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Article

## Can Sentencing Guidelines Commissions Help States Substantially Reduce Mass Incarceration?

Richard S. Frase<sup>†</sup>

### INTRODUCTION

In his forthcoming book, Franklin Zimring argues that sentencing guidelines commissions could, if given three additional powers, help states substantially reduce their bloated prison populations.<sup>1</sup> This Article examines the strengths and weaknesses of these proposals, while also highlighting the ways in which such commissions have already helped some states limit excessive growth in their prison populations.

As always, Professor Zimring clearly identifies a problem—here, the many drivers of mass incarceration (hereafter: M.I.)—and suggests thought-provoking solutions. His structural solution, Minnesota-style sentencing commissions, is already operating in several states. The ways in which Zimring wants to expand the role of such commissions may not all work as he envisions, at least in some states, but each is worthy of serious consideration.

Part I of this Article summarizes and critiques Zimring's commission-based proposals. Part II explains how, even without Zimring's new commission mandates, guidelines commissions have helped some states limit the use of imprisonment. The argument of that Part is two-fold: first, states that have such commissions should maintain them, and other states should follow their lead; second, any added commission roles, similar to or different from those that Zimring proposes, must not interfere with the valuable tasks these commissions already perform. Subject

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<sup>†</sup> Benjamin N. Berger Professor of Criminal Law, University of Minnesota Law School. Copyright © 2020 by Richard S. Frase.

1. FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (manuscript ch. 7 at 28–32) (on file with author).

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to that caveat, Part III identifies some further roles that guidelines commissions might play (including modified versions of Zimring's three added roles), which could help to roll back M.I. The Conclusion summarizes this Article's main arguments about the ways in which guidelines commissions do or could help roll back M.I., while also noting that there is much we still don't know about "what works" in pursuing that goal—or even what each jurisdiction's target prison rate should be.

### I. SUMMARY AND CRITIQUE OF ZIMRING'S THREE-PRONGED, COMMISSION-CENTERED PROPOSAL

Section A describes how Zimring proposes to use sentencing guidelines commissions to roll back M.I. by giving those commissions three new kinds of powers and duties and summarizes the strengths of the commission model and the overall advantages of using commissions in this way. Section B examines, in turn, the strengths and weaknesses of each proposal. Section C considers some broader problems with giving guidelines commissions these or other new powers.

#### A. EXPANDED POWERS AND DUTIES OF SENTENCING GUIDELINES COMMISSIONS

Zimring proposes to give sentencing commissions, of the kind that Minnesota and several other states have created to develop and implement sentencing guidelines,<sup>2</sup> three new roles.<sup>3</sup> Under Zimring's expanded guidelines commission model, these commissions would be given power to

- (1) make case-specific prison release (i.e., parole) decisions;
- (2) administer state-funded financial grants and charge-backs to encourage local government compliance with policies

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2. The federal sentencing commission is less likely to be effective in rolling back M.I., given that escalating prison costs remain a tiny fraction of the massive federal budget. The same is true for some state commissions, due to staffing and other limits on their powers and stature. For comparisons of state and federal guidelines and commissions, see RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 121–41, 163 (2013) [hereinafter FRASE, JUST SENTENCING]; Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?* 48 CRIME & JUST. 79 (2019) [hereinafter Frase, *Forty Years*]; Richard S. Frase, *Sentencing Guidelines in American Courts: A Forty-year Retrospective*, 32 FED. SENT'G REP. 109 (2019) [hereinafter Frase, *Retrospective*].

3. ZIMRING, *supra* note 1 (manuscript ch. 7 at 28–32).

designed to minimize unnecessary prison commitments and make greater use of non-prison sentences; and

(3) collect and publicize data on specific local criminal justice policies and practices, especially by prosecutors, that drive up prison commitments and prison durations.

Zimring sees Minnesota-style sentencing commissions as the ideal governmental agency to take the lead in rolling back M.I., and there is much wisdom in this assessment. As Zimring notes, such commissions are located “at the appropriate level of government—the state level where prisons are paid for and administered.”<sup>4</sup> At present, decisions about which offenders to send to state prison, and with what prison terms, are made by local government officials, i.e., judges and prosecutors. These officials are free to consume state prison resources without paying for them—a problem Zimring refers to as the “correctional free lunch.”<sup>5</sup>

Such commissions also have several other important strengths as policymaking bodies. Although ultimately subject to legislative oversight and override, they enjoy a degree of insulation from short-term political pressures of the law-and-order type because they are not elected or under the direct control of elected officials.<sup>6</sup> They also usually have representatives from all major criminal justice stakeholders, giving them a more balanced perspective than the legislature, governor, or judiciary.<sup>7</sup> And like all administrative agencies, sentencing commissions can collect data, acquire expertise, and bring an evidence-based, comprehensive (all crimes, all geographic areas), and long-term perspective to complex public policy questions.<sup>8</sup> Furthermore, the greater uniformity and predictability of sentencing under state-wide guidelines allows sentencing policy to be implemented with improved transparency, consistency, and fiscal responsibility. These are all important strengths of the sentencing commission model, which many states have used to improve sentencing policy and practice.<sup>9</sup> Zimring’s decarceration proposals build on these strengths.

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4. *Id.* (manuscript ch. 7 at 28).

5. *Id.* (manuscript ch. 3 at 14).

6. Frase, *Forty Years*, *supra* note 2, at 113.

7. *Id.* at 115–16.

8. *Id.* at 125.

9. FRASE, JUST SENTENCING, *supra* note 2, at 123–61; MICHAEL TONRY, SENTENCING MATTERS 190–96 (1996); Rachel E. Barkow, *Sentencing Guidelines*

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The next section will examine the pros and cons of each of these proposed new commission roles. Then, Section C will address some more general problems posed by all three proposals.

#### B. STRENGTHS AND WEAKNESSES OF EACH PROPOSED NEW COMMISSION ROLE

Each of Zimring's proposals has strong arguments in its favor—each suggests a plausible mechanism to reduce M.I., and draws on the guidelines commission strengths summarized above. At the same time, each proposal has potential drawbacks and limitations.

##### 1. Giving the Guidelines Commission Control over Prison Release (i.e., Parole) Decisions

Although some sentencing guidelines reforms have abolished parole release discretion, Zimring prefers to retain it, for two reasons having to do with the level of government and timing. A state-level decision maker is able to smooth out disparities in sentences imposed by individual judges and in different localities and is also more likely to pay attention to the aggregate impacts of prison sentences in terms of prison beds required and prison overcrowding.<sup>10</sup> As for timing, Zimring argues that when specific decisions about each offender's required time to serve in prison are made years after the imposition of sentence, this allows passions to cool, mitigates the tendency of trial court judges to impose unreasonably severe prison terms so as to symbolically denounce the harms done to victims and communities, and makes it possible to factor in offender-specific changed circumstances, such as successful completion of rehabilitative prison programming and maturation (or the simple fact that older persons are less crime prone).<sup>11</sup>

There is much truth in these supposed advantages of retaining parole discretion, although there are also potential disadvantages. The history of parole in the United States casts doubt on the assumption that entrusting release decisions to a state agency helps to promote consistency and avoid unnecessary

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*at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599 (2012); Frase, *Forty Years*, *supra* note 2, at 23–27; Frase, *Retrospective*, *supra* note 2, at 2–5.

10. ZIMRING, *supra* note 1 (manuscript ch. 7 at 28).

11. *Id.* (manuscript ch. 7 at 9–12).

incarceration.<sup>12</sup> Indeed, the available evidence suggests that, compared to parole abolition systems, states that retained parole discretion were more likely to experience above-average growth in their imprisonment rates in the period leading up to peak M.I.<sup>13</sup>

In theory, a sentencing commission's release decisions should be more consistent and parsimonious than a parole board's, given the institutional strengths of such commissions noted above, especially if the commission develops and generally follows presumptive releasing guidelines. Commission decisions (especially with guidelines) are also likely to be more transparent than a parole board's and, given the commission's more broadly representative membership, will arguably be seen as more legitimate. But what reason is there to believe that a commission would actually use its new parole-release power to substantially reduce prison populations? Sentencing commissions may be more insulated from direct political pressures than parole boards are, but commissions remain subject to legislative oversight and possible revocation of delegated policymaking authority. Unless the legislature gives the commission a specific mandate to reduce overall imprisonment, most such commissions are unlikely to try to do so.

There is also the question of scale—how much scope will commissions have to mitigate maximum prison terms imposed by judges? Greater mitigation power increases a commission's power to reduce the prison population, but it also risks the return of politicized, “truth in sentencing” rhetoric—when offenders reappear in the community long before the end of their prison terms, actual or opportunistic victims' advocates may object that those terms are being undermined, or are a sham, thus generating pressure to limit or eliminate “early” release authority.<sup>14</sup> Once upon a time, parole boards operated largely in secret and could quietly grant substantial reductions in prison time served,

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12. Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741 (2020); see also EBONY L. RUHLAND ET AL., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 45 (2016) (observing that most parole boards either have no guidelines or give greatest weight to input from prosecutors, victims, and the sentencing judge).

13. Frase, *Retrospective*, *supra* note 2, at 118 tbl.2; Reitz, *supra* note 12. For discussion of whether such patterns reflect causation or selection bias, see *infra* at note 45.

14. Frase, *Retrospective*, *supra* note 2, at 118.

allowing the sentencing system to “bark[] louder than it really wants to bite.”<sup>15</sup> But those days are gone, and will probably not return. Moreover, when prison terms are subject to substantial later mitigations, judges may feel free to look “tough” and impose very long prison terms, relying—perhaps unrealistically—on parole discretion. By contrast, with parole abolition and “real-time” sentences subject only to specified good-conduct credits, judges (as well as legislators) must take responsibility for the human and fiscal costs of lengthy prison sentences.

Furthermore, some of the claimed advantages of parole discretion can be achieved by other means once such discretion is abolished. Legally binding guidelines for judges can reduce disparities in prison durations across judges and counties (and can also reduce disparities in decisions about which offenders are sent to prison in the first place).<sup>16</sup> As for the problem of timing, most of the factors relevant to the appropriate duration of imprisonment can be assessed as well or better at the time of sentencing. That is clearly true with regard to case-specific assessments of offense seriousness, under guidelines. As for the risk of renewed offending, aging inmates pose substantially lower risks (while the costs of holding them in prison are very high, especially medical costs).<sup>17</sup> But advancing age is highly foreseeable; a judge at sentencing can know how old each offender will be after X years in prison.<sup>18</sup> Aside from age, the most reliable predictor of post-prison recidivism is the offender’s criminal record, which is also known at sentencing.<sup>19</sup> The next most reliable factors are probably whether the offender accepted and completed assigned prison programming and complied with prison disciplinary rules; but parole-abolition guidelines can and do take these factors into account by means of good-conduct credits.<sup>20</sup>

Admittedly, some kinds of changed circumstances (e.g., ill health or a family caretaking crisis) are truly unforeseeable and cannot be handled with good-conduct formulas. However, such case-specific circumstances (as well the need for broad-scale

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15. Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer’s Guide to Sentencing Reform*, in OCCASIONAL PAPERS 1, 7 (Univ. of Chi. Law Sch., No. 12, 1976).

16. Frase, *Forty Years*, *supra* note 2, at 102–05.

17. *Id.* at 93.

18. *Id.* at 119.

19. *Id.* at 91–93.

20. *Id.* at 119.

releases to avoid prison overcrowding) can be accommodated by the various “second-look” re-sentencing and releasing procedures recommended under the revised Model Penal Code.<sup>21</sup> Granted, these alternative prison-release mechanisms have limited potential to substantially reduce prison populations. But as was noted above, it is not clear that sentencing commissions, if granted across-the-board parole release authority, would actually achieve substantial prison reductions.

Regardless of how a jurisdiction resolves the policy tradeoffs described above, one of the critical needs in any serious decarceration strategy is to reduce the number of offenders who are revoked from parole supervision and sent back to prison for violation of the terms of their release. Such revocations are a major contributor to mass incarceration, and substantially cutting them back was a major component of the California Realignment reforms Zimring points to as a major decarceration success story.<sup>22</sup> Moreover, for the reasons discussed in the next section, a guidelines commission would probably be much better able than a parole board to reduce such revocations, in tandem with steps the commission could take to reduce revocations to prison for violation of probation conditions. The commission could reduce both kinds of revocations by implementing guidelines to structure not only revocation decisions, but also decisions about conditions of release (excessive numbers of conditions increase violation rates).

## 2. Having Commissions Administer Financial Incentives To Encourage Non-Prison Sentences

In his new book, Zimring returns to a critically important insight he made almost thirty years ago<sup>23</sup>: that a major reason why American prison sentences are so frequent and lengthy is that sentencing decisions are made by local judges and prosecutors who need not concern themselves about unnecessary use of imprisonment because prisons are paid for by the state—the “correctional free lunch” problem noted above. Several other writers have subsequently addressed this theme, suggesting that local officials should be given financial incentives to make

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21. MODEL PENAL CODE: SENTENCING §§ 305.6, 3.05.7, 3.05.8 (AM. LAW INST., Proposed Final Draft 2017).

22. ZIMRING, *supra* note 1 (manuscript ch. 5 at 30–31).

23. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211–15 (1991).

greater use of community-based sentences and less use of state prison sentences.<sup>24</sup> Zimring's book likewise proposes a system of financial grants to support community sentencing, combined with charge-backs when a local jurisdiction fails to comply with policies designed to minimize unnecessary prison commitments.<sup>25</sup> The new element in Zimring's book is to have sentencing guidelines commissions administer these grants and charge-backs.<sup>26</sup>

The subsidy/charge-back concept is a very good idea: many local jurisdictions simply lack the resources to increase their use of community-based sentences; moreover, such sentences are less expensive to operate than prison sentences, so the state will save money even if it heavily subsidizes local sentences. And charge-backs are needed to address the correctional free lunch problem. Zimring is probably also right to conclude that, given their previously noted institutional strengths and expertise on sentencing issues, guidelines commissions are the best state agency to administer this system.<sup>27</sup> Such commissions are also well equipped to address the related problem of excessive probation conditions and resulting high rates of revocation to prison for violation of those conditions. As with parole revocation, probation revocations are a major contributor to mass incarceration.<sup>28</sup> Although probation conditions and revocations have mostly been ignored or only lightly regulated in American guidelines systems, a few systems structure such conditions, and require or strongly encourage use of local jail or limited prison terms to sanction probation violations.<sup>29</sup>

To make the subsidy and charge-back system work, the sentencing commission will need to decide how many prison beds each local jurisdiction is allowed to take up. On the surface, the process is straightforward—the commission's guidelines define which offenders should go to prison and for how long. Based on these rules, and on sentencing caseloads, each local jurisdiction

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24. See, e.g., FRASE, *JUST SENTENCING*, *supra* note 2, at 58; TONRY, *supra* note 9, at 192.

25. ZIMRING, *supra* note 1 (manuscript ch. 6 at 28–29).

26. *Id.*

27. *Id.*

28. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1019–21 (2013).

29. See Frase, *Forty Years*, *supra* note 2, at 95–96; Richard S. Frase, *Suspended Sentences and Free-Standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment*, 82 LAW & CONTEMP. PROBS. 51 (2019).

can be allocated enough resources to fund all recommended community-based sentences, and charged for each offender sent to prison in violation of the commission's guidelines.

However, there is a potential problem with the process described above: guidelines recommendations assume a typical case and allow departures based on atypical offense and offender circumstances. Aggravating case facts justify "upward departure" as to prison duration and/or prison commitment, thereby permitting the imposition of a longer prison term than would normally apply and/or immediate commitment to prison of an offender who would normally be recommended for a community-based sentence; mitigating facts justify "downward departure" as to prison duration and/or prison commitment. For ease of administration, the commission would probably have to simply assume that all counties have identical patterns of aggravating and mitigating circumstances, or that counties with higher rates of the former always have compensating higher rates of the latter. But many counties will strongly contest such assumptions, especially when the commission has imposed a charge-back penalty for sending too many offenders to state prison, or for prison terms that are too long.

Alternatively, commissions could attempt to assess which upward departures are valid, and also whether a county charged with making excessive use of prison sentences is failing to recognize valid grounds for mitigating departure. But this would be a time-consuming, staff-intensive process, and to my knowledge only the Minnesota guidelines commission has done this kind of research. Moreover, the Minnesota research only covered a sample of counties in two early guidelines years,<sup>30</sup> and it used what was described as a "conservative" standard designed only to identify cases in which departure was deemed "essential . . . to achieve proportionality rather than to identify [all] cases in which departure might be justifiable."<sup>31</sup> Sentencing proportionality depends on the aggravating and mitigating circumstances of the conviction offense, but all modern punishment systems (including Minnesota's) also recognize crime-control grounds for upward and downward departure, based, for example, on assessments of elevated or reduced offender recidivism risk and amenability to probation. When assessing whether departure is warranted, after the fact and based solely on available written case

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30. MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 19-20 (1984).

31. *Id.* at 53.

file records, it is probably easier to judge grounds based on offense proportionality than grounds based on offender risk factors (which, except for a prior record, are less likely to be consistently included in case files). In short, commissions may simply have to conclusively presume that each county's needs for community-sentence alternatives and state prison beds reflect that county's caseload mix and the corresponding typical-case guidelines sentence recommendations.

### 3. Having Commissions Collect and Publicize County Data on Excessive Prison Sentencing

Zimring proposes to grant Minnesota-style sentencing guidelines commissions “[e]xplicit authority to review patterns of local criminal justice outcomes.”<sup>32</sup> He gives particular emphasis to decisions of local prosecutors that drive up prison commitments and durations.<sup>33</sup> Zimring views prosecutors as “the real power in local sentencing” and notes that, unlike judges’ sentences, prosecutors’ decisions remain largely hidden and escape any form of direct appellate scrutiny.<sup>34</sup> Zimring further argues that “the most significant incentive for prosecutorial compliance [with the commission’s prison-use policies] is the presence of a fiscal incentive for county governments and the credible prospect of its withdrawal.”<sup>35</sup>

In order to maximize the effects of such fiscal incentives on prosecutors’ decisions, Zimring seems to be saying that commissions should study and publish data on the specific prosecutorial decisions and policies, in each local jurisdiction, that contribute to excessive prison sentencing and charge-back penalties for the county. Such data might include the extent to which certain prosecutors, or prosecution offices, exercise their discretion in more punitive ways than most other prosecutors with respect to matters such as whether mandatory penalties are charged and not dismissed in plea bargaining; whether higher-severity offenses are preferred over applicable lower-ranked offenses (i.e., charging of higher-ranked felonies, or of felony rather than misdemeanor crimes); the number of separate counts charged and retained to conviction (which can raise the offender’s future and sometimes current criminal history score, while also enabling consecutive sentencing); the severity of prosecutorial sentence

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32. ZIMRING, *supra* note 1 (manuscript ch. 7 at 28–29).

33. *Id.*

34. *Id.* (manuscript ch. 7 at 31).

35. *Id.* (manuscript ch. 7 at 32).

recommendations; and the extent to which prosecutors invoke available diversion options (e.g., drug courts). Tying such prosecution decisions to sentences that invoke fiscal penalties for the county will help to generate local pressures on chief prosecutors and change evaluation criteria for line prosecutors. In a later chapter, Zimring argues that such pressures are needed in order to counteract the inherent pro-prison biases of American prosecutors—the tendency to measure their “success” and the performance of line prosecutors according to the number and duration of prison sentences imposed.<sup>36</sup>

This proposed third new role for sentencing commissions makes a lot of sense, not only for the reasons Zimring cites but also because it represents a way to finally address a major area of unfinished business in sentencing reform. Guidelines regulate sentencing decisions by judges, and often abolish or constrain prison-release decisions, but do not regulate prosecutorial decisions that strongly influence most of those decisions. Giving local jurisdictions and their prosecutors what amounts to a prison-bed “budget” at least permits guidelines commissions to regulate excessively severe prosecutorial decisions and policies. (There is less need for regulation of prosecutorial leniency given the pro-severity biases Zimring identifies.)

One potential problem is that much of the necessary data will be difficult to obtain—prosecutors tend to keep secret the inner workings of their charging and plea-bargaining decisions. Moreover, it’s not clear that data tying prosecutorial decisions to lost state aid for community sentences will have the desired effect of discouraging unnecessary imprisonment; some prosecutors may welcome such data, as proof of how “tough” they have been in fighting crime.

Some local judges (especially those fearing a re-election challenge) may likewise be relatively immune to criticism that their policies are costing the county state subsidy money. Still, the collection and publication of data showing how decisions by county officials (or some of them) translate into prison impacts may serve to encourage more moderate policies by local officials who recognize that M.I. is a problem and want to do something about it. Another defect of the current system is that the aggregate, state-level effects of each county’s sentencing decisions are largely invisible to the officials making those decisions.

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36. ZIMRING, *supra* note 1 (manuscript ch. 8).

Another limitation on the effectiveness of Zimring's proposal is that it does not address a broader and probably more important prosecution-controlled driver of mass incarceration: the large increase—probably by all prosecutors, not just some of them—in the number of cases filed and resulting in felony conviction. Zimring recognizes this problem and laments the limited national-level data on decisions between the arrest and prison-admissions stages of the criminal process.<sup>37</sup> The only reliable national data on state court felony convictions is for the years 1986 to 2006, and it shows that such convictions almost doubled over this time period: from an estimated 582,764 convictions in 1986 to 1,132,290 in 2006.<sup>38</sup> As will be discussed later, some of the increase in felony cases probably reflects public pressure to take certain criminal behaviors more seriously. But how can a sentencing commission—or any public body—decide, for a given jurisdiction, how many felony convictions is the right number?

### C. SOME BROADER QUESTIONS ABOUT THE ASSIGNMENT OF NEW ROLES TO SENTENCING COMMISSIONS

No sentencing commission has ever had the three new roles Zimring wants to give them. And although many commissions have been directed to avoid prison overcrowding<sup>39</sup> (which in turn tends to produce slower prison growth), only two commissions—in North Carolina and Alabama—appear to have played a major role in facilitating substantial *reductions* in prison rates or populations. In the first four years of sentencing under North Carolina's legally binding guidelines (1995–1999), that state's prison rate declined by twelve percent, whereas the rate had increased by forty-one percent in the four years before guidelines adoption.<sup>40</sup> And in the first four years after 2013, when Alabama converted from advisory to legally binding guidelines for most non-violent crimes, the prison rate declined by twenty-five percent (it had remained essentially unchanged in the four years before

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37. *Id.* (manuscript ch. 2).

38. CARLA K. GASKINS, BUREAU OF JUSTICE STATISTICS, FELONY CASE PROCESSING IN STATE COURTS, 1986, at 2 tbl.1 (1990); ROSENMERKEL ET AL., U.S. DEPT' OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 3 tbl.1 (2010); *see also* JOHN F. PFAFF, LOCKED IN 2 fig.1 (2017).

39. Frase, *Forty Years*, *supra* note 2, at 87–88.

40. E. Ann Carson, *Imprisonment Rate of Sentenced Prisoners Under the Jurisdiction of State or Federal Correctional Authorities*, BUREAU OF JUST. STAT. (Mar. 14, 2018), <https://www.bjs.gov/index.cfm?ty=nps>.

adoption of binding guidelines).<sup>41</sup> In both of these states, prison reductions were deliberately chosen, and were primarily achieved by guidelines sentence recommendations calling for fewer and shorter prison sentences; North Carolina also provided state aid for community corrections.<sup>42</sup>

In addition to the lack of historical precedent, another reason for caution when assigning major new duties to sentencing guidelines commissions is the risk that this may overload these bodies and/or unduly politicize the very valuable work they are already doing (some of which, as further discussed in Part II below, has helped states avoid the worst problems of mass incarceration). Each of the three new duties Zimring proposes will require substantial additional funding, which may not be provided.

As for the politicization risk, each of the proposed new duties will involve the commission in highly contentious matters: granting of “early” release from prison, withdrawal of previously awarded funds to local jurisdictions, and publishing of data showing how some local officials are causing their counties to lose state subsidies for community-based sentencing. Working on such matters will attract media and political attention, and perhaps increase the salience of all of the commission’s work; this in turn could risk undercutting the commission’s relative insulation from electoral politics, which is a major advantage of having a sentencing commission.

## II. EXISTING GUIDELINES COMMISSION ROLES IN CONTROLLING OVER-USE OF IMPRISONMENT

A recent survey of American guidelines systems reported that most of these systems experienced slower prison growth, from the year they implemented guidelines to the “peak” M.I. year, than the all-states average increase in those years.<sup>43</sup> However, this difference was due entirely to slower growth in the guidelines systems that eliminated parole release discretion (parole-retention guidelines systems experienced average growth).

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41. *Id.*; JENNIFER BRONSON & E. ANN CARSON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 (Edrienne Su & Jill Thomas eds., 2019).

42. Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, in 29 *Crime & Justice: A Review of Research* 39, 85–86 (2002); Griffin Edwards et al., *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1 (2019).

43. Frase, *Retrospective*, *supra* note 2, at 110 tbl.2.

Only three of the ten parole-abolition guidelines systems had above-average growth.<sup>44</sup> Moreover, the elevated growth in two of those systems, Kansas and Minnesota, was largely explained by above-national-average increases in the number of felons being sentenced each year, while the above-average growth in federal prison populations was due to certain design features of the federal guidelines, along with few, if any, budgetary constraints (prisons account for a tiny fraction of the massive federal budget).<sup>45</sup>

Of course, correlation does not prove causation. Systems were not randomly assigned to guidelines, non-guidelines, and guidelines with and without parole discretion—it's quite possible that the slower-growing parole-abolition guidelines systems benefitted from other protective features, besides their sentencing structure, that served to limit prison growth. However, there are good reasons to believe that having such guidelines did actually cause most of these systems to experience slower prison growth. Those reasons reflect certain essential features of guidelines sentencing, especially when combined with parole abolition:

- The essence of recommended sentences under guidelines is that they are deemed to be the appropriate sentence for a typical case of each type,<sup>46</sup> not the worst possible case that would justify the statutory maximum penalty. Giving judges a typical-case starting point not only promotes consistency across judges,<sup>47</sup> it also reminds them that most sentences should be and usually are well below the maximum.

- Under guidelines, judges retain not only the power to depart upward (and in unusually aggravated cases, to impose the statutory maximum), but also the power to depart downward.<sup>48</sup> And in most guidelines systems with reported data, downward departures outnumber upward departures (as would be expected, given the ubiquity of plea-bargaining).

- All state guidelines systems base recommended sentences on the crime(s) of which the defendant has been found, or pled, guilty;<sup>49</sup> this means that judges have limited power to enhance sentences based on additional or more serious crimes that

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44. *Id.* at 118.

45. Frase, *Forty Years*, *supra* note 2, at 108–09; Frase, *Retrospective*, *supra* note 2, at 7.

46. Frase, *Forty Years*, *supra* note 2, at 82.

47. *Id.* at 115.

48. *Id.* at 97.

49. *Id.* at 90.

were dismissed or never charged (without guidelines, judges are free to impose such “real-offense” sentence enhancements, and in many federal cases the guidelines encourage judges to do so).

- Under parole-abolition guidelines, offenders serve the entire prison term after credit for good behavior and completion of assigned prison programming. The use of such “real-time” recommended and imposed sentences promotes a more honest approach to punishment decisions (sometimes referred to as “truth in sentencing”).<sup>50</sup> And while it might seem that the loss of parole’s greater mitigation power would lead to higher rates of prison growth, the opposite appears to be the case in practice, at least for systems with sentencing guidelines—as noted above, parole-abolition guidelines systems have slower-than-average prison growth.<sup>51</sup> One reason for that may be a greater sense of responsibility that real-time sentencing imposes on sentencing judges: they cannot impose draconian prison terms, designed to look tough on crime and/or symbolically denounce the offender’s criminal behavior, while relying on the possibility (in practice, often illusory) of substantial mitigation by the parole board.

- Parole-abolition guidelines make the time offenders will serve in prison very predictable, which permits more accurate assessments, at the time prison sentence durations are authorized and imposed, of the full fiscal impacts of severe penalties.<sup>52</sup> Most state guidelines systems now regularly conduct prison bed impact projections of sentence enhancements being proposed under guidelines or criminal laws.

- Abolition of parole gives the commission and the legislature a strong incentive to predict and control prison growth and prison overcrowding from the “front end” of the punishment process (since such problems can no longer be controlled from the back end of the process).

- Accurate prison population projections permit commissions and legislatures to set priorities in the use of expensive prison beds and forces these policymakers to reconcile higher prison costs with other pressing budget needs—more punishment for one group of offenders requires either less punishment for other offenders, cutting existing programs, or raising taxes.<sup>53</sup>

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50. Frase, *Retrospective*, *supra* note 2, at 119.

51. Frase, *Forty Years*, *supra* note 2, at 105–06.

52. *Id.* at 109.

53. *Id.*

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- Another inherent benefit of commission-drafted guidelines, especially combined with parole abolition, is that they help to mitigate what might be called the *temporal* correctional free lunch problem (akin to the *intergovernmental* free lunch Zimring has identified, where local officials consume state resources without paying for them). The temporal free lunch relates to the duration of prison terms, especially very long terms. Such severe penalties give elected state officials the immediate benefit of looking “tough on crime,” with no immediate fiscal cost to taxpayers and no impact on current state budgets—the added cost of a three-strikes life-in-prison law, or even a “mere” five or ten more years in prison on top of the substantial prison terms already imposed, will be paid for many years in the future, when elected officials will have to either raise taxes, lower penalties for other offenders, or cut funding for non-prison programs. Here too, a sentencing commission, because of its comprehensive (covering-all-crimes) focus, more balanced composition, and relative degree of insulation from direct political pressures, is less likely to indulge in such short-term, fiscally irresponsible sentencing policy.

In light of the guidelines characteristics and commission activities described above, it therefore seems quite likely that the use of parole-abolition guidelines actually caused slower prison growth in many guidelines states. On the other hand, it is possible that the same features of guidelines and commissions may not be effective in substantially *reducing* current high levels of imprisonment. What worked “on the way up” to peak M.I. may not work as well on the way down. We now have almost a decade of post-peak data, but the results are inconclusive: in three of the four major sentence-structure groups (guidelines with parole, non-guidelines with parole, non-guidelines without parole) there were approximately equal numbers of states with above- and below-average declines in rates of imprisonment following the national peak year.<sup>54</sup> The fourth group, parole-abolition guidelines, tended to have *below-average* post-peak declines.<sup>55</sup> But that pattern might simply reflect the greater pre-peak success these systems had in restraining prison growth, and the fact that most of

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54. See Adam Gelb & Jacob Denney, *National Prison Rate Continues To Decline Amid Sentencing, Re-Entry Reforms*, PEW CHARITABLE TR. (Jan. 16, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms> [https://perma.cc/T7UU-E38U].

55. *Id.*

those state systems already had below-average prison rates in the peak M.I. year (so they felt less pressure to scale back their prison populations, even when lots of other states started doing so).

### III. POSSIBLE ADDITIONAL ROLES FOR SENTENCING COMMISSIONS

Given the risk of overloading sentencing commissions noted above, it is not clear that they can or should attempt to do more than the functions summarized above, to limit unnecessary prison commitments and long durations. But if we are optimistic that they could handle additional duties, and if we are concerned that existing commission activities are not likely to be effective in substantially *reducing* prison populations, here are some additional duties we might want to give these commissions (some of which Zimring has already endorsed at least in some form).

#### A. MANDATES TO IMPLEMENT ZIMRING'S OFFENSE-SPECIFIC PRISON-DIVERSION PROPOSALS

Sentencing commissions could be directed to develop guidelines and/or make recommendations to the legislature to implement Zimring's proposals to reduce or eliminate prison terms for certain groups of offenders, in particular<sup>56</sup>:

- for most drug offenders, replace prison terms with community treatment;
- for offenders convicted of low-level felonies, or charged with violating conditions of community release, convert short prison terms to even shorter local jail terms;
- in cases of non-stranger assault, replace prison sentences with restorative justice alternatives.

Most guidelines commissions already have a general mandate to study all aspects of sentencing, including alternatives to prison, and make recommendations for needed improvements.<sup>57</sup> Legislatures desiring to roll back M.I. should add specific mandates to promote the kinds of decarceration proposals Zimring proposes.

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56. ZIMRING, *supra* note 1 (manuscript chs. 6–7).

57. See, e.g., MINN. STAT. § 244.09, subd. 6 (2019) (directing the Minnesota commission to analyze sentencing information and conduct ongoing research).

## B. MODIFIED VERSIONS OF ZIMRING'S THREE EXPANDED COMMISSION ROLES

Each of the modified reform options below might prove useful as a fallback proposal if Zimring's full version lacks support, or to lessen the risks of overloading or politicizing sentencing commissions.

*Commission as Parole Board.* In lieu of making all prison-release decisions, commissions could be tasked with hearing appeals from parole board denials of release. In addition, commissions could issue guidelines encouraging judges to reduce sentences for changed circumstances and for older offenders.<sup>58</sup>

*Administration of community corrections subsidies and charge-backs.* A less burdensome and contentious version of this proposal would involve subsidies only. This would probably result in less need, compared with charge-backs, to assess each county's valid rate of upward and downward departures. And the lost incentive of charge-backs for excessive prison sentencing might not be great, provided that subsidy funds can only be spent on community sentences.

*Commission research and published data on local prison-use decisions.* Even without detailed data on charging decisions, prosecutor responsibility can be inferred from high prison rates and durations that are not attributable to high rates of upward guidelines departures by judges. And even without commission-ordered charge-backs, data that identifies which counties are consuming "more than their share" of state prison beds can be reported to the legislature, which may enact charge-backs.

## C. IDENTIFYING STATEWIDE SENTENCING PRACTICES THAT REQUIRE GUIDELINES MODIFICATIONS

Sentencing commissions can and should regularly evaluate prison-use patterns and revise guidelines when prison use deviates from state policy. For example, the Minnesota commission found that increasing proportions of prison commitments were for property crimes, contrary to the commission's policy to use community-based sanctions for most of these offenders.<sup>59</sup> A major cause of this shift was steadily rising criminal history scores

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58. ZIMRING, *supra* note 1 (manuscript ch. 7) (suggesting restructured roles for commissions).

59. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 3-4 (1990).

caused by prosecutor charging policies; the commission reversed this pattern by lowering the weight given to low-level (mostly property) prior felony convictions.<sup>60</sup>

#### D. ADDRESSING COLLATERAL CONSEQUENCES OF CONVICTION

In Chapter 10 of his book Zimring proposes a national commission to study and promote reductions in the huge number of disabilities and other collateral consequences of felony conviction (which often increase the risk of recidivism and thus contribute to M.I.). Sentencing commissions are not given a role in this process, but perhaps they should be.<sup>61</sup> Such a role is particularly appropriate with respect to the disparate impacts of such laws, given that reduction of racial disparities in punishment is a widely endorsed goal of sentencing guidelines reforms.<sup>62</sup> Commissions could document and study the most frequently applicable collateral consequences, and give judges guidance on how to take them into account, and, where appropriate, grant relief from their operation. Such judicial measures would better serve retributive and crime-control punishment goals by promoting sentence proportionality in the broader sense and by seeking to avoid making the offender even more socially disadvantaged and crime-prone.<sup>63</sup>

#### E. PROPOSING A REDUCED SCALE OF IMPRISONMENT ACROSS THE BOARD

The national prison rate could be cut substantially if a number of states (especially larger states or those with per capita

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60. However, history scores later rose again, and the Commission made only minor further changes in criminal history scoring. In general, much more of this type of research and re-calibrating of guidelines rules needs to be done, especially in connection with criminal history which, among its many problems, sends far too many older and non-violent offenders in prison. For further discussion of the problematic aspects of calculating criminal history scores, see generally RICHARD S. FRASE & JULIAN V. ROBERTS, *PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS* 183–206 (2019).

61. See MODEL PENAL CODE: SENTENCING, art. 7 (AM. LAW INST., Proposed Final Draft 2017) (providing model for sentencing commissions to have a role in regulating collateral consequences of criminal convictions); FRASE, *JUST SENTENCING*, *supra* note 2, at 221–34.

62. FRASE, *JUST SENTENCING*, *supra* note 2, at 226.

63. See MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(iv) (AM. LAW INST., Proposed Final Draft 2017) (stating that judges should “avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct”).

prison rates above the national average) were to lower the absolute magnitude of their punishment scales. This is certainly something that a sentencing commission (with legislative support) could promote. As a matter of retributive proportionality and marginal deterrence (discouraging commission of more serious crimes), what matters is the *relative*, not the absolute, severity of punishment across crime types.<sup>64</sup> Moreover, there is substantial research support for the conclusion that the current high rate of sentence severity in most U.S. states is not a cost-effective way to control crime.<sup>65</sup> A sentencing commission can point all this out and propose a new scale of punishment for the state that is relatively proportional across crimes but much less severe, much less expensive, and much less damaging to offenders and their families. The commission can also point out that redeploying a large portion of the saved prison costs to community supervision, treatment, and training programs would be much more effective in controlling crime. In other words, such a commission should ask its state's citizens and elected officials: Why are we wasting so much taxpayer money on prison cells that many other states have shown are not necessary for ensuring deserved punishment and that are not the most cost-effective way to control crime?

### CONCLUSION

Sentencing guidelines commissions like those operating in Minnesota and several other states have already helped to control overuse of imprisonment, especially when such guidelines are combined with abolition of parole-release discretion. Given the known strengths of such guidelines and commissions, it is likely that they can help states roll back Mass Incarceration in the ways Zimring proposes and/or in other ways. It is vital to ensure, however, that any added duties do not interfere with the important work these commissions are already doing.

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64. See, e.g., ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS OR DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 39–40 (1985) (noting the special retributive importance of relative (“ordinal”) proportionality between offense and penalty severity); see also ANDREW VON HIRSCH ET AL., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) (discussing marginal deterrence).

65. See FRASE & ROBERTS, *supra* note 60, at 73–83 (discussing the limited crime-preventative benefits of increased sentence severity); NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 130–55 (Jeremy Travis et al. eds., 2014) (same).

Rolling back M.I. will not be easy; indeed, Zimring doubts that the current American prison rate (440 inmates per 100,000 residents, as of 2017) can be reduced to less than three times the stable rate that prevailed from 1925 to 1975, that is, to less than 330 per 100,000.<sup>66</sup> It is very hard to predict the effects of proposed reforms designed to address a complex problem like M.I. or even to identify how we got M.I. in the first place. The potential causes of this phenomenon are many; and even if we think we know “how we got [up] here”—to persistently very high rates of incarceration—that doesn’t necessarily tell us how to get down. The best ways to roll back M.I. may not all mirror the causes of M.I., and the protective factors that helped some jurisdictions avoid the worst M.I. effects may not all be equally effective in helping those or other jurisdictions cut back.

Finally, although there may be widespread agreement that current prison rates are too high, there is probably much less agreement about *how much lower they should be*—how much imprisonment is “necessary,” and how can specific prison-rate-reduction targets be defined and defended? These are not just theoretical questions. Very ambitious M.I. rollback proposals (e.g., cutting the national prison rate in half) are likely to seem so unrealistic to many observers as to be dismissed out of hand; more moderate (but still substantial) rollbacks in prison rates may actually be achievable. And in that case, Zimring’s backup proposals—for improved prison conditions and reduced collateral consequences of conviction<sup>67</sup>—become all the more important.

On the one hand, it seems very unlikely that Americans are four times more culpable today than they were fifty years ago, or four times more dangerous. On the other hand, many people believe that some criminal behaviors were not treated with sufficient seriousness until the late twentieth century. Those behaviors include: domestic violence, acquaintance rape, repeat drunk driving, sexual abuse of children, child pornography, crimes committed against poor and/or non-white victims, and gun violence. Zimring argues that most of these crimes do not justify substantially increased prison beds.<sup>68</sup> But there is also another new factor: because criminal record systems have become more comprehensive and more accessible,<sup>69</sup> sentencing courts today have

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66. ZIMRING, *supra* note 1 (manuscript at preface); BRONSON & CARSON, *supra* note 41, at 1.

67. ZIMRING, *supra* note 1 (manuscript ch. 10).

68. *Id.* (manuscript ch. 7 at 21).

69. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 13–31 (2015).

much more information about offenders' true criminal pasts and likely future propensities.

So, twenty-first century American incarceration rates probably need to be higher than the average mid-twentieth century nationwide rate of 110 prison inmates per 100,000 residents—but *how much* higher? Zimring doesn't specify an optimum or target prison rate, in part because he suspects that very substantial reductions are unlikely. Another reason is that he believes incarceration rate measures should also count local jail inmates (a measure that raises U.S. incarceration rates by at least fifty percent);<sup>70</sup> since jails also hold many persons awaiting trial, reducing jail rates is an even more complex task. Moreover, Zimring proposes to reduce prison populations by shifting many inmates to local jails, and that is a very good idea for the reasons Zimring cites—it will shorten custody-sentence lengths and keep offenders closer to their families and community resources. I would also note that heavy use of jail sentences for felons is a major reason why Minnesota has maintained one of the lowest incarceration rates of any state—even when jail inmates are counted.<sup>71</sup>

With respect to prison sentences, however, I think it is useful to specify all-states, federal, and state-specific targets for scaling back M.I. The all-states target prison rate should be 300 per 100,000—that was the rate in the early 1990s, when crime rates peaked and began their steady decline,<sup>72</sup> and it would represent a reduction of about one-quarter from the current all-states rate of 390. The federal prison rate should decline even more, since it rose much faster than the all-states rate in the pre-peak-M.I. period;<sup>73</sup> cutting the federal prison rate to 25—what it was in the early 1990s—would represent a decline of about one half. For individual states the target should likewise be a one-quarter reduction from their current rates. That would reduce each state's rate to a level at or below the current all-states rate

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70. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 2 tbl.1 (2018); ZIMRING, *supra* note 1 (manuscript ch. 5 at 21–22).

71. See Richard S. Frase, *Sentencing Policies and Practices in Minnesota*, OXFORD HANDBOOKS ONLINE (2016) (contrasting custody-sentence rates for Minnesota—26% prison and 66% jail—with rates for all states—41% prison and 28% jail).

72. BRONSON & CARSON, *supra* note 41, at 1 fig.1; ZIMRING, *supra* note 1 (manuscript ch. 7 at 12–13); Carson, *supra* note 40.

73. Frase, *Forty Years*, *supra* note 2, at 10.

(390), except for the eight highest-rate states (Louisiana, Oklahoma, Mississippi, Arkansas, Arizona, Texas, Missouri, and Kentucky). Those states (which have current prison rates ranging from 527 to 719) should make more than one-quarter reductions, to at least reach the current all-states rate of 390.

These are ambitious goals, but they are feasible and defensible. With legislative support, sentencing guidelines commissions can help to achieve these goals.