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# The Institutional Design of Punishment

Aaron J. Rappaport

*UC Hastings College of the Law*, [rappapor@uchastings.edu](mailto:rappapor@uchastings.edu)

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# THE INSTITUTIONAL DESIGN OF PUNISHMENT

Aaron Rappaport\*

*For the past 40 years, policymakers have engaged in a debate over which institution should wield the principal power over punishment. Should courts and parole boards have the dominant role at sentencing, or should that power be left to legislatures and sentencing commissions? These debates are typically couched in policy terms, yet they also raise deeply philosophical questions. Among the most notable is a normative one: what is the morally justified sentencing system?*

*Perhaps surprisingly, criminal theorists have almost uniformly ignored this normative question, and that neglect has degraded the quality of the ongoing institutional debates. This Paper seeks to address that shortcoming by exploring the moral ramifications of design choices in the sentencing field. In particular, this Paper identifies the institutional structure best suited for promoting utilitarianism, a widely accepted moral theory of punishment.*

*Drawing insights from cognitive science and institutional analysis, this Paper concludes that a properly structured sentencing commission is the institution best able to satisfy the moral theory's demands. Beyond that policy prescription, this Paper has a broader set of goals: to start a conversation about the link between moral theory and institutional design, and to encourage policymakers to more fully explore the premises of their own institutional choices in the criminal justice field.*

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\* Professor of Law, University of California, Hastings College of the Law.

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## INTRODUCTION

Over the past 40 years, the United States has experienced an extraordinary transformation in the institutional design of its punishment systems. Many states, along with the federal government, have shifted from indeterminate sentencing models—in which courts and parole boards wield principal authority—to determinate systems—in which legislators and sentencing commissions have principal power.<sup>1</sup> This shift has been called one of the most important changes in federal judging in the last half-century or more.<sup>2</sup> It has also been cited as a key factor in the dramatic increase in incarceration since the early 1980s.<sup>3</sup>

The institutional change has not occurred without controversy. From the start, critics have questioned whether legislatures and sentencing commissions are

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1. See generally Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 354–81 (2016) (discussing institutional shift); Samuel Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 759–65 (1989) (same). This general transformation is touched on further in Section I.B, *infra*.

2. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2 (“[T]he Guidelines system is probably the most significant development in ‘judging’ in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure.”).

3. See, e.g., STEVEN RAPHAEL & MICHAEL STOLL, *WHY ARE SO MANY AMERICANS IN PRISON* 97–113 (2013) (arguing that mass incarceration is due to tough-on-crime policies, including determinate sentencing).

appropriate punishment institutions and whether the structural changes will lead to a more fair and effective criminal justice system.<sup>4</sup> That debate continues to this day. In the last few years alone, several jurisdictions have considered ways to reverse the pendulum's course and return sentencing power to courts and parole boards.<sup>5</sup> Pushing back, influential organizations—such as the American Law Institute—have argued for a renewed commitment to elements of the determinate sentencing model.<sup>6</sup>

The policy debate, in short, has been vigorous and remains so. Yet, notably lacking from the discussion has been any effort to examine the institutional design of punishment from a theoretical point of view; that is, to explore the underlying *morality* of different institutional schemes.<sup>7</sup> Criminal theorists, of course, have not ignored questions of moral justification; they often seem obsessed with such questions.<sup>8</sup> But much of that theoretical work has focused on foundational moral questions, such as the endless debate about which moral theory—utilitarianism, retribution, or some hybrid of the two—should govern sentencing decisions. To the extent that theorists have taken a more “applied” approach, their focus has been on specific sanctions—e.g., is the death penalty justified?—on criminal doctrine—e.g., what justifies the rules of self-defense?—and on certain crimes—e.g., are current penalties for felony murder justified?<sup>9</sup> Rarely do theorists ask the question: what justifies choosing one institutional structure of punishment over another?

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4. See, e.g., LOIS FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994) (sharply criticizing movement toward mandatory penalties); Terence Dunworth & Charles Weiselberg, *Felony Cases and The Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 101 (1992) (federal guidelines “have been the focus of a fury of criticism from judges, lawyers, and scholars”).

5. One notable example is California, which has enacted several reforms in recent years that give judges more authority to release major categories of offenders from prison. See, e.g., Assemb. B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011). In 2016, the State also increased the authority of parole boards to release nonviolent offenders before they serve their full terms. Proposition 57, the Public Safety and Rehabilitation Act of 2016. See also Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 960 (2013) (discussing analogous changes to federal system).

6. In its recently enacted proposal for a model code of sentencing, the American Law Institute endorsed the use of sentencing commissions—a pillar of the determinate sentencing model. See MODEL PENAL CODE: SENTENCING (AM. LAW INST., Proposed Final Draft 2017).

7. This neglect is consistent with the general lack of attention given to institutional issues in normative philosophy. See JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 3–4 (2016) (bemoaning the dearth of careful theoretical work about government institutions).

8. See generally Antony Duff, *Legal Punishment*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/legal-punishment/> (last visited July 21, 2018) (“The central question asked by philosophers of punishment is: What can justify punishment?”).

9. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 6–8 (2009) (exploring ramifications of retribution for criminal doctrines, such as omission liability and inchoate crimes); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 967 (2008) (discussing moral justifications for felony-murder doctrine); Carol Steiker, *No, Capital Punishment Is Not*

This neglect is problematic in the sentencing field. Institutional choices have profound implications for the punitiveness of the criminal justice system. Different sentencing institutions have different biases, leading to different sentencing outcomes.<sup>10</sup> It simply *matters* whether punishment decisions are controlled by judges, juries, legislatures, commissions, or parole boards. Careful empirical work can help identify these institutional biases, but philosophical analysis is needed to illuminate the deeper moral implications of the design choices.

Even more importantly, this is an area where casual intuition is a poor guide for decision-making. Criminal justice policy evokes strong emotions, which make it hard to think through policy questions in a reasoned and principled manner. Deeper assumptions about the moral and political effects of institutional design can be obscured by emotions—by the fear of crime or by worries about government overreach. This is not to say that concerns about public safety or individual liberty should be ignored, only that assessing their significance and determining how to balance these factors requires hard philosophical reflection.

In short, the absence of systematic work by moral theorists degrades the quality of ongoing policy debates. It increases the risk that policies will be adopted with unintended consequences or uncertain justifications. To help redress this problem, this Paper offers what I believe is the first sustained attempt to explore the relationship between moral theory and institutional design in the punishment field. It yields not only a specific policy prescription but also a general framework for assessing the moral ramifications of institutional-design choices.

The effort is admittedly preliminary and partial, primarily because of two daunting impediments facing any theoretical effort. The first is the lack of agreement over the appropriate moral theory governing punishment decisions. Two moral theories dominate the field—utilitarianism and retribution—along with hybrid versions that meld the two.<sup>11</sup> The choice among these moral theories has proved endlessly controversial, and no accepted methodology exists to resolve the dispute.

The controversy over moral premises need not be an insuperable obstacle, however. Rather than trying to identify the “correct” moral principle, an alternative approach would be to assess the institutional ramifications of *each moral theory in turn*. The result would be a menu of design options, each associated with a different moral principle. This approach would confront retributivists and utilitarians, in turn, with the institutional ramifications of their favored moral outlook. In adopting this approach, the current Paper takes the first step, exploring the institutional

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*Morally Required: Deterrence, Deontology, and the Death Penalty*,” 58 STAN. L. REV. 751, 752 (2005) (criticizing moral justifications for the death penalty).

The publication of the Oxford Handbook of Philosophy of Criminal Law offers an illustration of this phenomenon. See THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, at ix–x (John Deigh & David Dolinko eds. 2011). That survey of criminal philosophy touches on a range of topics, including theoretical topics relating to types of crimes, defenses, doctrinal elements, and sanctions. See *id.* None of the 17 chapters, however, offers a sustained treatment of the moral justifications for the institutional structure of the criminal justice system. See *id.*

10. Several such institutional features are discussed in Part III, *infra*.

11. See generally Duff, *supra* note 8.

ramifications of one dominant principle of punishment—utilitarianism. The hope is that the effort will inspire others to examine the institutional implications of other moral theories in the punishment field.

A second obstacle cannot be so easily evaded. To determine which institution is most likely to promote utilitarian goals, a theorist must make a range of assumptions about how different sentencing institutions operate in practice. Reliable empirical support for these assumptions will not always exist, so at times, anecdote and judgment must be relied upon. This means that the assumptions are often tentative and controversial. The contingent nature of the claims may discourage theorists from even attempting to develop institutional arguments.

This would be a mistake. Any debate about institutional design in the punishment field—including policy debates today—inevitably turns on just these kinds of empirical assumptions. Typically, these assumptions are hidden from view, impeding open debate and obscuring areas in need of further study. We can improve policy deliberation and debate by being explicit about these assumptions and their relationships to preferred moral goals. Thus, the bulk of this Paper is an attempt to articulate and defend the core empirical assumptions driving the ultimate policy prescription. Though some of these claims will be controversial, I believe that they are, at the very least, plausible in nature and will offer a productive starting point for further discussion and research.

The ultimate analysis, in short, draws a link between utilitarianism and institutional design choices in the sentencing field. In doing so, it highlights which institutional structures have the best chance of promoting utilitarian goals. The analysis ultimately suggests that none of the traditional sentencing institutions—the legislature, jury, judiciary, parole board, or sentencing commission—possess the full range of skills needed to effectively carry out the utilitarian calculus. Nonetheless, the study indicates that one option is far superior to the rest: the sentencing commission model. The theoretical analysis thus yields a concrete policy prescription.

This is a significant and perhaps surprising result. It represents the first theoretical justification for sentencing commissions in the criminal justice field.<sup>12</sup> Though numerous commentators have supported the commission approach—including, more recently, the American Law Institute—virtually all have relied on a hodgepodge of policy arguments. None have presented a cohesive normative

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12. Franklin Zimring and his co-authors have commented on the growing popularity of sentencing commissions, despite their lack of a clearly articulated grounding. As they write,

What makes this particularly interesting is the lack of any justifying ideology to support the legitimacy of sentencing commissions. Parole boards were supported by an ideology of rehabilitation and prediction of dangerousness, but the sentencing commission is a nakedly pragmatic institution with an expertise that is not linked to any larger theory of criminal punishment.

FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY* 213 (2001) (citation omitted).

justification, rooted in moral principle, for the institutional structure. This analysis, in other words, directly contributes to the ongoing institutional debate in the sentencing field.

### I. PRELIMINARY CONSIDERATIONS

For the utilitarian, institutions are instrumental: they are valued to the extent that they promote the moral goal of maximizing utility. Theorists, of course, adopt different interpretations of “utility.” Some view it as a subjective experience—e.g., the experience of happiness—others view it as a more objective idea of well-being—e.g., the actualization of inherent talents.<sup>13</sup> In this Paper, I will adopt the former, more traditional approach, which is often called “hedonistic” utilitarianism.<sup>14</sup>

Equating utility with happiness clarifies the goal of any sentencing decision: a morally justified sentence is one in which the amount of happiness in society is maximized over the long run. This is a future-oriented assessment.<sup>15</sup> It requires the decision-maker to evaluate the future consequences of any punishment decision for human happiness. In this sense, utilitarianism is typically classified as a type of “consequentialist” moral theory.<sup>16</sup>

Invariably, a punishment decision will both increase the happiness of some and decrease the happiness of others. For example, punishment may ultimately reduce the amount of crime in a community (and thereby increase future happiness). At the same time, it may cause certain individuals to suffer—most obviously, the offender himself. Thus, in assessing which punishment is justified, the sentencing institution must weigh the costs and benefits of various punishment options.<sup>17</sup>

Ultimately, a justified sentence is one in which the benefits of the punishment outweigh the costs; the most justified sentence is the one that does this to the greatest degree. Making this assessment is extremely challenging because punishment decisions have such wide-ranging and hard-to-measure effects on

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13. See ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 13 (1995) (discussing different interpretations of “utility”).

14. Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/consequentialism/> (last visited July 17, 2018) (“Classic utilitarians held hedonistic act consequentialism.”).

15. Utilitarianism might be contrasted with backward-looking theories, such as retribution. The latter is concerned with the inherent culpability of an individual for *past* acts. For the utilitarian, in contrast, issues of moral culpability are not directly relevant.

16. See Sinnott-Armstrong, *supra* note 14 (“The paradigm case of consequentialism is utilitarianism.”).

17. The focus of this Paper is on identifying the sentencing institution best able to identify the optimal punishment within a utilitarian framework. However, it is important to recognize that, from a broader utilitarian perspective, punishment decisions are only one of several levers government has for increasing social welfare. For example, attempts to address the root causes of crime—through improved education, job training, and other programs—are alternative mechanisms for dealing with criminal activity, and their costs and benefits would ideally be considered as well. Ultimately, the goal should be to identify the best option in any given situation—the option with the greatest net benefit.

society and its citizens. Nonetheless, the overarching goal is clear in principle, if not always in practice: the decision-maker should maximize net benefits, measured in terms of subjective feelings of happiness.

#### *A. Two Principles of Institutional Design*

With the moral goal established, the institutional challenge follows naturally. The designer must identify a sentencing structure that is best able to carry out the utilitarian cost-benefit analysis. Such an institution must, at a minimum, possess two essential qualities. First, it must be *committed* to promoting utilitarian goals. Second, it must be *capable* of carrying out the relevant analysis consistently and competently over time.<sup>18</sup>

Commitment to the utilitarian enterprise is a critical requirement. An institution that fails to adopt the moral principle of utilitarianism, and thus embraces theories such as retribution, will be utility-maximizing only by accident. Thus, the institutional designer must consider whether an entity's structure might influence its choice of moral goals. This idea—that institutional structure can affect goal selection—might seem surprising. But as we shall see, recent research in moral psychology identifies structural features that tend to encourage the adoption of a utilitarian orientation.<sup>19</sup>

Commitment to utilitarian goals, of course, is not alone sufficient. An institution will attain those goals only if it is also *capable* of carrying out the cost-benefit analysis consistently and accurately over time. The institutional designer, thus, must also consider the kinds of institutional competences necessary to effectively carry out the analysis. As later Sections explain, a fully competent institution will need a diversity of skills, including technical expertise, a degree of impartiality, and an expansive sense of empathy.<sup>20</sup>

This is an unusual set of competences to find in any institution, and one might doubt that a sentencing body could possess all sufficiently. Those doubts cannot be easily dismissed, nor should they be. In the real world, as Neil Komesar has repeatedly noted, every institution is imperfect to one degree or another.<sup>21</sup> Thus, perfection is not, and cannot be, the standard for making institutional choices. Rather, the goal must be to identify the best institution out of a range of imperfect options—that is, to choose the “least imperfect” alternative.<sup>22</sup>

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18. To keep the analysis manageable, this Paper does not discuss several other factors that might also be relevant in a comprehensive utilitarian analysis. For example, the relevance of disparities at sentencing are not addressed, even though these kinds of inequalities may have utilitarian implications.

19. See *infra* Part II.

20. See *infra* Part III.

21. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 5 (1997).

22. Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350, 1350 (1981).

### *B. Five Traditional Institutions of Punishment*

Ideally, the search for the least imperfect sentencing system would survey all possible structures. In practice, this would be impractical. Thus, to keep the discussion manageable, this Paper limits its focus to five traditional sentencing institutions: the jury, judiciary, parole board, legislature, and sentencing commission.<sup>23</sup>

Over the past century, these five institutions have all been employed in criminal sentencing to some degree. Jury sentencing is probably the least commonly used of the group. At its heyday in the early part of the 20th century, roughly a dozen states relied on juries to sentence ordinary criminals.<sup>24</sup> Today, jury sentencing is reserved almost exclusively for death penalty hearings.<sup>25</sup>

Courts and parole boards, by contrast, have played a central role in sentencing during much of the last century. Those two institutions formed the core elements of the “indeterminate sentencing system.”<sup>26</sup> By the 1960s, this was the

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23. A number of other institutions may also have a significant effect on punishment. Perhaps the most notable is the prosecution, which can influence sentences through charging and related decisions. Nonetheless, the prosecutor’s office is not typically viewed as being a neutral sentencing institution, and consideration of its role adds significant complexities to the analysis. Thus, for this preliminary effort, the role of prosecutors is set aside. See AMERICAN LAW INSTITUTE, REPORT OF APRIL 11, 2003, MODEL PENAL CODE: SENTENCING 9–10 (2003) [hereinafter ALI 2003] (describing reasons for deferring consideration of prosecutorial discretion in the ALI’s recent sentencing proposals).

24. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 319 (2003).

25. According to one estimate, only six states—Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia—rely on jury sentencing in noncapital cases to any degree. *Id.* at 314 n.16. Even among this group, the jury’s role varies. For example, in Virginia, jury sentencing is only advisory; the judge makes the final decision on sentencing matters. *Id.* at 355. In Arkansas, the jury sets the maximum sentence, but the judge can impose a more lenient sentence in the interests of justice. *Id.* In Kentucky, a defendant can waive jury sentencing, but only with the consent of the prosecutor. *Id.* at 376–77. In Oklahoma, the judge must consent to such a waiver. *Id.* at 377. Finally,

[i]n all states, jury sentencing occurs in only a small percent of the docketed cases, because over ninety percent of cases are plea bargained; and even where the defendant has the option of being sentenced by a jury after a guilty plea, this choice is, rationally, almost never exercised in practice.

*Id.* at 355.

26. Although the term has been used in varied ways, “indeterminate sentencing” commonly “include[s] very broad legislative ranges of permissible punishments for most offenses, unguided and unreviewable trial-court discretion to pronounce sentences within permitted statutory ranges, and appreciable powers (also unguided and unreviewable) vested in parole and corrections officials to determine prison-release dates.” ALI 2003, *supra* note 23, at 19 n.23; see also DAN STEMEN & ANDRE RENGIFO, OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975-2002, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 9 (2016) (similar).

near-universal approach to punishment in the United States, and it remains the system employed in many jurisdictions today.<sup>27</sup>

Starting in the late 1970s, two other institutions—legislatures and sentencing commissions—emerged as increasingly dominant players. Legislatures have always played some role at sentencing, but they began to intervene more forcefully in the last decades of the 20th century. Among other things, legislatures enacted a slew of mandatory-minimum laws, which significantly circumscribed judicial and parole-board discretion at sentencing.<sup>28</sup> In some jurisdictions, legislatures abolished discretionary parole, ensuring that offenders could not be released before their full terms were completed.<sup>29</sup> Legislatures also established sentencing commissions, which enacted rules to further constrain judicial discretion at sentencing.<sup>30</sup> The result has been a more “determinate” system of punishment, in which penalties are set out in rules and laws enacted by legislatures and commissions.

The modern movement toward determinate sentencing has hardly settled the debate over the institutional structure of sentencing. All five of the sentencing candidates have their vocal supporters. Sentencing commissions continue to receive strong praise from a wide range of individuals and groups, with some urging the further expansion of this method of sentencing.<sup>31</sup> Legislative sentencing has its

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27. See ALISON LAWRENCE, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 4–5 (2015) (eighteen states have indeterminate sentencing schemes lacking any kind of structured sentencing component).

28. For a historical view of federal mandatory minimums, see U.S. SENTENCING COMMISSION, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, Ch. 2. In a few states, legislatures went further, creating detailed sentencing rules. In California, for example, the legislature enacted basic sentencing rules for run-of-the-mill crimes. See Sheldon L. Messinger & Philip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, 1 DETERMINATE SENT'G: REFORM OR REGRESSION 13, 29 (1978).

29. This is true of the federal system, for example, which abolished parole by enacting the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

30. ALI 2003, *supra* note 23, at 50–51 (“Guideline systems vary widely from one another, but nearly all accept the starting premise that there should be a permanent policymaking body at the jurisdiction-wide level, usually called a sentencing commission, with dual responsibilities of research and prescription.”). Roughly two dozen states and the federal government have adopted this method of sentencing. See MODEL PENAL CODE § 6A.01 cmt. a (AM. LAW INST., Tentative Draft #1 2007) [hereinafter ALI 2007].

31. In recent decades, the ABA and the ALI have both concluded that sentencing commissions deserve broader application. See ALI 2003, *supra* note 23, at 47 (“After five years of study, the commission-guidelines model became the centerpiece of the American Bar Association’s recommendations in its revised Criminal Justice Standards for Sentencing, published in 1994.”); STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-6.1 (AM. BAR ASS’N 1975); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, SENTENCING (3d ed. 1994); BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 127 (1996) (concluding “the most promising structured sentencing model” to address problems of disparity, incarceration rates, and prison crowding, was “sentencing guidelines developed by sentencing commissions”).

defenders too, particularly among law-and-order supporters of mandatory minimums.<sup>32</sup> Meanwhile, a growing number of commentators have urged the adoption of the elements of indeterminate sentencing, arguing for an expansion of court and parole-board power.<sup>33</sup> Even jury sentencing has its fans, though admittedly these remain in the distinct minority.<sup>34</sup> The question thus remains: which institution—or group of institutions—is best able to advance utilitarian goals?

### C. Three Complexities

Even limiting the focus to these five institutions, the analysis can quickly become unwieldy. The principal reason is that these institutions can be structured and combined in various ways, creating numerous complexities in the analysis.

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Sentencing commissions have their detractors, as well, and criticism has been heaped, in particular, on the federal sentencing commission, which is widely seen as an excessively rigid and inflexible system that diverts far too much power from judges. *See, e.g.*, Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> (discussing view that judges, not sentencing commissions, should exercise sentencing discretion); Dan Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1684–85 (1992) (offering wide-ranging critique of federal guideline system).

32. *See, e.g.*, Maura Ewing, *The Federal Prosecutors Backing Jeff Sessions on Mandatory Minimums*, ATLANTIC (May 22, 2017), <https://www.theatlantic.com/politics/archive/2017/05/mandatory-minimums-sessions-naausa-sentencing/527619/>; Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 69 (2009) (“No one who has lived in the United States, however, can be unaware that conservative politicians for 3 decades consistently promoted passage of more and harsher mandatory sentence laws.”).

33. *See, e.g.*, Noah Atchison, *Bipartisan Efforts on Criminal Justice Reform Continue*, BRENNAN CTR. FOR JUST. (June 27, 2017), <https://www.brennancenter.org/blog/bipartisan-efforts-criminal-justice-reform-continue> (discussing legislative efforts to expand judicial discretion); SAMANTHA HARVELL ET AL., REFORMING SENTENCING AND CORRECTIONS POLICY (2016) (urging reforms to expand judicial discretion at sentencing and increase opportunities for parole); *cf.* Inimai Chettiar & Udi Ofer, *The ‘Tough on Crime’ Wave is Finally Cresting*, DAILY BEAST (Jan. 13, 2018), <https://www.thedailybeast.com/the-tough-on-crime-wave-is-finally-cresting>. These efforts have already led to significant reforms, including changes to mandatory-sentencing statutes in many states. *See, e.g.*, THE SENTENCING PROJECT, STATE ADVANCES IN CRIMINAL JUSTICE REFORM, 2016, at 1–4 (2017) (summarizing changes); FAMILIES AGAINST MANDATORY MINIMUMS, RECENT STATE-LEVEL REFORMS TO MANDATORY MINIMUMS LAWS (2017) (same).

34. Advocates have argued that jury sentencing has been unfairly neglected. *See* Iontcheva, *supra* note 24, at 35; Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999). The central argument for an expanded jury role relies heavily on claims about the importance of promoting democratic participation in the criminal justice field. *See* Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 888 (2004) (noting that, for its academic supporters, “jury sentencing could perform a very special function—the jury’s sentence could reflect the community’s view of punishment, a view that may be different from that of a professional judge”).

Three complexities are particularly notable, and each requires a strategy to keep the analysis focused.

The first complexity arises because individual institutions can be combined in various ways within a single sentencing system. Sentencing, in other words, almost always involves a system of shared powers.<sup>35</sup> The possible permutations are endless and far beyond the scope of a single paper to investigate. To address this complexity, this analysis starts by evaluating each sentencing institution independently, adopting the assumption that the institution is the sole or dominant sentencing power in a jurisdiction. This means, for example, that when analyzing judicial sentencing, we will assume that judges have the sole and unfettered discretion to determine the appropriate sentence, without any control by the legislature or any other institution. This is plainly counterfactual, but the simplifying assumption allows us to carefully examine the specific biases and competences of the individual institution. In a later Section, this assumption is suspended, and we briefly consider whether a shared system of powers would be more just and effective.

A second complexity arises because sentencing institutions themselves can be structured in a range of ways, each with distinct properties and biases. Again, surveying the range of options is not feasible. Instead, this analysis focuses on a single exemplar of the institution. In specifying the relevant features of that model, we will follow a principle of charitable interpretation. That is to say, we will assume that an institution is designed not only in a plausible way, but also in a way that gives it the best chance of promoting utilitarian goals. Thus, for example, in discussing the federal judiciary, our attention will be focused on life-tenured judges, rather than elected ones, because (as we shall discuss) the former has a far better chance of promoting utilitarian goals.

A third and final complexity concerns the sentencing decision itself. Roughly speaking, one can think of the sentencing decision as encompassing two key parts: the first is the fact-finding phase, which involves identifying the specific details of the offense and offender; the second is the valuation phase, which focuses on identifying the appropriate sentence in light of the specific facts of the case. Different skills may be relevant for each operation, which at least suggests the possibility that different institutions might be appropriate for each. For purposes of this Paper, however, we will focus solely on the “valuation” part of the decision. We will assume, in other words, that the facts are given, and what remains is for the sentencing institution to determine what sentence is justified.<sup>36</sup> No recommendation is offered in this Paper about the institution best able to find the relevant facts of the case.

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35. Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PENN. L. REV. 733, 735 (1980) (“Typically, sentencing power is shared by prosecutors, judges, and a parole board or similar administrative agency.”). See generally Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL. 389 (1998) (discussing how different sentencing systems allocate discretion).

36. Of course, a fact-finder can influence the ultimate sentence by highlighting or suppressing certain facts (as can a prosecutor). For purposes of this Paper, this complication is ignored.

## II. THE MORAL ORIENTATION OF INSTITUTIONS

In assessing the merits of the five traditional sentencing institutions, the first question is perhaps the least obvious. The institutional designer must ask: what kind of institution is most likely to be *committed* to promoting utilitarian goals? This might seem like an odd question to ask because it is not immediately clear how institutional structure is relevant to an entity's objectives. One might think, for example, that the goals of an institution simply depend on the objectives of the individuals elected or appointed to run the organization. If those individuals are utilitarians, the institution will pursue utilitarian goals; if the individuals have other goals (say, retribution), those other goals will be pursued.<sup>37</sup>

The reality, however, is more complex. Most individuals do not come to their institutional roles embracing moral theories that they apply consistently and rigorously in their decision-making. They do not, in other words, think like philosophers. Instead, individual actors are capable of adopting various moral positions: they might focus on an offender's blameworthiness at one moment (a retributive consideration) and then emphasize public-safety concerns at another (usually a utilitarian factor). Part of what affects individuals' moral orientations is the structure of their institutional environments. The challenge for the organizational designer, then, is to identify an institutional structure that will increase the likelihood that consequentialist factors will predominate and decrease the likelihood that nonconsequentialist considerations will come to the fore.<sup>38</sup>

### A. Utilitarianism & Moral Psychology

To identify the factors that encourage a utilitarian orientation, the institutional designer can find some guidance in recent research in moral psychology. Indeed, the past decade has seen an enormous surge in empirical work examining how individuals make moral decisions.<sup>39</sup> Although the field is still new and the findings tentative, the research has direct relevance to the field of institutional analysis.

#### 1. Moral Dilemmas

Much of the new research has focused on how human beings make moral judgments—specifically why the very same individuals sometimes make judgments aligned with consequentialist theories (like utilitarianism) and at other times reach

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37. See WALDRON, *supra* note 7, at 10.

38. To avoid misunderstanding, the claim is not that institutional design alone determines how moral goals are chosen. Other factors might be relevant, including the background and beliefs of the individual decision-makers. But institutional design is a notable factor nonetheless. As Jeremy Waldron has written, “institutional forms can be designed so as to outwit and outflank what Hume called ‘the casual humors and characters of particular men.’” *Id.* at 1. Moreover, it is a factor that can be shaped by policymakers when the sentencing system is established.

39. Janice Nadler & Pam Mueller, *Social Psychology and the Law*, in 1 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 124, 138 (2017) (“Moral psychology is a burgeoning subfield within social psychology, and recent findings inform a wide range of legal processes.”).

decisions more consistent with nonconsequentialist (or “deontological”) theories.<sup>40</sup> A common research strategy has been to pose moral dilemmas to individuals and study how the participants react.<sup>41</sup>

One of the most famous moral dilemmas is the well-known “trolley dilemma.” As Joshua Greene describes it:

A runaway trolley is headed for five people who will be killed if it proceeds on its present course. The only way to save these people is to hit a switch that will turn the trolley onto a side track, where it will run over and kill one person instead of five. Is it okay to turn the trolley in order to save five people at the expense of one?<sup>42</sup>

The consequentialist’s approach is straightforward: pull the switch, because it is better to save five lives than only one. In contrast, the deontologist might reach a different result: rather than focusing on the consequences of an act, the deontologist looks at the inherent goodness or badness of the act itself. That might lead the deontologist to refuse to pull the switch, because turning the trolley would lead to the killing of an innocent person. The moral principle—don’t kill the innocent—might trump any consequentialist analysis.

In empirical testing, most people vote to pull the switch in this scenario, suggesting a characteristically utilitarian approach to the trolley problem.<sup>43</sup> However, by modifying the facts slightly, researchers can elicit a more deontological approach. A common counter-example is the “footbridge dilemma.” Here is Joshua Greene’s description again:

As before, a runaway trolley threatens to kill five people, but this time you are standing next to a large stranger on a footbridge spanning the tracks, in between the oncoming trolley and the five people. The only way to save the five people is to push this stranger off the bridge and onto the tracks below. He will die as a result, but his body will stop the trolley from reaching the others. Is it okay to save the five people by pushing this stranger to his death?<sup>44</sup>

This time most people refuse to say that they would push the man onto the tracks; they will not sacrifice one man to save five. In other words, Greene concludes, “people exhibit a characteristically consequentialist response to the trolley case and

40. Joshua Greene, *The Secret Joke of Kant’s Souls*, in 3 *MORAL PSYCHOLOGY* 35, 37 (W. Sinnott-Armstrong ed., 2008) (“Deontology is defined by its emphasis on moral rules, most often articulated in terms of rights and duties. Consequentialism, in contrast, is the view that the moral value of an action is in one way or another a function of its consequences alone. Consequentialists maintain that moral decision-makers should always aim to produce the best overall consequences for all concerned, if not directly then indirectly.”).

41. See Michael Laakasuo & Jukka Sundvall, *Are Utilitarian/Deontological Preferences Unidimensional?*, 7 *FRONTIERS PSYCHOL.* 1228, 1229 (2016) (“In recent years, these two moral preferences have been studied in the field of moral psychology by using vignettes, stories, and dilemmas.”).

42. Greene, *supra* note 40, at 41–42.

43. *Id.*

44. *Id.*

a characteristically deontological response to the footbridge case.”<sup>45</sup> These results point to a puzzle: why, as a psychological matter, do individuals adopt different moral goals in these similar scenarios?<sup>46</sup>

## 2. *The Dual-Process Theory*

Joshua Greene proposes an explanation. He argues that human beings have two different mental processes for reasoning about moral matters—one more closely associated with consequentialist thinking; the other aligned with nonconsequentialist approaches.<sup>47</sup>

These processes take place in different parts of the brain, suggesting different biological mechanisms for each.<sup>48</sup> They also operate in very different ways. For example, the nonconsequentialist process appears to require a smaller degree of effort and, perhaps as a result, operates at a faster speed.<sup>49</sup> That helps explain why individuals, when given moral dilemmas under stress or time constraints, tend to favor deontological decisions. By contrast, utilitarian considerations become more

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45. *Id.* This is not to say that individuals who choose the “characteristically” utilitarian approach fully embrace the doctrine of utilitarianism favored by Mill and Bentham or any other philosophical doctrine associated with consequentialism. Nor is it to say that individuals who adopt the deontological position adopt Kant’s philosophy or the philosophy of any other deontological thinker. Researchers are not talking about a conflict between fully-thought-out philosophical positions; they are talking about orientations that are loosely consistent with one moral theory rather than another. Psychological orientations should not be confused with deeply considered philosophical theories. *See generally id.* at 37–39.

46. This is a descriptive question, which should not be confused with the normative (and philosophical) question concerning whether the answers to the trolley and footbridge scenarios are justified. *See id.* at 42 (“Philosophers have generally offered a variety of normative explanations. That is, they have assumed that our responses to these cases are correct, or at least reasonable, and have sought principles that justify treating these two cases differently . . . . [In contrast, my] collaborators and I have proposed a partial and purely descriptive solution to this problem and have collected some scientific evidence in favor of it.”).

47. Joshua Greene, *Beyond Point-and-Shoot Morality: Why Cognitive (Neuro)Science Matters for Ethics*, 124 ETHICS 695, 700 (2014).

48. Joshua Greene et al., *Embedding Ethical Principles in Collective Decision Support Systems*, in PROCEEDINGS OF THE THIRTIETH AAAI CONFERENCE ON ARTIFICIAL INTELLIGENCE (AAAI-16) 4147, 4248 (2016) (noting that MRI scans indicate that different brain regions are triggered when individuals make deontological and consequentialist decisions); *see also* Cendri Hutcherson et al., *Emotional and Utilitarian Appraisals of Moral Dilemmas Are Encoded in Separate Areas and Integrated in Ventromedial Prefrontal Cortex*, 35 J. NEUROSCI. 12593, 12604 (2015) (“Our results support a nuanced version of the dual-systems view of moral choice.”); Paul Robinson, Robert Kurzba & Owen Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1661 (2007) (“[S]tudies have shown that specific regions of the brain are used for specific functions, including moral reasoning.”).

49. *See* Greene, *supra* note 40, at 60 (The “emotions [that underlie non-consequentialist thought] are very reliable, quick, and efficient responses to recurring situations, whereas reasoning is unreliable, slow, and inefficient in such contexts.”).

prevalent when participants are given greater opportunities for reflection and deliberation.<sup>50</sup>

From these and related studies, Greene concludes that the deontological mechanism operates as an intuitive, fast-operating process, one that occurs automatically without any conscious thinking. By contrast, the consequentialist process is a slower, more methodological process requiring more effort.<sup>51</sup> This “dual-process theory,” as Greene calls it, rests on a wealth of supporting data;<sup>52</sup> it

50. Michael Bialek & Sylvia Terbeck, *Can Cognitive Psychological Research On Reasoning Enhance The Discussion Around Moral Judgments?*, 17 COGNITION PROCESS 329, 330 (2016) (“[T]he tendency to engage in reflection increases the likelihood of utilitarian decisions.”); Zachary Horne & Derek Powell, *How Large Is the Role of Emotion in Judgments of Moral Dilemmas?*, PLOS ONE, July 6, 2016, at 3 (“[R]eaction time data and experiments examining speed-pressure and cognitive load manipulations suggest that deliberative reasoning is crucial for utilitarian judgments—utilitarian judgments are sometimes slower, and seem to be impaired by speed-pressure and increased cognitive load. . . .” (citations omitted)). *But see* Gustav Tinghog et al., *Intuition and Moral Decision-Making: The Effect of Time Pressure and Cognitive Load on Moral Judgment and Altruistic Behavior*, PLOS ONE, Oct. 26, 2016, at 15 (“In two studies, we applied time pressure and cognitive load to investigate the effect of intuition on moral decision-making. . . . [W]e find no supporting evidence for the claim that intuitive moral judgments and intuitive decisions in the dictator game differ from more reflectively taken decisions.”).

51. Greene compares the two-tiered system to a camera with two settings. The camera’s automatic setting responds instantaneously using preset procedures. Its manual mode requires more effort and thought to use, but it can operate in a more nuanced manner to account for special circumstances. *See* Greene, *supra* note 47, at 696 (2014); *see also* Bialek & Terbeck, *supra* note 50, at 330 (“Researchers have proposed the theory that the two components on which decisions are based are intuition (Type 1 processing) and reflection (Type 2 processing). Type 1 processing is fast, automatic, and heuristic, while Type 2 processing is slow, rule-based, and typically requires cognitive resources . . .”).

52. *See* JOSHUA GREENE, MORAL TRIBES 199 (2013) (discussing “dual-process theory”). Much of the research supporting this theory originally utilized moral dilemmas, like the trolley problem, that took place outside the punishment field. Tehila Kogut, *The Role of Perspective Taking and Emotions In Punishing Identified And Unidentified Wrongdoers*, 25 COGNITION & EMOTION 1491, 1492 (2011) (noting that past research focuses mostly on “willingness to help,” rather than on punishment decisions). More recent research has begun to explore how moral reasoning applies in the punishment field as well. That work appears to confirm that the same dual-process approach applies in this context. *See, e.g.*, Bunmi Olatunji & Bieke Puncochar, *Delineating the Influence of Emotion and Reason on Morality and Punishment*, REV. GEN. PSYCHOL. 201 (2014) (“Although punishment decisions, more so than moral judgment, seem to rely on conscious reasoning and consideration of violation outcomes, automatic, emotion-driven processes nevertheless influence punishment decisions, and may at times dominate them.”) (citation omitted).

It is fair to say the dual-process model represents the leading theory of moral psychology today. *Cf.* Hutcherson et al., *supra* note 48, 12593–94 (“Most approaches to these questions” rely on a dual-process theory). At the same time, Greene’s theory is not without critics, and a number of rival accounts have been advanced. *See, e.g.*, Bialek & Terbeck, *supra* note 50 (discussing the rival approach of Jonathan Haidt); Gustav Tinghog et al., *supra* note 50 (noting alternative theory proposed by Gürçay and Baron).

will serve as our working hypothesis going forward concerning how individuals make moral decisions.

### ***B. Relevance of the Decision-Making Environment***

A particularly interesting feature of the empirical research is the suggestion that various aspects of the decision-maker's environment might influence which of the two cognitive processes is favored. Three factors in particular appear to be significant: first, the emotional vibrancy of the decision; second, the individual's scope of responsibility; and third, the decision-maker's opportunities for deliberation and reflection. These factors provide a set of criteria for assessing which institution is most likely to adopt a utilitarian goal.

#### *1. Emotional Vibrancy of Decision*

The emotional vibrancy of a decision is probably the central factor influencing moral deliberation. Indeed, it has long been recognized that emotions play a major role in deontological thinking.<sup>53</sup> Strongly held emotions of anger and disgust, among others, are associated with intuitive desires to punish violators or help victims, and thus they increase the likelihood that an individual will adopt nonconsequentialist ways of thinking.<sup>54</sup> By contrast, consequentialist thinking tends to be more deliberative, abstract, and "cognitive."<sup>55</sup> Thus, where individuals are able to moderate their emotional responses and consider decisions more abstractly, utilitarian considerations are favored.<sup>56</sup>

In the punishment realm, several factors increase the emotional potency of a sentencing decision. Perhaps most obviously, the more violent and severe the

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One further appeal of the dual-process theory is that it is consistent with the work of Daniel Kahneman and others, who contend that human decision-making in general involves two different processes—fast and slow thinking. *See* DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2013); *see also* Denise Dellarosa Cummins & Robert C. Cummins, *Emotion and Deliberative Reasoning in Moral Judgment*, 3 *FRONTIERS PSYCHOL.* 328, 328 (2012) ("This dual-process explanation of moral judgment is consistent with several decades of cognitive science research on decision-making in other domains.").

53. Greene, *supra* note 40, at 110 ("For a representation to be 'emotional', it must be quick, automatic, etc., and also *valenced*. It must 'say' that something is good or bad . . . , a little voice that pops out of nowhere and says 'No! That would be wrong!'").

54. This view is supported by a wide array of scientific evidence. For example, MRI studies indicate that the brain areas used when individuals make nonconsequential (system 1) decisions are those associated with emotions. *See id.* at 40–41. Similarly, individuals who suffer disabilities that damage emotional responsiveness have a much-diminished tendency to adopt the nonutilitarian orientation. *Id.* at 59 & 110–12.

55. *See id.* at 44–46 (noting that "people exhibit more 'cognitive' activity when they give the consequentialist answer"). To be sure, as Greene notes, consequentialist thinking is not devoid of all emotional content. Rather, the difference between the emotional content of consequentialist and deontological thinking is a matter of degree. *See id.* at 41 ("[A]ll moral judgment (including consequentialist judgment) must have some emotional component . . . but I suspect that the kind of emotion that is essential to consequentialism is fundamentally different from the kind that is essential to deontology, the former functioning more like a currency and the latter functioning more like an alarm.").

56. *See, e.g.,* GREENE *supra* note 52, at 127.

criminal violation, the more likely that deontological mechanisms will predominate.<sup>57</sup> Thus, physically aggressive crimes increase the chances that decision-makers will adopt nonconsequentialist ways of reasoning. In addition, situations involving specific, concrete victims tend to have more salience than cases involving individuals considered in the abstract. The “identifiable victim effect,” as it is called, generates a strong retributive response.<sup>58</sup>

Greene refers to violations that involve both factors—direct aggressive action against concrete individuals—as “personal harms.”<sup>59</sup> These violations are most likely to trigger nonconsequentialist thinking.<sup>60</sup> This feature helps explain why pushing an individual off a footbridge invokes the retributive principle “do not kill the innocent,” while pulling a switch does not, at least to the same extent.

These observations have implications for institutional design. Perhaps most notably, they suggest that, to promote utilitarian thinking, an institution should be designed in a way that creates some emotional distance from specific offenders and their concrete crimes. The most feasible way to achieve that result is to ensure that an institution addresses a sentencing question in the abstract rather than in the context of a specific individual’s case.<sup>61</sup> All else being equal, entities that confront defendants more directly, such as juries, are more likely to react in an intuitive, retributive manner. Conversely, institutions that have some distance from the

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57. M. Treadway et al., *Corticolimbic Gating of Emotion-Driven Punishment*, 17 NATURE NEUROSCIENCE 1270, 1270 (2014) (“Using fMRI, we found that emotionally graphic descriptions of harmful acts amplify punishment severity, boost amygdala activity and strengthen amygdala connectivity with lateral prefrontal regions involved in punishment decision-making.”); Bialek & Terbeck, *supra* note 50, at 332 (“[I]t has been shown that increased severity of harm decreased the likelihood of making a utilitarian decision.”).

58. The identifiable victim effect has been repeatedly confirmed. *See* Greene, *supra* note 40, at 48–49. The effect has been validated in the punishment context, as well. *See id.* at 53 (noting the “parallel effect in the domain of punishment”); Kogut, *supra* note 52, at 1497 (“[T]he availability of a concrete identifiable target increases the role of emotions in the decision regarding the severity of the punishment.”).

59. Joshua D. Greene, *The Cognitive Neuroscience of Moral Judgment and Decision Making*, in THE MORAL BRAIN: A MULTIDISCIPLINARY PERSPECTIVE 1013, 1016 n.1 (Jean Decety & Thalia Wheatley eds., 2015).

60. As Greene notes, “[w]hen a moral violation is ‘personal’ (as in the footbridge case), it triggers a strong, negative emotional response that inclines people to judge against it. When a moral violation is ‘impersonal’ (as in the trolley case), there is no comparable emotional response, and the judgment is made in a ‘cooler,’ more ‘cognitive’ way.” Greene, *supra* note 40, at 106; *see also* Horne & Powell, *supra* note 50.

61. Nadler & Mueller, *supra* note 39, at 141 (“[O]nly recently have researchers systematically investigated the psychological influence of deterrence and retribution motives on people’s punishment judgments. The results indicate an interesting division: in the abstract, people explicitly endorse utilitarian goals . . . but when presented with a specific scenario, they consistently choose to impose retributive punishments . . .”).

sentencing decision, such as sentencing commissions, are more likely to adopt a utilitarian framework.<sup>62</sup>

## 2. *Scope of Responsibility*

A second relevant factor concerns the scope of the decision-maker's responsibilities. According to preliminary research, individuals who have a society-wide perspective may be more likely to take into account the broader costs and benefits of a decision, while individuals who are narrowly focused on one individual tend to react in a more intuitive, moralizing way.<sup>63</sup> That effect is suggested by a study carried out by Joshua Greene comparing two kinds of health-care professionals—doctors and public-health scientists. Greene writes:

Doctors aim to promote the health of specific individuals and are duty-bound to minimize the risk of actively harming their patients. Thus, one might expect doctors to be especially concerned with the rights of the individual. For public health professionals, by contrast, the patient is the society as a whole, and the primary mission is to promote the greater good . . . . Thus, one might expect public health professionals to be especially concerned with the greater good.<sup>64</sup>

Greene confirms that this is exactly what his research found:

Public health professionals, as compared with doctors, gave more utilitarian responses to both the trolley-type dilemmas and to our more realistic healthcare dilemmas. The public health professionals were also more utilitarian than ordinary people, whose judgments resembled those of the medical doctors. In other words, most people, like doctors, are automatically tuned in to the rights of the individual. Giving priority to the greater good seems to require something more unusual.<sup>65</sup>

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62. The idea that individuals react differently when crafting general, future-oriented rules, rather than punishing an identifiable wrongdoer, seems quite plausible. Tehila Kogut writes:

Imagine a school student behaving in an inappropriate way, violating the school's rules or even hurting another student. Given that the teacher decides to punish the student, to what extent will his/her decision be guided by emotions towards the student? Now think about the same teacher trying to set rules for the school code, including the expected punishment for the violation of each rule. Will decisions about the appropriate punishment, following the same behaviour, be different than the one chosen in the specific case? Will the punishment meted out to a specific identified student be more or less severe than the punishment determined in a general perspective (without reference to a specific case)? To what extent will the decision be guided by the decision maker's emotions in each of the two cases?)

Kogut, *supra* note 52, at 1491.

63. GREENE, *supra* note 52, at 129–30.

64. *Id.*

65. *Id.* at 130.

In short, public-health officials, who have a broad view of health effects on society, tend to adopt a consequentialist way of thinking; doctors, who are responsible for a single individual, tend to possess a more deontological framework.<sup>66</sup> The results may be due, in part, to the identifiable victim effect mentioned above, but they may also be due to the way that decision-makers' responsibilities alter their perspectives on moral questions.

These results have implications for the punishment field. Certain sentencing institutions, such as the legislature, possess a system-wide perspective; their responsibility, in a sense, is for society at large. Others, like judges, are principally focused on an individual criminal case. The implication is that, for a utilitarian, sentencing authority should be given to institutional actors with the broader, system-wide perspective, because they are more likely to adopt a consequentialist approach to punishment decisions.

### 3. Opportunities for Reflection

Finally, cognitive research suggests that the decision-maker's opportunities for reflection can affect his or her moral orientation. When required to make decisions under time constraints or with other stressors, individuals default to the automatic and intuitive nonconsequentialist thinking.<sup>67</sup> Conversely, some evidence indicates that efforts to promote deliberation and increase accountability may encourage a more reasoned approach that is conducive to utilitarian thinking.<sup>68</sup>

Institutions can be structured to promote a more reflective decision-making environment. For example, establishing a multi-member decision-making panel or commission can increase the likelihood that the members deliberate over various policy options. Mandating a period of time for input from affected individuals, requiring actors to consider those comments, and demanding that the officials issue a statement of reasons for their decisions would help, as well. All of these features should be considered, because all can be helpful in calming the emotions of the punishment decision, thus promoting consequentialist thinking.

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66. This evidence is only suggestive. It is possible, for example, that individuals with consequentialist tendencies are drawn to public-health careers, and those with nonconsequentialist tendencies are drawn more to direct-service professions. In that case, institutional roles do not drive moral perspectives; rather, moral orientation drives institutional-role selection.

67. Cummins & Cummins, *supra* note 52, at 340 (noting that researchers "found that activation of the stress response yielded a reduction in utilitarian responses that was specific to personal moral dilemmas that described deontological violations").

68. Bialek & Turbek, *supra* note 50, at 330 (noting that with controlled deliberation, individuals "usually decide counter to their immediate intuitions and might therefore reach a utilitarian decision"); Joseph Paxton, Leo Unger & Joshua Greene, *Reflection and Reasoning in Moral Judgment*, 36 COGNITION SCI. 163, 163 (2011) (more time for deliberation increases utilitarian response); Olatunji & Puncochar, *supra* note 52, at 199 (when anger is checked by an accountability mechanism, priming effect is reduced).

### *C. Moral Goals and the Traditional Punishment Institutions*

The research into moral psychology provides a general blueprint for creating an institution relatively well-oriented to promoting utilitarian goals. That institution should possess all three structural features mentioned above.<sup>69</sup> First, it should be charged with promulgating general sentencing rules rather than imposing punishment on specific individuals. Second, it should have a system-wide perspective on punishment decisions, including a responsibility to consider the interests of the community at large. Third, it should be subject to procedures that encourage reflection and deliberation. With these criteria in mind, we can evaluate the likelihood that the five traditional sentencing institutions will be oriented toward utilitarian goals.

#### *1. Jury*

To start with a relatively straightforward case, the jury's structure is poorly designed to encourage the adoption of utilitarian goals. Jurors impose sentences in specific, concrete cases. Their direct exposure to the defendant and to the details of the crime make it likely that jurors will have an emotional involvement in the sentencing decision.<sup>70</sup> Further, because a jury sits in judgment over a specific offender, the jury's responsibility is often viewed as doing justice in the individual case, rather than considering the broader social costs or benefits of its punishment decisions. The emotional intensity of its decision-making environment and its lack of a system-wide perspective makes the jury particularly susceptible to retributive thinking.<sup>71</sup>

#### *2. Judiciary*

The judiciary hardly seems more promising. Like jurors, judges tend to focus on the offender before the court, and they typically lack a system-wide perspective on punishment. One might expect, then, that judges are no more likely to adopt consequentialist goals than jurors. This conclusion, though, may be too quick. At least two institutional factors make the judiciary somewhat more amenable to consequentialism.

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69. See *supra* Section II.B.

70. Such a reaction seems particularly likely when victims or others affected by the crime are permitted to make pleas for retribution, or when the jury is confronted with graphic descriptions of harm. In these cases, one might expect the jury to react with an emotional, moralizing response, rather than a utilitarian one.

71. Perhaps the only factor that tempers this retributive orientation is that jurors must deliberate before reaching a decision. Ideally, that deliberation would allow emotions to cool off and future consequences to be considered. Susan Bandes & Jessica Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1051 (2014) ("Deliberation can force jurors to be accountable to other people, not only for their decision, but also for the reasons behind their decision."). In some situations, however, cool heads do not prevail, and group dynamics intensify the emotional reaction or biases among jurors. *Id.* ("Alternatively, deliberation might also maximize initial biases, or do little more than develop the picture that was formed before deliberation among the majority of jurors.").

First, judges likely have a greater ability than jurors to withstand the emotions wrought by the punishment decision. Unlike jurors, judges sit on numerous cases and, at least at the federal level, possess a strong tradition of professionalism.<sup>72</sup> These factors should encourage judges to act more dispassionately and resist the pull of the more automatic retributive impulse.

Second, given their repeated involvement in sentencing cases, judges are likely more inclined to deliberate abstractly about the purposes of punishment. That kind of exercise may help promote a more reflective approach too, which could increase the likelihood that judges favor a more utilitarian approach.<sup>73</sup>

The judiciary, in short, shares certain institutional features with the jury, including a narrow focus on the individual offender, that orient it toward retributive goals. But it also possesses several countervailing factors that encourage a more reflective—and hence consequentialist—approach.<sup>74</sup> The result is an institution that may not embrace utilitarian thinking in all cases but that is at least marginally more likely to do so than the jury.<sup>75</sup>

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72. Gill Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 100 (2009) (the federal court system “is characterized by a high measure of procedural homogeneity, a standardized culture marked by a strong ethic of professionalism, and a bench that exhibits generally high levels of competence in the stuff of judge-craft”).

73. See *supra* note 61. Besides the factors mentioned in the text, judges also engage in a deliberative process when imposing punishment. Sentencing typically involves a hearing, with the opportunity for both sides to introduce evidence in their favor. One might hope that the process allows judges to engage the more analytical, reflective parts of their personalities, allowing them to withstand the emotional pull of retribution.

74. In fact, there is some preliminary evidence that this is the case. See John M. Darley, *Citizens' Assignments of Punishments for Moral Transgressions: A Case Study in the Psychology of Punishment*, 8 OHIO ST. J. CRIM. L. 101, 113 (2010) (“John Hogarth’s monumental study, begun in 1965 and published in 1971, examined different influences on the sentencing practices of seventy-one full time magistrates in the province of Ontario . . . . Interestingly, in this particular study, not many judges regarded the retributive goal that we have argued is the primary driver of the sentencing judgments made by people reacting in the intuitive mode as an important purpose of sentencing.”).

75. The analysis also suggests that structural changes in the judiciary might encourage a more consequentialist approach. One proposal might be to authorize appellate courts to develop a set of sentencing rules that would guide sentencing decisions in typical cases. In essence, appellate courts over time would announce standard sentences that trial courts should adopt in cases that had the specified features. If a trial court wished to depart from the standard sentence, it would be required to explain its justification. Appellate courts would review sentencing decisions to ensure rough conformity with their rules. In theory, this would at least create general guideposts for sentencing decisions by trial courts.

In effect, appellate courts would create a common law of sentencing. By locating sentencing power in the appellate courts, this approach might reduce the emotional involvement and immediacy of the sentencing judgment and allow the sentencing decision to be made dispassionately and from a system-wide perspective.

The solution has some appeal, though it is not without shortcomings. Among other things, a common-law approach is a very slow method for developing rules, as it must proceed methodologically in a case-by-case manner. Further, the approach will yield

### 3. Legislature

In contrast to the previous two institutions, the legislature is structured in a manner that seems well-suited for promoting consequentialist goals. The legislature, for one, is charged with crafting general, forward-looking rules, rather than imposing sentences on individual offenders. Moreover, its scope of responsibility is exceptionally broad. The legislature's system-wide perspective requires its members, at least in theory, to consider the costs and benefits of its policies for society at large. Indeed, the tradeoffs required by the utilitarian calculus are the natural stuff of legislative policymaking.

Despite these initial impressions, real questions exist about the legislature's commitment to utilitarian principles. A central issue concerns its political sensitivity. Legislators do not consider the sentencing decision in a vacuum but are inevitably influenced at some level by the punishment views of their constituents. The legislature's moral goals, as a result, depend in part on their constituents' likely moral orientations.

The institution's appeal fades as we begin to examine the public's attitudes. The public, after all, often engages in issues of crime and punishment in the context of specific crimes and offenders, and rarely over statistics and trends.<sup>76</sup> Moreover, when faced with a notorious crime, the public's initial response is, not infrequently, emotional and, thus, retributive in nature. This is particularly so for the most graphic and violent crimes, which make the most "gripping mental TV."<sup>77</sup>

The retributive orientation is amplified further by the dramatic role that the media plays in the public's perception of criminal justice matters. News outlets focus on the most disturbing crimes because that is what tends to sell, and these incessant stories create a background sense of danger and fear.<sup>78</sup> In this way, the modern media

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"standard" sentences in a field where few cases are standard. Significant discretion will remain in the trial courts to determine when deviations are appropriate, and those deviations will reintroduce the same concerns about trial-court decision-making mentioned above. The debate over this approach to sentencing is an interesting one, though at this point it is largely academic. For more on the idea of a common-law approach to sentencing, see Douglas Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV 93 (1999).

76. See Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748–49 (2005) ("Cognitive psychology teaches that when voters think of crime and sentencing, they tend to think of examples of crimes that are most salient."); W.C. Bunting, *The Regulation of Sentencing Decisions: Why Information Disclosure Is Not Sufficient, and What To Do About It*, 70 N.Y.U. ANN. SURV. AM. L. 41, 51–52 (2014) ("A substantial empirical literature shows, however, that voters are not particularly well informed about criminal justice matters, especially optimal sentence lengths. Voters, for example, tend to recall only the most salient examples of crime—most often violent crimes.").

77. Greene, *supra* note 59, at 1017.

78. See Barkow, *supra* note 76, at 749–51.

has a pernicious effect, reducing policy debates about crime to sensationalism, while stoking emotions about widespread disorder.<sup>79</sup>

The public's retributive orientation is picked up by legislators, who tend to act in response to the public's outcry over crime. One might hope that legislators deliberate and reflect on the validity of the public's sentiment, keeping in mind the broader policy effects of their decisions. But there is little incentive for legislators to do so. As a result, legislative action on sentencing often occurs in quick response to certain high-profile, widely publicized crimes, often without any substantive discussion at all.<sup>80</sup>

In short, the legislature has certain structural features that are appealing, including its broad perspective on social issues and its responsibility for making general, forward-looking rules for punishment. But its initial appeal is offset by its political sensitivity, which makes it highly responsive to the public's passions about crime and punishment. That sensitivity makes the legislature an unreliable candidate to serve as an institution committed to utilitarian objectives.

#### 4. Parole Board

The fourth institution—the parole board—might also seem well-suited to promoting the utilitarian mission. Historically, board members have viewed their role as promoting public safety, specifically by assessing whether an offender poses a continuing risk to society.<sup>81</sup> That general goal would seem to dispose members favorably toward a consequentialist approach.

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79. Darley, *supra* note 74, at 116 (“In the first sections of this article, we suggested that most people’s first responses to crimes were automatic and intuitive in character, normally driven by just deserts considerations and thus retributive in character . . . . In the society of the United States, this natural tendency is amplified by certain cultural forces, such as the constant portrayal of violent criminal actions by the entertainment media and the television and newspaper news outlets. This contributes to broad-based fear of crime on the part of the populace. Further, it creates fear among politicians of appearing ‘soft on crime,’ lest some other politician gain advantage when running against them.”); Gerry Stoker, Colin Hay & Matthew Barr, *Fast Thinking: Implications For Democratic Politics*, EUR. J. POL. RES. (2015) (“Modern marketing techniques favoured by political elites lead invariably down the path of reinforcing the fast thinking mode . . . . It is not that most citizens cannot engage in slow thinking . . . . What is in question is how to get citizens to sustain the effort, commitment and time required when in that mode . . . .”).

80. Perhaps the most notorious example at the federal level is the enactment of crack-cocaine penalties after Len Bias’ death, which was widely (and mistakenly) reported to be due to a crack overdose. See David Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 218 n.49 (2004).

81. Stéphane Mechoulan & Nicolas Sahuguet, *Assessing Racial Disparities in Parole Release*, 44 J. LEGAL STUD. 39, 41 (2015) (“[T]he literature suggests that parole boards are mostly concerned with avoiding parole violations of released inmates.”); see also Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 299–301 (2017) (“A parole board’s release decisions should be based on prospective evaluations of whether individual prisoners are likely to commit serious crimes in the future.”).

At the same time, two structural features of the parole board raise some questions about the board's ultimate commitment to the utilitarian objective. One concern is that the parole board, like the judiciary and the jury, confronts individual, identifiable offenders (and sometimes victims or their representatives) during parole hearings. That direct contact with identifiable offenders likely increases the risk that parole boards will adopt a more retributive orientation.

This concern has been mitigated in recent years as parole boards have taken certain steps that create some distance from the individual offenders seeking parole. Increasingly, boards have adopted general, forward-looking rules for determining when a candidate should be released on parole.<sup>82</sup> Typically, these rules are based on statistical studies that take into account an offender's crime, criminal record, and other factors in order to predict an offender's recidivism risk.<sup>83</sup>

However, the parole guidelines are not a perfect solution. The guidelines are often quite broad, leaving a fair amount of discretion with board members.<sup>84</sup> That permissiveness in turn may allow retributive considerations to reinfiltrate the decision-making process. Nonetheless, even in their current imperfect state, parole guidelines provide some help in preserving the general impulse toward utilitarian thinking.

The second objection is more worrisome. It concerns the board's ability to act impartially, free from the retributive impulses of the public at large. At first glance, the parole board seems relatively well-protected from public opinion, at least compared to the jury or the legislature. That is because the board makes its decisions long after an offender has been sentenced, allowing it to operate largely out of the public eye and the media's glare.<sup>85</sup>

In practice, however, the board's political insulation is more qualified. This is primarily because of the way board members are selected. Board members tend to be appointed by governors, and in most states members can be removed without cause.<sup>86</sup> As the executive and political branches have moved to adopt tough-on-crime approaches, parole boards have followed suit.<sup>87</sup> Like the legislature, then, parole boards may be swayed by the retributive impulses of the public, even if the board is formally committed to utilitarian goals of public safety.

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82. Rhine et al., *supra* note 81, at 299–301 (“A recent survey found that 88 percent of paroling authorities report using an actuarial risk prediction instrument to guide decision making.”).

83. *Id.* at 300–02 (discussing statistical-prediction tools).

84. *Id.* at 306 (“Despite the appearance of structured decision-making, parole guidelines are broadly permissive.”). In theory, of course, more detailed guidelines could be implemented, a step that would make the parole rules more similar to sentencing-commission guidelines. But such a step would be difficult and costly to implement.

85. The principal exceptions are high-profile cases that continue to draw media attention, such as the recent parole hearings of Charles Manson's followers. *See, e.g.*, Melissa Etehad, *Judge Denies Parole to Former Manson Follower Leslie Van Houten*, L.A. TIMES (June 29, 2018), <http://www.latimes.com/local/lanow/la-me-ln-leslie-van-houten-20180629-story.html>.

86. Rhine et al., *supra* note 81, at 286.

87. *See id.* at 287.

Parole boards, in short, have distinct advantages over juries, judges, and legislatures, including a general disposition to promote public safety. But the parole board's qualified insulation from public opinion, and its direct contact with the criminal offender, slightly tarnish the appeal of the institution.

#### 5. Sentencing Commission

The final institution, the sentencing commission, has a basic structure that seems particularly hospitable to consequentialist thinking. Like the legislature, the commission enacts general sentencing rules, rather than imposing sentences on specific, identifiable offenders. Further, commissions have a system-wide perspective that requires them to consider the costs and benefits of their decisions for society at large. These factors likely reduce the emotional impact of the sentencing decision, promoting a consequentialist approach.

The legislature, of course, possesses similar structural features, yet its appeal is undercut by its political sensitivity. Do sentencing commissions suffer from the same defect? The track record has been mixed. Influential groups, like the ALI, have emphasized the need for commissions to act in a nonpartisan, objective manner.<sup>88</sup> Yet, one of the central critiques of the federal sentencing commission has been that it is insufficiently insulated from the political branches.<sup>89</sup> Are all commissions vulnerable to such a critique? Not necessarily. The truth is that nothing about sentencing commissions makes them inherently political or apolitical. The degree of political insulation they possess is largely dependent on each commission's specific structure.

Perhaps the most important structural feature in this regard concerns how commission members are appointed to or removed from office. The U.S. Sentencing Commission, for example, has several membership rules that are designed to curb political influence.<sup>90</sup> These include establishing long terms in office, requiring Senate confirmation for all nominations, permitting no more than four of seven members to be drawn from the same political party, permitting removal only for "cause," and requiring staggered appointments to the commission (to prevent the appointment of all commission members during the same Presidential term).<sup>91</sup> All of these features give the Commission some insulation from political pressures.<sup>92</sup>

Despite these numerous restrictions, there is one critical area where the federal Commission (and, for that matter, every other commission) lacks sufficient insulation, and that concerns *who* can be appointed to the Commission. What kind of official is best suited for commission work? Some commentators have argued that

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88. ALI 2007, *supra* note 30, at 51.

89. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1091–92 (2003); *see also* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 7–23 (1991) (discussing various ways the commission is politically motivated).

90. For a summary, see *Mistretta v. United States*, 488 U.S. 361, 368–69 (1989).

91. *Id.*

92. The most notable illustration of this is the Commission's long-standing opposition to mandatory-minimum statutes. *See supra* Subsection I.C.5.

commissions should be staffed by politically influential individuals in order to ensure that their members can work effectively with the political branches.<sup>93</sup> But this approach is shortsighted, at least for the utilitarian. Working effectively with Congress is an important goal, but not if it means sacrificing political independence.

For the utilitarian designer, a far more important requirement is to ensure that agency members are not overly dependent on, or subservient to, the political branches. Appropriately crafted membership requirements can promote that goal. To give one obvious approach, a commission that is comprised of life-tenured officials would have a much greater degree of political insulation—indeed, insulation comparable to that of the federal judiciary. Thus, one approach to ensure a high degree of independence would be to require that all sentencing commission members be life-tenured judges and appointed to the commission for life (or at least very long terms).<sup>94</sup>

This approach, of course, would not entirely eliminate the role of politics in the commission's rulemaking. Even life-tenured judges have political allegiances, and they may desire higher offices within the judiciary or elsewhere. As a practical matter, moreover, the sentencing commission is dependent on the legislature for funding and its autonomy. The commission, thus, must be wary of making decisions that could trigger a legislative backlash. At the extreme, the commission must take into account the risk that the legislature would eliminate the commission entirely should the agency act too far outside the mainstream. Nonetheless, one might hope that, over time, a relatively independent commission will accrue sufficient political capital to withstand the inevitable pressures generated by the political branches.<sup>95</sup> In doing so, it will be able to fulfill its ultimate role as a broadly independent institution within the sentencing system.<sup>96</sup>

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93. See, e.g., Barkow, *supra* note 76, at 812 (“[T]he key is to place the commission in the middle of the political thicket—with legislative membership and legislative contacts . . .”). To be fair, Barkow recognizes that the commission should not be dominated by political entities. *Id.* at 803 (“In order for a commission to bring apolitical judgment and rational reflection to its task, it seems that the number of politicians must remain small compared to the other members of the commission.”). But she sees politically connected individuals as playing an important role in the commission's decision-making. *Id.* at 804.

94. Cf. ALI 2007, *supra* note 30, at 63 (“It is desirable that a critical mass of experienced judges from the trial and appellate benches serve on the commission.”).

95. *Id.* at 51 (arguing that it is vital for the commission to work toward developing institutional capital to withstand pressures from legislatures); ALI 2003, *supra* note 23, at 70 (noting that, over time, a sentencing commission can gain credibility and legitimacy that will grant it greater independence and leeway for action).

96. Coincidentally, in embracing a utilitarian goal more explicitly, a sentencing commission may even strengthen its legitimacy. Utilitarianism gives the commission something to be an expert about because questions about reducing recidivism risk, predicting rehabilitative potential, and assessing deterrent effects all involve a degree of technical skill. See *supra* Section I.B (discussing the range of technical issues raised in a utilitarian punishment system). Utilitarianism thus allows the agency to defend its decisions as the product of empirical research, rather than political influence or contested claims about an offender's culpability.

A carefully structured sentencing commission, in short, may help mitigate the risks of politicization, even if it does not eliminate those influences entirely. Creating such an institution is an aspiration, even if the idea has not yet been fully implemented in practice. Most state commissions include at least one judge as a member, but no system is staffed entirely by judges (let alone life-tenured judges).<sup>97</sup> The governing statute for the U.S. Sentencing Commission currently requires at least three (of seven) members to be life-tenured judges.<sup>98</sup> However, over the Commission's entire history, only a slight majority of commissioners have been federal judges at the time of their appointment.<sup>99</sup> That is certainly a larger percentage of life-tenured judges than any other jurisdiction, but it is well-short of the goal of a commission run solely by life-tenured officials.

In sum, the sentencing-commission model has certain appealing features that make it relatively well-designed to promote utilitarian goals. Like the legislature, it possesses the emotional distance and system-wide perspective that are conducive of utilitarian goals. In contrast to the legislature, though, the commission can be structured to reduce the influence of political pressure. The result is an entity well-suited for promoting utilitarian goals, or at least better suited than its rivals.

### III. THE COMPETENCE OF UTILITARIAN INSTITUTIONS

Being committed to utilitarian goals is only one part of what constitutes an effective institution. The decision-maker must also have the *capability* of achieving the moral goal, of carrying out the utilitarian calculus consistently and accurately over time. That is an unusually challenging requirement. The utilitarian calculus requires consideration of a broad range of private and public interests, which in turn calls for the use of a comparably diverse set of skills. This Part takes a closer look at the kinds of skills utilitarianism demands and then assesses which sentencing institution is best equipped to undertake the analysis effectively.

#### A. Public and Private Interests

An effective sentencing institution must possess skills tailored toward assessing the specific interests at stake in the utilitarian cost-benefit analysis. What are those interests? To answer that question, we need to take another—and closer—look at the basic utilitarian equation. According to that formula, a sentencing

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97. For detailed information on the composition of sentencing commissions nationwide, see NEAL B. KAUDER & BRIAN J. OSTROM, NATIONAL CENTER FOR STATE COURTS, STATE SENTENCING GUIDELINES (2008), [https://www.ncsc.org/~media/microsites/files/csi/state\\_sentencing\\_guidelines.ashx](https://www.ncsc.org/~media/microsites/files/csi/state_sentencing_guidelines.ashx).

98. 28 U.S.C. § 991 (2016). The original statute required “at least” three federal judges to be appointed to the commission. In 2001, Congress amended the statute to indicate that *no more* than three may be federal judges. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1433 n.43 (2008). Then in 2010, Congress amended the statute to return it to its original language. PROTECT Act of 2003, Pub. L. No. 108-21 § 401(n)(1), 117 Stat. 650, 676.

99. Of the 33 past and present commissioners, 18 were federal judges when appointed. *Former Commission Information*, U.S. SENT'G COMMISSION, <https://www.ussc.gov/about/who-we-are/commissioners/former-commissioner-information> (last visited Jan. 21, 2018).

decision is justified when the good consequences of a decision—i.e., its benefits—outweigh the bad consequences—i.e., its costs. Thus:

Benefits – Costs > 0

or

Benefits > Costs.

The benefit of punishment is principally—though perhaps not exclusively—the reduction of crime. This is a public benefit because it accrues to the public at large. Punishment can reduce crime through various mechanisms, including general deterrence, specific deterrence, incapacitation, and rehabilitation.<sup>100</sup> To determine if a decision is justified, these benefits must be weighed against its costs.

The costs of punishment are also varied. They include the general costs of constructing prisons, operating the courts, and running the police. These are public costs, in that they are incurred by society as a whole. Of course, there is another cost that must be taken into account in the punishment decision—the cost to the individual defendant. Utilitarian theory is a radically egalitarian theory; everyone's happiness must be counted equally, regardless of whether the individual is a law-abiding citizen or a law-breaker.<sup>101</sup> In this context, the defendant's cost is frequently significant because punishment typically causes the defendant substantial suffering.<sup>102</sup> Though it may seem counterintuitive, the cost to the defendant must be counted in the analysis. We might refer to this as the *private* cost of punishment.

Might prison yield private benefits too? In theory, a defendant could experience some benefits from prison life, either because of an unusually pleasant prison experience or because prison provides skills or tools that enable the defendant to lead a more satisfying life over the long run. Whether these benefits exist in the modern prison state is debatable, and even if they do, they are likely to be marginal. To simplify matters, I will assume that the private benefits of punishment are not significant. Consequently, the only benefit that needs be considered in the utilitarian calculus is the public benefit of crime reduction.

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100. Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1942 (2010) (“Utilitarian avoidance of crime has traditionally been sought through the mechanisms of general and special deterrence, incapacitation of the dangerous, and rehabilitation.”).

101. Tomislav Bracanovic, *Utilitarian Impartiality and Contemporary Darwinism*, 62 FILOZOFIA 14, 14 (2007) (The principle of impartiality “figures prominently in the classic versions of utilitarian ethics, especially that advocated by John Stuart Mill, . . . as well as in its contemporary versions, such as that advanced by Peter Singer.”); see also JOHN STUART MILL, *UTILITARIANISM* 24 (1861) (“[T]he happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.”).

102. Sonja Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner’s Dilemma*, 98 IOWA L. REV. BULL. 97, 104 (2013) (“[I]ncarceration imposes its most obvious and, in most cases, its most severe harm on the prisoner himself.”).

Given this discussion, we can rewrite the general punishment equation as follows: punishment is justified when the total benefit (principally, the benefit of public safety) exceeds the total costs (the sum of private and public costs). In other words,

$$\text{Public benefits} > \text{Public costs} + \text{Private costs.}$$

Grouping the public interests on the left side of the equation, the equation becomes:

$$\text{Public benefits} - \text{Public costs} > \text{Private Costs.}$$

Or, more simply,

$$\text{Net Public Benefits} > \text{Private Costs.}$$

In short, punishment is justified when the net public benefits of punishment exceed the private cost to the defendant. Punishment is most justified when the difference between the two sides of the equation is maximized.

### ***B. Institutional Competence and Utilitarian Balancing***

Given this range of public and private interests, a sentencing institution must possess a correspondingly diverse set of competences. Three are particularly notable: technical expertise, empathy, and impartiality.

First, a sentencing institution must possess a degree of technical expertise. Attempts to assess the public-safety benefits of a sentence inevitably involve complex judgments about the deterrent effect of punishment, the risk of recidivism, and the rehabilitative potential of the defendant. Similarly, attempts to assess the public costs of punishment will require some understanding of government finances, including the financial costs associated with the courts, police, prison, and other entities within the criminal justice system.

Technical competence is not alone sufficient to ensure that an institution can identify the optimal sentence. A second critical competence might be classified as a human, rather than technical, skill. It is the ability to *empathize* with human beings who may be very different from the decision-maker. The utilitarian calculus, after all, requires consideration of the private costs of punishment, which means a decision-maker must be willing and able to take into account the suffering of a defendant sentenced to prison. Empathy requires the decision-maker, then, to see the essential human worth of every defendant, despite the offender's possibly egregious acts.

Third, and finally, a sentencing institution must be able to employ these skills without being unduly influenced by political pressure or public opinion. This too is a challenging requirement because sentencing takes place within a turbulent political environment. Given the passions surrounding crime and punishment today, the ability to maintain any kind of independence is inevitably difficult. The unfortunate result is a skewing of sentencing decisions. Political pressure can lead an institution to overstate public benefits or understate the private costs of a sentencing decision.<sup>103</sup> The results, in such a case, are excessive penalties. The

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103. See *infra* Section III.C.

implication is clear: to ensure an impartial assessment of the interests at stake, a sentencing institution must be insulated to some degree from the political passions swirling through the criminal justice field.

### C. Assessing the Competence of Sentencing Institutions

These three competences—technical expertise, empathy, and impartiality—are the essential skills of a utilitarian sentencing institution. Lacking those skills, an institution’s decisions will be based on speculation or, worse, political influence or bias. So how do the traditional sentencing institutions compare on these criteria?

To answer that question, we need to take a closer look at each of the five traditional sentencing institutions. In doing so, we will assume for the moment that each institution is fully committed to pursuing utilitarian goals. This counterfactual assumption allows us to examine the capacity of each institution to assess the relevant private and public interests, without concerning ourselves with questions about the entity’s commitment to the utilitarian goal.

#### 1. Jury

The jury is, once again, a relatively easy case because it is ill-equipped to evaluate either the public or private interests at stake in the sentencing decision. Starting first with public interests, jurors typically lack expertise in statistics, criminology, and other disciplines needed to make informed judgments about the deterrence, incapacitation, and rehabilitative effects of penalties.<sup>104</sup> They also lack information about the defendant’s background and character—information necessary to make accurate assessments of the defendant’s risk of recidivism.<sup>105</sup>

The jury’s lack of expertise in these disciplines makes it particularly vulnerable to widespread, often erroneous assumptions about the prevalence of criminal activity in society. Public opinion, for example, has succumbed to a general and sometimes dramatic fear of crime, even as crime rates have fallen to record-low levels.<sup>106</sup> This is partly due to the actions of politicians over the past several decades who “have used rhetoric, too often racially tinged, to incite concern about public safety.”<sup>107</sup> Partly, as well, it is due to the effects of modern media, which tends

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104. Oddly, in defending jury sentencing, Iontcheva suggests that sentencing is not a technical enterprise. Iontcheva, *supra* note 24, at 343. That claim might hold true in a retributive framework, but it is certainly not correct in a utilitarian system, where questions about the public-safety effects of punishment require technical competence to answer.

105. Typically, information about the defendant’s background and history cannot be offered in jurisdictions that allow jury sentencing. *See id.* at 366–67.

106. Gallup has, for many years, polled Americans about whether there is more crime in their area than the year prior. Since 2002, only a minority of respondents have said that crime has fallen. *See Crime*, GALLUP, <https://news.gallup.com/poll/1603/crime.aspx> (last visited July 29, 2018). Nonetheless, during these time periods, crime rates have fallen dramatically and fairly consistently. *See United States*, CRIME DATA EXPLORER, <https://crime-data-explorer.fr.cloud.gov/explorer/violent-crime?page=crime&placeId=usa&since=2002&until=2016> (last visited July 29, 2018).

107. Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 5 (2000).

toward the dramatic and dreadful. Media stories inevitably focus on the most horrific cases; the repeated, graphic stories about crime have led to a strong emotional response by the public.<sup>108</sup> That reaction, as previously noted, encourages a retributive orientation. But even when individuals continue to hold consequentialist goals, these emotions can lead decision-makers to overstate the threat of criminal activity and to exaggerate the public benefits of punishment.<sup>109</sup>

Jurors will likely fare no better in assessing many of the public costs of crime. Those costs—of corrections, law enforcement, and the judiciary—are often hidden from the average citizen, who typically has little familiarity with the details of government financing. As a result, the public costs are rarely treated as relevant factors in the ultimate sentencing decision. Moreover, even if they were taken into account, jurors generally have little idea of the precise costs to society in operating prisons or the broader criminal justice system (including the cost of jury sentencing itself).

Finally, the jury's ability to accurately assess the private costs of punishment is questionable as well. To be sure, an aspect of the jury's structure is likely to encourage empathy. The jury has direct contact with the accused. In the immediacy of the confrontation, the sentencing jury may appreciate that it is dealing with a human being, who has been driven to crime for a variety of reasons, not all of which are within the defendant's control.<sup>110</sup> This will be particularly true if the

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108. See Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making*, 38 *FORDHAM URB. L.J.* 775, 775–89 (2011); Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 *HASTINGS WOMEN'S L.J.* 27, 61–64 (1998).

109. Roger Warren, *A Tale of Two Surveys: Judicial and Public Perspectives on State Sentencing Reform*, 21 *FED. SENT'G. REP.* 276, 279 (2009) (survey highlights how 60% of respondents believed crime increased between 1999 and 2005, even as crime rates fell 13%); cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 510 (2001) (“Surface politics, the sphere in which public opinion and partisan argument operate, ebb and flow, just as crime rates ebb and flow. Usually these conventional political forces push toward broader liability, but not always, and not always to the same degree. A deeper politics, a politics of institutional competition and cooperation, always pushes toward broader liability rules, and toward harsher sentences as well.”).

110. This conclusion is debatable and tentative. Some research suggests that, under certain circumstances, individuals are also more willing to express blame when confronted with a concrete offender, compared to an anonymous one. See Kogut, *supra* note 52, at 1497 (“The results of the two studies presented suggest complex relationships between the identifiability of the wrongdoer and willingness to punish . . . . However, the perspective from which the situation is viewed plays a major role in the punishment decision. When taking the wrong-doer's perspective, one is more likely to consider the reasons behind the behaviour or the underlying circumstances, hence identification tends to increase pity and understanding and decrease anger leading to a lighter punishment. On the other hand, if the perceiver (the punisher) was personally hurt by the wrongdoer's behaviour . . . or takes the injured perspective, identification is more likely to increase negative emotions toward the wrongdoer and to decrease pity or understanding leading to a more severe punishment.”). In a given case, the question is which tendency predominates—whether direct contact with the defendant generates more blame or greater sympathy for the individual offender.

interaction is coupled with information about the offender's background that *humanizes* the defendant, thus making his actions seem more sympathetic.

The positive benefits of this exposure, however, should not be overstated. For a variety of reasons, the jury's empathy for the defendant is likely to be limited, especially for the most serious offenders. Individuals have a difficult time sympathizing with those considered "other."<sup>111</sup> The defendant, who has transgressed against the community and whose background and race may appear foreign to members of the jury, is a classic outsider. Popular culture magnifies the dehumanizing tendency and often stereotypes offenders as hardened predators.<sup>112</sup>

This analysis suggests that jurors, even if they are committed to utilitarian goals, are likely to make significant errors in assessing both the public and private interests at stake. They will tend to overestimate the social benefits of crime, neglect the social costs, and underestimate the individual costs for disfavored offenders. These errors all point in the same direction, leading jurors to be more punitive on average than what a utilitarian analysis demands.

## 2. Legislature

Legislators are likely to fare only slightly better than jurors in carrying out the utilitarian calculus. Individual legislators typically have little technical expertise in assessing the public benefits of punishment or the financial costs of the criminal justice system. To be sure, legislators often have access to experts who can inform them about these matters. But individual legislators may have limited interest in that information. Politicians' incentives lie not so much in "getting the numbers right," as in serving their constituents' desires. Consequently, when push comes to shove, the typical legislator may be more concerned with the public's views than with expert opinion.

The responsiveness to public opinion is problematic, surfacing many of the same defects mentioned in our discussion of the jury. Politicians inevitably respond to the public's fear of crime with harsher penalties, and they are particularly wary of being deemed "soft-on-crime." In some cases, legislators amplify the public's fears, based on the assumption that it is better to err on the side of severity than risk being targeted for coddling criminals.<sup>113</sup> Again, careful and cautious consideration by legislators of empirical data could, in theory, temper the bias toward over-punishment. But that would require an uncharacteristic commitment to, and interest in, considering such data.

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111. Steven L. Blader & Tom R. Tyler, *Justice and Emphathy: What Motivates People to Help Others?*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 226, 234 (Michael Ross & Dale T. Miller eds., 2002) ("Empathic emotions are less likely towards individuals with whom we do not feel close or whom we regard as dissimilar to us.").

112. See generally Craig Haney, *Demonizing the 'Enemy': The Role of "Science" in Declaring the 'War on Prisoners'*, 9 *CONN. PUB. INT. L.J.* 185 (2010) (discussing process of demonizing criminal offenders); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *BERKELEY J. CRIM. L.* 259 (2011) (similar).

113. See Aaron Rappaport, *What the Supreme Court Should Do*, 17 *FED. SENT. R.* 46, 47 n.6 (2004) ("A range of commentators have discussed the distorting influence of legislative politics on criminal lawmaking.") (collecting citations).

One might hope that legislators are more inclined than jurors to consider the public costs of punishment, because it is the legislature's express responsibility to fund criminal justice activities. In practice, though, a misalignment of incentives makes it unlikely that a legislator will engage in an unbiased assessment of financial costs. Legislators, after all, tend to have a short-term focus, driven by their need to run for reelection. That creates an incentive for legislators to avoid paying the full cost of their proposals up front, at least not if they can get away with deferring those costs into the future. In the case of proposals to increase sentences, the opportunity to do just that exists. The full financial impact of these proposals may not occur for many years to come. For example, a proposal to increase the sentence for a given crime from six years to ten will not incur additional costs until at least six years from the effective date of the proposal.<sup>114</sup>

To be sure, at some point the bill for the increased penalty will come due. But legislators can push off the full costs of corrections for years through the issuance of general obligation and lease revenue bonds.<sup>115</sup> This tactic is not cost-free: states must still pay interest on the bonds each year, and they must also be concerned with the impact of debt financing on the state's overall credit ratings.<sup>116</sup> But the effect of those considerations is indirect and gradual.<sup>117</sup> The impact is even more attenuated at the federal level, where criminal justice spending is a relatively small part of the overall budget.<sup>118</sup> Absent some mechanism to force legislators to internalize the costs of their sentencing proposals at the time of passage, the temptation to defer payments will be significant.<sup>119</sup>

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114. For further discussion of this effect, see Bunting, *supra* note 76, at 53–56.

115. See HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 45–46 (2015) (discussing use of debt financing to pay for increased incarceration).

116. *Id.*

117. Even in states with balanced-budget amendments, politicians are able to enact tough-on-crime laws without requiring off-setting appropriations. Costs can be deferred to future years by issuing bonds that are paid back over time. NATIONAL CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 1 (2010) (“Bond finance for capital projects, the purpose of which is borrowing against future revenues, is generally not considered by policymakers to fall within any constraints of a balanced budget requirement.”).

118. The budget for the Department of Justice in 2017 was \$29 billion. *Fact Sheet 2017*, DEP’T JUSTICE, <https://www.justice.gov/jmd/file/822511/download> (last visited July 29, 2018). The total federal budget that year was approximately \$4 trillion. *The Federal Budget In 2017: An Infographic*, CONG. BUDGET OFF. (Mar. 2018), <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/graphic/53624-fy17federalbudget.pdf>.

119. Some states have experimented with legislative mechanisms designed to bring attention to the costs of tough-on-crime legislation, such as the requirement that an “impact statement” be attached to any bill that increases penalties. See, e.g., Bunting, *supra* note 76, at 57–58 (“At least fourteen states have established, by law, special requirements for fiscal notes written in connection with criminal justice legislation . . . . Some states additionally require that the fiscal note be accompanied by a ‘prison impact statement,’ ‘population impact statement,’ or ‘correctional resources statement.’”). The effectiveness of such efforts is

Lastly, the legislature is poorly situated to consider the private costs of punishment. In some ways, the legislature is in an even more disadvantaged position than the jury. Unlike jurors, legislators have little or no direct contact with the offender being sentenced. That distance makes it easier to view the defendant as an abstraction and harder to see the offender as a person of moral worth and significance. The emotional distance also makes legislators more prone to accept negative stereotypes promulgated by the media and other sources.<sup>120</sup> Again, such stereotyping will be more significant for high-profile and egregious crimes, which tend to inflame the public's passions. The prominence of those cases—and the horror of the crimes—focuses attention on the worst kinds of offenders.

To make matters worse, legislators have few personal incentives to consider the defendant's viewpoint. Inmates are barred from voting in all but two states.<sup>121</sup> In many states, ex-felons also face restrictions.<sup>122</sup> For all of these reasons, legislators are even less likely than jurors to take full account of the private costs of punishment.

The bottom line is that legislators are unlikely to carry out the utilitarian calculus accurately or impartially. The institution will tend to overstate the public benefits of punishment and to underestimate the costs. The end result is that the legislature, like the jury, will skew sentencing decisions toward excessive severity.<sup>123</sup>

### 3. *Judiciary*

Like the jury and legislature, the judiciary typically lacks the technical competence to make accurate assessments of the public interests at stake in the punishment decision. Though some are exceptionally knowledgeable, judges are not expected to be conversant with the latest social-science research regarding recidivism or deterrence. The judiciary is also poorly situated to estimate the public costs of punishment, such as the costs of law enforcement and corrections. While

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disputed, but it is unlikely to be significant without a requirement that a funding mechanism be passed along with any sentencing legislation. *Id.* at 58–62.

120. Thus, one way to counteract this kind of bias is to provide direct contact with individuals who believe the negative stereotype. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012) (“If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.”).

121. CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT (Oct. 2016).

122. *Id.*

123. This analysis has repercussions beyond the immediate sentencing decision. Because the legislature tends to give short shrift to the private costs of punishment, one might also expect pervasive problems in the housing and care of inmates, as well as other services designed to ensure a minimum level of human dignity for prisoners. That prediction has been borne out in various states, such as California, which have been subject to court orders because of substandard prison care. *See, e.g.*, Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (discussing prison litigation in California and other states).

judges have more familiarity with these issues than jurors, it seems doubtful they can make accurate assessments of these factors consistently over time.

On a more positive note, judges appear relatively well-positioned to take the defendant's own interests into account. Like jurors, sentencing judges have direct exposure to the defendant in the dock, along with at least some access to information about the defendant's background and circumstances.<sup>124</sup> In that regard, they will be less prone to see the defendant as an abstraction, and correspondingly less likely to completely ignore the defendant's suffering.<sup>125</sup>

One might also hope that, given their culture and history of professionalism, judges are less susceptible to the kind of stereotyping that infects legislative and jury decision-making. Judicial practice may help too. Historically, the courts have stood as the defender of private interests, and courts have at least some familiarity with vindicating broader moral, political, and legal principles against majority passions directed at despised members of the community.<sup>126</sup>

Perhaps most important of all is a key distinguishing feature of the federal judiciary: its relative insulation from public opinion. The insulation means that members of the judiciary are far less prone to be swept up in the public's clamor for tough-on-crime decisions, and they are more willing to consider the humanity of the defendant without excessive stereotyping.

These initial observations suggest that life-tenured judges will have a far different profile than legislators and juries. The judiciary will be less caught up in the tough-on-crime hysteria of the day, making it less willing to overstate the net benefits of punishment. It will also be more attentive to the offender's interests and

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124. Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For The People: Notes For the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 28 (2008) ("Judges on higher appellate courts deal primarily in legal abstractions; they are less likely to consider the particular needs of individuals. By contrast, the trial judge--and jury--is in the presence of the individuals the laws affect. They have a stronger sense of how a ruling will influence the lives of the parties, their families, and their communities.").

125. This point is certainly debatable. One might argue, on the other side, that judges over time will become inured to the defendant's "excuses," while jurors might be more open to hearing the offender's explanations. See King & Noble, *supra* note 34, at 951 (quoting prosecutor who asserts that judges become "calloused" over time and start "comparing the case in front of them to the worse they've ever seen, and the sentences keep getting lighter.").

Another counterbalancing factor is that the judiciary may be exposed to the injuries suffered by the victim, and that may, in turn, trigger feelings of anger and vengeance toward the defendant. For serious crimes, the judiciary may even hear from the victim's family and friends about the suffering that they experienced. Whether judges can remain dispassionate in the face of such images and testimony remains an open question.

126. That is not to say that judges will be unaffected by bias. Judges, as members of society, share the cultural biases of the community at large to some degree. During the indeterminate era, empirical research underscored just how much bias infected judicial sentencing. See Eric S. Fish, *Criminal Law Sentencing and Interbranch Dialogue*, 105 *J. CRIM. L. & CRIMINOLOGY* 549, 561-62 (2015) (discussing studies). The point is not that judges are philosopher kings, only that judges are more likely to consider the defendant's interests than the legislature is.

needs, ensuring that the private costs of punishment will, on average, be more prominent. The impartiality will not make the punishment decision more accurate, but it will make judges less prone to the temptation of excessive severity.

These trends yield a prediction—that over time a life-tenured judiciary that is committed to utilitarian goals will be less punitive than either juries or legislatures pursuing the same objectives.<sup>127</sup> Although this prediction is extremely difficult to test empirically, some anecdotal evidence exists to support the claim. For example, the idea that judges are less punitive than juries seems to be conventional wisdom in states where jury sentencing is an option.<sup>128</sup> This is true even in states where judges are elected.<sup>129</sup> Similarly, at the federal level, judges and legislatures have exhibited sharply divergent views on the merits of statutes imposing long mandatory-minimum penalties on drug offenders and others. Many politicians find mandatorics to be an appealing, easy method of sending a message that crime does

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127. Not everyone agrees that an indeterminate sentencing regime (where judges play a dominant role) is likely to be less punitive than determinate sentencing models. Kevin Reitz, for example, has highlighted the sentencing severity of states with indeterminate models compared to those with determinate ones. After reviewing the literature on the subject, Reitz concludes: “Indeterminate sentencing systems, of the kind recommended in the original Model Penal Code, have been the primary engines of U.S. prison growth since the 1970s.” ALI 2007, *supra* note 30, at xxxi n.7. For a concise literature survey, see Kevin R. Reitz, *The American Experiment: Crime Reduction Through Prison Growth*, 4:3 EUROPEAN J. ON CRIM. POL’Y & RES. 74 (1996); see also Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1794–1801 (2006); Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in THE FUTURE OF IMPRISONMENT 199, 217–28 (Michael Tonry ed., 2004).

The applicability of that research to our discussion, however, is not entirely clear. Studies of indeterminate sentencing jurisdictions often focus on states with elected judges, which makes the comparison less relevant. Moreover, regimes that embrace indeterminate sentencing may have been affected by many factors besides institutional structure, such as changes in legislatively enacted sentencing laws or parole-board rules. Ultimately, changes in the local culture might drive changes across the board for all institutions, which would make it hard to identify the specific effect of institutional structure on sentencing decisions.

128. In those states, jury sentencing is seen as a kind of check on the excessive leniency of judges. See King & Noble, *supra* note 34, at 941 (“The more important reason to support jury sentencing is its leveling effect on judges. The perception of the prosecutor is that the judges are too lenient, and most people probably think judges are more lenient, but not always. The jury keeps them in line.”).

129. At present, a few researchers have attempted to assess whether juries are more punitive than judges. The most thorough study to date suggests jurors are more severe. See *id.* at 895–96. Other studies show conflicting results. See Iontcheva, *supra* note 24, at 361. But all of these studies involve states with elected judges and so are not immediately relevant to our prediction. If elected judges are found to be less punitive than jurors in the same community, one would expect that life-tenured judges would be even more so.

not pay.<sup>130</sup> But mandatories have also been sharply criticized by members of the judiciary who see them as blunt, overly-punitive proposals.<sup>131</sup>

Of course, even if judges are less punitive than juries or legislatures on average, that does not mean that judges are well-situated to identify the optimal sentence under a utilitarian system of punishment. The courts' incapacity to make accurate assessments of the public and private interests at stake will increase the chances that their punishment decisions will be inaccurate, if not excessively lenient. The judiciary, in short, also exhibits serious deficiencies in carrying out the utilitarian calculus.

#### 4. Parole Board

Parole boards appear to have one distinct advantage over other institutions discussed so far: promoting public safety has long been a focus of their efforts, and they have developed some expertise and quite a bit of experience in pursuing that goal. In particular, parole boards have long focused on assessing the defendant's likely recidivism risk upon release.<sup>132</sup> This task was initially based on clinical assessments by parole commissioners, at least some of whom were trained in psychology and human behavior.<sup>133</sup> In recent decades, doubts have grown about clinicians' ability to make consistently accurate assessments of risk.<sup>134</sup> That criticism has motivated parole boards to incorporate "evidence-based" approaches to assessing risk, typically relying upon statistical studies to develop algorithms that

130. Tonry, *supra* note 32, at 69.

131. See Paul Cassell, *Statement on Behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security*, 19 FED. SENT'G REP. 344, 345 (2007) (observing that "scores of federal judges" have condemned mandatory-minimum terms).

132. See *supra* note 81, and accompanying text.

133. Iontcheva, *supra* note 24, at 326 n.80. As an added advantage, parole boards have historically had access to important and relevant information about the defendant not available to other institutions. Notably, because they make sentencing decisions after the defendant has typically served a portion of his or her sentence, the parole board can consider information about the defendant's conduct in prison, such as whether the offender has discipline violations, or taken advantage of appropriate rehabilitation services (such as drug treatment or job-training programs). Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 31 (Nat'l Bureau of Econ. Res., Working Paper No. 1380, 2007) ("[P]arole boards have access to information revealed after sentencing and therefore may be better than judges at forecasting [sic] inmates' expected recidivism risk."). One might imagine that this information, which offers a more recent picture of the defendant's conduct, would be relevant in any assessment of an offender's risk of recidivism. Nonetheless, as several leading researchers recently observed, "[a] sparse body of research has produced mixed results on the relationship between misconduct in prison and recidivism." Rhine et al., *supra* note 81, at 310.

134. See Rhine et al., *supra* note 81, at 300 ("Early parole hearings were often haphazard, based primarily on brief interviews with each prisoner. Parole boards were guided by their experiences and gut-level instincts (referred to as "clinical" assessments). But studies of such methods revealed that the predictive validity of clinical assessments was inferior to more structured actuarial methods." (citation omitted)).

can predict the likelihood that a criminal will reoffend.<sup>135</sup> The hope is that these empirically based rules will improve the accuracy of parole decisions.<sup>136</sup>

The board's apparent expertise in assessing recidivism risk gives it a leg up over its competitors in measuring the public benefits of punishment, but that advantage is qualified. The first limitation is that the parole board's focus on recidivism risk neglects other potential benefits of punishment, such as its deterrent effect. To the extent that the neglected effects are significant, the parole board's analysis of public benefits will be incomplete. In addition, the parole board is limited in its ability to make accurate assessments of the public costs of punishment. Parole boards do not typically consider those costs in making their parole decisions, and they are almost never an explicit part of the parole boards' calculi.<sup>137</sup>

For both reasons, a parole board's assessment of the net public benefits of punishment is likely to be inaccurate. What about its ability to measure the private costs of a sentence? Certain features of the parole board's structure might be conducive to feelings of empathy, at least under the right conditions. Notably, like the judiciary and jury, the parole board confronts the defendant directly. Given its position within the prison system, the parole board also has a unique sense of the deprivations the offender has faced during incarceration. Finally, to the extent some parole boards continue to be comprised of social workers or therapists, the board might be disposed to consider the hardships experienced by criminal offenders in prison.

This initial assessment suggests that the parole board is much better situated to assess the private costs of punishment than the net public benefits. That appealing feature, however, is tempered by countervailing factors that tend to harden board members against criminal offenders. Perhaps most significant is the politicization of parole boards.

As noted previously, the parole board is likely to be somewhat sensitive to political pressures, in part because of the way board members are appointed.<sup>138</sup>

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135. See *supra* note 81.

136. Researchers have offered reasons to believe this optimism may be well-founded. See, e.g., Jeremy Isard, *Under the Cloak Of Brain Science: Risk Assessments, Parole, And The Powerful Guise Of Objectivity*, 105 CALIF. L. REV. 1233, 1241 (2017) ("According to a seminal meta-analysis . . . mechanical prediction techniques and statistical actuarial tools—across medicine, finance, and criminal justice—are about 10 percent more accurate than clinical judgment when predicting human behavior."). At the same time, questions persist about the accuracy of the algorithms used in punishment decisions. See Rhine et al., *supra* note 81, at 300 (noting that even one of the most successful algorithms—called LSI-R—has a 30% false-positive rate). Doubts have been raised, as well, about the accuracy of the inputs used in the algorithm. *Id.* at 303–04. And significant concerns exist that risk variables might be unduly correlated with race and class. *Id.* at 301–02.

137. See, e.g., W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 397–400 (2011) (discussing California parole board's failure to consider cost issues).

138. See *supra* Subsection I.C.4. The politicized nature of parole decisions is exacerbated in states like California, where the Governor retains the power to reverse parole decisions. In the past, that power has been used to impose a highly punitive approach to parole

Members are also less likely to be drawn from the social-work or psychology professions, and much more likely to be picked from the ranks of probation officers and correctional officials.<sup>139</sup> These factors contribute to a more law-and-order orientation, skewing the board's assessment of the offender's threat to society.<sup>140</sup> As a result, parole boards may ultimately deny parole to individuals, even in situations where the benefits of release outweigh the risks.<sup>141</sup> This same orientation can harden the board's views of the defendant, making it less willing to appreciate the offender's basic humanity.

In sum, the parole board has a distinct advantage over the three institutions discussed before. Unlike the jury, legislature, and judiciary, the parole board has at least some expertise in assessing a key mechanism for promoting public safety—the recidivism risk of the defendant. However, the parole board also exhibits serious deficiencies. Its focus on recidivism risk ignores other mechanisms for promoting public safety. It has limited expertise in assessing the costs of punishment. And it lacks the same kind of independence possessed by federal judges, making it vulnerable to political pressures and neglectful of the defendant's liberty interests. The parole board may be superior to the jury and legislature in carrying out the utilitarian calculus, but it is hardly the ideal structure for sentencing offenders in a utilitarian punishment system.

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decisions, with only a small fraction of those approved by the parole board being released. See Kathryn M. Young, Debbie A. Mukamal & Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates*, 28 FED. SENT'G REP. 268, 270 (2016) (“[F]rom 1999–2011, even in the few cases where [the parole board] found an inmate suitable for parole release, Governors . . . usually reversed grants.”).

139. Rhine et al., *supra* note 81, at 286 (“The majority of states specify at most vague educational requirements or relevant work experience.”); see also Stefan J. Bing, Note, *Reconsidering State Parole Board Membership Requirements in Light Of Model Penal Code Sentencing Revisions*, 100 KY. L.J. 871, 877 (2011–2012) (“Generally, most parole board members have served in the corrections system as a corrections officer, warden, parole officer, probation officer, or in another capacity.”)

140. Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in *THE FUTURE OF IMPRISONMENT* 199, 206 (Michael Tonry ed., 2004) (discussing how parole boards have become increasingly risk averse in their release decisions).

141. W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV 395, 398 n.8 (2011) (“[T]he parole board, so long as it is at least indirectly politically accountable, will systematically under-release prisoners according to political criteria that are divorced from an actual cost-benefit calculation.”). To be sure, the use of algorithms to help determine release dates provides some counterbalance to this orientation. See Rhine et al., *supra* note 81, at 301 (“Actuarial tools also help insulate decision making from politicization and, since the process is more objective, reduce the number of legal appeals due to adverse parole decision making.”). But the algorithms do not completely eliminate the boards' discretion in choosing release dates. See, e.g., Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 244 (2017) (With parole algorithms, “there are still value judgments at play—such as how much risk is tolerable. Further, in these judgments, some suggest that parole boards still ‘err on the side of severity.’”).

### 5. Sentencing Commission

The sentencing commission is the final institutional option. At least at first glance, it offers significant advantages in evaluating both the public and private interests at stake. Consider the public benefits first.

Sentencing commissions can possess significant technical skill in assessing the public-safety effects of punishment. Commissions are commonly conceived as expert agencies charged with taking into account the latest research on punishment.<sup>142</sup> Moreover, unlike the parole board's focus on recidivism issues, sentencing commissions can adopt a broad, system-wide approach that encourages consideration of the full range of public-safety concerns.<sup>143</sup> In some jurisdictions, commissions are staffed with highly trained experts, including statisticians and other research scientists.<sup>144</sup>

The primary obstacle commissions face in assessing the public benefits of punishment has been the "shortfall in quality research on the effectiveness of criminal sanctions in reducing crime."<sup>145</sup> Nonetheless, sentencing commissions are well-positioned to make the best use of the available information. Moreover, in some jurisdictions, commissions are tasked with actively promoting and supporting new research initiatives.<sup>146</sup>

Turning to the public costs of crime, sentencing commissions appear to have comparable advantages. An effective institution must account for the full range of costs incurred by the government, including the costs of prison, correctional personnel, and the court system.<sup>147</sup> Only an institution like the commission—with

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142. Barkow, *supra* note 76, at 717 ("One stated justification for relying on an agency was that it would allow a group of experts to set policy based on the best knowledge available, as opposed to the political winds."); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 75 (1999) ("[State sentencing] commissions have begun to develop useful sentencing policy expertise, a comprehensive statewide view of punishment priorities, better management of resources, and a long-term perspective."); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice System*, 61 FED. PROBATION 58, 62 (1997) ("As an independent, expert agency, the Commission's role is to develop sentencing policy on the basis of research and reason.").

143. See ALI 2003, *supra* note 23, at 66–71.

144. See ALI 2007, *supra* note 30, at 90 for discussion of the importance of this feature.

145. See *id.* at 33, 96; see also ALI 2003, *supra* note 23, at 106 (discussing importance of improved information). In any event, saying that we lack any guidance or research is mistaken. Efforts to develop more accurate tools for predicting recidivism risk, for example, continue. See ALI 2007, *supra* note 30, at 34 (noting that some progress has been seen in assessing recidivism risks).

146. For discussion of this research objective, see ALI 2007, *supra* note 30, at 21, 42.

147. See ALI 2007, *supra* note 30, at 85 ("The commission's work . . . carries enormous budgetary implications for state and local governments. A well-functioning commission can do much to ensure that public resources are deployed in an effective and cost-efficient manner.").

its system-wide perspective and with some expertise in accounting and related disciplines—will be able to gather and analyze these various data streams.<sup>148</sup> The agency is also positioned to take account of cost issues relating to prison capacity.<sup>149</sup> Sentencing commissions may not yet fulfill these tasks with complete success— anecdotal evidence suggests that commissions look at the cost side only occasionally—but the institution is the candidate with the best potential to carry out the task effectively.

The sentencing commission's ability to assess the private costs of punishment is more questionable. Like legislatures, commissions operate at a distance from individual offenders, potentially leading agency members to treat offenders as abstractions, without the full appreciation for the unique self-worth of the lives at stake. This danger can be mitigated somewhat by appropriately crafted membership rules. For example, a commission comprised of a panel of trial judges would be far less vulnerable to this critique. Trial judges have extensive experience confronting offenders in their ordinary sentencing decisions. One might hope that this experience would ensure that judges understand that they are dealing not with abstractions, but with real human beings.<sup>150</sup>

The final consideration in assessing the commission's competence is its ability to weigh the public and private interests in an impartial, unbiased way. How does the commission fare on this metric? For many observers, the answer is: not particularly well. Commissions have been criticized for being overly political.<sup>151</sup> Justice Scalia famously denounced the federal Sentencing Commission for being merely a "junior varsity Congress."<sup>152</sup> Despite this critique, it is a mistake to conclude that sentencing commissions are inherently sensitive to political pressure. The degree of independence they enjoy depends on their structure and membership.

As mentioned previously, the federal Sentencing Commission possesses several structural features—such as removal only for cause—that help ensure that it has a degree of political insulation.<sup>153</sup> That insulation would be dramatically strengthened by requiring all commission members to be life-tenured judges. This change would not eliminate all political influence, but it would significantly reduce

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148. For discussion of system-wide policymaking, see ALI 2003, *supra* note 23, at 66.

149. Commissions, of course, do not have direct control over prison capacity. Nonetheless, the commission could highlight for the legislature the costs incurred in new sentencing legislation. That, alone, may have some effect on the legislative process. For discussion of "correctional resource management," see ALI 2007, *supra* note 30, at 19–20, 40–42, 168–69. One of the first tasks for the sentencing commission, according to the ALI, is to develop a "correctional population forecasting model." *Id.* at 93. For discussion of resource management, see ALI 2003, *supra* note 23, at 72.

150. Though much more controversial, a commission with significant participation from criminal-defense attorneys or prison-rights advocates would achieve the goal even more effectively, though perhaps at the expense of undermining objectivity about other factors in the utilitarian calculus.

151. See Rappaport, *supra* note 89, at 1120–21.

152. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

153. See *supra* note 90, and accompanying text.

its significance. Over time, as the Commission gains legitimacy and political capital, it will have further leeway to act on its own judgments without interference.<sup>154</sup>

The analysis suggests that a properly structured sentencing commission—one that is comprised of life-tenured trial judges—would be well-equipped to weigh the costs and benefits of punishment.<sup>155</sup> In contrast to the legislature, it would not overstate the public interests of punishment, nor give short shrift to public or private costs. In contrast to the judiciary, it would not be tempted to neglect public interests in its focus on private ones. Under this analysis, a sentencing commission would represent the least-imperfect alternative among the traditional sentencing institutions. The analysis also makes clear that the appeal of a sentencing commission depends fundamentally on how it is structured. To gain the full benefits of the commission approach, it is essential that the appropriate institutional

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154. See ALI 2003, *supra* note 23, at 70 (noting that over time, a sentencing commission can gain credibility and legitimacy that will allow it greater independence); see also ALI 2007, *supra* note 30, at 51 (stating that it is critical for the Commission to work toward developing institutional capital over time so that it can withstand pressures from political branches).

155. This conclusion offers a further important prediction: assuming that the institutions are committed to utilitarian goals, a well-structured sentencing commission will be somewhat less punitive than the legislature, and somewhat more punitive than the judiciary. Unfortunately, testing that hypothesis is impossible at this time for two fundamental reasons. First, there is no certainty that all three institutions are committed to pursuing utilitarian goals. Second, we do not have an example of a well-structured sentencing commission in existence; we only have the imperfect example of the partially politicized U.S. Sentencing Commission.

Nonetheless, is it worth noting that, despite the methodological problems in making the assessment, there is some reason to believe that the institutional prediction is correct. The leniency of the U.S. Sentencing Commission relative to the Congress is suggested by several Commission acts. For example, the federal Commission has criticized Congress for enacting mandatory-minimum statutes, along with several other punitive initiatives. See *generally*, U.S. SENT'G COMM'N, REP. TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011). More concretely, the Commission has enacted several rules that impose less severe penalties than the identical enhancements set forth in the mandatory-minimum statutes. The most obvious example is the enhancement for use of a gun. Compare 18 U.S.C. § 924(c)(1)(A)(i) (2016) (mandatory sentence of five or more years for use of a gun), with U.S.S.G. § 2D1.1(b)(1) (2016) (two-level sentence enhancement).

The evidence that the Commission is more punitive than the *judiciary* is more anecdotal, but still compelling. Federal judges historically have viewed the Commission's rules as being overly severe. In accord with that view, judges depart downward from the guidelines with much greater frequency than they vary upward. See U.S. SENT'G COMM'N, REP. TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 32 fig. 1 (Oct. 2003). That trend has persisted after the *Booker* decision made Commission rules advisory. U.S. SENT'G COMM'N, REP. ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 69 (2012) (after *Booker* decision, rate of below-guideline sentences increased further). These findings suggest that judges view the guidelines as overly punitive and have used their departure power to impose penalties more in line with their own judgments.

safeguards be erected to protect the commission from the inevitable political pressures that will be brought to bear on it over time.

#### IV. A SHARED POWER

This analysis suggests that a properly structured sentencing commission is the best candidate to satisfy the two key requirements of a utilitarian punishment institution. It is the entity most likely to be committed to utilitarian objectives, and it is the institution most capable of achieving those objectives consistently over time. If this is correct, a sentencing commission should be the primary decision-maker in the punishment realm. But whether it should be the *only* decision-maker is another question entirely. It is worth considering whether the commission's power should be exclusive, or whether it should be shared with one or more secondary institutions.

Pragmatic reasons militate for a shared power. If the commission were the only sentencing institution, it would be responsible for enacting rules to account for every factor that might be relevant in the sentencing decision (and for every possible way such factors might appear). Given the range of potentially relevant factors at sentencing, this would create an extraordinarily complex system, one that would be unworkable to implement in practice. It would also impose an exceptionally heavy burden on commission rulemaking.<sup>156</sup>

A shared-power approach would avoid this problem and arguably prove superior. Under this alternative approach, the sentencing commission would not try to account for all relevant factors. Rather, it would adopt rules for only the most significant ones, and its rules would permit a range of sentencing outcomes. The choice of punishment within that range would be left to the secondary institution. In carrying out that responsibility, the secondary institution would examine additional facts about the offense and offender and then, based on those further considerations, choose where within the range a sentence should be imposed (or, in exceptional cases, whether a departure from the range would be justified). This is truly a sentencing system of shared powers, with the commission taking the primary role in defining the sentencing range, and the secondary institution fine-tuning the sentence within that range.<sup>157</sup>

Which institution should serve as the secondary sentencing entity? Ideally, the institution would be the next-most-effective entity (after a sentencing

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156. To be sure, it would be possible to create general rules without undue complexity—by ignoring relevant differences among offenders. For example, the commission could impose the same penalty on broad categories of criminals, ignoring differences in the criminal conduct, or in the defendant's background. This approach, however, would result in a kind of sentencing disparity, in which dissimilarly situated offenders are treated similarly. Administrative convenience would be gained at the cost of excessive uniformity.

157. The idea of a complex sentencing scheme is hardly novel. Historically, in the sentencing field, power has been distributed broadly among different institutions. In indeterminate schemes, for example, sentencing discretion has been shared among legislatures, judges, parole boards, and other entities. In typical guideline regimes, too, sentencing power has been shared among commissions and other entities—notably, judges. Thus, complex sentencing schemes are the norm, not the exception.

commission) in promoting utilitarian goals. The legislature and the jury, as a result, can be immediately excluded from the list. Both entities are deeply problematic candidates, because they both tend to favor retributive considerations, and both lack the expertise and independence needed to serve as an effective sentencing institution.<sup>158</sup>

That leaves the judiciary and the parole board. The choice between them is not obvious. Each offers its own advantages and disadvantages. The federal judiciary offers greater independence, while the parole board has greater technical expertise in relevant areas (such as risk assessment) and also seems more likely to adopt a utilitarian orientation. A plausible argument could be made under these circumstances for either institution. Nonetheless, several additional factors tip the balance in favor of the judiciary.

First, the parole board is handicapped by its position at the back-end of the sentencing system. The board typically makes its sentencing decisions only after the offender has served a portion of the ultimate sentence.<sup>159</sup> By that time, it may be too late to determine if a downward departure is warranted, because the defendant might have already served longer than the justified sentence.<sup>160</sup>

Second, the parole board's involvement might exacerbate, rather than mitigate, certain biases built into a commission approach. We have already seen that sentencing commissions typically depart from the preferred institutional structure, principally because they are usually not staffed by life-tenured judges. In that situation, one might expect the commission to be swayed somewhat by the tough-on-crime attitudes infusing the criminal justice field, which would skew the commission's decisions toward excessive punitiveness. Ideally, then, a secondary sentencing institution would compensate for that defect, by erring on the side of leniency.<sup>161</sup>

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158. The legislature is problematic for an additional reason: any institution that can fill the role of a secondary sentencing body must be able to sit in judgment of individual offenders and consider the individual circumstances of each offender. The legislature is plainly ill-suited for that role.

159. The minimum amount of time a defendant must serve before being eligible for parole varies by jurisdiction. For a few real-life examples, see Rhine et al., *supra* note 81, at 292.

160. The parole board could still operate as a secondary value-giving institution, but only by introducing additional complexities into the institutional scheme. For example, a third institution could be given the authority to decide whether a departure was warranted. Assuming no departure was appropriate or authorized, the parole board would then decide when, after the minimum guideline sentence had been served, a defendant should be released. In effect, an offender would know the range of possible sentences at the initial sentencing hearing but would not know his or her specific sentence until the parole board made its ultimate decision.

161. In doing so, the two institutions operating together would roughly approximate the optimal sentence. This idea—that institutions can be combined in ways that promote overall social welfare—is hardly a novel concept. For example, James Wilson, a leading theorist of the founding generation, wrote about the importance of working institutions off each other. As he wrote,

Given this requirement, a judiciary would seem to be a more appealing choice as a secondary institution. Compared to the parole board, the judiciary is less prone to adopt a punitive orientation. Among other things, it possesses a degree of political insulation that allows it to resist the public's punitive passions.<sup>162</sup> Delegating some sentencing power to judges, as a result, might ensure that the ultimate sentence is more closely aligned with the optimal result.

This discussion suggests that a shared-sentencing system might make sense from a utilitarian perspective. The sentencing commission is the entity best able to serve as the primary sentencing institution. But a separate institution—the judiciary—would be useful in carrying out the secondary value-giving functions.<sup>163</sup> The result would be a system that comes close to reproducing most of the guideline structures in use today.

This, of course, is not a definitive argument, and we need not take a stand here on whether a parole board or a court is the best candidate for wielding secondary power (or even whether a shared-power system is best). The fundamental point is that a utilitarian theory need not result in a sentencing system governed by a single institution. Whether policymakers establish a shared system or not, this Paper's conclusion is the same: for the utilitarian, a sentencing commission should be the primary, if not the sole, sentencing institution.<sup>164</sup>

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“[I]n government, the perfection of the whole depends on the balance of the parts, and the balance of the parts consists in the independent exercise of their separate powers, and when their powers are separately exercised, then in their mutual influence and operation on one another . . . . They move, indeed, in a line of direction somewhat different from that, which each, acting by itself, would have taken; but, at the same time, in a line partaking of the natural direction of each, and formed out of the national directions of the whole—the true line of publick liberty and happiness.”

1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 708 (Kermit L. Hall & Mark David Hall eds., 2007).

162. The issue is muddled, however, by the fact that the judiciary may be somewhat more likely to adopt a retributive orientation. *See supra*, Subsection I.C.2. Though this does not necessarily mean that the judiciary will react in an excessively punitive way, that is a danger in some situations.

163. Under this scheme, the sentencing commission would set the initial guideline range, and the judiciary would make decisions about whether departures are appropriate from that range (and, if not, where within the range the defendant's sentence should fall). Further refinements in this approach might be considered as well. It certainly seems possible to include parole release in the structure, creating a three-institution structure. *Cf.* ALI 2003, *supra* note 23, at 57 n.69 (“One important issue for study in the Code revision process will be whether parole-release discretion ought to be retained, at least for some prisoners, and under what legal constraints.”).

164. Even if a sentencing-commission approach is morally justified, one might wonder whether it is legally permissible. In *United States v. Booker*, the Supreme Court ruled that the U.S. Sentencing Guidelines were unconstitutional, on the grounds that binding guidelines violated the 6th Amendment and Due Process clauses of the Constitution. 543 U.S. 220, 227 (2005). A common view today is that *Booker* creates an insuperable obstacle to the establishment of a sentencing commission with binding-rulemaking authority. As I will

### CONCLUSION

For nearly half a century, policymakers have engaged in a debate over the proper structure of the punishment system. Yet little agreement exists today over the optimal approach. To advance the debate, this Paper returns to first principles, asking a basic question: what punishment system is morally justified? The analysis presented here offers a first step in developing an answer. Relying on utilitarianism as the governing moral theory, the analysis suggests that a sentencing commission is the entity most committed to, and capable of, satisfying the moral theory's demands.

One might disagree with some of the empirical assumptions made in this Paper. Questioning those assumptions is entirely appropriate, and further research is unquestionably needed to ensure that the analysis is grounded in data rather than anecdote. Others might disagree with the analysis on a more fundamental level: they might reject the moral premise of utilitarianism. For these individuals, this Paper will hopefully spur exploration of the institutional ramifications of their own favored theory of morality. Indeed, the ultimate goal of this Paper goes beyond specific policy prescriptions. It is to promote a more transparent debate about the moral assumptions of institutional design, and to encourage individuals to be more reflective about the bases for their own institutional preferences in the criminal justice field.

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explain in more detail in a subsequent paper, this view is mistaken. My contention, in brief, is that the line of cases culminating in *Booker* cannot be justified in terms of traditional constitutional interpretive factors, such as text, tradition, or original intent. Rather, if this line of cases deserves fealty, it is because the decisions are consistent with fundamental moral principles. In this way, the moral argument presented in this Paper is relevant to deciding how to understand *Booker* and related cases. More specifically, *Booker* should be interpreted to undercut the validity of rules enacted by *politically sensitive* sentencing commissions—like the U.S. Sentencing Commission. It should not, however, be interpreted to undermine the rules established by properly structured, politically insulated commissions like the kind endorsed in this Paper.