SANCTIONS

PENAL POLICY AND PENAL LEGISLATION IN RECENT AMERICAN EXPERIENCE

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INTRODUCTION

The last quarter of the twentieth century stands out as the most remarkable period of change in American penal policy even when the entire history of the United States is considered. Nothing in the two centuries before 1975 would prepare observers to expect that a long run of stable rates of incarceration would shift to a fourfold expansion of rates of imprisonment in less than three decades. This Article will consider the origins and careers of proposals for penal legislation in a time of radical change. How, when, and why were legislative acts involved in the massive shift of policy after the early 1970s? What institutional controls were implicated in penal policy changes after 1975,

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and how did they function? To what extent was legislation a driving force in changes in penal policy during the 1970s, the 1980s, and the 1990s? What does a review of the recent history of American criminal justice tell us about what comes next?

In this Article, Part I presents introductory descriptions of where penal policy is made in the American governmental system and outlines national-level measurements of punishment trends over the period since 1975. Part II addresses issues of quality control in shaping, passing, implementing, and reviewing penal legislation in recent U.S. experience. Part III then addresses the role of penal legislation in changing penal practices in the past generation. The final Part discusses two questions about the future of imprisonment.

I. AMERICAN PENAL POLICY: GOVERNMENT STRUCTURE AND RECENT TRENDS

This Part covers two topics not usually discussed together: the government organization of criminal justice in the United States and the surprising imprisonment output of that federal system in the period after 1972.

A. *The Federal System and American Penal Policy*

A short course in federalism is a strict necessity to any comprehension of how criminal justice policy is constructed and executed. The quintessential difference between the government of the United States and that of most developed Western nations is the division of government power between the national government and fifty different state governments, with most of the authority to make and enforce the criminal law given to the states and localities. Table 1, which is taken from a 1986 analysis of the federal role in criminal justice,[1] shows the level of responsibility for administering three institutions at the front lines of American criminal justice: prisons; jails for short-term incarceration and remand; and police agencies, including special-purpose law enforcement groups, like drug enforcement agencies and state highway patrols, as well as general jurisdiction police.

Table 1. Criminal Justice Responsibility by Level of Government

	Prisons*	Jails*	Police**
Federal	7%	1%	8%
State	93%	--	15%
Local	--	99%	77%

*Number of inmates by level of government **Officers by level of government

While both states and the national government have created penal codes

1. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 160 (1992).

and enforced them, the national government accounts for less than ten percent of all prisoners and of all police and just a tiny fraction of the jails. Most persons in prison have been convicted of violating state penal laws, so the fifty state governments have the most influential criminal codes in that sense. But even though the states pass the laws and run the prisons, most police (and most prosecutors as well) are county and municipal employees, so the power to enforce the laws and to set the punishment in individual cases is really more decentralized than state-level penal codes and prisons.[2] The most powerful punishment-setting individuals are found in the thousands of counties and cities of the United States.

With most power decentralized to the states and localities, we would expect to find very large state-to-state variations in the extent of criminal punishment, and this has been true for a long time. Table 2 shows the extent of variation in rates of imprisonment in the United States in 1980, ranked from highest to lowest.[3]

Table 2. Rates of Imprisonment in the United States, 1980 (per 100,000 population)

North Carolina	281	Tennessee	138	Utah	92
South Carolina	230	Arizona	136	Idaho	90
Delaware	223	Arkansas	129	Wyoming	90
Washington, DC	219	New Mexico	124	Wisconsin	86
Texas	216	Indiana	123	New Jersey	85
Georgia	214	Ohio	121	Nebraska	83
Kansas	209	California	120	Rhode Island	81
Nevada	190	New York	119	Montana	80
Florida	183	Missouri	116	Pennsylvania	79
Maryland	177	Washington	115	Hawaii	76
Louisiana	176	West Virginia	115	Minnesota	70
Oklahoma	170	Alaska	110	Iowa	69
Virginia	161	Illinois	108	Vermont	69
South Dakota	156	Oregon	104	Maine	56
Michigan	153	Colorado	100	North Dakota	49
Kentucky	146	Mississippi	96	Massachusetts	44
Connecticut	143	Alabama	93	New Hampshire	28

From top to bottom, rates of imprisonment varied in the United States by an order of magnitude, with the highest states showing an imprisonment rate ten times higher than that of the lowest state. This is fully as much variation as the range of imprisonment rates found across European nations, and led Gordon Hawkins and this author in 1991 to title our chapter dealing with the range of state policies "Fifty-One Different Countries"—suggesting that there was an element of myth to the notion that the United States had a single aggregate set

2. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 138-42 (1991).

3. MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 30 (1986).

of punishment priorities and policies.[4] And the ten-to-one differences at the state level are only the beginning. With local prosecutors and police setting their own priorities, each state might contain very large variations at the county level from the aggregate average computed by adding these autonomous regions together. How much further variation is found at the county level in rates of imprisonment or in total incarceration (a broader measure, because it includes jails as well as prisons) has not yet been determined.

Decentralized power and large variations in punishment policy would lead us to expect two things about rates of imprisonment in the United States that turned out not to be the case in the last quarter of the twentieth century. First, with so many different centers of power exercising independent authority, the structure of U.S. criminal justice power would argue against seeing clear trends in aggregate policy measures like rates of imprisonment at the national level. Second, because national aggregates include so many different independently determined outcomes, even if trends up or down in policy could be sustained over many different independent centers of authority, the magnitude of aggregate changes at the national level should be modest. So adding up fifty-one independent prison policies would not be likely to show much of a trend at all, and, if it did, the slope of the change would be modest, with so many different systems averaging out the extremes experienced by individual states and presenting a smoother aggregate portrait. That is the theoretical expectation. It turned out to be quite wrong in the period since 1973.

B. *The Immoderate Recent Trend*

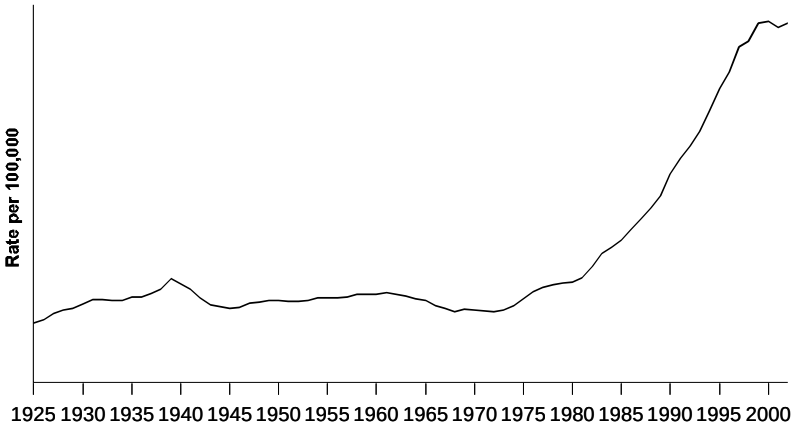
Figure 1 puts the lie to expectations of moderate changes in aggregate U.S. imprisonment rates by charting rates of state and federal imprisonment by year from 1925 to 2002.[5]

The first fifty years of history summarized in Figure 1 are consistent with the belief that aggregate U.S. totals would not show clear trends and not exhibit high magnitudes of variation. Rates of imprisonment oscillate over five decades without any long-term upward or downward trend and with increases or decreases within twenty percent of long-term mean levels. After 1973, however, the trend turns up in a sharp and sustained fashion. The collective behavior of fifty states and the national government stops looking like an aggregate of independently determined outputs and begins to appear as if there were a larger coordinating force pushing all or most of the constituent elements a long distance in the same direction. Yet there was neither change in the allocation of power in the federal system nor any major federal initiative in the 1970s or 1980s that would provoke such uniformity. What looks like a drastic

4. ZIMRING & HAWKINS, *supra* note 2, at 137.

5. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 495 (2002).

Figure 1. U.S. Imprisonment Rate, 1925-2002



shift in the tendency for states to act in consort has no evident mechanical or legislative causes. Any larger force operating to coordinate state and local action was outside the spheres of government in the United States. But there is nonetheless every evidence of important change in the character of policy trends in American criminal justice.

II. CHANGING PATTERNS OF MEDIATION AND REVIEW IN THE POLITICS OF PUNISHMENT

Serious criminal offenders are never popular in stable democracies, and this produces tendencies for political proposals about crime and criminals to begin with demands for further punishment and larger investment in suppressing crime. But this predisposition does not produce a continuous intensification of punishment and law enforcement for a variety of reasons. One is inertia. Crime is not a terribly important topic in the domestic politics of most democracies—there are not many powerful constituencies that stand to make great gains out of building new prisons or filling them. Traditionally, those in the political system who wished strong action against criminals could be satisfied by symbolic legislation that did not make important operational changes and thus carried few costs.

Throughout most of the twentieth century, actors who ran the criminal justice system—judges, prosecutors, police, and prison administrators—had a strong interest in maintaining stability, which pushed crime proposals toward low-cost symbolism. Subject-matter experts also helped tone down attempts to crack down on crime, and the executive branch of government was usually interested in keeping the fiscal costs of crime legislation low—symbolic gestures are always less expensive than large operational increases in the scale of a punishment enterprise. Populist impulses reflected in the legislature would

be neutralized by deference to executive authority and expertise from outside the political system.

And even when legislation providing for large change becomes law, the usual pattern is for the substantial discretion of executive and legislative branch agents to moderate the extent to which mandated changes happen. No legislation is truly mandatory to an American prosecuting attorney, meaning that legislation that seeks uniformity and mandatory outcomes can be softened to the prosecutor's taste by the exercise of unreviewable discretions not to prosecute or to reduce charges.[6]

All of these moderating influences on proposed and enacted laws continued to operate in most parts of the United States through the period of penal expansion, and these controls on legislation and its impact continued into the 1990s, when punitive penal legislation became an important cause of changes in punishment, a development discussed in Part III.

The bulk of all penal legislation in the United States is contained in state laws, which are subject to a variety of state government reviews and some further scrutiny on constitutional grounds in the federal courts. During the 1990s, the state courts that reviewed most penal laws were relatively passive, but there were some occasions when state courts modified the apparent impact of new penal laws to preserve judicial prerogatives. As an example, the most important of these state court interventions in the California "three-strikes" law was the *Romero* case in 1996, in which the California courts read the "three-strikes" statute to preserve judicial power to avoid mandatory punishments by disregarding previous convictions that would trigger the longer penalties in the interests of justice.[7] Such state court intervention has been pretty rare.

In theory, the federal courts can also intervene to restrain the enforcement of state laws that violate rights guaranteed by the Federal Constitution. Among these guarantees are "due process of law," found in the Fifth Amendment to the U.S. Constitution; "due process of law" and "equal protection of the laws," guaranteed by the Fourteenth Amendment; and the right not to be subjected to "cruel and unusual punishments," provided by the Eighth Amendment.[8] Writs of habeas corpus provide a procedural device by which some state prisoners can invoke the federal judicial process, but the standard for finding constitutional violations is usually quite high. For state death penalties, the Supreme Court has used the Eighth Amendment to scrutinize statutes and case outcomes. But almost any prison sentence that the states wish to invoke is upheld if any rationality can be found in its classifications and its claims. The Supreme Court has thus rejected an attack on California's notoriously rigid

6. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 63-84, 125-47 (2001).

7. People v. Superior Court (Romero), 917 P.2d 628 (Cal. 1996); *see also* ZIMRING ET AL., *supra* note 6, at 128-33 (discussing *Romero* in more detail).

8. U.S. CONST. amends. V, VIII, XIV.

twenty-five-year-to-life sentences for persons convicted of petty theft as not meeting the high standard required to invalidate state-approved terms of imprisonment.[9] It is hard to imagine state legislation that would fail to meet the loose standards now in force.

III. PENAL LEGISLATION AND PENAL POLICY IN RECENT TIMES

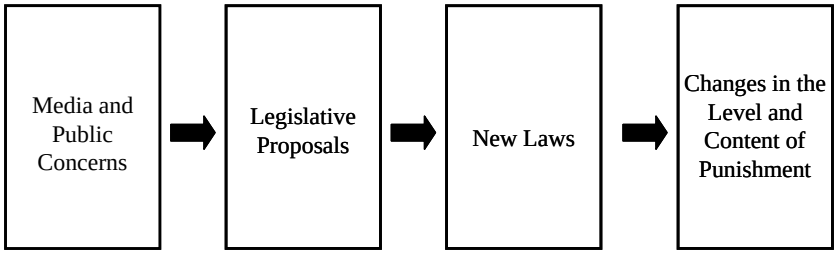
The huge turn in punishment after the mid-1970s puts a discipline on the time horizon that must be discussed when considering the causes of recent American punishment policy. No discussion of penal legislation and its influence on punishment can be credible unless it considers the entire timespan during which the year-to-year variations turned upward in Figure 1 and the almost three decades in which they have continued upward. Any discussion of the influence of penal law on policy that started its consideration in 1985 or 1990 would be transparently insufficient. Instead, we are duty bound to consider the relationship between penal laws and penal policy outputs over the thirty years after prison populations began to rise in 1973. Our sample of political units is thus fifty-one different governments over a period of almost thirty years. What general patterns can we discern, and what is their significance?

This Part begins by setting out a standard model of change in penal policy in democratic government in order to set a paradigm against which the patterns noted since 1975 can be compared. I will then tell my version of the story of penal legislation in three different eras of prison policy over thirty years.

A. *A Standard Model*

Figure 2 puts forward a simplified model of the influence of opinion and concerns on penal legislation and penal policy.

Figure 2. How Penal Policy Gets Changed—A Standard Model



The figure imagines both a temporal and a causal sequence, in which public and media concerns happen prior to and cause legislative proposals that

9. *See* Ewing v. California, 538 U.S. 11 (2003).

change the content of the law, which in turn changes the level and content of punishment. Something like this model sequence seems to have influenced the outline of topics and questions to be considered in this Issue.[10]

One drastic oversimplification in the model is the assumption that public and media concerns are chiefly causes of legislative efforts rather than the effects of political effort. In fact, media, public, and political entities relate to each other in an interactive fashion.[11] But what we will learn about the events after 1975 support a more basic objection to the standard model set up as a strawman here—the problematic assumption that changes in law precede and are necessary to important shifts in punishment policy. More often than not, major changes in policy happened without legislation, whether caused by public and media concern or wholly independent of the assumed prior conditions to penal change.

To be sure, there were major legislative activities in both federal and state governments throughout the period from 1972 to 2003. The 1970s witnessed major reforms in criminal sentencing at the state level, with determinate sentencing in California, Illinois, Indiana, and three other states,[12] while Minnesota and several other states created "sentencing commissions" to restructure the process of determining criminal sentences.[13] When all this legislative activity coincides with a time of increasing rates of penal confinement, it is tempting to conclude that the new sentencing laws were a major influence on rates of imprisonment, but there is no good evidence that the legislative output of the 1970s was a major cause in changing rates of incarceration. The upward bounce was just as great in states without change as in the change states, and the changes instituted in most states had been designed to have little effect on rates of prison commitment. Perhaps some of the same political and attitudinal shifts that precipitated legal change also increased rates of imprisonment, but the legal changes of the 1970s themselves played no obvious role in the penal expansion of that era.

The first half of the 1980s was a period of relative inactivity in state penal law. Violent crime rates were high in 1980 but trended down for the five years after that. The national government passed a new federal criminal code in 1984 that produced the U.S. Sentencing Commission, which eventually increased federal prison sentences, but there was nothing in the 1984 code to push in any

10. *See* Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1 (2005) (in this Issue) (providing a basic overview of this Issue of the *Stanford Law Review*, which focuses exclusively on the post-*Booker* reform of the Federal Sentencing Guidelines).

11. *See* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (emphasizing political attempts to induce public fears); *see also* Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005) (in this Issue).

12. *See* NAT'L RESEARCH COUNCIL, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 133-34 (Alfred Blumstein et al. eds., 1983).

13. MICHAEL TONRY, SENTENCING MATTERS 25 (1996).

clear prison policy direction except for abolishing parole decisionmaking. Sentencing commissions can either increase or restrain rates of imprisonment.[14] Until 1985, the best summary of the apparent impact of new penal legislation on rates of imprisonment would have denied any role of the new laws in the extraordinary changes in penal policy happening all over the United States. By 1985, the rate of imprisonment in the United States had more than doubled over a twelve-year span and stood at the high point of the century. Yet these large changes were in no visible sense the product of penal legislation.

B. *The Latitude in Legal Structure*

It is something of a tribute to the enormous discretion allowed by American penal law that the rate of imprisonment can double without any change in either the penalties provided by statute or the ways in which sentences are determined. There is enough free play in the choices available to prosecutors and judges that the formal conditions of a sentencing regime can remain untouched while the punishments delivered by the system can double or drop by half! Much of that latitude is contained in the wide discretion to either send felons to prison or put them on probation—what sentencing analysts call "the in-out decision."

For the first twelve years after 1973, the growth of the U.S. prison population was chiefly a matter of a larger number of convicted felons serving prison sentences, rather than of any substantial increase in the terms of prison sentences, so that the first installment of the great imprisonment boom in the United States was well suited to the absence of penal legislation. Only the behavior of legal actors needed to change, not the law.

C. *The Post-1985 Pattern*

The first time that penal legislation was a substantial contributing cause to increasing incarceration was 1985, and the occasion was the beginning of a public panic and set of initiatives by federal and state governments that have come to be known as "the war on drugs." The precipitating events were the arrival of a form of cocaine known as "crack" in several large-city drug markets and media concern about the power and addictive potential of the drug. While illicit drug use was actually down by the mid-1980s from the 1979 rate highs, at least among adolescents and young adults,[15] the level of public concern about drugs had never been greater in American history.[16] The lead role in declaring a war on drugs was played by Congress, which has throughout

14. ZIMRING & HAWKINS, *supra* note 2, at 160-62.

15. NAT'L INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: HIGHLIGHTS 12 fig.2, 13 fig.3, 15 fig.4 (1988).

16. *See* ZIMRING & HAWKINS, *supra* note 1, at 43-44.

the period after 1914 played a much larger role in penal policy regarding drugs than any other forms of crime. More than a quarter of all persons imprisoned for drug crimes are in the federal prisons, as compared to about four percent of persons imprisoned for common violent and property crimes.[17]

The temporal and causal sequence outlined in Figure 2 played out in pretty standard fashion for the drug war. Public and media concern produced swift action in Congress, with major bills proposed in both 1986 and 1988.[18] The federal legislation had a direct impact on imprisonment for drug crimes by increasing punishments for federal drug crimes and by vastly expanding enforcement resources in federal and state drug enforcement. This greatly increased the rate of arrest for drug crimes because enforcing this victimless offense is a supply-side phenomenon, greatly dependent on the level of police effort invested in producing drug arrests.

The federal legislation in the late 1980s also provoked copycat state legislation and generated substantial pressure on state prosecutors and judges to give drug cases and drug punishment much greater priority. The result was a period—from 1986 to 1993—when general rates of imprisonment continued upward at the fast pace that had been noted since the mid-1970s, but the primary increase of this second era of prison expansion was in drug cases.[19] In California, for example, the number of persons in prison for drug offenses expanded almost fifteenfold in eleven years.[20] There were more persons in prison for drug offenses in California by 1992 than had been in that state's prisons for all offenses in 1980, and California was not an unusual case history of the period. The growth in drug prisoners in state prisons between 1986 and 1991 was 289%, from 38,515 to 149,990.[21] In this second era of carceral expansion in the United States, the growth in imprisonment reflected the impetus of legislation, although the indirect effects of both the laws and the panic that inspired the laws were much more important than changing prison terms or mandatory minimum sentences.

D. *The Third Era of Penal Expansion*

The most recent period of growth in U.S. imprisonment, from 1993 until 2002, had a different focus from earlier expansions and exhibits more direct influence of penal legislation on penal policy. The numerical growth of prison populations continued from 1993 through 2002,[22] and this was remarkable

17. *Id.* at 161 tbl.7.2.

18. *Id.* at 43-44.

19. *Id.*

20. FRANKLIN E. ZIMRING & GORDON HAWKINS, PRISON POPULATION AND CRIMINAL JUSTICE POLICY IN CALIFORNIA 32 (1992).

21. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 623 (1992).

22. BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE, INCARCERATION RATE,

because the new growth occurred on top of a prison population that had already grown for two decades without pause. And most of the growth in the prison population that happened after 1993 happened after crime rates finally turned down. With a very high base rate of prisoners and declining rates of crime after 1994, how did the system manage to sustain further growth throughout the 1990s?

A large part of the further expansion in prison population was a result of the lengthening of prison terms,[23] and a large part of these longer terms was a result of new penal legislation from Congress and state legislatures that was explicitly designed to increase prison terms. Congress passed crime legislation in 1994 that contained financial assistance to state governments to increase both prison capacity and prison terms.[24] A new class of state laws was introduced in the 1990s with titles like "Truth in Sentencing," and these laws had as their principal aim the increase in time served in prison by convicted felons—the device used was to increase the percentage of nominal prison terms that either violent felons or all felons had to serve before they became eligible for release.[25] A second wave of "three strikes and you're out" laws passed in Congress and in half of all states, creating optional or mandatory, lengthy prison terms for persons with specific prior criminal records who were convicted for new violent offenses (e.g., Washington in 1993) or for any new felony (e.g., California in 1994). The California legislation created mandatory twenty-five-year-to-life prison terms for some persons convicted of petty thefts that normally have a maximum sentence of six months or one year in jail.[26]

This new wave of legislation-driven shifts in penal policy was a major innovation in the American politics of criminal justice. Public attitudes toward criminals are almost always hostile, so legislation that promises to crack down on crime would be popular most of the time. Traditionally, however, such laws were symbolic acts with little practical impact on the usual operations of the criminal courts. Popular feeling was served, but the business of criminal justice was undisturbed. Such laws' "bark was worse than their bite" because the business of criminal sentencing was insulated from direct legislative impact by ameliorating discretions. Nobody minded much.

In the 1990s, right-wing political pressure groups suddenly were designing laws with more bite than bark. And several new elements of the politics of punishment acted against the inertial forces that usually take the edge off crime legislation. The first big change was that crime became a more important

1980-2003 (2005), *at* http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm (last visited Sept. 25, 2005).

23. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 40 tbl.4 (1999).

24. On the federal crime legislation of 1994, see LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 129 (1998).

25. *Id.*

26. Ewing v. California, 538 U.S. 11, 16 (2003).

political issue by the early 1990s—at both the state and federal levels—than it had been previously. The second change was that right-wing politicians who had long been satisfied with symbolic legislation developed a taste for programs—such as "truth in sentencing"—that were designed to have substantial impact on prison populations. A third new development was the bypassing of legislative bodies in states like Washington and California to have voters pass specific proposals drafted by advocates with none of the usual executive branch influence on the final terms of the law.[27] This successful use of direct democracy also made politicians more sensitive to the demands of new lobby groups associated with victim interests and other pro-punishment groups who had participated in the ballot initiatives. So the power of these groups to push legislation increased dramatically.[28]

The net effect of increased power for groups that wished to promote harsher criminal penalties was to reduce (but not eliminate) the moderating influence of the executive branch and cost-reduction interests when penal legislation was being considered and to make discretion in the process of administering the penal law much more important. The local prosecutor was a powerful figure in criminal justice throughout the history of the American system, but he has become much more powerful in the generation since the 1970s. As the authority of judges, parole officials, and correctional administrators has been reduced by legal reforms, the relative power of the prosecutor has increased. Because the prosecutor is a local official, the increased power of that office has generated wide local variation in practice. The "three-strikes" penalties that were supposed to be mandatory in California were invoked in perhaps ten percent of all eligible cases statewide in the early days of the law, but were almost never used in San Francisco (where the prosecutor did not like them) and were much more often invoked in San Diego (where the prosecutor did).[29]

For the first time in recent American history, state penal legislation became an important force in shifting penal policy. This was after rather than before the bulk of the prison expansion, so this important change in the politics of penal legislation is easier to regard as an effect of the boom in imprisonment rather than its cause. But this shift in the political setting of penal legislation makes the post-legislative controls and reactions to the most recent generation of state laws more important for predicting future developments. The post-1993 changes in punishment policy in the United States are the most difficult layer of law and policy changes to comprehend, but they are also the most important data to understand when predicting future developments.

27. ZIMRING ET AL., *supra* note 6, at 4-16.

28. *Id.* at 171-80.

29. *Id.* at 74-84.

IV. SENTENCING AND THE FUTURE OF IMPRISONMENT

Are there lessons available from recent history that can help to predict and comprehend punishment trends over the next decades? My speculations about this involve two questions. The first question concerns the potential for declines in the numbers of prisoners and rates of imprisonment in the United States in the near future. Can this amalgam of fifty-one penal systems that has expanded the scale of imprisonment sevenfold display variability on the downside of equivalent magnitude? The second question concerns the relationship between sentencing structures—the way in which the power to set punishments is distributed—and sentencing outcomes. The issue is whether sentencing structure matters much and, if so, whether changes toward sentencing commissions and away from parole release are important elements in predicting sentencing trends.

A. *The Downside Potential for Imprisonment*

There are unmistakable signs in the imprisonment trend that the era of unmitigated growth in prison population is at or near an end. The growth rate in prison populations in the first years of the twenty-first century is not only smaller in percentage terms (which happens automatically when the base rate gets much bigger), but the number of additional prisoners at the national level is smaller, and a number of states exhibited downward variations in recent years. The period of consecutive decades of growth in the rate of imprisonment has already ended,[30] and very soon the thirty-year string of uninterrupted growth in the number of prisoners will also end. But what happens after this era of expansion?

The two most plausible alternatives are (1) relative stability at a new high plateau of incarceration rates, with prison numbers not growing much but not declining significantly from the rates of imprisonment that were established in the late 1990s, or (2) higher volatility with relatively wide swings in the rate of imprisonment and a larger downside potential. The key concern is one of commonsense physics: Do the large upward shifts signal any two-way volatility for the future? Do huge increases carry the potential for huge decreases?

My suspicion is that the determining feature of potential downward variability in rates of imprisonment is the politics of criminal justice. There is little in the current political climate that suggests a large downward potential for prison populations in the near future.

The most amazing period of recent prison growth was the seven years after 1992, when the U.S. prison population expanded by 144 per 100,000 during a period when the crime rate was falling.[31] If one really believed that "what goes

30. *See supra* Part I.B & fig.1.

31. BUREAU OF JUSTICE STATISTICS, *supra* note 22.

up must come down," then a decline of imprisonment of 144 per 100,000 should be achievable in stable crime environments. Of course, no nation ever reduced a prison population by that much in a period of political stability, but the upward variation was also unprecedented. Why can't volatility work both ways?

Because of the new politics of criminal justice. The political environment in which the United States expanded its prison system by more prisoners than the whole system had contained prior to 1981 is very close to the political system in which future punishment policy will be made. Crime and the fear of crime have both declined, but there is no shift in basic attitudes and no second-guessing about the current distribution of power in criminal justice. None of the legislative products of the most recent political era have been repealed. The most likely result will be a relatively high plateau of rates of imprisonment, quite close to a total of 1.6 million prisoners in 2005, with a slight decline in the rate of imprisonment as an expanding general population surrounds a relatively stable prison and jail population.

If any large dents do come in prison populations, drug offenders are the most likely source of sharp policy shifts. But as long as the arguments for moderating punishment policy are focused on prison costs rather than crime policy, the changes in rates of incarceration will most likely be small decreases across the board rather than discrete cutbacks in particular categories. In a stable political environment, it is hard to imagine population drops larger than ten percent, which is a significant number of prisoners but less than one-sixth of the one-generation increase and only about one-third of the increase generated amongst declining crime rates in the 1990s.

B. *Does Sentencing Structure Matter?*

One question of obvious importance with respect to sentencing commissions is whether the legal structure governing sentencing makes a difference in the amount of punishment that system delivers. The question first was posed in the early 1980s when a series of determinate sentencing systems were put in place just as the prison population started its major increase, but studies found that growth in the prison population was similar in these jurisdictions with determinate sentencing systems and in jurisdictions that had not changed their systems.[32] Since then, skepticism about a strong relationship between methods of sentencing and punitiveness has been in intellectual fashion.

Kevin Reitz has argued that those states with strong forms of sentencing commissions have lower growth in imprisonment than systems that have

32. Leo Carroll & Claire P. Cornell, *Racial Composition, Sentencing Reforms, and Rates of Incarceration, 1970-1980*, 2 JUST. Q. 473, 480 (1985).

retained traditional parole and judicial sentencing.[33] The problem with inferring from this lower rate of growth that sentencing commission structures generate lower growth is twofold. The first problem is the wide range of outcomes associated with the commission as a sentencing structure. The federal system is notorious as an example of a high-growth commission.[34] But doesn't the lower *average* growth establish the commission as a cause of penal moderation? The problem here is that the sample of "strong commission" states is a self-selected group of jurisdictions that cared enough about problems with traditional sentencing systems to pass a major reform. These states may have had both the motivation and the means to moderate prison growth even without the new structure. When generalizing about the major forms of sentencing structure—indeterminate versus determinate, commission versus judicial—the amount of variance within each category is high, and the evidence favoring particular forms of sentencing authority is equivocal at best.

But more helpful insights may be available if we disaggregate sentencing systems down to particular functions. This kind of functional disaggregation can generate a number of noncontroversial predictions about specific practices that can occur in a wide range of systems.

Whether determinant or indeterminant, for example, mandatory minimum sentences both provoke severe outcomes and generate problems of penal proportionality and inefficiency. There is no major difference in these problems in commission versus judicial systems. It would also seem likely that systems that can delegate sentencing decisions to institutions removed from legislative regulation are less prone to penal inflation. In a recent book, I have called this process "insulated delegation."[35] Somewhat more controversially, I would argue that some discretionary review of very long sentences that takes place years after sentencing is a feature that can reduce one particular source of unnecessary excessiveness in a broad range of systems.

But these modest functional relationships are not the equivalent of predicting that sentencing systems have a major impact on penal outcome. In the recent history of American criminal justice, most punishment powers are held by executive offices of government—prosecutors—and the determinants of penal severity are not closely linked to the formal mechanisms of sentence determination. Penal reform in the twenty-first century is more closely linked to the hearts and minds of criminal prosecutors than to parole boards or sentencing guidelines.

33. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1101-08 (2005); *see also* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005) (in this Issue).

34. ZIMRING & HAWKINS, *supra* note 2, at 156-75.

35. ZIMRING ET AL., *supra* note 6, at 184.

CONCLUSION

The revolutionary changes in penal policy in the United States were not for the most part a product of changes in penal law, but the last ten years of the thirty-year growth of imprisonment were a product of the legislative process in state and federal government. The changing politics of criminal justice have eroded many of the traditional quality controls in penal legislation and left the system much more dependent on the discretion of prosecutors than on other controls in the legislative or executive branches of state government. The federal role is a relatively passive one for state systems.

When examining the link between recent history and likely future developments, there is reason for only modest hope. There is every reason to suppose that the penal expansion of recent decades will abate, but little reason to expect that the current scale of mass incarceration will shrink back even to rates found during the early 1990s. The barriers to extensive decarceration are political rather than structural, but they are no less formidable because they concern attitudes and values rather than the institutional dynamics of criminal justice.