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Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing

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LEGISLATURES, JUDGES, AND PAROLE BOARDS: THE
ALLOCATION OF DISCRETION UNDER DETERMINATE
SENTENCING

Dharmika Dharmapala, Nuno Garoupa,** and Joanna M. Shepherd****

Abstract

The most significant development in criminal sentencing in recent decades has been the shift from indeterminate to determinate sentencing. Yet no study has systematically explored the factors leading to this shift. In this Article, we provide the first analysis to explain why state legislatures enact reforms that significantly reduce both judges' and parole boards' discretion over criminal sentencing. First, we develop a political economy model that explains why legislatures acting in their own self-interest may be motivated to enact these laws. Our model predicts that legislatures are more likely to enact determinate sentencing reforms when there is tension among the political ideologies of legislatures, judges, and parole boards. Then, we empirically test the predictions of our political economy model using data from all fifty states over the period from 1960 to 2000. Our analyses confirm that political variables, such as divided government, are the primary influences on legislatures' decisions to enact determinate sentencing reforms. These results are consistent with our model's hypothesis: long histories of divided government produce clashes among the sentencing goals of legislatures, parole boards, and judges, and legislatures respond by enacting reforms that take power away from the judges and parole boards. Our conclusions are especially important given recent court cases and criticisms that challenge the future of determinate sentencing reforms.

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I. INTRODUCTION

Criminal sentencing in the United States has undergone sweeping changes in recent decades. The most significant development in sentencing has been the reallocation of power away from judges and parole boards and towards legislatures. State legislatures have accomplished this reallocation of power by enacting determinate sentencing legislation, such as sentencing guidelines, truth-in-sentencing laws, and the abolition of discretionary parole. Despite these dramatic changes in criminal sentencing, no study has systematically explored the factors leading to this shift. In this Article, we provide the first analysis to explain why state legislatures enact reforms that significantly reduce both judges' and parole boards' discretion over criminal sentencing.

Explaining the factors that influence legislatures to enact determinate sentencing reforms is especially important given recent developments in determinate sentencing. Decisions in several recent cases threaten the future of state sentencing guidelines and may presage further significant changes in criminal sentencing in the near future. For example, in its landmark *Blakely v. Washington* and *United States v. Booker* decisions, the Supreme Court found both state and federal sentencing guidelines to be unconstitutional under the Sixth Amendment.¹ Although *Blakely* and *Booker* found unconstitutional only provisions of the Washington state and federal sentencing systems, scholars agree that the decisions threaten the sentencing systems of many other states.² For example, in her *Blakely* dissent, Justice Sandra Day O'Connor identified nine other states whose sentencing regimes may also be unconstitutional under *Blakely*.³ Others have concluded that all but the District of Columbia and three of the twenty-four states with sentencing guidelines or similar sentencing systems are threatened.⁴

Similarly, constraints on parole boards have recently come under attack as states target prison overcrowding and rising correctional expenditures. In at least twenty-three states, correctional institutions experienced overcrowding, with constraints on parole ranking moderately high as a cause among correction officials.⁵ In 2010, the Supreme Court delayed a final ruling, on jurisdictional grounds, on a recent court order requiring the California prison system to house 40,000 fewer prison inmates;⁶

1. *United States v. Booker*, 543 U.S. 220, 226–27 (2005); *Blakely v. Washington*, 542 U.S. 296, 305 (2004). The Court set the stage for *Blakely* and *Booker* in three earlier decisions. In *Jones v. United States*, 526 U.S. 227, 248 (1999), the Court found that a federal carjacking statute could be unconstitutional if it allowed judges to determine the existence of sentencing factors that would increase a defendant's sentence. Likewise, in 2000, the Court ruled in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), that racial bias must be proved to a jury beyond a reasonable doubt before a judge could impose an enhanced hate crime sentence. Two years later, in *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002), the Court extended this reasoning to capital cases by requiring a jury to rule on aggravating factors that could result in a penalty of death. In the 2004 *Blakely* decision, the Court expanded these rulings to include sentencing guidelines. In the 2005 *Booker* decision, the Court confirmed *Blakely*'s far-reaching impact by ruling that, like the Washington sentencing guidelines held unconstitutional in *Blakely*, sections of the Federal Sentencing Guidelines were constitutionally flawed.

2. See, e.g., Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1049 (2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086–87 (2005); Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems*, 17 FED. SENT'G REP. 60, 60 (2004); Katie M. McVoy, Note, "What I Have Feared Most Has Now Come To Pass": *Blakely*, *Booker*, and the Future of Sentencing, 80 NOTRE DAME L. REV. 1613, 1613 (2005).

3. 542 U.S. at 323 (O'Connor, J., dissenting).

4. For a discussion, see Wool & Stemen, *supra* note 2, at 62.

5. Fred Holbert & Jack E. Call, *The Perspective of State Correctional Officials on Prison Overcrowding: Causes, Court Orders, and Solutions*, 53 FED. PROBATION 25, 26–27 tbls.1, 2 & 3 (1989).

6. Michael Rothfeld, *U.S. Supreme Court Delays Final Ruling on California Prison Case*, L.A. TIMES, Jan. 19, 2010, available at <http://latimesblogs.latimes.com/california-politics/2010/01/supreme-court-to-weigh-in-on-california-prison-case.html>.

constraints on discretionary parole are blamed as a primary cause for this prison crisis in California.⁷

Thus, as states consider reforming their determinate sentencing practices, it is particularly important to understand the factors that influence legislatures to enact these reforms. An understanding of the original motivations for these practices can provide guidance on the directions that future reforms may take in response to the recent Supreme Court decisions. Legislatures originally asserted that their decisions were motivated by public interest concerns such as reducing crime rates and sentencing disparity. However, in this Article, we provide both theoretical reasoning and empirical evidence implying that legislatures were primarily influenced by political and ideological concerns.

We begin in Part II by explaining the evolution of the shift from indeterminate to determinate sentencing. Under indeterminate sentencing, judges had considerable discretion over imposed sentences, and parole boards had authority over actual sentences served. However, beginning in the 1970s, states began to adopt determinate sentencing reforms, such as sentencing guidelines, truth-in-sentencing laws, and the abolition of discretionary parole, in response to the growing rejection of the discretionary and individualized punishments under the previous system.⁸

These reforms significantly reduce the power of judges and parole boards. Sentencing guidelines structure the sentencing process and limit judicial discretion by requiring judges to reference, consider, or adhere to a specific sentencing recommendation that is typically formulated by a state sentencing commission.⁹ The abolition of discretionary parole completely excludes the parole board from the prison release decision, and truth-in-sentencing laws greatly reduce parole boards' discretion by requiring that an offender serve some minimum percentage of the pronounced sentence before parole officials have the discretion to release the offender from prison.¹⁰

These determinate sentencing reforms originally received significant bipartisan support. Liberals believed that the reforms, by restricting the discretion of judges and parole boards, would reduce sentencing discrimination and sentence-length disparity.¹¹ On the other hand, conservatives believed that determinate sentencing reforms would result in more certain and more severe sentences that would reduce crime.¹²

7. James Sterngold & Mark Martin, *Hard Time: California's Prisons in Crisis: High Price of Broken Prisons: Tough Sentencing Creates Overcrowding that Endangers Inmates, Haunts Taxpayers*, S.F. CHRON., July 3, 2005, at A1.

8. See *infra* notes 22–25 and accompanying text.

9. See *infra* text immediately following note 22.

10. See *infra* note 23 and its succeeding text and text following note 37.

11. See *infra* note 27 and accompanying text.

12. *Id.*

However, despite this initial support, criticisms of determinate sentencing soon emerged. Both legal scholars and judges have argued that there are significant costs to reducing judges' and parole boards' discretion.¹³ Discretion among judges and parole boards is critical to assessments of deterrability and the likelihood of recidivism. Only these actors can tailor sentences to ensure that imprisonment serves its purpose and that inmates are rehabilitated. In addition, to the extent that determinate sentencing tended to increase the average length of sentences served, criticisms arose in relation to the growing burden on states' budgets.

In Part III, we explore why and under what circumstances state legislatures enact different permutations of reforms, and in particular, what factors influence legislatures to reallocate power over criminal sentencing across different institutional actors. We first explain why legislatures acting in the public interest may enact laws that constrain the discretion of judges and parole boards. The legislatures may be motivated by concerns over high crime rates, increasing correctional budgets, or sentencing disparity.

Then, we develop a political economy model that explains why legislatures acting in their own self-interest may be motivated to enact these laws. Political economy theories assume that political actors are self-interested and influenced by factors such as the pursuit of ideological goals, the accumulation of institutional power, or re-election concerns. Our model predicts that legislatures have an incentive to enact these reforms when their sentencing preferences differ from the preferences of judges and parole boards. Thus, reforms that limit the power of judges and parole boards are more likely to be enacted when there are differences among the sentencing goals of legislatures, judges, and parole boards.

Our political economy model produces specific predictions that we test in Part IV. Our analyses include several variables that represent either the political economy concerns or public interest concerns of state legislatures. The political economy variables directly test the predictions of our political economy model; they measure the degree of political divisiveness and tension among the sentencing goals of legislatures, judges, and parole boards. Likewise, we employ specific public interest variables to test whether the purported social goals of determinate sentencing—reducing crime and controlling correctional budgets—are consistent with the actual data.

We analyze data from all fifty states for the period from 1960 to 2000. First, we present and describe the basic data to identify general trends among states that have and have not enacted determinate sentencing reforms. Then, we perform more sophisticated analyses in order to isolate

13. See *infra* notes 47–52 and accompanying text.

the influence of political economy variables and public interest variables on legislatures' decisions to enact reforms. We estimate both maximum likelihood logit models and semiparametric duration models to ensure that our empirical findings are robust to different estimation techniques.

Our analyses confirm that political variables are a significant influence on legislatures' decisions to enact determinate sentencing reforms. For example, longer histories of divided government increase the likelihood that legislatures will enact determinate sentencing reforms. These results are consistent with our model's hypothesis: long histories of divided government produce clashes among the sentencing goals of legislatures, parole boards, and judges. Our results suggest that legislatures respond to this tension by enacting determinate sentencing reforms that reallocate power away from judges and parole boards and towards the legislature itself.

The weak results for most of the public interest variables suggest that legislatures' public interest concerns are not the primary drivers of determinate sentencing reforms, as is often claimed. Instead, legislatures appear to be primarily motivated by political economy concerns. Namely, they tend to reallocate power away from judges and parole boards when those groups have political ideologies that conflict with the legislatures' preferences.

In Part V, we conclude and explain that understanding the motivations for the adoption of determinate sentencing is essential to states that are currently considering reform.

II. DETAILS OF STATE SENTENCING GUIDELINES, TRUTH-IN-SENTENCING LEGISLATION, AND THE ABOLITION OF DISCRETIONARY PAROLE

A complete understanding of this Article's theoretical predictions and empirical findings requires a brief discussion of the purposes and history of state sentencing guidelines, truth-in-sentencing legislation, and the abolition of discretionary parole.¹⁴

A. *Original Goals of Determinate Sentencing*

States adopted determinate sentencing reforms in response to a growing rejection of the discretionary and individualized punishments under the previous system of indeterminate sentencing. Through the mid-1970s, all states and the federal system had such indeterminate systems. As Michael Tonry describes this period,

14. For a related discussion of the history of sentencing guidelines, see Joanna Shepherd, Blakely's *Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 537–43 (2007).

Mandatory penalties were few in number and modest in scope, prosecutors had unaccountable power over charging and plea bargaining, judges' sentencing discretion was constrained only by statutory sentencing maximums, and parole boards had broad or plenary authority to release prisoners subject, usually, only to the maximum prison term set by the judge or the legislature.¹⁵

In the 1970s and early 1980s, sentencing practices began to change as three criticisms of indeterminate sentencing emerged. First, critics asserted that indeterminate systems' sentencing disparities were unfair and unjust.¹⁶ Although numerous critics of sentencing disparity emerged,¹⁷ one notable group was the American Friends Service Committee, which argued that racial discrimination was responsible for imprisonment disparities.¹⁸ Another influential voice was then-U.S. District Court Judge Marvin Frankel, who argued that indeterminate sentencing was "lawless."¹⁹

Second, rehabilitation fell from favor as a sentencing goal. An important rationale for indeterminate sentencing was that if judges and parole boards were given discretion over sentencing and time served, they could individually craft sentences to match each offender's prospects for rehabilitation. However, several studies conducted in the 1970s doubted the ability of prison programs to rehabilitate offenders.²⁰

Third, critics blamed indeterminate sentencing for the period's dramatically increasing crime rates, asserting that sentences were too uncertain and too lenient.²¹ A leading book on crime policy argued that only more certain punishments could reduce crime.²²

Legislatures enacted determinate sentencing reforms to cure the perceived failures of indeterminate sentencing. Although states experimented with various reforms, the most common reforms aimed to directly reduce the discretion of either judges or parole boards. States enacted sentencing guidelines to reduce judges' discretion over imposed sentences. Other states reduced parole boards' discretion over actual time

15. Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1234 (2005).

16. See, e.g., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 1, 5–6 (1996), available at <http://www.ncjrs.gov/pdffiles/strsent.pdf>.

17. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 33–36 (1998).

18. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

19. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER ix–x (1972).

20. See, e.g., Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 22–23, 49 (1974); James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67, 80 (1971).

21. Tonry, *supra* note 15, at 1247.

22. JAMES Q. WILSON, THINKING ABOUT CRIME 192–94 (1st ed. 1977).

served by either passing truth-in-sentencing laws or by abolishing discretionary parole all together.

By abolishing discretionary parole, several states have completely removed the role of the parole board in determining when a prisoner's release should occur. Instead of a parole board making the release decision based on the prospects of rehabilitation and the likelihood of recidivism, the release date is instead determined by statute.²³

Truth-in-sentencing laws also reduce the role of parole boards by requiring that an offender serve some minimum percentage of the pronounced sentence before parole officials have the discretion to release the offender from prison. Although these laws have no direct impact on the court-imposed sentence, they do reduce the discrepancy between the imposed sentence and the actual time served by the offender. By restricting early parole, truth-in-sentencing laws greatly reduce the discretion of parole officials.

Whereas truth-in-sentencing laws constrain parole decisions, sentencing guidelines structure the sentencing process and limit judicial discretion by requiring judges to reference, consider, or adhere to a specific sentencing recommendation. "Guideline sentences are typically based on factors such as offense severity, the offender's prior record, the availability of punishment alternatives, and concerns for community safety."²⁴ The guidelines have narrowed the range of acceptable sentences that a judge may impose on a convicted offender.

These determinate sentencing reforms ultimately became law because they attracted a diverse coalition with diverse goals: they promised both to reduce unfair disparity and to crack down on criminals.²⁵ For example, in California, determinate sentencing was propelled into law by an improbable alliance of prisoners' rights and civil liberties groups, law-and-order conservatives, and police unions.²⁶

Liberals believed that the reforms, by restricting discretion of judges and parole boards, would reduce sentencing discrimination and sentence-

23. TODD REIMERS, SENATE RESEARCH CTR., PAROLE: THEN & NOW 1-7 (1999), available at <http://www.senate.state.tx.us/SRC/pdf/ib0599.pdf>.

24. BRIAN J. OSTROM ET AL., SENTENCING DIGEST: EXAMINING CURRENT SENTENCING ISSUES AND POLICIES 11 (1998).

25. See generally SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990 (1993) (noting disdain with discretion by both liberals objecting to it resulting in discrimination and by conservatives decriing it leading to more crime).

26. See Sheldon L. Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, in DETERMINATE SENTENCING: REFORM OR REGRESSION? 13, 21-29 (1978); Tonry, *supra* note 15, at 1248. See also STITH & CABRANES, *supra* note 17, at 38-77 (discussing the bipartisan support for federal sentencing guidelines). Although much of the public discourse surrounding determinate sentencing in the 1970s and 1980s focused on the federal system, arguments as to sentencing guidelines' functions and expected impacts also applied to the states.

length disparity. On the other hand, conservatives believed that determinate sentencing reforms would result in more certain and more severe sentences that would reduce crime.²⁷ They believed that judicial and parole board discretion was inconsistent with deterrence.²⁸ Conservative supporters of determinate sentencing could invoke former FBI director J. Edgar Hoover's criticism of indeterminate sentencing. Hoover had frequently condemned indeterminate sentencing, asserting that both its discretionary sentence lengths and its focus on rehabilitation produced excessively lenient punishments that increased crime.²⁹ Many others supported determinate sentencing as a get-tough program for crime reduction.³⁰

B. *History of Parole Abolition, Sentencing Guidelines, and Truth-in-Sentencing Legislation*

Despite the bipartisan support for determinate sentencing, the enactment of specific determinate sentencing reforms varied among the states. In 1975, Maine became the first state to abolish discretionary parole. Other states soon followed, and by 2000, fourteen states had abolished discretionary parole release. Table 1 presents the states that have abolished discretionary parole along with the year in which the state legislature abolished discretionary parole.³¹

Table 1

States Abolishing Discretionary Parole			
State	Year Enacted	State	Year Enacted
Arizona	1994	Minnesota	1980
Delaware	1990	New Mexico	1979
Illinois	1978	North Carolina	1994
Indiana	1977	Ohio	1996
Kansas	1993	Oregon	1989
Maine	1975	Virginia	1995
Mississippi	1995	Washington	1984

Although Pennsylvania became the first state to adopt truth-in-sentencing legislation in 1911, several other states enacted similar laws in

27. STITH & CABRANES, *supra* note 17, at 104.

28. *See id.* at 59, 104 (discussing the perceived conflict between deterrence and judicial discretion).

29. *Id.* at 31 (citing J. Edgar Hoover, *The Dire Consequences of the Premature Release of Dangerous Criminals through Probation and Parole*, 27 F.B.I. L. ENFORCEMENT BULL. 1 (1958)).

30. For a discussion, *see id.* at 38–48.

31. Reimers, *supra* note 23, at 3 fig.2.

the 1980s and 1990s. To further encourage the movement away from indeterminate sentencing, the federal government passed the 1994 Crime Act,³² which awards grants to states that can prove that offenders convicted of a Part 1 violent crime serve at least 85% of their sentences.³³ Between 1996 and 1999, twenty-eight states and the District of Columbia qualified for the federal truth-in-sentencing grants.³⁴ Table 2 presents the states that enacted truth-in-sentencing laws and their year of enactment.

Table 2

States Enacting Truth-in-Sentencing Laws			
State	Year Enacted	State	Year Enacted
Arizona	1993	New Hampshire	1982
California	1994	New Jersey	1997
Connecticut	1994	New York	1995
Delaware	1989	North Carolina	1993
Florida	1995	North Dakota	1995
Georgia	1994	Ohio	1995
Illinois	1995	Oklahoma	1997
Iowa	1996	Oregon	1989
Kansas	1992	Pennsylvania	1911
Louisiana	1995	South Carolina	1995
Maine	1995	South Dakota	1996
Michigan	1994	Tennessee	1995
Minnesota	1992	Virginia	1994
Mississippi	1995	Washington	1990
Missouri	1994	Wisconsin	1999

32. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

33. Part 1 violent crimes are “murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports” 42 U.S.C. §13701(2).

34. The table is based on data from four publications. THOMAS J. HAMMER & MICHAEL B. BRENNAN, 2001 WISCONSIN ACT 109: CRIMES AND THEIR PENALTIES 3 (2003), <http://www.wisspd.org/html/forprac/TISpartII.pdf>; WILLIAM J. SABOL ET AL., EXECUTIVE SUMMARY: INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/195163.pdf>; WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 11 tbl.1.5 (2002) [hereinafter SABOL, POLICY CENTER REPORT], http://www.urban.org/UploadedPDF/410470_FINALTISRpt.pdf; U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 6 fig.1 (1998), available at <http://www.gao.gov/archive/1998/gg98042.pdf>.

First developed during the late 1970s and early 1980s, sentencing guidelines currently apply in the federal courts, eighteen states, and the District of Columbia. Table 3 lists the states that have enacted sentencing guidelines and the years of adoption.³⁵

Table 3

States Enacting Sentencing Guidelines			
State	Year Enacted	State	Year Enacted
Arkansas	1994	North Carolina	1994
Delaware	1987	Ohio	1996
Florida	1983	Oregon	1989
Kansas	1993	Pennsylvania	1982
Louisiana	1992	Tennessee	1989
Maryland	1983	Utah	1993
Michigan	1981	Virginia	1991
Minnesota	1980	Washington	1984
Missouri	1997	Wisconsin	1985

C. *The Reforms' Effects on the Discretion of Judges and Parole Boards*

The states' determinate sentencing reforms are not identical.³⁶ Truth-in-sentencing laws often differ in the percentage of the imposed sentence they require convicted offenders to serve. Sentencing guidelines vary in the degree to which judges are forced to comply with the guidelines and, hence, in how strongly they constrain judges.³⁷ The states that have abolished discretionary parole have established a variety of alternative systems to determine parole eligibility. Despite the differences, all varieties of these reforms have achieved their goals of limiting the discretion of either the judges or the parole boards.

The abolishment of discretionary parole has significantly reduced the role of parole boards in determining inmates' releases. In states that have abolished discretionary parole, inmates are instead released by mandatory

35. The table is based on data from three publications: Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196 (2005); BUREAU OF JUSTICE ASSISTANCE, *supra* note 16, at 28 tbl.3-5; SABOL, POLICY CENTER REPORT, *supra* note 34. At least seven other states—Connecticut, Maine, Texas, Colorado, Nevada, New York, and Montana—have decided, after consideration, against guidelines; Frase, *supra*, at 1197.

36. Many authors have discussed similarities and differences. *See generally* Frase, *supra* note 35 (analyzing the diversity in state sentencing guidelines).

37. *See* OSTROM ET AL., *supra* note 24.

parole, and release dates are determined by statute. In 1976, 65% of state prison releases were by discretionary parole. However, by 1999, only 24% of state prison releases were by discretionary parole, while the remaining 76% were mandatory parole releases.³⁸

Removing parole boards from release decisions has substantially increased the percentage of the court-imposed sentences served by prison inmates. In 1999, inmates released by discretionary parole had served only 37% of their imposed sentences, whereas inmates released by mandatory parole had served 61% of their imposed sentences.³⁹

Truth-in-sentencing laws have also reduced the discretion of parole boards in determining the time served by criminal offenders. In states with discretionary parole release, truth-in-sentencing laws prevent parole boards from releasing inmates before they have served the designated percentage of their sentence. The laws have significantly increased the percentage of the sentence that released inmates must serve. Whereas prisoners released in 1996 served on average only 44% of their sentence,⁴⁰ prisoners admitted to prison in states with truth-in-sentencing laws served a significantly greater percentage of their sentence. For example, thirteen states that qualified for the Federal Truth-in-Sentencing Incentive Grants reported prison release data for 1997. Seven of those states reported that prisoners released in 1997 served more than 85% of their imposed sentence, and an additional four states reported that inmates served between 70% and 84% of their imposed sentence.

Whereas the abolition of discretionary parole and enactment of truth-in-sentencing legislation greatly reduces the discretion of parole boards, sentencing guidelines constrain judges and cause them to impose different sentences than they would impose in the absence of the guidelines. Individual states have conducted pre- and post-guidelines evaluations of sentences and have concluded that sentencing guidelines have significantly changed sentencing practices. For example, Minnesota has determined that before the guidelines, only 62% of sentences had fallen within what the guidelines later established as the recommended range. During the first three years after the guidelines, at least 77% of sentences were within the recommended range.⁴¹ Likewise, other states have found that the use of guidelines greatly reduces the variability in sentences that resulted from judicial discretion. For example, the 1983 Washington guidelines caused

38. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST. JUSTICE POLICY CTR., *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 4 (2002), http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf.

39. TIMOTHY A. HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, *TRENDS IN STATE PAROLE, 1990–2000*, at 7 (2001).

40. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, *TRUTH IN SENTENCING IN STATE PRISONS* 1, 13 tbl.14 (1999).

41. KAY A. KNAPP, *THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION* 43 (1984).

sentence-length variability to decrease by 60%.⁴² The variability of Oregon's sentence lengths was reduced by 45% after the imposition of their guidelines.⁴³

D. Reactions to Determinate Sentencing Reforms

Proponents of determinate sentencing reforms have been delighted with the success of these reforms.⁴⁴ Sentencing guidelines have generally achieved the legislatures' goals of reducing variability in sentences and increasing sentence lengths.⁴⁵ Moreover, supporters point to evidence that by curbing the discretion of judges and parole boards, determinate sentencing reforms have curbed racial discrimination in sentencing.⁴⁶

However, other commentators, both from academia and from within the criminal justice system, have noted the large costs associated with the increasing constraints on judges' and parole boards' discretion. For example, Richard Frase has identified the harms that result when guidelines systems make assessments of deterrability and likelihood of recidivism "on the basis of group or actuarial risk, rather than

42. Shepherd, *supra* note 14, at 564.

43. KATHRYN ASHFORD & CRAIG MOSBAEK, OR. CRIMINAL JUSTICE COUNCIL, FIRST YEAR REPORT ON IMPLEMENTATION OF SENTENCING GUIDELINES: NOVEMBER 1989 TO JANUARY 1990, at 17 (1991).

44. See, e.g., WALKER, *supra* note 25, at 145–56.

45. After Minnesota's implementation of sentencing guidelines in 1980, the rate of imprisonment for violent crimes increased from 61.1% to 85.9%, and average sentence lengths for violent crimes also increased. KAY A. KNAPP, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 21 (1984). After adoption of the 1982 Pennsylvania sentencing guidelines, incarceration rates for violent crimes increased from 44% to 64% for aggravated assault, from 74% to 86% for rape, and from 67% to 74% for robbery. John H. Kramer & Robin L. Lubitz, *Pennsylvania's Sentencing Reform: The Impact of Commission-Established Guidelines*, 31 CRIME & DELINQ. 481, 497 tbl.6 (1985). Sentence lengths also increased: from 8.5 months to 13.6 months for aggravated assault, from 41.5 months to 51.9 months for rape, and from 21.1 months to 21.6 months for robbery. *Id.* The 1983 Washington guidelines caused imprisonment rates for violent offenses to increase from 48.8% to 65.1% from 1982 to 1985. In addition, sentence lengths for violent crimes increased: sentences for murder increased from an average of 75 months to a range of 109–164 months; robbery sentences increased from an average of 40 months to a range of 40–60 months. SENTENCING GUIDELINES COMMISSION, PRELIMINARY EVALUATION OF WASHINGTON STATE'S SENTENCING REFORM ACT app. C at 49 (1986). After Oregon's implementation of sentencing guidelines in 1989, imprisonment rates for violent crimes increased from 62% to 89% for homicide, from 29% to 37% for assault, from 40% to 61% for rape, and from 50% to 61% for robbery. ED DEERY, OR. CRIMINAL JUSTICE COMM'N, FELONY SENTENCING IN OREGON 1994, at 49 (1997). Average sentence lengths for violent crimes increased from 34.4 to 119.8 months for homicide, from 26.1 to 32.1 months for assault, from 33.6 to 36.4 months for robbery, and from 40.1 to 76.7 months for rape. *Id.* at 50. The North Carolina sentencing guidelines enacted in 1994 have increased the imprisonment rate for violent offenders from 67% to 81% and increased the average sentence length from 56 months to 87 months. Robin L. Lubitz, *Sentencing Changes in North Carolina*, in PENAL REFORM IN OVERCROWDED TIMES 84, 86 (Michael Tonry ed., 2001).

46. STEPHEN P. KLEIN ET AL., RACIAL EQUITY IN SENTENCING 11 (1988).

individualized, case-by-case diagnoses.”⁴⁷ Likewise, judges have been furious that guidelines spurn judges’ skill and experience in evaluating deterrability and the ability to be rehabilitated and that the guidelines discard the individualized knowledge about the defendant that the judge gains during pretrial proceedings and trial.⁴⁸ For example, Oregon Judge Michael Marcus has long opposed the reduced discretion under sentencing guidelines. He notes, “[O]ffenders for whom public safety is best achieved by disparate dispositions . . . should be treated differently. That an identical crime can be committed by a psychopath or by an addict susceptible to recovery (with equal criminal histories) does not compel identical dispositions as a matter of fairness.”⁴⁹

In a survey by the Federal Judicial Center in 1996, about 80% of district and appellate judges said that they thought judges should be given more discretion than permitted under the guidelines.⁵⁰ In a 2002 survey of federal court judges, 45% of the responding judges said that the federal guidelines were too inflexible.⁵¹ Indeed, many judges are so outraged at sentencing guidelines that they claim to have decided to retire early to avoid sentencing with such limited discretion.⁵²

Concerned that guidelines restricted necessary sentencing discretion, many judges admit to evading the system. In a series of interviews with California municipal court judges, the judges admitted to using “a variety of methods to expand their discretion, including refusing plea bargains, assignment of offenders to probation and community service, creative interpretation of statutes, and recommendations to the probation department to allow alternative placements for mandatory sentences.”⁵³

47. Frase, *supra* note 35, at 433–34.

48. Michael Marcus, Blakely, Booker, and the Future of Sentencing, 17 FED. SENT’G REP. 243, 244 (2005); Harlington Wood Jr., Panel Remarks, *Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing*, 44 ST. LOUIS U. L.J. 418, 418–21 (2000).

49. Marcus, *supra* note 48, at 245. Other scholars discuss similar concerns. See, e.g., Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?*, 2 FED. SENT’G REP. 189, 189 (1989/1990).

50. See MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES 6 (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$file/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$file/gssurvey.pdf).

51. See Michael Edmund O’Neill, *Surveying Article III Judges’ Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENT’G REP. 215, 216 (2003). The survey was sent to all active Article III judges. One-half of the district court judges and one-third of the appellate judges responded. *Id.* at 215. The full survey report can be found at <http://www.uscc.gov/judsurv/judsurv.htm>.

52. See Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 251 (2004) (suggesting “that the sentencing guidelines have led district court judges to select senior status earlier. Specifically, judges take senior status after .4 years instead of after 3 years of eligibility”).

53. Jon’a Meyer & Paul Jesilow, *The Formation of Judicial Bias in Sentencing: Preliminary*

Other studies provide empirical evidence that is consistent with judges' evasion of the guidelines. They find that both judges and juries are more likely to acquit as the punishment following a conviction increases.⁵⁴ Moreover, the likelihood of acquittal is even higher when judges and juries have little control over the punishment required by a conviction, as in guidelines systems.⁵⁵

Commentators have expressed similar concerns over the reduction in the parole boards' discretion over time served. Many have asserted that treating all inmates in the same manner by requiring them to serve at least some minimum percentage of their sentence does not promote equality: "Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases. Excessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality."⁵⁶

Others have argued that parole board discretion is necessary to revisit the need for long terms of incarceration. Parole boards are critical to assessing when imprisonment has served its purpose, when inmates have been rehabilitated, and when the likelihood of recidivism is low.⁵⁷ In contrast, requiring inmates to serve a set percentage of their imposed sentence undermines the efficacy of incapacitation:

Findings on "Doing Justice," 22 W. ST. U. L. REV. 271, 279 (1995).

54. See Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 LAW & PSYCHOL. REV. 1, 8 (1986) (analyzing a hypothesis that judges or juries are more likely to render acquittals when they have little control over a mandated punishment to avoid the imposition of inappropriate sentences); Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 J. PERSONALITY & SOC. PSYCHOL. 1431, 1439 (1978) ("Increasing the severity of the prescribed penalty for an offence resulted in an adjustment of subjects' conviction criteria such that more proof of guilt was required for conviction and thus resulted in a reduced probability of conviction."); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 793–94 (1979) (finding that acquittals are more likely when charged offense is serious); Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCH. 211, 216 (1972) ("The present data indicate that restricting the decision alternatives available to [mock] jurors, especially when the guilty alternative has a consequence which is perceived to be too severe, may increase the likelihood of obtaining a not guilty verdict.").

55. James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*, 22 RAND J. ECON. 385 (1991) (presents a model where juries hoping to avoid wrongful convictions are less likely to convict after sentencing guidelines are enacted); Kaplan & Krupa, *supra* note 54 (concluding that judges and juries want to be sure that appropriate sentences are imposed); Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, WASH. U. L.Q. 151, 207, 210–11 (2005) (empirical evidence is consistent with the theory that judges are less likely to convict under the guidelines).

56. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 916 (1991).

57. Kate Stith, *Two Fronts for Sentencing Reform*, 20 FED. SENT'G REP. 343, 343–44 (2008).

It is difficult enough to determine a person's present dangerousness—whether he would commit an offense if released today. It is much more difficult to predict an offender's future dangerousness—whether he would commit an offense if released at the end of the deserved punishment term in the future. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition now of a fixed term that predicts preventive needs far in the future.⁵⁸

Similarly, other critics argue that the possibility of early release provides a strong incentive for many inmates to behave well and participate in programs that aid in their rehabilitation.⁵⁹ Because both truth-in-sentencing laws and the abolishment of discretionary parole effectively eliminate the possibility of early release, they take away hope for the inmates and reduce the incentive to behave and enroll in rehabilitative programs.⁶⁰

Finally, legal scholars are also concerned that discretionary parole release allows correctional officials to manage the prison population.⁶¹ In contrast, when release dates are set by statute, parole boards are incapable of controlling prison overcrowding by releasing low-risk and well-behaved inmates. Moreover, truth-in-sentencing laws exacerbate the problem of prison overcrowding by increasing the time served by prison inmates, at least when holding fixed the sentence imposed and ignoring the strategic responses of judges and juries as discussed above.⁶²

Despite the numerous concerns about limiting judges' and parole boards' discretion, many state legislatures have enacted determinate sentencing reforms. In the next Part, we explore why and under what circumstances state legislatures enact different permutations of reforms, in particular when they reallocate power over criminal sentencing across different institutional actors.

III. EXPLAINING THE ENACTMENT OF SENTENCING GUIDELINES, TRUTH-IN-SENTENCING, AND ABOLITION OF DISCRETIONARY PAROLE

The decision by legislatures to enact laws that constrain the discretion of other government officials is typically explained by either “public

58. Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1452 (2001).

59. Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 779 (2009).

60. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 480–81 (1999).

61. REIMERS, *supra* note 23, at 2.

62. Joseph A. Colquitt, Essay, *Can Alabama Handle the Truth (in Sentencing)?*, 60 ALA. L. REV. 425, 436 (2009).

interest” theory or “political economy” theory.⁶³ Public interest theory predicts that legislatures’ decisions are determined by the potential costs and benefits to society of legislation. On the other hand, political economy theory focuses on the self-interest of political actors, rather than their faithful representation of the public interest. In this Part, we first explain why legislatures acting in the public interest may enact laws that constrain the discretion of judges and parole boards. Then we develop a political economy model that explains why legislatures acting in their own self-interest may be motivated to enact these laws.

A. *Public Interest Theory*

Public interest theory asserts that legislators act as faithful agents of their constituents as they seek to further the welfare of the general public.⁶⁴ Thus, the legislature would enact determinate sentencing reforms that reduce discretion when doing so is in the best interests of society. Under this theory, the primary factors driving the trend towards curtailing discretion should be the social costs of crime and incarceration. For example, excessively lenient judges and parole boards may reduce both the incapacitative and deterrent functions of criminal punishment, causing crime rates to increase. Thus, legislatures acting in the public interest might pass laws that limit the judges’ and parole boards’ discretion in order to reduce crime rates. On the other hand, excessively severe judges and parole boards might produce lower crime rates but at the cost of straining the correctional budget. Legislatures acting in the public interest might enact legislation that reduces the judges’ and parole boards’ discretion in order to lessen the fiscal burdens on the state.

Alternatively, judges and parole boards might make inconsistent sentencing decisions, producing erratic, discriminatory, or unpredictable sentence lengths. The public is likely to view these inconsistent sentences as unjust, and unpredictable sentences might cause both increases in crime and difficulty in managing correctional budgets.⁶⁵ Thus, legislatures acting in the public interest may limit the discretion of the judges and parole boards in order to produce more uniform, predictable sentences.

Ultimately, legislatures acting in the public interest should weigh the social benefits and social costs of crime, sentences, and incarceration costs to achieve the correct balance.⁶⁶ Many states claim that these public

63. For a discussion of several public interest theories, see generally WALKER, *supra* note 25.

64. For pioneering discussions of the “public interest” theory of regulation, see Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211, 217 (1976) and Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

65. For a discussion of unpredictable sentences’ effect on crime rates, see Shepherd, *supra* note 14, at 586–87.

66. It is important to note the social benefits and costs alluded to here can include noneconomic factors, such as the expression of values held by the public in relation to crime, as

interest concerns were the primary drivers of determinate sentencing reforms. One of the purported goals of sentencing guidelines was to increase imprisonment for many criminal offenders.⁶⁷ In many states, the guideline legislation itself explicitly states that crime reduction is a central goal.⁶⁸ For example, Tennessee's enabling statute states that the purpose of sentencing guidelines is "to prevent crime and promote respect for the law by . . . providing an effective general deterrent to those likely to violate the criminal laws of this state"⁶⁹ Indeed, the states that have conducted pre- and post-guidelines implementation studies have all found that their state's average incarceration rates and sentence lengths increased substantially under the systems using sentencing guidelines.⁷⁰

Similarly, truth-in-sentencing legislation and the abolishment of discretionary parole were also motivated by concerns over rising crime rates. Discretionary parole release came "to symbolize the leniency of a system in which inmates [were] 'let out' early."⁷¹ Abolishing discretionary parole was expected to increase the length of prison time served.⁷² Similarly, truth-in-sentencing laws have been embraced to ensure long prison terms for criminal offenders.⁷³

Some legislatures that enacted determinate sentencing reforms were also influenced by the desire to control the fiscal burdens of imprisonment. These states adopted sentencing guidelines in the hope of producing more predictable sentences and controlling prison expenditures.⁷⁴ In contrast, many legislatures recognized that reforms that increased sentence lengths, such as parole abolition and truth-in-sentencing laws, might increase incarceration costs.⁷⁵

well as economic benefits and costs.

67. See, e.g., STITH & CABRANES, *supra* note 17, at 38–48.

68. See, e.g., BUREAU OF JUSTICE ASSISTANCE, *supra* note 16, at 39 tbl.4-2.

69. TENN. CODE ANN. §40-35-102(3) & (3)(A) (2005). Likewise, Arkansas, Louisiana, Oregon, and Washington cite public safety as a primary concern of guidelines. For a list of the purposes of guidelines in individual states' enabling legislation, see BUREAU OF JUSTICE ASSISTANCE, *supra* note 16, at 39 tbl.4-2.

70. See *supra* note 45.

71. See, e.g., Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 479–80 (1999).

72. REIMERS, *supra* note 23, at 3.

73. MICHAEL TONRY, U.S. DEP'T OF JUSTICE, NCJ 175721, THE FRAGMENTATION OF SENTENCING AND CORRECTIONS IN AMERICA I (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/175721.pdf>.

74. Rachel E. Barkow and Kathleen M. O'Neill argue that a desire to restrain growth in the costs of incarceration is an important factor in explaining the creation of sentencing commissions and the adoption of guidelines. However, they find mixed evidence in support of this hypothesis. Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 2006 tbl.2, 2009 & n.169 (2006).

75. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 9 fig.2.

Moreover, other states were motivated to enact determinate sentencing reforms in order to increase uniformity in prison sentences. One of the primary goals of sentencing guidelines was to increase sentence uniformity by requiring or recommending that judges impose sentences within a predetermined range.⁷⁶ Similarly, discretionary parole release was often perceived as producing disparate release dates for similar criminals.⁷⁷ Both the abolition of discretionary parole and the implementation of truth-in-sentencing legislation were expected to increase uniformity in time served by offenders because release dates would be set by statute.

Our empirical analysis includes several control variables to measure the influence of public interest factors on legislatures' decisions to enact determinate sentencing reforms.

B. *A Political Economy Model*

In addition to public interest concerns, legislators considering determinate sentencing reforms may be motivated by their own self-interest. Political economy theories assume that political actors are self-interested and influenced by factors such as the pursuit of ideological goals, the accumulation of institutional power, or re-election concerns.⁷⁸

We develop a political economy model to explain why legislatures enact laws that constrain the discretion of judges and parole boards. This theory necessarily focuses on political variables to explain states' adoption of guidelines and truth-in-sentencing laws. For example, when the state legislature and judiciary are dominated by different political parties, there could be a political interest in adopting stricter guidelines to indirectly exercise influence on the bench. Similarly, when parole boards' political ideologies conflict with legislatures' goals, legislatures may have a political interest in enacting constraints on parole.

Our model assumes that there are three primary actors in this process—the judiciary, the legislature, and the parole board. All three sets of actors potentially have distinct preferences over the sentences served by offenders. Their preferences may differ significantly if the actors place different priorities on factors such as public interest concerns, electoral and fundraising goals, or maintenance of the status quo.

76. See, e.g., STITH & CABRANES, *supra* note 17, at 33–36.

77. See generally Kevin R. Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 543 (Michael Tonry ed., 1998) (noting that “parole release decisions were essentially unguided by rule or principle, went unexplained, and were not appealable”).

78. Of course, re-election concerns can align politicians' objectives with the public interest. The political economy approach thus involves the additional assumption that such alignment is imperfect, allowing politicians some leeway to pursue ideological and power-related goals. For recent evidence suggesting that legislators are not tightly constrained by voters' preferences, see, for instance, Ebonya L. Washington, *Female Socialization: How Daughters Affect Their Legislator Fathers' Voting on Women's Issues*, 98 AM. ECON. REV. 311 (2008) (arguing in support of a hypothesis that a congressperson's propensity to vote liberal increases as a function of the number of daughters).

The sequence of actions in our political economy model of determinate sentencing reforms is as follows. First, the legislature enacts legislation, which may or may not include guidelines or rules affecting the granting of parole. Then, the judiciary imposes sentences on convicted offenders. Finally, the parole board decides how much of that sentence each of the offenders serves before being granted parole. Each relevant actor seeks to achieve an outcome—the incarceration length or sentence actually served by offenders—that is as close as possible to its preferred sentence, subject to the applicable constraints, such as the need to build majoritarian coalitions or limits on discretion imposed by statute.⁷⁹

Clearly, this model is a highly simplified representation that does not fully capture the complexities of the legislative and criminal justice processes. However, the fundamental test of a model lies not in its complexity but rather in whether its simplifications yield important insights and testable hypotheses about the phenomena being analyzed.

1. Outcomes with No Sentencing Guidelines or Constraints on Parole

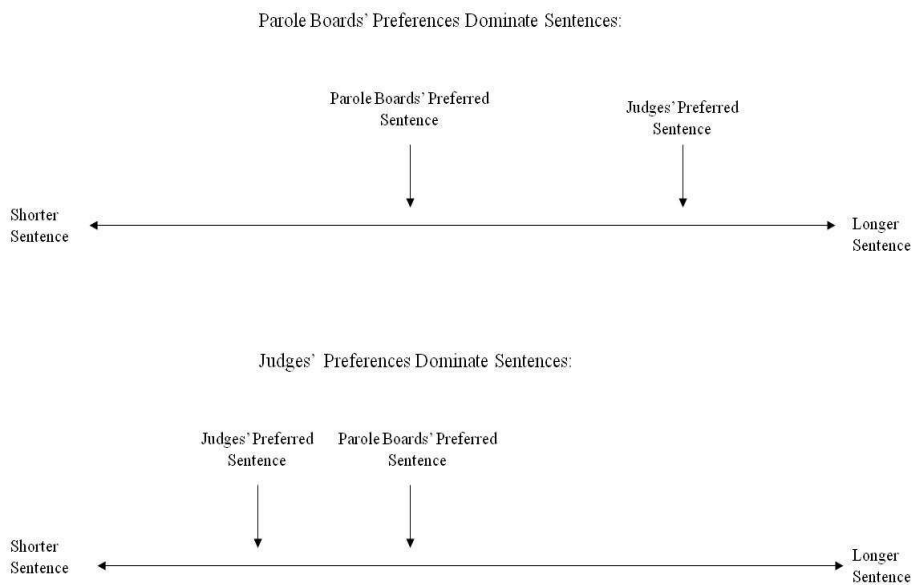
We begin with the simplest version of our model—sentencing in the absence of guidelines or constraints on discretionary rule. In this simple model, the parole board enjoys a last-mover advantage. However, the parole board can achieve its preferences over incarceration lengths only if the parole board prefers less severe sentences than the judiciary. For example, suppose the judiciary prefers that a specific type of offender serves ten years. If a parole board prefers that such offenders serve only five years, then offenders will only serve five years; the parole board with discretion over release dates can release the offenders after they serve five years of their ten-year term.⁸⁰ In contrast, if the parole board prefers fifteen-year sentences for these offenders while the judiciary prefers ten-year sentences, the offenders will only serve ten years.

79. This means that, for example, the sentence imposed by a judge can differ from the sentence she actually prefers, as she may have to compromise between her true preferences and the constraints created by external accountability. It is important to note that we assume that preferences apply to sentence lengths actually served by the offender, rather than to the nominal sentence that is imposed by the court. It may be possible to argue that nominal sentences may have an “expressive” effect in giving voice to society’s disapproval of crime. However, policy preferences are more likely to pertain to actual sentences served, as these influence the level of deterrence and incapacitation of offenders. Moreover, any expressive effect of nominal sentences is likely to be undermined when the public perceives a divergence between nominal and actual sentences.

80. This is, of course, subject to a number of caveats. For instance, parole boards will consider factors such as the prisoner’s behavior in prison when determining whether the prisoner should be released. However, in the example above, the parole board will seek to release offenders after five years, on average.

Thus, the parole board can effectively reduce incarceration lengths, but they cannot increase incarceration lengths beyond the court-imposed sentence. The parole board’s “last-mover advantage”—its ability to determine unilaterally the actual sentence served—is only relevant when the judiciary prefers more severe sentences. Hence, in the absence of guidelines and laws constraining the parole board, our model predicts that i) the judges’ preferences prevail when they prefer lenient sentences, ii) the parole boards’ preferences prevail when it prefers lenient sentences, and iii) severe sentences can only be achieved when both judges and parole boards prefer more severe sentences. Figure 1 depicts this relationship between judges’ and parole boards’ preferences and sentence lengths.

Figure 1
The Relationship Between Judges’ and Parole Boards’ Preferences and Sentence Lengths



Moreover, our model also predicts that legislatures have no incentive to constrain either parole boards or judges if the legislatures’ preferences coincide with the preferences of the actor that controls incarceration lengths. If the legislature has lenient preferences similar to those of either judges or parole boards, then the legislature achieves its preferred incarceration lengths. For example, if both judges and the legislature prefer five-year sentences, but the parole board prefers ten-year sentences, then both the court-imposed sentence and the incarceration length are five years. Similarly, if both parole boards and the legislature prefer five-year sentences, but judges prefer ten-year sentences, then the court-imposed sentence is ten years, but incarceration lengths are only five years.

2. Extension One: Constraints on Parole

Consider now an extension of the simple model to include constraints on parole—either the abolition of discretionary parole or the enactment of truth-in-sentencing laws. As an immediate consequence of constraints on parole, the parole board can no longer undermine the sentencing preferences of the judiciary. Thus, the enactment of constraints on parole increases judges' influence over sentencing because incarceration lengths are closer to the court-imposed sentences.

Our model yields two predictions. First, constraints on parole will only affect incarceration lengths when parole boards prefer more lenient sentences than judges. As our simple model already revealed, parole boards' preferences only affect incarceration lengths when parole boards prefer more lenient sentences than judges. In contrast, if parole boards had more severe preferences than judges, constraints on parole would have no effect on sentences.

Second, our model predicts that legislatures have an incentive to enact constraints on parole only when parole boards' preferences are more lenient than those of the legislature. If the parole boards' preferences are more severe than the legislatures' preferences, then constraints on parole will not help legislatures achieve their desired incarceration lengths.

To illustrate the reasoning, consider the following three examples. First, suppose that the parole board prefers sentences of five years, and both the legislature and the judiciary prefer ten-year sentences. Constraints on parole will cause incarceration lengths to increase from five to ten years. Without constraints on parole, the court-imposed sentence is ten years, but the parole board releases inmates after five years; with constraints on parole, both the court-imposed sentence and the incarceration length are ten years.

In contrast, assume that the legislature prefers five-year sentences while the parole board and judiciary prefer ten-year sentences. Now the legislature has no incentive to enact constraints on parole; with or without constraints on parole, both the court-imposed sentence and the incarceration period are ten years. Similarly, if both the legislature and the parole board prefer five-year sentences, but the judiciary prefers ten-year sentences, there is no reason to enact constraints on parole; the parole board is already achieving the legislatures' preferences by releasing inmates early.⁸¹

81. However, it is important to recognize that legislatures may enact constraints on parole for strategic reasons, even if the constraints will not affect incarceration lengths. For example, legislatures may engage in "position-taking" by signaling to the electorate that they are "tough on crime" while allowing the parole boards to enforce relatively lenient sentences that are closer to the legislature's true preferences. For a discussion of position-taking in legislatures, see, for example, Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. LAW & ECON. REV. 1 (2003) (contrasting

Thus, our model predicts that legislatures have an incentive to enact constraints on parole only when parole boards' preferences are more lenient than the legislature's.

3. Extension Two: Sentencing Guidelines

Consider another extension of the model to include only sentencing guidelines with no constraints on parole. Legislatures enact sentencing guidelines to provide judges with either a mandatory or recommended range of sentences. The minimum sentences in the guidelines' range will constrain only lenient judges who would prefer to impose a sentence below the minimum; the minimum sentence is irrelevant for judges with severe sentencing preferences. However, our model predicts that the minimum sentence only affects incarceration lengths when parole boards have severe preferences. If the parole board is more lenient than judges and the legislature, it can undermine the court-imposed sentence with or without guidelines.

To illustrate this reasoning, suppose that judges prefer five-year sentences, the parole board prefers ten-year sentences, and the guidelines' sentencing range is eight to ten years. Before the guidelines, both the court-imposed sentence and the incarceration length would be five years; after the guideline, both the court-imposed sentence and the incarceration length would be eight years. Thus, because the parole board is more severe than judges, sentencing guidelines will affect incarceration periods.

In contrast, assume that parole boards have more lenient preferences than judges. Assume that the parole board prefers five years, the judiciary prefers seven years, and the guidelines' sentencing range is eight to twelve years. The guidelines do not affect incarceration lengths. Prior to the guidelines, the court-imposed sentence was seven years and parole boards released inmates after five years; after the guidelines, the judges impose sentences of eight years, but parole boards still release inmates after five years. Thus, because the lenient parole board can undermine the court-imposed sentence with or without guidelines, the guidelines do not affect incarceration lengths.

Similarly, the maximum sentence in the guidelines' range will constrain only severe judges who would prefer to impose a longer sentence. However, our model predicts that the guidelines' maximum sentence only affects incarceration lengths when the parole board has severe preferences. If the parole board is more lenient than judges and the legislature, then they can undermine the court-imposed sentence with or without sentencing guidelines.

outcome-oriented preferences where legislatures are concerned with legislative outcomes as are voters likely to reward or punish the legislature, as a whole, with position-taking preferences where voters reward or punish individual legislators, distinguishing among those who voted favorably and unfavorably to voter wishes).

For example, assume that the judiciary favors ten years, the parole board prefers fifteen years, and the guidelines' sentencing range is eight to twelve years. Prior to the guidelines, both the court-imposed sentence and the incarceration length were ten years; after the guidelines, both the court-imposed sentence and the incarceration length will be twelve years. Thus, because the parole board is more severe than judges, sentencing guidelines will affect incarceration lengths.

In contrast, assume that the parole board prefers five years, the judiciary favors fifteen years, and the guidelines' sentencing range is eight to twelve years. Prior to the guidelines, judges imposed sentences of fifteen years and parole boards released inmates after five years; after the guidelines, judges impose sentences of twelve years and parole boards release inmates after five years. Thus, because the parole board is more lenient than the judges, the guidelines will not change the incarceration lengths.

Thus, our model predicts that sentencing guidelines affect incarceration lengths either when the judiciary is more lenient or more severe than the legislature but only if the parole board has severe preferences over sentencing. A lenient parole board can undermine sentences with or without the guidelines. Thus, the legislature has the incentive to introduce sentencing guidelines when the judiciary's preferences are too extreme relative to the legislature—either too lenient or too severe—but only when the parole board also has severe preferences.

4. Extension Three: Sentencing Guidelines and Constraints on Parole

Finally, we extend our model to consider the circumstances in which legislatures might want to enact both sentencing guidelines and constraints on parole. Recall that our model's first extension predicted that legislatures will enact constraints on parole when the parole board is too lenient. Our model's second extension predicted that legislatures will enact sentencing guidelines when the judiciary's preferences are either too lenient or too severe but only when the parole board has severe preferences.

Our model's final extension completes this picture; legislatures will enact both sentencing guidelines and constraints on parole when the judiciary's preferences are either too lenient or too severe but only when the parole board has lenient preferences. When parole is constrained, the guidelines directly affect the judiciary's discretion over incarceration lengths because the parole board can no longer undermine the court-imposed sentence. Our model reveals that when judges are very lenient, the guidelines' minimum sentence binds and judicial influence is reduced. When judges are quite severe, the guidelines' maximum sentence binds; judicial influence is also reduced. However, if judges had the same preferences as the legislature, there would be no reason to limit their discretion with sentencing guidelines.

To illustrate the reasoning, consider the following two examples. First, consider the case when both the parole board and judiciary are more lenient than the legislature. Assume that both the judiciary and the parole board prefer sentences of five years, but the legislature prefers sentences of ten years. If there are no constraints on discretion, both the court-imposed sentence and the incarceration length are five years. If only constraints on parole are enacted, the court-imposed sentence and incarceration length remain five years. If only sentencing guidelines of, say, ten to twelve years are enacted, the court imposes a sentence of ten years, but the parole board still releases inmates in five years. Only both sentencing guidelines and constraints on parole will achieve the legislature's preferences. If both constraints are enacted, judges impose ten-year sentences, and the court-imposed sentence cannot be undermined by parole boards.

Next, consider the case of a lenient parole board and a judiciary that is more severe than the legislature. Assume that the judiciary prefers fifteen-year sentences, the parole board prefers five-year sentences, but the legislature prefers ten-year sentences. If there are no constraints on discretion, the court-imposed sentence is fifteen years and the incarceration length is five years. If only constraints on parole are enacted, both the court-imposed sentence and the incarceration length are fifteen years. If only sentencing guidelines of, say, ten to twelve years are enacted, the court imposes a sentence of ten years, but the parole board still releases inmates in five years. Both sentencing guidelines and constraints on parole are necessary to achieve the legislature's preferences. If both constraints are enacted, judges impose ten-year sentences, and the court-imposed sentence cannot be undermined by parole boards.

Thus, our model predicts that legislatures have the incentive to enact both constraints on parole and sentencing guidelines when parole boards are lenient and undermine court-imposed sentences and when judges have preferences that are too extreme relative to the legislature.

5. Summarizing the Model

We can summarize the predictions of our model as follows:

1. Legislatures have no incentive to constrain either parole boards or judges if the legislatures' preferences equal the preferences of the actor that controls incarceration lengths.
2. Legislatures have an incentive to enact constraints on parole when parole boards' preferences are more lenient than the legislatures' preferences.
3. Legislatures have an incentive to enact only sentencing guidelines when either the judiciary is more lenient or more severe than the legislature, but the guidelines only

affect incarceration lengths if the parole board has severe preferences over sentencing.

4. Legislatures have an incentive to enact both sentencing guidelines and constraints on parole when the parole board is lenient and judges' preferences conflict with the legislatures preferences, regardless of whether they are too lenient or too severe.

These predictions from our political economy model depend on the preferences of the various actors over sentencing, but these preferences are not directly observable in reality. However, we can translate these theoretical predictions into testable hypotheses by making a straightforward general assumption. Namely, we assume that the political affiliations of the actors are good proxies for their sentencing preferences. That is, we assume that actors affiliated with the Republican Party tend to have more severe preferences over sentences, whereas actors affiliated with the Democratic Party tend to have more lenient preferences. Admittedly, this assumption will not be accurate for all judges. However, as long as this assumption is an accurate generalization—on average, Republicans have more severe preferences than Democrats—it suffices for forming testable predictions.⁸²

Using this assumption, our model produces the following testable hypothesis:

1. When legislatures, judges, and parole boards are affiliated with the same political party and have similar sentencing goals, then the legislature has little incentive to enact either sentencing guidelines or constraints on parole.
2. The legislature has an incentive to enact constraints on parole when the parole board is too lenient, or in other words, when the parole board is affiliated with the Democratic Party and the legislature is affiliated with the Republican Party.
3. The legislature has an incentive to enact sentencing guidelines when judges' sentencing goals conflict with the legislature's goals, or in other words, when judges are from a different political party than the legislature—either Republican or Democrat.

82. Indeed, empirical evidence suggests that this assumption is an accurate generalization. *See, e.g.,* Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009) (arguing that judges who must be reelected by Republican voters tended to rule in accordance with Republican policy, such as against defendants in criminal appeals, whereas judges facing re-election from Democratic voters were judiciously more liberal).

In the next Part, our empirical analysis estimates the influences of several public interest concerns and political economy concerns on legislatures' decisions to enact determinate sentencing reforms. For example, our empirical estimation includes proxies for incarceration costs and rising crime rates to measure the influence of these public interest concerns. Likewise, we include several variables that represent the predictions of our political economy model. For example, we include measures of divided government to determine whether divergent preferences between the legislature, judiciary, and parole board influence legislatures' enactment of determinate sentencing reforms. We also consider whether legislatures are more likely to enact sentencing guidelines to constrain elected judges, who may have preferences that are more likely to diverge from the legislature's than those of appointed judges.

IV. EMPIRICAL ANALYSIS: INFLUENCES ON THE ENACTMENT OF DETERMINATE SENTENCING REFORMS

We perform several analyses that measure the influence of both public interest concerns and political economy concerns on the enactment of sentencing guidelines, truth-in-sentencing legislation, and abolishment of discretionary parole. We first describe the public interest and political economy variables used in our analyses. Then, we present the basic data to see if general trends emerge among states that have and have not enacted determinate sentencing reforms. Next, we perform more sophisticated analyses in order to isolate the influence of political economy variables and public interest variables on legislatures' decisions to enact reforms. We discuss both the empirical methodology and the results from these more sophisticated techniques.

A. *Political Economy and Public Interest Variables*

Our analyses include several variables that represent either the political economy concerns or public interest concerns of state legislatures. The political economy variables directly test the predictions of our political economy model; they measure the degree of political divisiveness and tension among the sentencing goals of legislatures, judges, and parole boards. Likewise, we employ specific public interest variables to test whether the purported social goals of determinate sentencing—reducing crime and controlling correctional budgets—are consistent with the actual data.

1. Political Economy Concerns

Our political economy variables fall into two general categories: divided government variables and variables that reflect the need for legislative oversight of judges and parole boards.

First, we include variables that represent the political divergence among

state legislatures, judges, and parole boards. When a state's legislature, parole board, and judges have different political affiliations, a conflict among sentencing goals is more likely. In our analysis, the majority party of the legislature represents the political preferences of the legislature. Unfortunately, the political preferences of the parole board and state judges are typically unknown. However, we proxy these preferences with the political party of the governor in each state. Because governors appoint the parole board in each state, the political preferences of the governor will typically be consistent with the preferences of parole board members.⁸³ Moreover, in 24.3% of jurisdictions, trial court judges initially are appointed either directly by the governor or by a judicial nominating commission with many members appointed by the governor and with the governor making either the nominating decisions or final appointment decisions.⁸⁴ In addition, 43.2% of trial court judges are initially elected through partisan elections where receiving a party's nomination can be critical to a candidate's victory.⁸⁵ Thus, political party leaders effectively chose many of the states' trial court judges.

Thus, when a state's governor and legislature have different political affiliations, there is more likely to be conflict among the sentencing goals of legislatures, parole boards, and judges. Moreover, we measure the history of political divisiveness between the governor and state legislature instead of the current political divisiveness. Because many judges have long, fixed terms and low turnover rates due to automatic reappointments or uncontested re-elections,⁸⁶ the history of political divisiveness is more relevant than the current state of political divisiveness. Thus, a long history of divided government may produce clashes among the sentencing goals of legislatures and the governor-appointed parole boards and judges. Legislatures may try to reduce the tension by enacting determinate sentencing reforms that constrain the parole boards and judges.

We include two different measures of the history of political divisiveness between the executive and legislative branches of each state:

83. In most states, parole boards are executive branch agencies. See JOAN PETERSILIA, U.S. DEP'T OF JUSTICE, WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES 6 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/184253.pdf> ("In most States, the chair and all members of the parole board are appointed by the Governor."); Eric C. Tung, Comment, *Does the Prior Conviction Exception Apply to a Criminal Defendant's Supervised Release Status?*, 76 U. CHI. L. REV. 1323, 1323 n.1 (2009) (noting that state governors typically appoint state parole boards).

84. AM. BAR ASS'N, REPORT NO. 2 OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS 299 (1998).

85. *Id.* See also Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 718 (2005) (explaining how a party's nomination in New York judicial elections is "tantamount to victory").

86. William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 369 (1980).

the number of years since 1960 with Republican governors when the current legislature has a Democratic majority and the number of years since 1960 with Democratic governors when the current legislature has a Republican majority. We separate the political divisiveness variable by party affiliation because we expect that the majority party of the legislature may be relevant to the decision to enact determinate sentencing reforms. Although there is generally bipartisan support for sentencing guidelines, truth-in-sentencing laws, and abolition of discretionary parole, most of the reforms have been motivated by concerns over rising crime rates. Because the crime-fighting purpose of the guidelines more closely aligns with the Republican platform, we expect that Republican legislatures are more likely to enact these reforms. Moreover, our political economy model predicts that Republican legislatures will have a stronger incentive to constrain Democratic parole boards with lenient sentencing preferences.

We include other variables that measure the need for legislative control or oversight over judges' and parole boards' decisions. Various institutional factors may affect the amount of discretion judges and parole boards have, and the amount of oversight needed if legislatures' sentencing goals conflict with these other actors' goals.

First, we include a variable that represents whether judges face partisan or nonpartisan re-elections. Judges that face re-election by the voters will likely have more extreme preferences than judges that face reappointment by another government official. Judges that face future gubernatorial or legislative reappointment tend to vote more moderately than elected judges for two reasons. First, because appointed judges can never be certain of the politics of the government branch that will be responsible for their future retention, they have the incentive to vote moderately in order to appeal to politicians from either political party.⁸⁷ Second, governors and legislatures also tend to appoint moderate judges in order to increase the likelihood that future governors and legislatures of either party will reappoint the judges they originally selected.⁸⁸

In contrast, elected judges have very different incentives. As ideological changes in voters do not occur as suddenly as the executive or legislative branches can change power, elected judges do not face the same incentives to vote moderately in order to appeal to future politicians from either party.⁸⁹ In contrast, elected judges need to appeal to a small subset of citizens; voter turnout for judicial elections has historically been extremely low with often less than 20% of eligible voters turning out to vote in

87. Joanna M. Shepherd, *The Politics of Judicial Opposition*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 88, 92 (2010).

88. *Id.* at 92 n.3 (citing William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975)).

89. Shepherd, *supra* note 87.

judicial elections.⁹⁰ Moreover, the voters who actually do turn out may have relatively extreme preferences; their extreme preferences may be their motivation for voting.

We also include an indicator variable to represent whether criminal sentencing decisions are made by judges or juries. In a majority of states, judges impose criminal sentences after both jury and bench trials. However, in six states—Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia—juries select sentences after non-capital jury trials.⁹¹ The actors making the sentencing decisions may be relevant to legislatures' decisions to enact determinate sentencing reforms. Conflicting sentencing goals between judges and legislatures may be less relevant in states that allow juries to impose many criminal sentences. Alternatively, legislatures may feel that sentencing guidelines are more critical to constrain inexperienced juries than judges; evidence suggests that jury sentences are more varied than sentences imposed by judges.⁹²

Although judges' retention methods and jury sentencing may be more relevant in the decision to constrain judges through sentencing guidelines, they could also be relevant in the decision to constrain parole boards. Parole boards are the last movers in the sentencing process because their decisions are reactions to the court-imposed sentence. Thus, the preferences of the judges or juries making sentencing decisions should affect the parole boards' reactions to those sentences.

2. Public Interest Concerns

Next, we include several variables that represent legislatures' public interest concerns that may influence their decisions to enact determinate sentencing reforms. First, we include variables that reflect legislatures' concerns over high or rising crime rates. Determinate sentencing reforms were enacted, in part, to eliminate the lenient and uncertain sentences that resulted from indeterminate sentencing.⁹³ Indeed, one of the purported goals of sentencing guidelines, truth-in-sentencing legislation, and abolition of discretionary parole was to increase imprisonment for criminal offenders.

Thus, we include two variables that reflect legislatures' concerns for fighting crime. We include each state's annual violent crime rates to

90. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52–53 (2003).

91. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004).

92. See Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 331–32 (2005) (analyzing two of the six states—Arkansas and Virginia—with jury sentencing systems in non-capital cases).

93. Tonry, *supra* note 15, at 1247.

capture the influence of crime rates on legislatures' decisions, and we include each state's annual police per 100,000-person population (per capita) to capture the states' existing crime-control priorities.⁹⁴

Legislatures may also be motivated by concerns of rising correctional budgets. Indeed, some legislatures that enacted sentencing guidelines were influenced by the desire to control the fiscal burdens of imprisonment.⁹⁵ Thus, we include prisoners per 100,000-person population (per capita) to determine whether prison capacity and correctional costs were important factors in states' decisions to enact guidelines.

We also include measures of the general political preferences of each state's citizens. The people elect legislatures to represent the will of the people. Thus, legislatures' decisions to enact determinate sentencing reforms may reflect the wishes of the constituents more than the desires of the legislators themselves. We include the Berry et al. measure of citizen ideology to capture the general preferences of each state's citizens.⁹⁶ We also include the Berry et al. measure of government ideology that measures the ideology of the elected public officials in a state, which should correspond to the ideological preferences of the voting citizens that elect these officials.⁹⁷ Both of these variables are well-known and frequently used measures of ideology. They are computed from data on the interest group ratings of the members of Congress, election returns for congressional races, the party composition of state legislatures, and the party affiliation of state governors.

B. *The Basic Data*

Our data set consists of 2,050 observations, one for each state for the period 1960 to 2000. Thus, each observation represents a state in a given year. The appendix presents an overview of the data, including each variable's sample mean, standard deviation, and minimum and maximum

94. We lag all variables by one year because contemporaneous variables and sentencing reforms may exhibit reverse causality, where statutory changes may influence the variables. Evidence on the potential reverse causality between violent crime and truth-in-sentencing laws can be found in Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002) (noting, for instance, how truth-in-sentencing laws may result in violent crime offenders switching from violent crimes to property crimes that are not covered by the laws). Evidence on the potential reverse causality between violent crime and sentencing guidelines can be found in Shepherd, *supra* note 14, at 535 (noting how sentencing guidelines resulted in increases in crime).

95. The original stated purposes of the guidelines in Delaware, Minnesota, North Carolina, and Washington was to control resources. NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, *STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM* 10, 17, 19, 26 (2008).

96. William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327 (1998) (espousing on the authors' development of dynamic measures of the ideology of a state's citizens and politicians).

97. *Id.*

values. It also includes a detailed description of the sources of the data.

Figures 2 through 7 present the general trends in the data. The figures compare the average value of each variable among the states with sentencing guidelines, the states with either truth-in-sentencing laws (abbreviated “TIS” in the figures) or abolition of discretionary parole, the states with both reforms, and the states with neither reform. Figure 2 presents the data for the political divisiveness variables. It demonstrates that states with neither sentencing guidelines nor constraints on parole have a significantly lower incidence of divided government. This trend is consistent with the predictions of our model—states with less political divisiveness will have less tension among the sentencing goals of legislatures, judges, and parole boards, and in turn, legislatures will be less likely to enact reforms that constrain the sentencing discretion of these other actors. Moreover, Figure 2 shows that states with Democratic legislatures and divided government are more likely to enact sentencing guidelines than constraints on parole, whereas states with Republican legislatures and divided government are more likely to enact constraints on parole than sentencing guidelines.

Figure 2
General Trends in Divided Government Measures

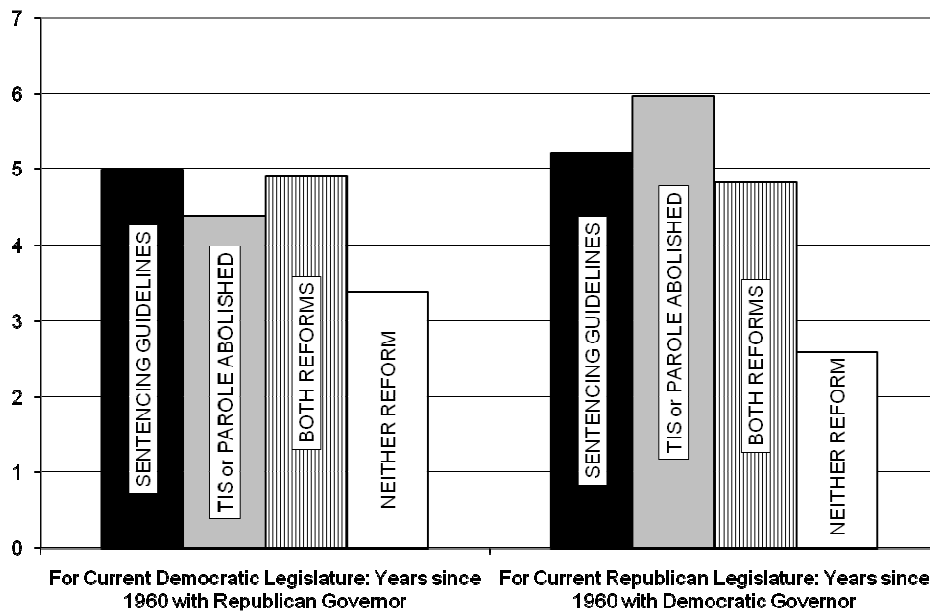


Figure 3 presents the trends in the judicial institutional variables. These institutional factors may affect the amount of discretion judges and parole boards have and the amount of oversight needed if legislatures' sentencing goals conflict with these other actors' goals. Figure 3 demonstrates that in states where judges face re-election, sentencing guidelines are more likely to be implemented than constraints on parole. A similar trend is visible in states where juries impose criminal sentences. These results are consistent with states enacting guidelines that restrict court-imposed sentences in order to control the extreme preferences of elected judges and juries. In contrast, constraints on parole are the least as likely in these states. This suggests that states may prefer to maintain the parole boards' discretion with incarceration lengths when judges and juries have more extreme preferences.

Figure 3
General Trends in Judicial Institutional Variables

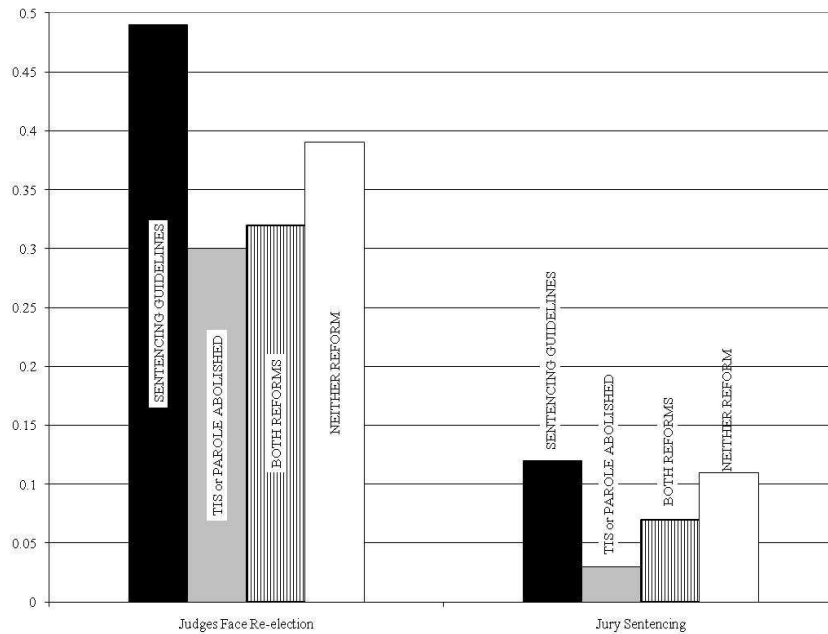


Figure 4 reveals the general trends in violent crime rates. The figure reveals that there is a large difference in violent crime rates among states with and without determinate sentencing reforms. Thus, the basic data is consistent with the purported crime-control goals of both sentencing guidelines and constraints on parole; states are more likely to enact reforms when crime rates are high.

Figure 4
General Trends in Crime

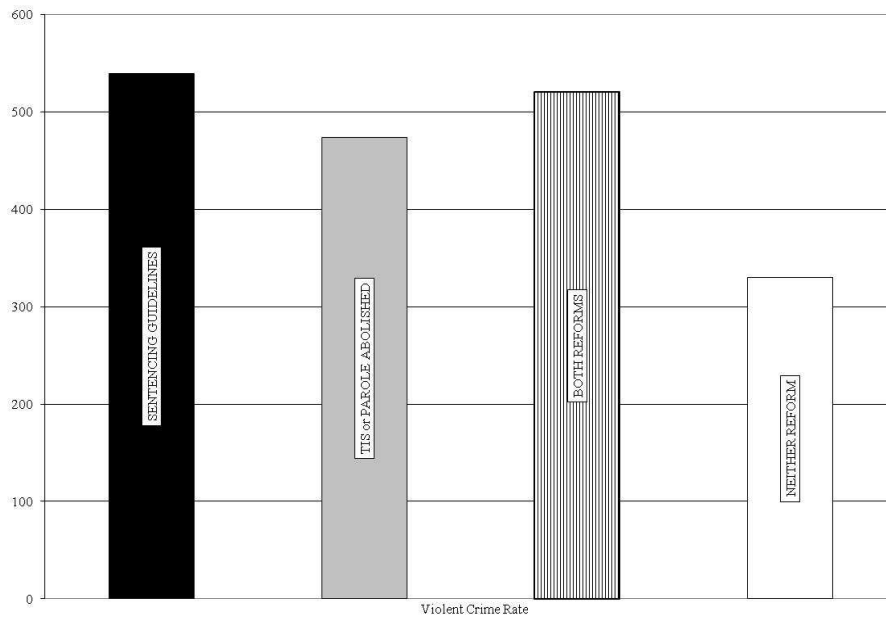


Figure 5 reveals the general trends in prisoners per capita. The data reveal that both sentencing guidelines and constraints on parole are more likely in states with high imprisonment rates. This is consistent with states hoping to control correctional costs through determinate sentencing reforms; the reforms are more likely in states with high imprisonment rates, and, in turn, high correctional costs.

Figure 5
General Trends in Prisoners

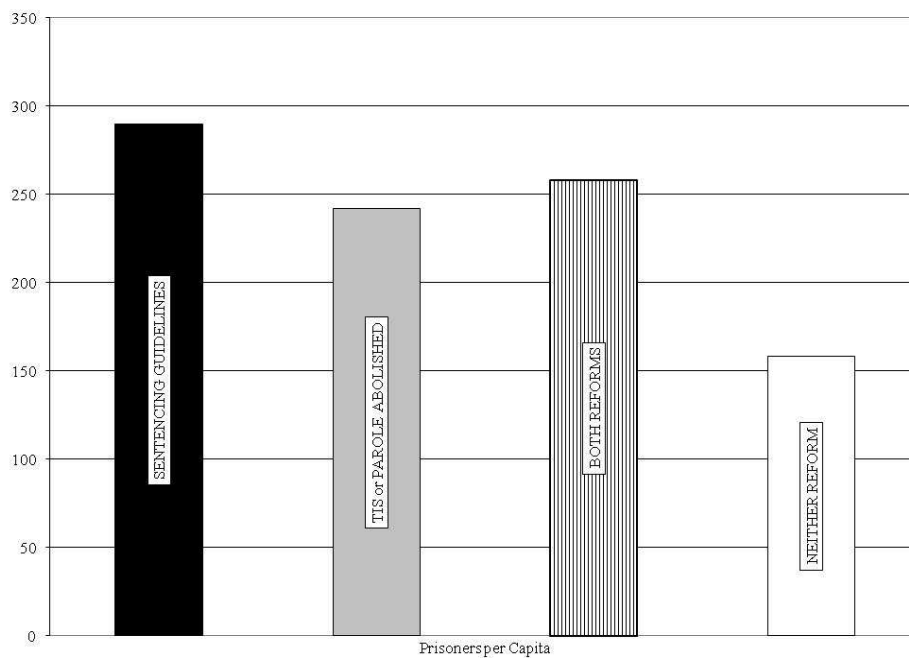
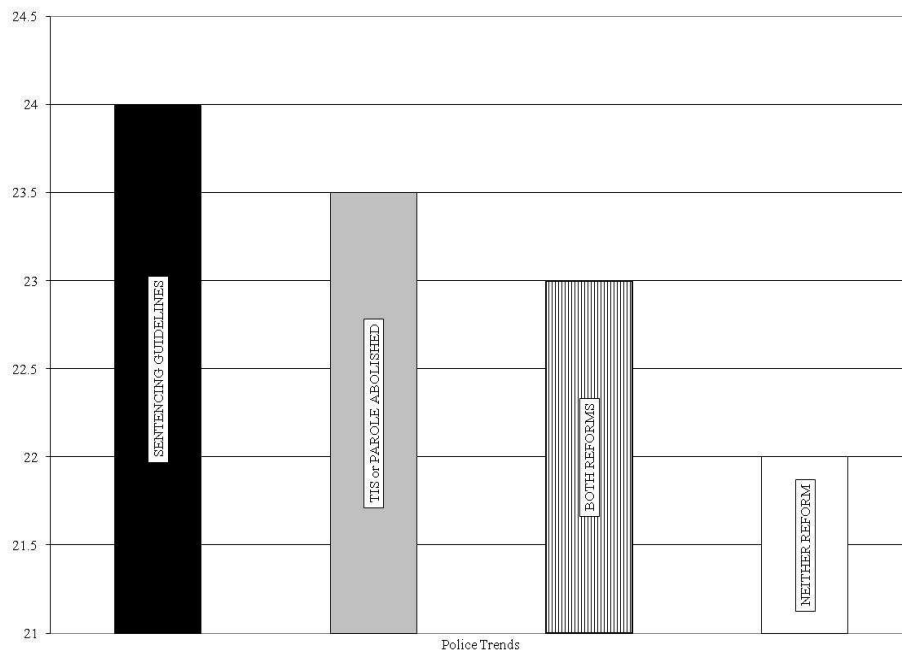


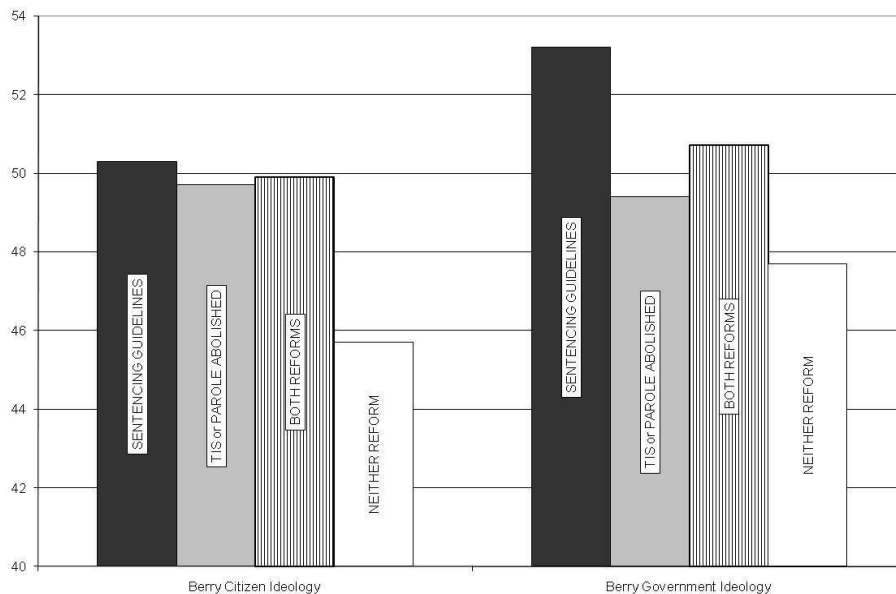
Figure 6 presents the basic data on police per capita. This figure shows that determinate sentencing reforms are more likely in states with more police. This trend is also consistent with the crime-control goals of determinate sentencing reforms; states that are concerned with crime rates tend to hire many police. Moreover, the basic data also suggest that sentencing reforms and police hiring are not considered to be substitute crime-control policies.

Figure 6
General Trends in Police



Finally, Figure 7 presents the general trends in the Berry et al. measures of citizen and government ideology. Higher values of these ideology measures indicate more conservative preferences. Thus, Figure 7, showing the average Berry et al. score of each category, demonstrates that states with more conservative citizens and governments are more likely to enact determinate sentencing reforms. These trends are consistent with legislatures striving to represent the will of the people.

Figure 7
Raw Data on Ideological Variables



C. Econometric Analysis

Although the basic data reveal general trends among states that have and have not enacted determinate sentencing reforms, we perform more sophisticated analyses in order to isolate the influences of political economy variables and public interest variables on legislatures’ decisions to enact reforms. After discussing our econometric methodology, we present the results from several different estimations.

1. Methodology

Our econometric analyses measure the relationship between the enactment of determinate sentencing reforms and several variables that represent either legislatures’ public interest concerns or political economy concerns. Our general estimation model is:

$$\text{Prob}(\text{Reform}=1|x) = \phi(\beta_0 + \beta_1 * \text{Political Economy Concerns} + \beta_2 * \text{Public Interest Concerns})$$

In each set of estimations, we specify *Reform* in three different ways. In the first specification, the dependent variable, *Reform*, is the presence of sentencing guidelines in a state. In the second specification, *Reform* is either the abolition of parole or the presence of truth-in-sentencing laws in a state. Finally, in the third specification, *Reform* is the presence of both sentencing guidelines and constraints on parole boards.

We estimate both logit models and semiparametric duration models to ensure that our empirical findings are robust to different estimation techniques. Our first set of estimations analyzes states' decisions to enact and maintain determinate sentencing reforms. Thus, our three outcome variables are 1) the decision to adopt and maintain sentencing guidelines; 2) the decision to adopt and maintain either truth-in-sentencing legislation or abolition of discretionary parole; and 3) the decision to adopt and maintain both sentencing guidelines and constraints on discretionary parole. We model these decisions as a dichotomous choice; each decision to enact and maintain a reform is a positive outcome and each failure to enact or maintain a reform is a null outcome. By coding as positive outcomes both the year of enactment and the years after enactment that states continue to uphold reforms, this estimation recognizes that both political economy and public interest concerns are important, not only in enacting but also in maintaining these sentencing reforms over time. Given the dichotomous nature of the outcomes, we estimate this model with a maximum likelihood logit model.⁹⁸

Next, we analyze a slightly different question—what influences states' decisions to enact determinate sentencing reforms. Thus, in the second set of estimations, we ignore influences on the decision to continue to uphold reforms in the years after enactment. Thus, our three outcome variables are: 1) the decision to adopt sentencing guidelines; 2) the decision to adopt either truth-in-sentencing legislation or abolition of discretionary parole; and 3) the decision to adopt both sentencing guidelines and constraints on discretionary parole. By coding only the year of enactment as a positive outcome (and coding subsequent years as a null outcome), this estimation controls for the fact that it may simply be inertia, and not political economy or public interest factors, that keeps these reforms in place. As these outcomes are still dichotomous, our second set of estimations also employs a maximum likelihood logit model.

For our third set of estimations, we employ a semiparametric duration model. Like our second set of logit estimations, duration models also test for influences on the decision to enact reforms, rather than on the decision

98. For a general discussion of the logit model, see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 846 (4th ed. 2000).

to both enact and maintain reforms. However, whereas the second set of logit estimations measures the factors that influence legislatures to enact reforms in a given year, the duration models are concerned with the length of time that elapses before a state enacts this type of legislation. Thus, the duration model estimations will reveal what factors influence the timing of enactment—whether states adopt reforms early, late, or never at all.

Moreover, we employ a semiparametric duration model—the Cox proportional hazards regression model.⁹⁹ Semiparametric models are superior to parametric models because they do not require assumptions about the distribution of failure times that could produce inconsistent estimation of covariate coefficients if the baseline hazard is misspecified.¹⁰⁰ Cox’s model exploits the fact that, with survival data, events that occur at certain times may be ordered so that estimates can be obtained by pooling over the risk groups based on ordered survival times.¹⁰¹ A partial likelihood calculation estimates the model.

2. Empirical Results

The results support the hypothesis that both political economy and public interest concerns influence legislatures’ decisions to enact determinate sentencing reforms. Tables 4, 5, and 6 report the results from our estimations. The tables indicate the relationship between each variable and the legislatures’ enactment and, in some regressions, maintenance of each reform. In each table, the top number in each cell is the regression coefficient, which indicates the magnitude and direction of each variable’s relationship with legislatures’ decisions. A negative coefficient indicates that a variable reduces the likelihood that a legislature will enact a reform. In contrast, a positive coefficient indicates that a variable increases the likelihood of enactment or maintenance of the reforms.

In addition, each table reports the t-statistic for each coefficient. In each cell, the t-statistic is the bottom number, in parentheses. Coefficients with t-statistics equal to or greater than 1.645 are considered statistically significant at the 10% level, meaning that there is 90% certainty that the coefficient is different from zero. T-statistics equal to or greater than 1.96 indicate statistical significance at the more-certain 5% level, and t-statistics equal to or greater than 2.576 indicate statistical significance at the most-

99. See D. R. Cox, *Regression Models and Life-Tables*, 34 J. ROYAL STAT. SOC’Y 187 (1972).

100. See Bruce D. Meyer, *Unemployment Insurance and Unemployment Spells*, 58 *ECONOMETRICA* 757, 769 (1990). Although these models are nonparametric because they make no assumptions about the distribution of time to failure, there remains a parametric component because we are still parameterizing the effect of the covariates. See MARIO CLEVES ET AL., *AN INTRODUCTION TO SURVIVAL ANALYSIS USING STATA 5* (2004). Thus, they are referred to as semiparametric. *Id.*

101. Essentially, a separate analysis on the probability of failure is performed at each failure time, and then these analyses are combined. CLEVES ET AL., *supra* note 100, at 3. Because each of the separate analyses made no assumption about the distribution of failure times, the combined analysis also makes no assumption. *Id.* at 4.

certain 1% level. Empiricists typically require t-statistics of at least 1.645 to conclude that one variable affects another in the direction indicated by the coefficient.¹⁰² In the table, “*”, “+”, and “a” indicate significance at the 1%, 5%, and 10% levels, respectively.

a. Legislatures’ Decisions to Enact and Maintain Determinate Sentencing Reforms

Table 4 reports the results from our logit estimations that analyze states’ decisions to both enact and maintain determinate sentencing reforms. The results show that several political economy concerns and public interest concerns are associated with all three outcome variables: the enactment and maintenance of sentencing guidelines alone, the enactment and maintenance of either truth-in-sentencing legislation or abolition of discretionary parole alone, and the enactment and maintenance of both sentencing guidelines and constraints on discretionary parole.¹⁰³

Table 4
Logit Estimation Results: Influences on the Enactment and Maintenance of Determinate Sentencing Reforms

	Sentencing Guidelines	Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
<u>Political Economy Variables:</u> For Current Democratic Legislature: Years since	0.04*	0.03+	0.04*

102. For each regression, the table also reports the pseudo R-squared statistic. In contrast to t-statistics, which measure the reliability of each individual coefficient, R-squared statistics measure the regression’s overall goodness-of-fit. GREENE, *supra* note 98, at 236–38. The statistics range from 0 to 1 with higher values indicating better goodness-of-fit. While the R-squared statistic indicates goodness-of-fit in an OLS regression, the pseudo R-squared statistic measures goodness-of-fit in a logistic regression. UCLA: Academic Technology Services, Statistical Consulting Group. FAQ: What are pseudo R-squareds?, available at http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Pseudo_RSquareds.htm (last visited June 20, 2010).

103. The table reports the results from logit regressions on the decision to enact and maintain each reform. In each cell, the top number is the coefficient estimate and the bottom number is the t-statistic computed from robust standard errors. “*”, “+”, and “a” represent significance at the 1%, 5%, and 10% levels, respectively.

	Sentencing Guidelines	Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
1960 with Republican Governor For Current Republican Legislature: Years since	(3.09) 0.08*	(2.37) 0.05*	(3.57) 0.05*
1960 with Democratic Governor Judges face Re-election	(6.89) 1.10*	(5.43) -.374+	(5.03) -.222
Jury Sentencing	(6.16) 0.21 (0.82)	(2.49) -1.61* (4.37)	(1.61) -1.74* (3.10)
<u>Public Interest Variables:</u>			
Violent Crime rate	0.002* (7.23)	0.0009* (2.98)	0.002* (6.72)
Prisoners 100,000 pop.	3.38* (6.54)	3.01* (5.36)	3.19* (6.31)
Police 100,000 pop.	-7.42 (1.22)	-8.84 ^a (1.73)	-13.42+ (2.48)
Berry Citizen Ideology	0.034* (5.15)	0.026* (4.89)	0.025* (4.99)
Berry Govt Ideology	0.009 ^a (1.92)	-0.006 (1.61)	-0.002 (0.07)
Number of Observations	1982	1982	1982
Pseudo R-squared	.2012	.1196	.1605

The results reveal that both measures of divided government have a positive influence on legislatures' decisions to enact determinate sentencing reforms. These results are consistent with our model's hypothesis that long histories of split parties produce clashes among the sentencing goals of legislatures, parole boards, and judges. Our results suggest that legislatures may try to reduce the tension by enacting determinate sentencing reforms that constrain the parole boards and judges.

The coefficients are larger in magnitude for the divided government variable with a majority Republican legislature than for the divided government variable with a majority Democratic legislature. This indicates that, consistent with the crime-control goals of these reforms, Republicans are more likely than Democrats to enact and maintain these reforms. This result is also consistent with the predictions of our political economy model: Republican legislatures have stronger incentives to restrain Democratic parole boards with more lenient sentencing preferences.

Although the coefficients in the table give the effect of each variable on the log odds of enactment and maintenance of each reform, we can interpret the coefficients using predicted probabilities.¹⁰⁴ For example, the coefficients reveal that the baseline probability of enacting and maintaining sentencing guidelines in any particular year is only 5%. However, when the legislature is currently majority Democrat while previously there have been at least twenty years with Republican governors, the probability of enacting and maintaining sentencing guidelines increases to 12.6%. Likewise, when the legislature is currently majority Republican but there have been at least twenty years with Democratic governors, this probability increases to 23.2%. Similarly, the baseline probability of enacting and maintaining either truth-in-sentencing laws or abolition of discretionary parole is 9%. However, the probability increases to 17.5% when there is a Democratic majority in the legislature but there have been at least twenty years with Republican governors, and the probability increases to 24.5% when there is a Republican majority in the legislature but there have been at least twenty years with Democratic governors.

The results also indicate that legislatures are more likely to enact and maintain sentencing guidelines when judges face re-election by the voters. This result is consistent with our prediction that legislatures are more likely to constrain judges' decisions when the judges have more extreme preferences than the legislatures.

However, legislatures are less likely to enact and maintain constraints on parole when judges face re-election. These results suggest that legislatures want to maintain the parole boards' discretion over incarceration lengths when judges have more extreme preferences.

104. For a discussion of how to transform logit coefficients into predicted probabilities, see ACADEMIC TECHNOLOGY SERVICES, UCLA, STATA DATA ANALYSIS EXAMPLES: LOGIT REGRESSION, <http://www.ats.ucla.edu/stat/stata/dae/logit.htm> (last visited May 10, 2010).

Similarly, legislatures are less likely to enact and maintain constraints on parole when criminal sentencing decisions are made by juries. This result suggests that legislatures want to maintain the parole boards' discretion over incarceration lengths when inexperienced juries impose criminal sentences.

Thus, consistent with the predictions of our theoretical model, several political economy concerns appear to influence legislatures' decisions to enact and maintain determinate sentencing reforms. The legislatures are more likely to enact reforms when there is tension between the sentencing goals of legislatures, parole boards, and judges—either because there is a history of divided government or because elected judges have more extreme preferences. Moreover, legislatures tend to not enact constraints on parole, preserving the parole boards' discretion, when court-imposed sentences tend to be more extreme—either because judges face re-election or because criminal sentencing decisions are made by juries.

In addition, public interest concerns also influence legislatures' decisions to enact and maintain determinate sentencing reforms. The table indicates that legislatures are more likely to enact and maintain both sentencing guidelines and constraints on parole when violent crime rates are high. This suggests that legislatures' concerns over high crime rates motivated them to pass and maintain determinate sentencing reforms.

Both sentencing guidelines and constraints on parole are also more likely when there are large numbers of prisoners. This result is consistent with legislatures' tough-on-crime mentality; states with high crime rates tend to have more prisoners, and thus, legislatures are motivated to enact reforms aimed at fighting crime. However, this result also suggests that legislatures are not influenced by concerns over rising correctional budgets. They tend to enact reforms that will increase imprisonment when prison capacity and, in turn, correctional costs are already high.

Moreover, the results suggest that legislatures are less likely to enact and maintain both sentencing guidelines and constraints on parole when their states have a high proportion of police per capita. These results indicate that when states have already taken measures to control crime by hiring more police, they are less likely to enact reforms that will increase incarceration lengths, possibly because these reforms serve as substitute mechanisms for achieving deterrence.

Finally, legislatures are more likely to enact and maintain both sentencing guidelines and constraints on parole when the states' citizens are more conservative. This result suggests that legislatures are striving to represent the wishes of their constituents by enacting tough-on-crime reforms.

b. Legislatures' Decisions to Enact Determinate Sentencing Reforms

Table 5 reports the results from our logit estimations that analyze states' decisions to enact determinate sentencing reforms.¹⁰⁵ Once again, the results show that both political economy concerns and public interest concerns influence legislatures' decisions.¹⁰⁶

Table 5
Logit Estimation Results:
Influences on the Enactment of Determinate Sentencing Reforms

	Sentencing Guidelines	Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
<u>Political Economy Variables:</u>			
For Current Democratic Legislature: Years since 1960 with Republican Governor	0.07+ (2.17)	0.10+ (2.10)	0.04* (1.98)
For Current Republican Legislature: Years since 1960 with Democratic Governor	0.09+ (2.25)	0.13+ (2.51)	0.05* (1.95)
Judges Face Re-election	0.85 ^a (1.66)	-.13 (0.24)	0.48 (1.21)
Jury Sentencing	0.51 (0.78)	0.06 (0.32)	0.14 (0.26)
<u>Public Interest Variables:</u>			

105. In 1994, the federal government passed the 1994 Crime Act, which awarded grants to states that enacted truth-in-sentencing legislation. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102, 20103, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.). In order to separate the influence of the federal legislation from the political economy and public interest variables, we limited our time period to pre-1994 in the estimations when the outcome variable is the decision to adopt either truth-in-sentencing legislation or abolition of discretionary parole.

106. The table reports the results from logit regressions on the decision to enact each reform. In each cell, the top number is the coefficient estimate and the bottom number is the t-statistic computed from robust standard errors. “*”, “+”, and “^a” represent significance at the 1%, 5%, and 10% levels, respectively.

	Sentencing Guidelines	Truth-in- Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
Violent Crime Rate	0.002* (2.77)	0.0003* (2.25)	0.002* (4.10)
Prisoners 100,000 pop.	-0.007 (0.29)	4.02 (1.03)	0.022 (0.03)
Police 100,000 pop.	11.42 (0.52)	20.42 (1.08)	8.37 (0.6)
Berry Citizen Ideology	0.007 (0.34)	0.012 (0.42)	0.001 (0.09)
Berry Govt. Ideology	0.019 (1.16)	-0.025 (1.15)	-0.004 (0.30)
Number of Observations	1982	1395	1982
Pseudo R-squared	.0862	.0964	.0637

The table reports the results from logit estimations when only the year of enactment is coded as a positive outcome (subsequent years are coded as a null outcome). Thus, these estimations ignore the influences of political economy and public interest variables on legislatures' decisions to uphold reforms after enactment.

Nevertheless, the table reveals that the divided government variables continue to have a statistically significant relationship with legislatures' decisions to enact sentencing guidelines alone, constraints on parole alone, and both reforms together. This indicates that not only is divided government important to maintaining determinate sentencing reforms, but it is also important to the initial enactment decisions. Once again, these results confirm the predictions of our model: Long histories of divided government produce clashes among the sentencing goals of legislatures, parole boards, and judges, and legislatures respond by attempting to restrict the discretion of the other actors.

Moreover, the coefficients continue to be larger in magnitude for the divided government variable with a majority Republican legislature than for the divided government variable with a majority Democratic legislature. This result suggests that Republican legislatures' tough-on-crime agenda was an important influence on their decision to enact these reforms. It is also consistent with the predictions of our political economy model: Republican legislatures have a stronger incentive to constrain Democratic parole boards with more lenient sentencing preferences.

The only public interest variable that has a statistically significant relationship with legislatures' decisions is the violent crime rate. The table reveals that the higher the violent crime rate, the more likely legislatures are to enact sentencing guidelines alone, constraints on parole alone, and both reforms together. Once again, this confirms that legislatures' concerns over high crime rates influenced their decisions to enact these determinate sentencing reforms. The statistical insignificance of the other public interest variables suggests that, although these other variables were relevant to the decision to maintain determinate sentencing reforms, they are less important to the initial decision to enact these reforms.

Table 6 reports the results from our Cox proportional hazards regression model. Like the previous logit model, this duration model analyzes states' decisions to enact, not maintain, determinate sentencing reforms.¹⁰⁷ The table reveals that the only significant variables are the divided government variables. Again, this confirms the hypothesis from our political economy model: Legislatures are more likely to enact determinate sentencing reforms when their sentencing goals differ from the goals of the judges and parole boards.

Table 6
Duration Model Results:
Influences on the Enactment of Determinate Sentencing Reforms

	Sentencing Guidelines	Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
<u>Political Economy Variables:</u>			
For Current Democratic Legislature: Years since 1960 with Republican Governor	0.06 ^a (1.71)	0.07 ^a (1.83)	0.03 (0.79)
For Current Republican Legislature: Years since 1960 with Democratic Governor	0.08+ (2.02)	0.11* (2.57)	0.08+ (2.01)
Judges Face Re-election	0.67	-0.15	-0.28

107. In 1994, the federal government passed the 1994 Crime Act, which awarded grants to states that enacted truth-in-sentencing legislation. Pub. L. No. 103-322, 108 Stat. 1796 (1994). In order to separate the influence of the federal legislation from the political economy and public interest variables, we limited our time period to pre-1994 in the estimations when the outcome variable is the decision to adopt either truth-in-sentencing legislation or abolition of discretionary parole.

	Sentencing Guidelines	Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole	Both Sentencing Guidelines and Truth-in-Sentencing Legislation and/or Abolition of Discretionary Parole
Jury Sentencing	0.08 (0.14)	-3.8 (0.532)	-1.29 (1.37)
<u>Public Interest Variables:</u>			
Violent Crime Rate	0.0002 (0.17)	-0.0001 (.07)	-0.00009 (0.07)
Prisoners per 100,000 pop.	4.36 (1.50)	1.38 (0.29)	4.79 (1.10)
Police per 100,000 pop.	-5.24 (0.18)	11.44 (0.68)	-9.18 (0.56)
Berry Citizen Ideology	0.014 (0.56)	0.037 (0.99)	0.013 (0.45)
Berry Govt. Ideology	0.013 (0.70)	-0.051 (1.55)	-0.007 (0.34)
Number of Observations	1755	1444	1427
Chi-Squared Test	.2179	.0547	.3150

c. Discussion of Results

The results from our empirical analyses strongly support the predictions of our political economy model. Regardless of the estimation technique, our measures of divided government have a strong positive relationship with legislatures' enactment and maintenance of sentencing guidelines and constraints on parole. Long histories of divided government likely produce clashes among the sentencing goals of legislatures, parole boards, and judges. Our results suggest that legislatures respond to this tension by enacting determinate sentencing reforms that reallocate power away from judges and parole boards and towards the legislatures themselves.

The results also consistently show that Republican legislatures with divided governments are more likely to enact determinate sentencing reforms than Democratic legislatures with divided governments. This result suggests that Republican legislatures' tough-on-crime agenda was an important influence on the legislatures' decisions to enact these reforms. It is also consistent with the predictions of our political economy model: Republican legislatures have a stronger incentive to constrain Democratic parole boards with more lenient sentencing preferences.

The results are weaker for most of the other variables. Violent crime rates have a statistically significant relationship with determinate

sentencing reforms in the two logit estimations, but the results from the duration model are insignificant. The results for the other public interest variables, elected judges, and jury sentencing are only statistically significant in the initial logit estimations.

The weak results for most of the public interest variables suggest that legislatures' public interest concerns are not the primary determinants of determinate sentencing reforms, as is often claimed. Instead, legislatures appear to be primarily motivated by political economy concerns; namely, they tend to reallocate power away from judges and parole boards when those groups have political ideologies that conflict with the legislatures' preferences.

V. CONCLUSION

The most significant development in criminal sentencing in recent decades has been the shift from indeterminate to determinate sentencing. In this Article, we present the first study to explore the factors leading to this shift. We develop a political economy model that explains why legislatures acting in their own self-interest may be motivated to enact these laws. Our model predicts that determinate sentencing reforms are more likely to be enacted when there is tension among the political ideologies of legislatures, judges, and parole boards.

Our empirical analyses confirm that political variables, such as divided government, are a significant influence on legislatures' decisions to enact determinate sentencing reforms. These results are consistent with our model's hypothesis: Long histories of divided government produce clashes among the sentencing goals of legislatures, parole boards, and judges, and legislatures respond by enacting reforms that take power away from the judges and parole boards.

Explaining the factors that influence legislatures to enact determinate sentencing reforms is especially important given recent developments in the Supreme Court's jurisprudence in relation to determinate sentencing. Decisions in several recent cases threaten the future of sentencing guidelines. In addition, constraints on parole boards have recently come under attack as states target prison overcrowding and rising correctional expenditures.

As states consider reforming their current guidelines or parole systems, it becomes more important for scholars, criminal law practitioners, and policymakers to understand the legislatures' original motivations for enacting these reforms. Contrary to the claims of many legislatures, the reforms were not solely motivated by public interest concerns. Instead, legislatures appear to be primarily motivated by political economy concerns; namely, they tend to reallocate power away from judges and parole boards when those groups have political ideologies that conflict with the legislatures' preferences.

In light of these recent and ongoing developments in criminal justice, these empirical findings have several important implications. Presumably, states will be less hesitant to alter their current sentencing practices if they understand that political concerns, rather than public interest concerns, were the primary influence on the original enactment of determinate sentencing reforms. This is especially true given recent studies that suggest that not only does determinate sentencing increase correctional budgets, but it may also increase crime.¹⁰⁸

In addition, our findings suggest that future state reforms in response to the Supreme Court's evolving jurisprudence in this area may depend on the constellation of preferences among state actors. For instance, states in which there is more agreement among the sentencing goals of legislatures, judges, and parole boards may be able to enact more far-reaching reforms that move away from determinate sentencing.

Overall, an understanding of the forces determining the original enactment of these sentencing regimes can provide a valuable compass in the uncertain times that appear to lie ahead for states' criminal justice systems.

108. Shepherd, *supra* note 14, at 533, 535. Shepherd, *supra* note 94, at 509.

APPENDIX

A. OVERVIEW OF THE DATA

Our data contains observations from all fifty states from 1960 to 2000. The data are arranged in a spreadsheet consisting of 2,050 rows and numerous columns. Each row is an observation and reports data for each state in a given year. Each column includes data on an individual variable for that state-year. For example, row 1 in our sorted data would include information on each variable for Alabama in 1960. Table 7 provides an overview of each variable:

Table 7
Descriptive Statistics

Variable	Mean	Standard Deviation	Minimum Value	Maximum Value
Sentencing Guidelines	0.1194	0.324	0	1
Truth-in-Sentencing Legislation or Discretionary Parole Abolished	0.1578	0.3646	0	1
Both Sentencing Guidelines & Truth-in-Sentencing or Discretionary Parole Abolished	.2036	.4027	0	1
<u>Political Economy Variables:</u>				
For Current Democratic Legislature: Years since 1960 with Republican Governor	3.727	5.592	0	31
For Current Republican Legislature: Years since 1960 with Democratic Governor	3.034	6.716	0	43
Judges Face Re-election	0.38	0.485	0	1
Jury Sentencing	0.12	0.325	0	1
<u>Public Interest Variables:</u>				
Violent Crime Rate	370.38	243.11	9.5	1244.3
Prisoners per 100,000 population	177.48	136.94	20.3	901
Police per 100,000 population	22.5	12.4	6.9	211.5
Berry Citizen Ideology	46.62	16.39	.9625	95.83
Berry Government Ideology	48.34	23.93	0	99.39

B. DATA DESCRIPTION AND SOURCES

Sentencing Guidelines

Data on the year of enactment of the state guidelines systems are from three sources: Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196 (2005); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 28 tbl.3-5 (1996), available at <http://www.ncjrs.gov/pdffiles/strsent.pdf>; and WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 11 tbl.1.5 (2002), http://www.urban.org/UploadedPDF/410470_FINALTISrpt.pdf. There were a few discrepancies between some of the sources, so we coded a state as having truth-in-sentencing laws if either of the sources reported that the state had enacted this legislation.

Truth-in-Sentencing Legislation

Data on the year of enactment of truth-in-sentencing laws are from four sources: THOMAS J. HAMMER & MICHAEL B. BRENNAN, 2001 WISCONSIN ACT 109: CRIMES AND THEIR PENALTIES 3 (2003), <http://www.wisspd.org/html/forprac/TISpartII.pdf>; WILLIAM J. SABOL ET AL., EXECUTIVE SUMMARY: INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 5 (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/195163.pdf>; WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 11 tbl.1.5 (2002), http://www.urban.org/UploadedPDF/410470_FINALTISrpt.pdf; and U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 6 fig.1 (1998), available at <http://www.gao.gov/archive/1998/gg98042.pdf>. There were a few discrepancies between some of the sources, so we coded a state as having truth-in-sentencing laws if either of the sources reported that the state had enacted this legislation.

Parole Abolition

Data on the year states abolished parole is from WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR, THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 11 tbl.1.5 (2002), http://www.urban.org/UploadedPDF/410470_FINALTISrpt.pdf.

Governors' Party Affiliation

The data on political party affiliation of governors from 1960 to 2000 is from Archive of Political Leaders by B. Schemmel, <http://www.rulers.org/index.html> (last visited May 10, 2010).

State Legislature Party Composition

The data on party composition in each state legislature following each two-year election cycle since 1960 was obtained via: E-mail from Tim Storey, Senior Fellow, National Conference of State Legislatures, to Joanna M. Shepherd, Associate Professor of Law, Emory University School of Law (Mar. 20, 2006) (on file with author).

Judicial Selection

Data on the method of judicial selection is from AM. BAR ASS'N, REPORT NO. 2 OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS 299 (1998).

Jury Sentencing

Data on jury sentencing in non-capital cases is from Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. LAW REV. 885, 886 (2004).

Crime Rates

State-level violent crime rates for the period from 1960 to 2000 are available from the FBI's Uniform Crime Reports. These data can be accessed on-line at the Database search of the Bureau of Justice Statistic, <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/StateCrime.cfm> (last visited May 10, 2010).

Police Employment

Data on full-time state police employees are from the Uniform Crime Reports for the United States (1960–1992) and Crime in the United States (1993–2000) both published by the U.S. Department of Justice.

Prison Population

Data on prison populations are from the Bureau of Justice Statistics, National Prisoner Statistics data series, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=131> (last visited May 10, 2010). We are thankful to Lawrence Katz for sharing prison population data from 1960 to 1990. E-mail from Lawrence Katz, Professor of Economics, Harvard University, to Joanna M. Shepherd, Associate Professor of Law, Emory University School of Law (May 11, 2005) (on file with author).

Berry et al. Measures of Government and Citizen Ideology:

Data on the Berry et al. measures of government and citizen ideology are available at: http://www.uky.edu/~rford/Home_files/page0005.htm. For a discussion of the measures, see William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327 (1998).

