law enforcement interests including Robert Morgenthau, the Manhattan district attorney and a member of the commission.¹⁸³ Neither the commission’s chairman nor its staff director emphasized research or data collection, and

176. Richard S. Frase, *Sentencing Guidelines in Minnesota 1978–2003*, 32 CRIME & JUST. 131, 213 (2005).

177. DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES 136 (1988); 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) (singling out Smaby as someone who was particularly skillful at satisfying and neutralizing “various external powers—interest groups within the criminal justice system, politicians, and the media”).

178. See Susan E. Martin, *The Politics of Sentencing Reform: Sentencing Guidelines in Pennsylvania and Minnesota*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 265, 283 (Alfred Blumstein et al. eds., 1983) (“[Smaby’s] commission sought to develop interest group participation Members kept in frequent contact with constituent groups they ‘represented’ on the commission, including judges, prosecutors, the defense bar, the corrections bureaucracy, and public interest groups (blacks, Indians, and women in particular).”).

179. Barkow, *supra* note 1, at 774–76 (highlighting the manner in which the Minnesota Commission’s positive relationship with interest groups and political lobbyists contributed to the formation of its guidelines).

180. *Id.* at 776 (describing the Minnesota Commission’s decision to require “that its guidelines not result in a level of imprisonment that would exceed 95 percent of state prison capacity”).

181. *Id.*

182. GRISET, *supra* note 117, at 114.

183. *Id.* at 112–13.

instead made normative judgments about what the guidelines should be.¹⁸⁴ But because committee members did not share the same normative judgments, they reached opposing conclusions and held firm to them even after the committee started to pay more attention to data.¹⁸⁵ In the end, the New York commission members “failed to reach consensus on most vital issues.”¹⁸⁶ This division did little to bring the varied interests together once the commission’s proposal was put out for public comment. The commission was not able to satisfy law enforcement concerns, even though their concerns were critical to getting sentencing legislation passed in the state senate.¹⁸⁷ The commission therefore failed to forge a solution that satisfied the key groups, thus the commission failed to survive and guidelines were never enacted.¹⁸⁸

These two examples illustrate that those who negotiate the political system are as important as the climate in which they are maneuvering. These actors can be critical to the initial creation of a commission and its continued success. A state’s history in trusting expert decisionmakers and professionals might also play a role in whether these political entrepreneurs are able to persuade key politicians that sentencing is an area where expertise is important and valuable.

It is also important to separate the question of delegation from the maintenance of a commission. Although we consider both decisions together for the purpose of our statistical analysis, they do involve different political considerations. In particular, after the commission is created, it can make a case for its continued existence through the work it does. Part of a commission’s success could be reflected in some of the variables we study, such as a lower rate of corrections expenditures or a lower incarceration rate. But it could also be demonstrated in other factors that we did not analyze, such as more predictable expenditures or lower crime rates. A commission’s retention, in other words, might reflect its own competence as much as anything else.

184. *Id.* at 116.

185. *Id.* at 116–17.

186. *Id.* at 142 (noting that “the committee imploded under the weight of strident internal opposition, with its final report riven with dissents from eight of its fourteen members”).

187. *Id.* at 167.

188. Other examples exist of commissions rising or falling on the strength of key political patrons. *See, e.g.*, Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (describing King County Prosecutor Norm Maleng’s instrumental role in persuading the Washington state legislature to pass sentencing reforms); Kathy Kemp & Brett J. Blackledge, *Officials Pushing for Truth in Alabama Sentencing*, BIRMINGHAM NEWS, Dec. 19, 2000, at 12A (highlighting then-Attorney General William Pryor’s role in creating the Alabama Sentencing Commission and in advocating parole reform).

In addition, although we study the states as separate entities, they co-exist and learn from one another.¹⁸⁹ Momentum for the creation of sentencing commissions and guidelines has been building steam in recent years as states with commissions have reaped fiscal rewards without an appreciable rise in crime. It is therefore not surprising that the recent crop of jurisdictions adopting commissions and guidelines have borrowed heavily from those states that have already taken the plunge.¹⁹⁰ Whether a non-commission state views the commission states as successful will necessarily affect whether a commission is adopted. Organizations such as the Vera Institute for Justice¹⁹¹ and the American Law Institute¹⁹² spread information about the most successful state models to states looking to reform sentencing policies, so it seems likely that this, too, has an effect on whether delegation seems attractive.

Still another factor is the particular history of sentencing in a state. For example, states like California that initially turned to legislative reform of sentencing in the 1970s as a response to dissatisfaction with judges might be less inclined to switch models at this point in time. If the impetus for reform was unhappiness with judges and judges have already been stripped of power, it might be more difficult to make the next leap from the legislative body to an agency. In contrast, under this view it might be easier for an indeterminate sentencing regime to move to the commission model if the jurisdiction is not satisfied with judicial performance because that model might hold promise as a method for controlling the judiciary and the jurisdiction has not already addressed the problem. It is also possible that the incentives are just the opposite. Perhaps those states with determinate sentencing are more inclined to turn next to a commission model because the legislature cannot keep up with all the needed reforms and the idea of more predictable sentencing is already ingrained in the culture. The point here is not to argue that one or the other hypothesis is correct. Instead, we emphasize only that a jurisdiction's historical decisions about sentencing may also play a key role in how sentencing power is delegated.

Finally, another important factor that might influence the decision to delegate is the amount of control that a legislature can exercise once the delegation is made. For example, some state sentencing commissions have a large legislative membership which allows the legislature to exercise greater

189. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

190. Note that most commissions are now charged with conducting some kind of resource impact analysis, which is undoubtedly modeled after the early commissions that used resource impact statements to positive effect. Frase, *Unresolved Issues*, *supra* note 1, at 1216.

191. Vera Inst. of Justice, State Sentencing and Corrections Program, http://www.vera.org/project/project1_1.asp?section_id=3&project_id=26.

192. ALI REPORT, *supra* note 87, at 63–114.

control over their policy recommendations. Similarly, most commissions must get their sentencing proposals enacted into law as legislation in order for them to take effect. These kinds of structural innovations make the initial decision to delegate less significant because the legislature will be able to exercise significant control over the ultimate policy, even if the sentencing commission is charged with making initial recommendations. Future work that looks more closely at the variation in the type of sentencing commission might therefore show a greater willingness to delegate and maintain a commission that is subject to extensive legislative controls.¹⁹³

IV. Conclusion

Many scholars¹⁹⁴ and law reform experts¹⁹⁵ have argued that a system of sentencing guidelines administered by a sentencing commission is the best available alternative for states that want an effective, rational sentencing policy. But less attention has been paid to the circumstances under which these theoretical ideas become practical realities.

In many ways, the creation of *any* sentencing commission is counter to the conventional theories of delegation given the modern politics of crime. Yet these ideas have been translated into reality and sentencing commissions are operating in a multitude of jurisdictions.

Our goal here is to begin to understand this development by identifying reasons that politicians would choose to delegate that go beyond the desire to avoid choosing among powerful constituents or groups. By highlighting these factors, we get a better understanding of what the politics of crime actually are—and perhaps they are not as one-sided as they initially appear. In particular, we find that fiscal concerns play a powerful role in legislative decisions to turn to commissions and guidelines.

We also find that, because sentencing commissions do not fit neatly into the executive or independent agency boxes, they also do not fit neatly into conventional theories of when legislatures delegate. This suggests that

193. There may be jurisdictional differences in the legality of various structural options which could also affect whether a legislature chooses to adopt a sentencing commission in the first place. For example, the federal commission could not contain legislative members without running afoul of the Constitution's separation of powers. Barkow, *supra* note 1, at 803 n.372.

194. See, e.g., Michael Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 43 (Andrew von Hirsch et al. eds., 1987) (discussing the contrasts in sentencing before and after guidelines were enacted, and noting the increasing openness and accountability that resulted from their adoption); Frase, *Unresolved Issues*, *supra* note 1, at 1191 (surveying approaches of various states and suggesting the best "legal transplants" for states with dissimilar or nonexistent sentencing guidelines); Reitz, *supra* note 42, at 1101–02 (offering a rough ranking of American sentencing regimes and recognizing jurisdictions with presumptive sentencing guidelines as the most favorable).

195. AM. BAR. ASS'N, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, at xxi (3d ed. 1994); ALI REPORT, *supra* note 87, at 63–114.

more attention needs to be paid to criminal justice agencies as a separate category of administrative agency.

There are undoubtedly other factors we have missed, and our hope is that future research can fill in more of the gaps. But by beginning to ask these questions—questions which are standard with regard to other regulatory agencies—we hope to get a better understanding of what motivates the structural choices that underlie the administration of criminal justice.

Appendix

A. Overview of the Data

If one were to look at the raw data used in the statistical analyses, one would find 1,372 rows of numbers arranged in columns. The columns represent the variables we are interested in, such as Republican governor—the variable is a one if the governor is Republican, and a zero otherwise. Each row is an observation and represents a state in a given year (state-years) for each variable in the data set. For example, row one contains data corresponding to Alabama in 1973. Row two contains data for Alabama in 1974, and so on, through row 1,372, which contains data for Wyoming in 2000.

Table 3 provides a general overview of the data.

Table 3: Description of the data

Variable	Mean	Standard deviation	Minimum value	Maximum value
Partisan margin	32.84	24.34	0	100
Republican governor	0.42	0.49	0	1
Republican house	0.30	0.46	0	1
Divided government	0.41	0.49	0	1
Elected judges	0.55	0.48	0	1
Corrections as % expenditure	2.48	0.98	0.63	6.76
Growth in corrections expenditures	5.92	28.00	-54.82	178.20
Incarceration rate	211.21	136.60	19	801
Growth in incarceration rate	6.52	9.56	-31.57	73.13

The first row of Table 3 tells us that the average size of the margin between Democrats and Republicans in state legislative houses is 32.84 percentage points. However, there is a wide range of variation: in at least one state in at least one year, there was no margin at all (a tie between the parties); in contrast, in at least one state in one year, one party controlled the entire house. The size of the standard deviation also tells us that most of the values that this variable takes on are within twenty-five percentage points of the mean—another sign that this value varies quite a bit across states and over time. In contrast, the amount spent on corrections as a percentage of state expenditures is distributed more closely around its mean of 2.48% with the smallest outcome occurring in West Virginia in 1993, when it spent just 0.63% of its state expenditures on corrections. The maximum percentage

spent was recorded by Nevada in 1977, when corrections accounted for 6.76% of its spending. While corrections as a percentage of state expenditures is closely distributed around its mean, the growth rate of corrections spending as a percent of expenditures, the incarceration rate, and the growth in the incarceration rate are all widely distributed as the standard deviation and minimum and maximum values make clear. For variables like Republican governor, elected judges, Republican house, and divided government, the mean represents the percentage of state-years in which the variable at issue takes on the value of one. For example, the mean for Republican governor is 0.42, indicating that 42% of all observations in the data set have Republican governors. While almost half of all state-years have Republican governors, the data indicate that only 30% have Republican majorities in the lower houses of state legislatures.

B. Results

Table 4: Regression results using annual data, where the positive values include both years of adoption and maintenance¹⁹⁶

Variable	Years with commission	Years with commission (fixed effects)	Years with guidelines	Years with guidelines (fixed effects)
Partisan margin	-0.030 (7.61) ^{***}	-0.020 (4.80) ^{***}	-0.031 (7.31) ^{***}	-0.012 (3.17) ^{***}
Republican governor	0.039 (0.25)	-0.152 (1.21)	-0.295 (1.78) [*]	-0.471 (4.12) ^{***}
Republican house	0.306 (1.83) [*]	0.366 (2.09)	0.462 (2.65) ^{***}	0.576 (3.94) ^{***}
Divided government	-0.281 (1.79) [*]	-0.138 (1.14)	-0.166 (1.02)	0.110 (1.03)
Elected judges	0.666 (4.14) ^{***}	N/A [†]	0.425 (2.55) ^{**}	N/A [†]
Corrections as % of expenditures	0.192 (2.03) ^{**}	0.042 (0.42)	0.475 (4.71) ^{***}	0.186 (2.12) ^{**}
Growth in corrections as % of expenditures	-0.005 (1.50)	-0.002 (0.82)	-0.008 (2.22) ^{**}	-0.003 (1.63)
Incarceration rate	0.004 (6.02) ^{***}	0.006 (9.22) ^{***}	0.001 (1.80) [*]	0.004 (7.45) ^{***}
Growth in incarceration rate	-0.024 (2.76) ^{***}	-0.014 (2.37) ^{**}	-0.025 (2.73) ^{**}	-0.013 (2.53) ^{**}
N	1270	1270	1270	1270
Pseudo-R ²	0.15		0.13	

196. For Tables 4 and 5: the numbers outside the parentheses are coefficients; T-stats appear in parentheses. *, **, *** denote significance 10%, 5%, and 1%, respectively.

[†] In the fixed effects models, elected judges is not included because it rarely varies over time within states.

Table 5: Regression results using annual data, where the positive values include only the year of adoption

Variable	Year commission adopted	Year commission adopted (fixed effects)	Year guidelines adopted	Year guidelines adopted (fixed effects)
Partisan margin	-0.011 (1.36)	-0.012 (1.82)*	-0.029 (2.16)**	-0.027 (2.34)**
Republican governor	-0.242 (0.47)	-0.253 (0.56)	-0.292 (0.51)	-0.239 (0.43)
Republican house	-0.797 (1.50)	-0.741** (1.86)	0.012 (0.03)	-0.223 (0.42)
Divided government	-0.482 (0.94)	-0.358 (0.78)	-0.629 (1.10)	-0.660 (1.18)
Elected judges	0.080 (0.20)	N/A [†]	0.637 (1.20)	N/A [†]
Corrections as % of expenditures	0.035 (0.15)	0.138 (0.77)	0.361 (1.21)	0.358 (1.33)
Growth in corrections as % of expenditures	-0.004 (0.50)	-0.005 (0.68)	0.005 (0.61)	0.005 (0.58)
Incarceration rate	0.002 (1.19)	0.001 (1.11)	-0.001 (0.46)	-0.001 (0.31)
Growth in incarceration rate	0.001 (0.06)	0.001 (0.03)	-0.010 (0.36)	-0.011 (0.43)
N	1270	1270	1270	1270
Pseudo-R ²	0.03		0.06	

C. Robustness

One way to test this model’s ability to predict the adoption of sentencing institutions, and also to check the robustness of its findings, is to split the data set and perform the statistical analysis on each half. If the coefficients and significance levels are roughly similar across both halves, then we can rule out any artifacts in the data that might be driving the results. While we do not report the results in this paper, the model passes this test with no difficulty. An additional benefit of having a large enough data set that we can split it in this way is that we can use the model derived from running the regression on one half of the data to make predictions about what we should find in the other half of the data. In other words, we take half of the data and run a regression yielding a vector of coefficients. We then use those coefficients along with the raw data for the other half of the dataset to create predicted values of the outcome variable (what is the probability that a

given state in a given year will have a sentencing institution, given the values of its input variables?). In a crude measure of the fit of the data, we can then determine how many instances occur in which the predicted probability is greater than 50% that the state would have a sentencing institution and in fact the state has one, and how many instances occur in which the predicted probability is less than 50% and where the state does not have one. We might consider these two categories to be correctly sorted by the model and any observations in which either the predicted probability of having a sentencing commission is over 50% and there is not a sentencing institution, or in which the predicted probability is less than 50% and a sentencing institution exists, to be incorrectly sorted. Using this approach, we find that the model correctly sorts 73%–85% of the results, depending on which half we use and whether we are using sentencing commissions or sentencing guidelines as the outcome variable. As a crude predictor of the conditions under which sentencing institutions are likely to be adopted, this model appears to do quite well.