

1 word “indeterminate” denotes that, on the day a prison sentence is handed down in court, no
 2 one—including the judge—can estimate with any certainty how long the defendant will
 3 actually be confined.⁵ The severity of an indeterminate sentence is unknowable, sometimes
 4 for many years.

5 Determinate sentencing systems, in contrast, are those that have removed the parole
 6 board’s authority to fix prison-release dates. Provisions for good time typically remain in
 7 place to encourage rule compliance and enrollment in prison programs.⁶ Thus, for example, in
 8 a jurisdiction offering good-time credits of 20 percent, a judicially pronounced sentence of
 9 five years will result in release eligibility after four years. Because good time is awarded
 10 routinely to most inmates in most jurisdictions,⁷ the actual time the defendant will serve is
 11 reasonably calculable on the day of judicial sentencing. Judges as a general matter know the
 12 severity of the punishments they select.

13 The choice between system types can be distilled to one of preference for who should
 14 hold primary sentencing discretion in prison cases. Durations of terms are largely prescribed
 15 by parole boards in an indeterminate structure, but the board’s power is transferred to the
 16 courts in a determinate framework. This is often described as a shift of sentencing discretion
 17 from the “back end” to the “front end” of the sentencing chronology.⁸

18 Of these alternatives, the revised Code concludes that a properly-designed determinate
 19 sentencing system is superior, see § 6.06(4) and (5) and Comments *a* and *e* (this draft). This
 20 reflects, in part, the Code’s preference for visible, regulated, and accountable forums for the

percent could be made for “especially meritorious behavior or exceptional performance of his duties.” See Model Penal Code, Complete Statutory Text § 305.1 (1985).

⁵ Andrew von Hirsch and Kathleen J. Hanrahan, *The Question of Parole: Retention, Reform, or Abolition* (1979), at 27.

⁶ See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 *UCLA L. Rev.* 217, 240-252 (1982) (observing that both theorists and state legislatures have included good-time credits within their determinate sentencing schemes).

⁷ See 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, 783 (2009) (“In both federal and state systems, most inmates are awarded the entire available amount of good time.”); Dora Schriro, *Is Good Time a Good Idea? A Practitioner’s Perspective*, 21 *Fed. Sent’g Rptr.* 179, 179 (2009) (“Typically, statutory good time is granted automatically when inmates meet certain requirements such as complying with prison rules and avoiding disciplinary infractions.”); Jacobs, *Sentencing by Prison Personnel*, 30 *UCLA L. Rev.* 217, 225 (“In large prison systems with vast inmate turnover and scarce resources, it is inconceivable that a thoughtful decision could be made each month as to whether an individual prisoner deserves to be awarded good time. Therefore, there is an inexorable tendency for statutory and meritorious good time to be awarded automatically.”).

⁸ See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 *U. Colo. L. Rev.* 679, 684 (1993) (“Almost all guidelines efforts have endeavored to move sentencing discretion from the back-end of the system to the front-end of the system. . . . Consequently, the leaders of many of the guideline efforts have come from the judiciary.”).

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1 exercise of sentencing discretion. It also reflects a policy judgment that the durations of prison
2 terms ordinarily should be determined by courts based on considerations known at the time of
3 sentencing, subject only to marginal adjustments for an inmate’s conduct or achievements
4 while institutionalized. Finally, it reflects the reality that American parole boards have proven
5 to be, in the words of Kenneth Culp Davis, administrative agencies of low quality.⁹

6 While few defend indeterminate sentencing systems as they now exist, or have existed
7 in the past, there have been recurring calls for the “reinvention” of the nation’s parole-release
8 agencies. While this remains a laudable goal worthy of serious effort, no reform has yet been
9 consummated that could serve as a platform for model legislation. Indeed, we lack evidence
10 that a “reinvention of parole” is possible in American correctional cultures—nor are there
11 compelling models of accomplishment elsewhere in the world.¹⁰ In contrast to these
12 unknowns, there are a number of long-running determinate sentencing systems in the United
13 States that have enjoyed comparative successes in areas of policy implementation, sentence
14 uniformity, procedural fairness, transparency, the (marginal) reduction of racial disparities in
15 punishment, improved information systems, and correctional resource management.¹¹ It is
16 these proven systems that have supplied the institutional foundations for the new Code.

17 In advocating the elimination of the *release authority* of the parole board, the Code
18 raises no question about the desirability of high-quality aftercare for prison releasees and,
19 when needed, a period of continuing surveillance.¹² Postrelease supervision (“parole
20 supervision” in indeterminate states) is retained in the Code, with much continuity dating
21 back to the 1962 provisions. Indeed, the revised Code urges state legislatures to give priority
22 to investments in reintegrative services for ex-prisoners, often today called “reentry”
23 programs.¹³ Because release dates are relatively easy to calculate in determinate systems,
24 planning for in-prison program completion and postrelease services is often easier than in a
25 discretionary release framework.

⁹ See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1971), at 133 (“the performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government”).

¹⁰ For an informative survey of European systems, see Nicola Padfield, Dirk van Zyl Smit, and Frieder Dünkel, *Release from Prison: European Policy and Practice* (2010).

¹¹ For a full discussion, see *Model Penal Code: Sentencing, Report* (2003), at 41-115.

¹² See Jack M. Kress, *Prescription for Justice: The Theory and Practice of Sentencing Guidelines* (1980), at 222 (“parole release decisionmaking and the supervision of released parolees bear neither a theoretical nor a practical relationship to the other. . . . [T]he abolition of parole release decisionmaking will not lead to any deleterious effects upon parole release supervision and may even improve its management”).

¹³ See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (stating that the “reintegration of offenders into the law-abiding community” is one principal purpose of the Code’s provisions on sentencing).

1 Few absolutes exist in the law. The current draft qualifies the Institute’s preference for
 2 a determinate sentencing system in several ways—and comparable exceptions can be found in
 3 all American determinate jurisdictions. First, the revised Code endorses the use of good-time
 4 allowances, see § 305.1 (this draft). Second, the Code introduces a mechanism to confront the
 5 problem of exceptionally long prison sentences—those measurable in decades rather than
 6 months or years—which U.S. jurisdictions mete out more frequency than most other nations.
 7 The draft creates a new process for a judicial decisionmaker to review lengthy prison terms
 8 after inmates have spent 15 years in confinement, with recurring review thereafter, see
 9 § 305.6 (this draft). Third, and building upon majority practice in the United States today,
 10 § 305.7 (this draft) permits the judicial modification of prison sentences for aged or infirm
 11 inmates, in cases of exigent family circumstances, or when other compelling reasons exist that
 12 justify a modified sentence under the principles of § 1.02(2) (Tentative Draft No. 1, 2007).
 13 Fourth, all U.S. jurisdictions have established a clemency power, usually held by the
 14 executive, often mandated in the states’ constitutions.¹⁴

15 Despite such provisos, there remain large differences in how and by whom sentencing
 16 discretion is exercised in systems that have eliminated the parole board’s release discretion
 17 and those that have not. Because the policy choice between the two approaches is
 18 fundamental to the institutional design of a criminal-sentencing system, this study sets out the
 19 reasoning behind the draft’s recommendations at some length.¹⁵

¹⁴ Once exercised with great regularity in many states, the clemency power fell into relative disuse by the latter 20th century. Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 *Fed. Sent’g Rptr.* 153 (2009).

¹⁵ Strong views on both sides of this issue have been aired since the beginning of the Model Penal Code: Sentencing project. E.g., comments of Judge Jack Davies (supporting parole-release discretion in a new Model Penal Code sentencing system) and Judge Theodore A. McKee (favoring elimination of parole-release authority in the Code), ALI Members Consultative Group meeting, Philadelphia, September 21, 2002. Respected academic voices have called for the retention—with substantial reworking—of parole-release authority in American sentencing systems. See Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003), at 187 (recommendation that “we should reinstitute discretionary parole release in the 16 states that have abolished it”; recommendation founded on need to provide incentives to inmates to rehabilitate themselves and provide state officials a tool to prevent the release of dangerous inmates); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 *Emory L.J.* 377, 455 (2005) (recommending “a guided, reconceptualized, and humble approach to parole release”; recommendation supported in major part by argument that such a system avoids Sixth Amendment requirements of jury factfinding at sentencing); Mark Bergstrom, Jordan Hyatt, & Stephen Chanenson, *The Next Era of Sentencing Reform Revisited* (paper presented to the American Bar Association Commission on Effective Criminal Sanctions: Roundtable on “Second Look” Sentencing Reforms, December 2008); Petty Burke & Michael Tonry, *Successful Transition and Reentry for Safer Communities: A Call to Action for Parole* (2006), at 30 (arguing that “such a sentencing scheme provides incentives that can be used to increase offenders’ willingness to participate in treatment and engage in the process of change”).

THE POLICY QUESTION

Fourteen states, the federal system, and the District of Columbia have abolished the release discretion of parole boards, including half of sentencing-guidelines jurisdictions. Five states cancelled their parole boards' release authorities in the 1970s, four did so in the 1980s, and seven more in the 1990s. Two states later reversed course.¹⁶ In 1994, the American Bar Association endorsed the trend, recommending that time served in prison should be determined by sentencing judges subject to good-time reductions, all within a framework of sentencing guidelines.¹⁷

This Study considers the question of parole-release discretion in light of accumulating experience since the 1970s in the two-thirds of U.S. sentencing systems that have retained a paroling authority, and the one-third that have not. The study first asks whether parole-release systems better advance the goals of the sentencing system than determinate systems. It then examines the procedural setting for parole-release decisions and the safeguards available to prisoners, with reference to the procedural attributes of judicial sentencings. Last, the study compares parole-release "abolition" jurisdictions with "retention" jurisdictions for their differing experiences of prison population growth over the past three decades.

Purposes of Sentencing and the Model Penal Code

The revised Model Penal Code adopts a framework of utilitarian purposes within limits of proportionality in sentence severity.¹⁸ The next four sections will consider the question of who—a court or a parole board—is best situated to set prison-release dates in light of the Code's sentencing purposes.

The traditional view is that a parole board's release decisions should be made on utilitarian grounds: *At what point has prisoner A been rehabilitated? Is prisoner B still too dangerous to release, thus requiring further confinement on incapacitation grounds?* The board's release authority was the centerpiece of the medical model of sentencing that took root in American penalty in the late 19th and early 20th centuries. The board was meant to

¹⁶ Determinate systems currently exist in Arizona, California, Delaware, Illinois, Indiana, Kansas, Maine, Minnesota, North Carolina, Ohio, Oregon, Virginia, Washington, Wisconsin, the District of Columbia, and the federal system. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003), at 66-67 table 3.1. Colorado returned to an indeterminate system in 1985, while Mississippi moved to a mixed system in 2008—with determinate sentences still used for violent offenders. Pew Center on the States, *Reforming Mississippi's Prison System* (2010), at 2.

¹⁷ American Bar Association, *Standards for Criminal Justice: Sentencing*, Third Edition (1994), Standards 18-2.5, 18-3.21(g), and 18-4.4(c).

¹⁸ Section 1.02(2)(a) (Tentative Draft No. 1, 2007).

1 determine if and when the “cure” of correctional treatment had taken hold upon individual
2 prisoners.¹⁹

3 It is conceivable, however, that the justifications for the board’s powers have evolved
4 since parole release became established in the early 1900s. The following four sections
5 explore a number of possible rationales for the retention of substantial “back-end” prison-
6 release authority. They ask, in turn, whether a parole-release agency should be created in
7 order to revisit questions of sentence proportionality, general deterrence, incapacitation, and
8 offender rehabilitation.

9 *Proportionality in Sentencing*

10 Section 1.02 of the revised Code defines sentence proportionality with reference to
11 “the gravity of offenses, the harms done to crime victims, and the blameworthiness of
12 offenders.”²⁰ American statutory schemes of parole release explicitly require, or tacitly allow,
13 parole boards to reassess the seriousness of the offense. They are not bound by the sentencing
14 courts’ views of the matter, so long as they stay within the minimum and maximum terms of
15 confinement.²¹ Studies of parole boards in action have found that they weigh the offense of
16 conviction, along with criminal history, most heavily of all considerations, with institutional
17 behavior secondary.²² Occasionally, parole release has even been defended as a way to iron
18 out disparities in the punishments handed out by the trial courts.²³ The question is not whether
19 parole releasing agencies rule upon sentence proportionality, but whether it is desirable.

¹⁹ For a history of parole-release discretion from the 1890s to the 1960s, see Rothman, *Conscience and Convenience*, ch. 5 (“A Game of Chance: The Condition of Parole”).

²⁰ Section 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

²¹ In New York and a number of other systems, for example, the parole board must be satisfied that the release date “will not so deprecate the seriousness of his crime as to undermine respect for law.” See Cons. Laws of N.Y. § 259-i(2)(c)(A); Tenn. Rules and Regulations § 1100-01-01-.07(4)(b); Wis. Admin. Code § PAC 1.04; accord Laws of R.I., § 13-8-14(a)(2). In other states, the board weighs the “sufficiency” of the amount of time that has been served by each prisoner, or is instructed to respond to the “severity” or “nature” of the offense for which the inmate is imprisoned. See Ala. Bd. of Pardons and Parole Pardons and Parole, Annual Report, Fiscal 2008-09 (2009), at 27; Ga. Code § 42-9-40(a); Iowa Admin. Code § 205-8.10(906); Tex. Gov. Code § 588.144(a)(2); Tex. Admin. Code § 145.2(b)(1). Boards also commonly consider the prisoner’s criminal record, anything contained in the original presentence report, and victim impact information. See Tenn. Rules and Regulations § 1100-01-01-.07; Rev. Code Neb. § 83-192(1)(f)(v); N.H. Admin. Code Rules, Par. 301.03; Code of N.M. Rules, R. 22.510.3.8; N.D. Code § 12-59-05; R.I. Admin. Code, Rule 49-1-1:1.

²² Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz eds., *The Oxford Handbook of Sentencing and Corrections* (forthcoming 2011); John C. Runda, Edward E. Rhine, and Robert E. Wetter, *The Practice of Parole Boards* (Association of Paroling Authorities International & Council of State Governments 1994); Rothman, *Conscience and Convenience*, at 166-168.

²³ Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., *Crime and Justice: An Annual Review of*

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1 The reference points of proportionality ordinarily do not change or become more
2 knowable between the sentencing hearing and later parole-board hearings. It is thus difficult
3 to explain why the parole board should be permitted to recast the proportionality judgment of
4 the sentencing court—especially when, as in the Code’s system, the judge’s decision was
5 informed by sentencing guidelines and subject to appeal. Indeed, it can seem pernicious to
6 have the parole board second-guessing the courts in this way, given that the transparency and
7 formalities of parole-board decisionmaking fall far short of those in the criminal courtroom
8 (see discussion below).

9 If one takes the view that an offender’s just punishment for a past crime should turn in
10 part on his *postsentencing* behavior, or other postsentencing developments, then we have the
11 seed of an argument that paroling authorities should share in ultimate judgments of
12 proportionate prison terms. Some may believe, for example, that an inmate’s behavior while
13 in prison incrementally moves the inmate up or down on a gestalt scale of personal
14 blameworthiness. This view would not support a vast power in the parole board to alter
15 release dates, however. A more limited mechanism of credits for good behavior (as in § 305.1
16 of this draft) can also serve the function of penalizing or rewarding in-prison behavior.

17 The most forceful claim for the relevance of postsentencing developments to
18 proportionality determinations rests on a belief in the possibility of human redemption. If we
19 think that offender blameworthiness can diminish over time through the effects of remorse,
20 empathy, religious conversion, or other processes of personal growth, then we may want to
21 empower a sentencing agency with discretion to recognize these changes in an offender’s
22 moral identity. The authority to grant or withhold official dispensation on such open-ended
23 and subjective grounds will strike many as troubling, however. Nor is it clear that parole
24 boards, with their relatively poor history of dealing with more prosaic tasks, should be given
25 this profound power. The revised Code takes the view that claims of dramatic human change
26 should be available in limited circumstances, and should be heard by judicial decisionmakers,
27 see § 305.6 (this draft) (judicial decisionmaker granted discretion to modify prison terms after
28 period of 15 years), § 305.7 (this draft) (courts granted discretion to modify prison terms at
29 any time for “compelling reasons” in light of purposes in § 1.02(2)).

30 A wholly different realpolitik argument is sometimes offered in favor of back-end
31 release discretion: that final judgments of proportionality are best made only when
32 considerable time has passed after the commission of offenses. On this view, judges are often
33 disabled by being too close to their cases and the interested parties, and cannot free
34 themselves from emotions and publicity that may surround a sentencing decision. Parole

Research, vol. 12 (1990), at 339; Michael Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 *J. of Crim. L. and Criminology* 1550, 1588 (1981). Of course, the diametrically opposite claim is also made, that the boards’ decisions themselves are inconsistent, inexplicable, or politically-driven. See Frankel, *Criminal Sentencing*, at 92-95; James J. Bagley, *Why Illinois Adopted Determinate Sentencing*, 62 *Judicature* 390, 392 (1979).

1 boards, in contrast, are portrayed as having greater detachment and the freedom of generally
 2 operating outside the glare of publicity. Months or years after an extremely disturbing event
 3 such as a serious crime, in other words, cooler heads can prevail.

4 This contemplates that the sentencing judge announce a penalty in open court that (by
 5 design) sounds much more formidable than the system will actually produce. The afterglow of
 6 the sentencing hearing, and the next day’s headlines, will satisfy the appetite for a cathartic
 7 punishment, but neither the corrections system nor the defendant will really pay the advertised
 8 price. As Franklin Zimring has put it, “In a system that seems addicted to barking louder than
 9 it really wants to bite, parole (and ‘good time’ as well) can help protect us from harsh
 10 sentences while allowing the legislature and judiciary the posture of law and order.”²⁴

11 If we accept these claims, little weight should be given to the decisions of sentencing
 12 judges in emotionally charged cases. The true sentencer ought to be an entirely separate
 13 agency, with power to effect significant alterations in judicial penalties not only on
 14 proportionality grounds, but on all other grounds. If judges are too clouded by the pressures of
 15 the moment to adjudge proportionality, they should not be trusted to weigh utilitarian
 16 purposes, either.

17 To accept the realpolitik argument, we must endorse a courtroom process for
 18 sentencing that is symbolic but intentionally misleading. We must be prepared to believe that
 19 crime victims and the general public will not realize what is happening. None of this is
 20 palatable or realistic.

21 Finally, there is reason to doubt that parole boards are in fact politically insulated
 22 decisionmakers, and that the tugs of publicity and victim sentiment do not tell upon their
 23 actions. Over the past decades, parole boards nationwide have become visibly more risk
 24 averse in their release decisions, often jolted by a single but terrifying episode of criminality
 25 by a prison releasee. All systems of release will experience horrific failures in a small number
 26 of cases. Yet paroling authorities are poorly constituted to withstand the pressures of an
 27 impossibly difficult job.²⁵

28 The above analysis suggests the following conclusions about the role of
 29 proportionality in the apportionment of prison-release discretion: The permissible range of
 30 proportionate prison sentences should usually be established at the front end of the sentencing
 31 process rather than the back end. The courts, in collaboration with a sentencing commission,

²⁴ Franklin E. Zimring, *A Consumer’s Guide to Sentencing Reform: Making the Punishment Fit the Crime*, 6 *Hastings Center Report* 13, 15 (1976).

²⁵ See Norval Morris, *Maconochie’s Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (2002), at 183 (“[p]oliticians and parole boards dislike this game and its certain losses; the only figure in the criminal justice system who should properly consider such predictions [of an offender’s ability to conform to the law], bounded of course by the gravity of the harm the prisoner has already encompassed, is the judge. The judge should be assisted in this task, but the ultimate responsibility should be that of the judge”).

1 should have primary responsibility for such judgments. If there is a place for proportionality-
2 based adjustments of dates of release in the mine run of cases, those adjustments should be
3 responsive to postsentencing behaviors and events. The revised Code takes the position that
4 this is an incremental task best achieved through a routinized system of credits for good
5 behavior, together with judicial sentence-modification discretion for cases of extraordinary
6 postsentencing developments.

7 *General Deterrence*

8 The Code allows criminal sentences to vary within the range of proportionate severity
9 if there is a good utilitarian reason to move up or down within the range.²⁶ This Study will
10 consider each of the crime-reductive utilitarian goals of punishment in turn, beginning with
11 general deterrence. Although the proposition is debatable, the discussion below accepts
12 *arguendo* that general deterrence can be effected through variations in penalty severity.²⁷

13 Deterrence, effected through communication to the society at large, would seem a
14 function best discharged through a judge's pronouncement of penalty in open court. The
15 formality and solemnity of most courtrooms, the public nature of their proceedings, the stature
16 of most judges, and the opportunities for participation extended to offenders, victims, and
17 other concerned parties—all augur in favor of a maximally effective deterrent message, at
18 least within the realm of what is realistically possible.

19 Is there any strong argument that an agency with back-end release authority should
20 share discretion over the length of prison terms in order to enhance the pursuit of general
21 deterrence? This seems unlikely. Such later-in-time discretion would tend to weaken the
22 postulated inhibitory force of judicial sentences once it is widely known that only a fraction of
23 sternly voiced prison terms will typically be served. Courtroom sentences without street
24 credibility may have insidious effects more widespread than those upon potential criminals
25 who are weighing their odds. General deterrence is sometimes allied with the idea that the

²⁶ If there is no utilitarian basis to move up or down in sentence severity, § 1.02(2)(a)(iii) (Tentative Draft No. 1, 2007) requires that a sanction near the low end of the range of proportionate punishments be chosen.

²⁷ Most criminologists agree that there is little or no evidence in support of this belief—although many caution that the absence of evidence is not the same thing as affirmative proof that severity-based deterrence does not occur. See Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in Michael Tonry ed., *Crime and Justice: A Review of Research*, vol. 30 (2003) (surveying 10 years of deterrence research; arguing that it is time to accept the null hypothesis that incremental increases in punishment severity do not deter). Some economists assert that changes in punishment severity can exert a measurable influence upon the behavior of potential criminals, as the perceived costs of a criminal act increase in relation to perceived benefits. See Steven D. Levitt, *Deterrence*, in James Q. Wilson & Joan Petersilia eds., *Crime: Public Policies for Crime Control* (2002). There is wide agreement across disciplines that general deterrence is better effected through increases in the certainty of punishment following criminal conduct than through increases in the severity of threatened sanctions. See Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999), at 45, 47-48.

1 criminal law can have an educative effect on citizens at large, reinforcing beliefs that the legal
 2 order must be respected.²⁸ Within this more diffuse understanding of general deterrence,
 3 parole release can produce negative ripple effects among those who see it as a failure of the
 4 legal system to keep its promises—or worse, among those who see it as a machinery for
 5 deceiving the public.

6 Parole-release discretion is not ordinarily defended as a way in which the general
 7 deterrent powers of the criminal law can be strengthened. In order to find a comfortable
 8 resting place for back-end release discretion as an aid to general deterrence, we would have to
 9 return to the discomfiting “bark and bite” approach discussed earlier, in the hope that the
 10 public can be dissuaded from crime by the pronouncement of tough sentences that the legal
 11 system does not intend to carry out. The Institute, however, is unwilling to advocate a
 12 program that relies on smoke and mirrors.

13 *Incapacitation (and Rehabilitation)*

14 Theories of incapacitation and rehabilitation, the traditional underpinnings of parole-
 15 release discretion, are two sides of the same coin. The flip side of releasing prisoners when we
 16 think they have been rehabilitated is continuing their confinement when we think they remain
 17 crime-prone.²⁹ Under the revised Code, in a case where the prospects for an offender’s
 18 rehabilitation are slim, and the risks of future serious criminality are high, a policy of
 19 incapacitation may push toward the longest prison term allowable within limits of
 20 proportionality.³⁰

21 Is a parole board with back-end release authority necessary or useful to the goal of
 22 extended confinement of dangerous criminals? The answer depends on whether the parole
 23 board, through observation of an offender during a prison term, is in a better position to
 24 forecast postrelease recidivism than the sentencing court.

25 In research and practice, the most powerful known predictive risk factors for serious
 26 criminality or violent behavior are all “static factors” about an offender. Static factors are
 27 unchangeable during the incarceration term, or else are characteristics (like age) that move
 28 along in a march-step fashion. They include the number and type of prior convictions,
 29 juvenile adjudications, and incarcerations, employment history, marital history, history of
 30 prior drug use, age of onset of criminal activity, gender, and current age. Attributes potentially

²⁸ See Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 *J. Crim. L., Criminology & Police Science* 176 (1952), at 179-180.

²⁹ See Herbert L. Packer, *The Limits of the Criminal Sanction* (1968), at 55.

³⁰ See § 1.02(2)(a)(i), (ii) (Tentative Draft No. 1, 2007); § 6B.09 and Comments *e* and *g* (“Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending”) (this draft). See also Franklin E. Zimring and Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (1995), chapter 4; Norval Morris and Marc Miller, *Predictions of Dangerousness*, in Michael Tonry & Norval Morris eds., *Crime and Justice: An Annual Review of Research*, vol. 6 (1985).

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1 subject to change during the offender’s term of imprisonment are termed “dynamic factors.”
2 These include observations over time of such things as an offender’s antisocial behaviors and
3 attitudes, social interactions, authentic (as opposed to grudging or feigned) participation in
4 treatment programming, work ethic, ability to regulate emotions, impulsivity, expressed
5 insights into violence, and compliance with terms of supervision.³¹ Static factors tend to be
6 objectively knowable; dynamic factors usually require qualitative judgment calls.

7 Despite much intuitive appeal, the predictive value of the so-called dynamic factors
8 has yet to be demonstrated empirically. In 2002, Norval Morris wrote that “[t]he blunt truth is
9 that at the time of sentencing as good a prediction as to when the prisoner can be safely
10 released can be made as at any later time during confinement.”³² Although there has been
11 much hope for the development of statistical risk measures that incorporate consideration of
12 inmates’ in-prison activities, to improve upon predictions prior to confinement, these
13 technologies remain unproven. Today, the most used and most successful risk-prediction
14 instruments rely heavily or exclusively on static factors.³³ In the research community, there is
15 disagreement over how close we are to valid dynamic models that may be applied to prison
16 inmates,³⁴ but consensus that the development of prediction models made better through the
17 use of dynamic variables remains a horizon for future research.³⁵

³¹ See Stephen C. P. Wong & Audrey Gordon, *The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool*, 12 *Psychology, Public Policy, and Law* 279, 282 n.1 (2006) (listing 6 static and 26 dynamic predictive factors).

³² Morris, *Maconochie’s Gentlemen*, at 186. Morris added the qualification that “Those sentenced to long terms are exceptions, most of whom will pass through ‘criminal menopause’ during their late thirties or early forties, aging out of their criminous proclivities.” See also Morris, *The Future of Imprisonment*, at 35 (“Protracted empirical analysis has demonstrated . . . that *predictions of avoidance of conviction after release are no more likely to be accurate on the date of release than early in the prison term.*”) (emphasis in original).

³³ See Thomas P. LeBel, Ros Burnett, Shadd Maruna, and Shawn Bushway, *The ‘Chicken and Egg’ of Subjective and Social Factors in Desistance from Crime*, 5 *European J. of Criminology* 130, 133 (2008) (“There is ‘no disagreement in the criminological literature’ about the most powerful, static predictors of recidivism—age, gender, criminal history and family background factors On the other hand, the more dynamic factors related to success or failure after prison are less well understood and such variables are rarely included in predictive reconviction research”) (citations omitted).

³⁴ For an optimistic view, see Paul Gendreau, Tracy Little, and Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *Criminology* 575, 588 (1996) (“While very few studies have assessed how well changes over time within dynamic factors predict recidivism, the data suggest that changes in criminogenic needs may produce strong correlations in that regard.”).

³⁵ See Anthony J. Glover, Diane E. Nicholson, Toni Hemmati, Gary A. Bernfeld & Vernon L. Quinsey, *A Comparison of Predictors of General and Violent Recidivism Among High-Risk Federal Offenders*, 29 *Criminal Justice and Behavior* 235, 236, 247 (2002) (“Most currently available actuarial approaches use primarily static or historical predictors Future work could focus on dynamic factors (e.g., criminal attitudes, antisocial associates) relating to high-risk individuals”); Stephen C. P. Wong & Audrey Gordon, *The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool*, 12 *Psychology, Public Policy, and Law* 279, 279 (2006) (“The development of risk assessment tools that use

1 Despite all of this, there is a resilient commonsense view that observable events during
 2 a prison term *must* tell us something about an inmate’s likely future conduct. In criminal
 3 justice policy, such intuitions count for a great deal. On reflection, however, it is not
 4 altogether paradoxical that a prisoner’s ability to navigate in the disciplined and artificial
 5 prison environment might not indicate very much about his functionality outside. As Hans
 6 Mattick famously said, “It is hard to train an aviator in a submarine.”³⁶ Prison is an
 7 environment wholly unlike any free community, with its own norms, culture, economy, status
 8 hierarchies, risks, and incentive systems. Above all, it is a highly-structured world in which
 9 freedom of action is drastically curtailed. Once released, the former inmate is plunged back
 10 into the world of temptations, personal deprivations, and criminogenic forces—probably more
 11 acute than before confinement—that propelled him toward the penitentiary in the first place.

12 In sum, contemporary risk-prediction science lends slight support to an across-the-
 13 board recommendation that parole-release discretion should be retained (where it exists) or
 14 restored (where it has been extinguished). This picture could change with future research
 15 breakthroughs, but it is unsound to design whole sentencing systems on knowledge we do not
 16 yet possess. Years ago, Marvin Frankel wrote that he had no categorical objection to
 17 indeterminate sentences for some offenders—but he believed they should be made available
 18 only “where the system can claim the ability to identify successes and failures with a decent
 19 approach to precision.”³⁷ The revised Code echoes that sentiment, and disapproves of a broad-

dynamic variables to predict recidivism and to inform and facilitate violence reduction interventions is the next major challenge in the field of risk assessment and management”); Kevin S. Douglas & Jennifer L. Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 *Psychology, Public Policy, and the Law* 347, 347, 349, 352, 358 (2005) (“[E]mpirical investigation of dynamic risk is virtually absent from the literature. . . . The field’s next greatest challenge is to develop sound methods for assessing changeable aspects of violence risk. . . . To date, the scientific focus on dynamic risk and risk management has been more conceptual than empirical. . . . [I]t is unclear what the most promising dynamic risk factors are.”).

³⁶ Quoted in Morris, *The Future of Imprisonment*, at 16. As Professor Jacobs has further explained:

Prison is a quintessentially abnormal environment dominated by a prison subculture with its own norms and values. Some of the most sophisticated and powerful prisoners either are never driven to break prison rules; or, if they are, their violations are not discovered or punished. Some individuals, however, necessarily break the rules in order to survive; others do so regularly in response to the extreme social, material, emotional, physical, and sexual deprivations which attend maximum security prison life. Those individuals incapable of coping with the extraordinary pressures of prison life may cope well enough with the stresses of everyday life on the streets. On the other hand, there are many individuals who have learned to survive and even “prosper” in prison who cannot or will not adhere to the rules imposed by our larger society.

James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, U.C.L.A. L. Rev. 217, 264 (1982) (footnotes omitted).

³⁷ Frankel, *Criminal Sentences*, at 98-100 (emphasis supplied).

1 based power to set prison-release dates, held by a parole board, without a better account of
2 how the board is meant to exercise that authority.

3 *Rehabilitation (and Incapacitation)*

4 Under the revised Code, sentence severity may be allowed to vary in the pursuit of
5 offender rehabilitation, so long as the resulting penalty is not disproportionate under
6 § 1.02(2) (Tentative Draft No. 1, 2007). Consider, for example, the case of a repeat offender
7 convicted of a violent crime in the middle range of seriousness, who has a history of severe
8 drug and alcohol dependency. Research shows that a sentence of two or three years of
9 confinement with intensive drug treatment (even if the offender does not participate
10 voluntarily) stands a realistic chance of bringing the offender’s addiction under control and
11 reducing or eliminating his propensity for crime. The research also tells us that success rates
12 in such programs are correlated with longer time periods of intervention. Three years would
13 probably be better than two.³⁸ Finally, assume that the sentencing judge (possibly double-
14 checked by an appellate court) has concluded on proportionality grounds that the penalty
15 deserved by the offender falls somewhere in the range of one-to-three years of
16 institutionalization. In such a case, the revised Code allows the sentencing court to select a
17 three-year term at the high end of the range.

18 Does a back-end paroling authority have a role to play in weighing and applying such
19 concerns? Much of this question was addressed in the preceding section, which examined the
20 hypothesis that parole boards can detect when in the timeline of a prison sentence an inmate
21 can safely be released into free society. The search for statistically powerful “dynamic
22 factors” in risk prediction could be described as the quest for reliable markers of prisoner
23 rehabilitation. While a determinate system can encourage enrollment in programs with good-
24 time or earned-time credits—and the revised Code does so, see § 305.1 (this draft)—we
25 cannot tell which individuals have reaped rehabilitative benefits from their participation.

26 A less individualized rehabilitation-based argument might still support the existence of
27 parole release, however. Joan Petersilia and others have reasoned that it is important to give
28 inmates incentives to commit themselves to reform, and that the general effectiveness of
29 prison programs will be increased if prisoners believe that their early release depends on
30 authentic engagement.³⁹ This argument supposes that: (1) holding dates of release in suspense

³⁸ See, e.g., M. Douglas Anglin and Yih-Ing Hser, Treatment of Drug Abuse, in Michael Tonry and James Q. Wilson eds., *Drugs and Crime, Crime and Justice: A Review of Research*, vol. 13 (1990), at 393-460.

³⁹ Petersilia, *When Prisoners Come Home*, chapter 2. See also Connie Stivers Ireland and JoAnn Prause, Discretionary Parole Release: Length of Imprisonment, Percent of Sentence Served, and Recidivism, 28 *J. Crime & Justice* 27 (2005) (“discretionary parole release is the best mechanism by which rehabilitation can be meaningfully achieved, as mandatory releasees are given an automatic release date and therefore have no system incentives to seek programs and treatment to facilitate change”).

1 can help prisoners apply themselves more effectively toward positive change, and (2)
2 prisoners will trust paroling authorities to recognize and reward their honest efforts.⁴⁰

3 To the extent these are commonsense assertions about human nature (that positive
4 incentives can bring about change, that people need to believe they have control over their
5 futures), it is interesting to note that they are contrary to the observations of other experienced
6 observers of the psychology of confinement. Norval Morris argued that the coercive edge of
7 the parole board's release power actually destroys the best chances for obtaining inmates'
8 genuine involvement in prison programming. In Morris's telling, a system of discretionary
9 release is most likely to encourage play-acting, or other behavior designed to ingratiate the
10 inmate with prison staff—not real commitment to change. Further, there is little in the annals
11 of parole history to support the idea that prisoners have placed their trust in parole boards to
12 make fair decisions on legitimate criteria. Quite the contrary—and prisoners' suspicions about
13 the unlovely quality of the boards' deliberations have often been well founded.⁴¹

14 If the question were simply one of intuition, it would be hard to choose between the
15 opposing views that parole release helps, or hurts, the chances of in-prison rehabilitation.
16 Unfortunately, the empirical studies that have looked into the question do not get us past the
17 need for speculation. They have produced conflicting results and are rooted in unacceptably
18 weak data.⁴²

19 In one study, for example, Connie Stivers Ireland and JoAnn Prause argue that there is
20 empirical foundation for the belief that discretionary release is a more successful way to help
21 prisoners transition to a law-abiding lifestyle than a system of determinate release.⁴³

⁴⁰ Note that both suppositions could be true even if the parole board has no real ability to detect rehabilitation or earnest effort. The important thing is that prisoners believe this to be so.

⁴¹ See, e.g., Rothman, *Conscience and Convenience*, at 159-201; Wilbert Rideau and Ron Wikberg, *Life Sentences* (1992), at 124-147. Even strong proponents of parole-release discretion sometimes concede the point that decisionmaking in the past has been unsystematic, and that a structured approach would be something new. See Peggy B. Burke, *Current Issues in Parole Decisionmaking: Understanding the Past; Shaping the Future* (1988), at xiv-xv (“[P]arole board members have in the past operated primarily as individual decisionmakers. They considered a case and cast a vote. There was no need to be explicit with one's colleagues about why the vote was cast, what factors were considered, or what goals were sought. But times have changed. More structure, accountability, and scrutiny are required of parole”).

⁴² Two recent studies arrived at opposite conclusions when comparing recidivism rates in determinate and discretionary release settings, see Richard Rosenfeld, Joel Wallman, and Robert Fornango, *The Contribution of Ex-Prisoners to Crime Rates*, in Jeremy Travis and Christy Visser eds., *Prisoner Reentry and Crime in America* (2005); William D. Bales, Gerry G. Gaes, Thomas G. Blomberg, and Kerensa N. Pate, *An Assessment of the Development and Outcome of Determinate Sentencing in Florida*, 12 *Justice Research and Policy* 41 (2010).

⁴³ Stivers Ireland & JoAnn Prause, *Discretionary Parole Release*, *supra*.

Appendix B

1 Using data from the U.S. Justice Department’s National Corrections Reporting
2 Program (NCRP), collected from 30 states and the federal system, and multiregression
3 analysis, the authors report that “those released from prison via a mandatory mechanism were
4 less than half as likely to successfully complete parole than those released from prison under
5 discretionary (parole board) systems.” Without regression, mandatory releasees were 75
6 percent less likely to succeed on parole.⁴⁴ These findings give credence to the claim that back-
7 end release discretion, as presently exercised in American jurisdictions, has a net positive
8 effect on prisoner’s behavior following release.

9 In fact, the results are highly suspect. The most evident problem with the study is the
10 disproportionate importance of data from a single determinate state, California. Among the 30
11 jurisdictions in the NCRP sample, California supplied more than one-quarter of all prison
12 releasees and more than one-half of all releasees from legal systems that had eliminated
13 parole-release discretion.⁴⁵ The study’s findings do not really tell us how determinate release
14 is working in all 17 jurisdictions across the country that have such an arrangement. We are
15 primarily seeing how it plays out in California.

16 This is an enormous problem because California, for idiosyncratic reasons, had the
17 highest rate of revocation of postrelease supervision of any state in the union. In 1995, at the
18 time of the Stivers Ireland-Prause study, parolees’ failure rate in California was a staggering
19 77 percent. Among all other states, the average failure rate was 47 percent. Looking across all
20 states that have abolished parole-release discretion, California is the only jurisdiction that has
21 produced revocation practices well above national averages.

22 What happens to the study’s main finding if we redact the anomalous California
23 numbers? In 1995, using raw data, prisoners released by discretionary authorities nationwide
24 succeeded on parole at a rate of 54.2 percent, while those released in “non-California”
25 determinate systems succeeded at a rate of 64 percent. The removal of California does not
26 simply soften the study’s conclusions; it reverses them. Without California fouling the data, it
27 could be argued that prisoners who have served time in determinate systems are in general
28 *more* rehabilitated upon release than those who have languished in indeterminate systems.⁴⁶

29 It is dangerous to draw policy conclusions from these statistics, however. Aside from
30 allowing one outlier state to overwhelm the sample, Stivers Ireland and Prause’s methodology
31 labors under an important conceptual difficulty that plagues much of recidivism research.
32 Simply put, it is a serious error to equate failure rates on postrelease supervision with the

⁴⁴ *Id.* at 38.

⁴⁵ In 1995, only eight of the fourteen U.S. jurisdictions that had abolished back-end release discretion were included in the NCRP database. See *id.*, at 34 table 1.

⁴⁶ In 1999, for example, an ex-prisoner was 18 percent more likely to succeed on postrelease supervision in a determinate regime than in an indeterminate system.

1 actual behavior of prison releasees. The states are far too different in their revocation practices
 2 to allow us to consider the data compatible from state to state. In any jurisdiction, the number
 3 and rate of revocations depends to some degree on the good or bad conduct of parolees, to be
 4 sure, but it also depends at least as much on what might be called the “sensitivity” of the
 5 supervision system to violations. Sensitivity varies with formal definitions of what constitutes
 6 a violation, the intensity of surveillance employed by parole field officers, the institutional
 7 culture of field services from place to place, and the severity of sanctions typically used after
 8 findings of violations. Judging by the great differences in revocation patterns found
 9 throughout the nation, it is hard to avoid the conclusion that high or low revocation rates are
 10 more the result of the system’s sensitivity to violations than any demonstrated difference in
 11 the postrelease conduct of offenders from place to place. One must be supremely cautious
 12 about drawing conclusions from a methodology that equates low revocations in a state with
 13 successful in-prison rehabilitation, or vice versa.

14 There is a further conundrum, even if we had hard data that discretionarily-released
 15 prisoners offend less often than those who “max out” or are released per determinate
 16 formulas. Most parole boards use actuarial-risk-assessment scales when deciding which
 17 prisoners should be freed. If we assume that the boards make use of these measures with even
 18 rough precision, and bring a healthy attitude of risk aversion to bear to their jobs, then
 19 prisoners discretionarily released will on average be lower-risk individuals than those who
 20 serve their full terms, or releasees unsorted by risk in determinate systems. This posited effect
 21 would bear no connection to prisoner rehabilitation, however. The same identification of low-
 22 risk offenders could have been performed on the day of original sentencing.⁴⁷

23 In summary, we possess no persuasive evidence that discretionary prison release, as
 24 opposed to determinate release, facilitates rehabilitation. This does not mean that a
 25 hypothesized connection between release mechanism and future behavior cannot exist or does
 26 not merit future study. But we should be wary of building important components of a
 27 sentencing system, especially rules and processes that apply indiscriminately to large numbers
 28 of prisoners, upon an absence of knowledge.

29 *Procedural Protections at Sentencing and at Parole Release*

30 The procedural safeguards that have traditionally attended judicial sentencing are
 31 notoriously inadequate.⁴⁸ Judge Gerard Lynch has dubbed sentencing a “second-string fact-

⁴⁷ See § 6B.09(3) (this draft) (proposing diversion of otherwise prison-bound defendants who are identified as posing an unusually low risk of serious reoffending; proposal includes judicial discretion to depart from mandatory-minimum penalties).

⁴⁸ Stephen Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733 (1980); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 548-549 (1993).

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1 finding process.”⁴⁹ If this is a fair assessment, then the procedural accoutrements of parole
2 release are of the third- or fourth-string variety.⁵⁰

3 The release process is necessarily streamlined given small person-power and large
4 caseloads. Parole boards simply cannot marshal resources comparable to trial-court systems;
5 they are tiny agencies averaging a total of five or six members. The number of prisoners
6 considered for release by the average state parole board in 2006 was 8,355—about 35 cases
7 for each working day, and comprising only one part of a typical board’s responsibilities.⁵¹
8 Kenneth Culp Davis reported that the well-resourced U.S. Parole Board, before abolition of
9 parole in the federal system, heard roughly 50 cases per day.⁵² Studies of parole in its mid-
10 20th-century heyday found decisionmaking times of only 3 to 20 minutes per case.⁵³ With the
11 explosion in correctional populations since then, it is unlikely that greater attention is given
12 today.

13 Parole-release “hearings” are often no more than brief interviews of the prisoner,
14 sometimes convened without notice. The prisoner’s role at the hearing varies quite a bit
15 among the states, but is often limited to responding to the board’s questions. Sometimes there
16 is no right for the prisoner to be present at all; the case is decided solely on the papers.⁵⁴

17 There is seldom a genuine adversarial process with the prisoner’s interests effectively
18 represented. Few prisoners are competent to raise the strongest legal and factual arguments on
19 their own behalf. In court, defendants have or are provided lawyers, and sometimes expert
20 witnesses, but such assistance is far from the norm in the parole milieu. Some states bar

⁴⁹ Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 10 Fed. Sent’g Rptr. 25, 27 (1997).

⁵⁰ As a matter of federal constitutional law, discretionary parole systems are not thought to create a liberty interest on the part of prisoners, so the Due Process Clause guarantees no minimum level of procedural regularity. See, e.g., *Dopp v. Idaho Commission of Pardons and Parole*, 84 P.3d 593 (Idaho App. 2004); *Morales v. Michigan Parole Bd.*, 676 N.W.2d 221 (Mich. App. 2003); *Barna v. Travis*, 239 F.3d 169 (2d Cir. 2001) (reviewing N.Y. parole procedures); *Weaver v. Pa. Bd. of Probation and Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997); *Quegan v. Mass. Parole Board*, 673 N.E.2d 42 (Mass. 1996); *Vice v. State*, 679 So. 2d 205 (Miss. 1996); *Saleem v. Snow*, 460 S.E.2d 104 (Ga. 1995). A liberty interest does arise if state law requires release after a set period unless contrary findings are made by the parole board—but, even then, the safeguards mandated by the constitution are not impressive. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

⁵¹ Susan C. Kinnevy and Joel M. Caplan, *Findings from the APAI International Survey of Releasing Authorities* (2008), at 9.

⁵² Davis, *Discretionary Justice*, at 127.

⁵³ Rothman, *Conscience and Convenience*, at 164-165; Robert O. Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Washington University Law Quarterly 243, 301 (1966).

⁵⁴ See Neil P. Cohen, *The Law of Probation and Parole*, Second Edition, vol. 1 (1999), at 6-27; Fla. Stat. § 947.06; Vt. Stat. § 502(a); *Mahaney v. State*, 610 A.2d 738 (Me. 1992).

1 representation by counsel outright.⁵⁵ Some permit only limited representation, such as
 2 allowing counsel to submit written statements—but even this assumes the prisoner has paid
 3 for a lawyer.⁵⁶ Only a tiny handful of states provide appointed counsel for indigent
 4 prisoners.⁵⁷

5 Often, there is no formal burden of proof a parole board must apply for its factual
 6 determinations. For example, in Tennessee, release is permitted only when the board is “of the
 7 opinion that there is reasonable probability that the prisoner, if released, will live and remain
 8 at liberty without violating the law, and that the prisoner’s release is not incompatible with the
 9 welfare of society.”⁵⁸ Some states define the applicable burden as the “preponderance of the
 10 evidence” standard, but there is no enforcement mechanism to see that the standard is actually
 11 applied.⁵⁹ In addition, there is no requirement that the parole board’s factfinding be consistent
 12 with the facts established when the prisoner was convicted, or those found by the sentencing
 13 court. Real-offense sentencing—punishment for crimes for which there has been no
 14 conviction—is the norm in parole proceedings.⁶⁰

15 The rules of evidence, and protections against the use of hearsay evidence, are
 16 inapplicable to the parole process.⁶¹ The lack of rigor in this regard should be considered in
 17 light of the usual contents of an inmate’s dossier:

18 Besides . . . hard data, the file may also contain “soft” information, such as
 19 observations of guards, counselors, and other corrections personnel. Even
 20 unsubstantiated rumors may appear. . . . [A]nything that an inmate may have
 21 done (and perhaps even some things that an inmate may not have done) in his
 22 or her life, but particularly while in prison, may be recorded in the file.⁶²

⁵⁵ See Code of N.M. Rules, R. 22.510.2.8(A)(3); *Franciosi v. Mich. Parole Bd.*, 604 N.W.2d 675 (Mich. 2000); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976).

⁵⁶ See Laws of R.I. § 13-8-26; Vt. Stat. § 502(d).

⁵⁷ See Hawaii Rev. Stat. § 706-670(3)(c); Mont. Code § 46-23-202. It is probably not a coincidence that these are states with very small prison populations.

⁵⁸ Tenn. Code § 40-28-117(a).

⁵⁹ See, e.g., N.H. Admin. Code Rules, Par. 210.02.

⁶⁰ See Dawson, *The Decision to Grant or Deny Parole*, 1966 Wash. U. L.Q. at 259; Michael Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. Crim. L. and Criminology 1550, 1557 (1981); *Hemphill v. Ohio Adult Parole Authority*, 575 N.E.2d 148 (Ohio 1991); Wis. Admin. Code § DOC 331.08.

⁶¹ See *Davis v. Brown*, 311 F. Supp. 2d 110 (D.D.C. 2004); *Hubbard v. Simmons*, 89 P.3d 662 (Kan. App. 2004).

⁶² See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-31.

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1 Basic rights of confrontation of adverse witnesses are often nonexistent. For example,
2 a Vermont statute provides that “the inmate shall not be present when the victim testifies
3 before the parole board.”⁶³ Indeed, the prisoner’s ability to respond to damaging information
4 of any kind can be severely limited. Some states refuse the prisoner access to the contents of
5 his dossier,⁶⁴ some routinely permit it,⁶⁵ while most give the board discretion to disclose some
6 or all of the file on a case-by-case basis.⁶⁶ Court challenges to rules barring access have
7 generally failed.⁶⁷

8 Fair process requires identifiable and enforceable decision rules. While some U.S.
9 jurisdictions have adopted statutory presumptions or guidelines that must be applied by
10 sentencing courts, there are no equivalent substantive directives for parole boards. Where
11 statutory criteria or parole guidelines exist, they are merely advisory; where risk-assessment
12 instruments come into play, it is entirely up to the parole boards to decide whether they should
13 be heeded or disregarded.⁶⁸

14 Decision standards have little integrity without a meaningful review process. This is
15 lacking in virtually all American parole systems.⁶⁹ In some systems, administrative review is
16 technically available, but it almost never operates as a real check on the board’s discretion.
17 Reversals of decisions rarely occur.⁷⁰ Oversight of any kind is hindered by the fact that many
18 states do not require a transcript or verbatim record of parole proceedings,⁷¹ and by the
19 general absence of requirements of reasoned explanations for decisions.⁷² Some jurisdictions

⁶³ Vt. Stat. § 507(b).

⁶⁴ See Ga. Code § 42-9-53; Ky. Rev. Stat. § 439.510; S.D. Codified Laws § 24-15-1.

⁶⁵ See Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505.

⁶⁶ See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-23, 6-32 to 6-33.

⁶⁷ See *Jennings v. Parole Bd. of Virginia*, 61 F. Supp. 2d 462 (E.D. Va. 1999); *Ingrassia v. Prukett*, 985 F.2d 987 (8th Cir. 1993); *Counts v. Commonwealth, Pennsylvania Bd. of Probation and Parole*, 487 A.2d 450 (Pa. Commw. 1985).

⁶⁸ Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, in Joan Petersilia and Kevin R. Reitz eds., *The Oxford Handbook of Sentencing and Corrections* (forthcoming 2011). Parole guidelines are demonstrably weaker instruments than presumptive sentencing guidelines, such as those envisioned in the revised Code. But they also lack the indirect enforcement mechanisms of advisory sentencing-guidelines systems. No sentencing commission collects and reports upon release decisions to monitor compliance rates and the reasons given for noncompliant decisions, and no appellate court polices questions such as whether the parole guidelines were duly considered by boards, or whether there were errors in the guidelines’ application or in the calculation of an offender’s recidivism risk.

⁶⁹ See, e.g., Utah Code § 77-27-5(3); Vt. Stat. § 454.

⁷⁰ See Tenn. Code § 40-28-105(11); Davis, *Discretionary Justice*, at 130.

⁷¹ See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-52.

⁷² See *Glover v. Michigan Parole Board*, 596 N.W.2d 598 (Mich. 1999); *Freeman v. State, Comm’n of Pardons and Paroles*, 809 P.2d 1171 (Idaho App. 1991).

1 do require that reasons be given, but are not rigorous about the content of the explanations.
2 Boilerplate, or a slight improvement on boilerplate, is often good enough.⁷³

3 Shoddy process might, to some extent, be offset by well-qualified decisionmakers. A
4 highly professionalized model might insist that board members have expertise in corrections,
5 criminology, and prediction science.⁷⁴ Falling far short of this standard, formal requirements
6 for appointment to state parole boards are often minimal or nonexistent.⁷⁵ Even in the
7 minority of states that mandate a background in criminal justice, the prerequisites do not
8 address the core function of behavioral science or risk prediction.⁷⁶ For instance, in
9 Wisconsin, it is vaguely specified that: “Members shall have knowledge of or experience in
10 corrections or criminal justice.”⁷⁷

11 Instead of experience or training, political connections are often the main prerequisite
12 for appointment to a parole agency.⁷⁸ Public recruitment of board members is virtually
13 unknown in the United States; by and large, positions are doled out in a closed process
14 controlled by the governor.⁷⁹ There is little pretense otherwise. A member of the Arkansas
15 parole board recently told the press, “We are not talking rocket science here. The board jobs
16 are known to some degree [to be] political patronage, and they’re not the most difficult jobs
17 for the pay [\$70,000 per year].”⁸⁰

18 Fair process also requires a neutral decisionmaker—and one component of neutrality
19 is the freedom to decide cases on the merits, without fear for one’s job. Service on a parole
20 board is usually a full-time commitment, and so the primary source of members’ livelihoods.
21 In nearly all states, the sole appointing authority is the governor,⁸¹ which includes

⁷³ See *Walker v. N.Y. State Div. of Parole*, 610 N.Y.S.2d 397 (N.Y. App. Div. 1994); *Goins v. Klinciar*, 588 N.E.2d 420 (Ill. App. 1992); N.M. Stat. § 31-21-25(C).

⁷⁴ See Model Penal Code, Complete Statutory Text § 402.1 (1985).

⁷⁵ See Rev. Stat. N.H. § 651-A:3; Fla. Stat. § 947.02(2); Miss. Code § 47-7-5(2); Neb. Stat. § 83-189; Texas Government Code §§ 508.032(b) & 508.033; Mich. Laws § 791.231a(2); Utah Code § 77-27-29(1); Rev. Stat. Neb. § 83-189; N.M. Stat. § 31-21-24 (D).

⁷⁶ See Colo. Rev. Stat. § 17-2-201(1)(a); Md. § 7-202(a)(3); N.D. Code § 19-59-0; Vt. Stat. § 451(a).

⁷⁷ Wis. Stat. § 15.145(1)(a). Nor do under-qualified appointees receive adequate training once they assume their posts. Mario A. Paparozzi and Joel M. Caplan, *A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism*, 89 *The Prison Journal* 401, 416, 418 (2009).

⁷⁸ See Rothman, *Conscience and Convenience*, at 162.

⁷⁹ Paparozzi and Caplan, *A Profile of Paroling Authorities in America*, 89 *The Prison Journal* at 411, 418.

⁸⁰ *Dumond Case Revisited: A Reminder of Huckabee’s Role in His Freedom*, *Arkansas Times*, September 1, 2005.

⁸¹ Susan C. Kinnevy and Joel M. Caplan, *Findings from the APAI International Survey of Releasing Authorities* (Center for Research on Youth and Social Policy, 2008), at 6-7.

1 reappointments at the expiration of members' terms. Also, in many states, members can be
2 removed from parole boards relatively easily, often at the discretion or instigation of the
3 governor.⁸² One board member expressed the "most obvious" reality of the situation: "If the
4 governor likes you, you might get to keep your job."⁸³ Political pressure on a board to adopt
5 new practices is remarkably successful. It is commonplace across the United States for parole-
6 release policy to change abruptly and radically in response to a single high-profile crime in
7 the jurisdiction.⁸⁴

8 The glaring weaknesses in American parole-release procedures stem, historically,
9 from a view of the benignity of government. The American Progressives who promoted
10 indeterminate sentencing reforms saw the state as a force with considerable resources that
11 could be turned to good purposes, and did not reflexively distrust state officials ceded with
12 free-ranging discretion.⁸⁵ The shortfalls of the parole-release process have remained a blind
13 spot for lawmakers, courts charged with constitutional review, and many academics. The
14 stubborn belief that indeterminacy is at root a compassionate system still insulates it from
15 scrutiny.

16 *Does the Abolition of Parole-Release Discretion Contribute to Ungoverned Prison*
17 *Expansion?*

18 Unless the preceding discussion has taken a serious wrong turn, neither proportionality
19 concerns, nor any of the traditional utilitarian theories of sentencing, offer justification for a
20 sentencing system that places a large reservoir of discretion in a parole-release agency.
21 Likewise, legal-process values do not augur in favor of a powerful parole board.

22 The argument cannot end here, however, for it is possible to favor the existence of
23 discretionary release on other grounds. There is a romantic view of parole release that, despite
24 its defects, it can at least be relied upon to work in the direction of lenity for many individual

⁸² See Miss. Code § 47-7-5(1); Fla. Stat. § 947.03(3); Utah Code § 77-27-2(2)(c).

⁸³ *Dumond Case Revisited*, supra.

⁸⁴ See Martin Finucane, In Wake of Officer's Slaying, Mass. Gov. Shakes up Parole Board, Boston Globe, January 13, 2011; Jeffrey A. Meyer and Linda Ross, Abolish Parole, New York Times, October 28, 2007; Martin Fish, Killing Led to Tougher Parole System: Ten Years After 'Mudman,' Pennsylvania Convicts Still Serve Some of the Longest Terms, Philadelphia Inquirer, June 6, 2005.

⁸⁵ Rothman, *Conscience and Convenience*, at 70. In contrast, the failure of indeterminate sentencing to gain a strong foothold in England and the Continent is explained in part by a fear of giving the government too much unstructured power over individual liberty. As one European scholar has argued, "the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative arbitrament of the prerevolutionary era, as if the storming of the Bastille had been fruitless." Michele Pifferi, Individualization of Punishment and the Rule of Law: Reshaping the Legality in the United States and Europe between the 19th and the 20th Century, (unpublished paper), ms. at 39, available: http://works.bepress.com/michele_pifferi/1/ (last visited Mar. 14, 2011).

1 prisoners, and the reduction of incarceration rates overall.⁸⁶ There are many who hold a
 2 committed humanitarian view that the United States overincarcerates offenders by a large
 3 margin, has done so for a long time, and that the problem has greatly worsened in the last 40
 4 years.⁸⁷ Thus any device, even if clumsy, will find strong adherents if it is perceived to go
 5 hand-in-hand with lenity in prison policy.

6 It is also argued that the abolition of back-end release authority allows pressures
 7 toward prison growth to become ungovernable because there is no longer a flexible release
 8 valve at the back door of institutions. Thus, we have become accustomed to hear charges that
 9 determinate sentencing, where it has been adopted, has been a powerful contributor to late
 10 20th-century prison growth.⁸⁸ This indictment is sometimes made specific to parole-release

⁸⁶ Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, Introduction to Articles 6 and 7 (1985), at 22-23; Douglas A. Berman, The Enduring (And Again Timely) Wisdom of the Original MPC Sentencing Provisions, 61 Florida Law Rev. 709, 724 (2009); Wilbert Rideau and Ron Wikberg, Life Sentences: Rage and Survival Behind Bars (1992), at 136; Leonard Orland, Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 49 (1978). Of course, parole is sometimes *condemned* on the same empirical assumption, when it is characterized as releasing criminals prematurely and sacrificing public safety. See Robert Emmet Long, Editor's Introduction, in Robert Emmet Long, Criminal Sentencing (1995), at 40; Rothman, *Conscience and Convenience*, at 159-161.

⁸⁷ See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006); Marc Mauer, *Race to Incarcerate* (rev. ed. 2006); Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (2005); Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* (2004); David Garland ed., *Mass Imprisonment: Social Causes and Consequences* (2001); Joel Dyer, *The Perpetual Prisoner Machine: How America Profits from Crime* (2000); Elliott Currie, *Crime and Punishment in America: Why the Solutions to America's Most Stubborn Social Crisis Have Not Worked—and What Will* (1998). Even before the spectacular growth in American incarceration rates that occurred from the early 1970s through the early 2000s, distinguished commentators expressed the view that U.S. prison sentences were too numerous and too severe. See Morris, *The Future of Imprisonment*, at 7-8; Frankel, *Criminal Sentences*, at 58-59.

⁸⁸ See, e.g., David F. Weisman and Christopher Weiss, The Origins of Mass Incarceration in New York State: The Rockefeller Drug Laws and the Local War on Drugs, in Steven Raphael and Michael A. Stoll eds., *Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom* (New York: Russell Sage Foundation, 2009), at 76-77; Douglas A. Berman, Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines, 21 Fed. Sent'g Rptr. 182 (2009); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007), at 51-53; James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003), at 56-57; David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2002), at 60-61; Marc Mauer, *Race to Incarcerate* (1999), at 49, 56-58; David J. Rothman, More of the Same: American Criminal Justice Policies in the 1990s, in Thomas G. Blomberg and Stanley Cohen eds., *Punishment and Social Control: Essays in Honor of Sheldon L. Messinger* (1993); Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* (1991), at 169-171; Edward E. Rhine, William R. Smith, and Ronald W. Jackson, *Paroling Authorities: Recent History and Current Practice* (1991), at 26; Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., *Crime and Justice: An Annual Review of Research*, vol. 12 (1990), at 342; Alfred Blumstein, *Prison Populations: A System Out of*

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1 abolition, and is sometimes broadened to include sentencing guidelines and other determinate
2 sentencing laws as alleged engines of punitive expansionism.⁸⁹ On this view, the quintupling
3 of imprisonment rates that occurred nationwide from 1972 to 2009 would have been
4 ameliorated if all U.S. jurisdictions had retained their former indeterminate sentencing laws.

5 These speculations are invariably voiced without empirical support. They have entered
6 the conventional wisdom because they seem intuitively correct—and because they line up
7 with one conspicuous example of determinate sentencing reform gone awry. Most lawyers,
8 judges, and academics are aware that the federal sentencing system, which abolished parole
9 release in 1987 while instituting felony sentencing guidelines, has worked over the past 20
10 years to balloon the federal imprisonment rate. Per capita confinement in federal prisons grew
11 281 percent from 1987 to 2009—a near quadrupling—and a spectacular amount even when
12 compared with the swift nationwide growth among state prisons of 109 percent over the same
13 period.⁹⁰ There are obvious dangers in extrapolating from events in a single jurisdiction,
14 however. Too often, the federal experience is taken as conclusive evidence that all
15 determinate sentencing reforms produce the same results.⁹¹

16 If we broaden the inquiry from the 12 percent of prison inmates housed for federal
17 crimes to include the 88 percent under state jurisdiction,⁹² observations about the effects of
18 parole-release abolition shift dramatically. Indeed, the federal criminal-justice system bears so
19 little resemblance to any state system that has abolished parole or has instituted guidelines for
20 sentencing, that it is the poorest of starting points for generalization.⁹³ When policymakers

Control?, in Michael Tonry and Norval Morris eds., *Crime and Justice: An Annual Review of Research*, vol. 10 (1988), at 241.

⁸⁹ A frequent object of attack is the proliferation of mandatory-minimum penalties nationwide, which are the most extreme examples of determinate sentencing legislation. See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, in Michael Tonry ed., *Crime & Justice: A Review of Research*, vol. 38 (2009). Some mandatory-penalty laws have been directly linked to large upswings in prison growth. See Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (2001). The revised Code, like the original Code, takes a strong view that mandatory-minimum prison sentences should not be legislated for any offense, see § 6.06(3) and Comment *d* (this draft).

⁹⁰ U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 6.29.2009, available at <http://www.albany.edu/sourcebook/pdf/t6292009.pdf> (last visited Mar. 14, 2011).

⁹¹ The published scholarship of sentencing law and policy exacerbates the problem of knowledge and perception focused too much on one system, by devoting nearly exclusive attention to federal law. See generally *A Symposium on Sentencing Reform in the States*, 64 *U. Colo. L. Rev.* 645-847 (1993).

⁹² U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2009* (2010), at 19, app. table 4 (at yearend 2009 there were a total of 187,886 inmates in federal prisons and 1,360,835 in state prisons).

⁹³ See *Model Penal Code: Sentencing, Report* (2003), at 115-125; Kay A. Knapp and Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 *U.C. Davis L. Rev.* 679 (1992); American Bar

1 consider the future design of a state’s sentencing system, the pertinent knowledge base should
2 be drawn from other states.

3 *Indeterminacy, Determinacy, and the Expansionist Era*

4 Although it is frequently asserted today that determinate sentencing reform has been
5 an instrument of prison growth, there was a widespread belief mere decades ago that
6 *indeterminate* sentencing systems were peculiarly associated with prison expansionism.⁹⁴ It is
7 ironic that perceptions have flipped, but the kernel of wisdom here is that such broad-brush
8 statements are almost always oversimplifications. Historically speaking, it is clear that the
9 structural design of a sentencing system does not dictate by itself whether and how quickly
10 the prisons will grow. In the late 19th century and for the first 70 years or so of the 20th
11 century, American sentencing systems were increasingly taken over by indeterminate
12 sentencing reform (they were *all* indeterminate by the 1930s).⁹⁵ Across that period the
13 nation’s prisons grew slowly but relatively steadily. From 1880 to 1980 the state prisons

Association, Standards for Criminal Justice, Sentencing, Third Edition (1994), pp. xxv-xxvii; Michael Tonry, Sentencing Matters (1996), chapters 2 and 3.

⁹⁴ See Francis A. Allen, *The Borderland of Criminal Justice* (1964), at 34-35 (“The tendency of proposals for wholly indeterminate sentences . . . is unmistakably in the direction of lengthened periods of imprisonment”); Norval Morris, *The Future of Imprisonment* (1974), at 48 (“The tendency of parole boards to overpredict danger and to follow the politically safer path of prolonging incarceration . . . would lead one to suspect that parole may well have increased total prison time.”); Sheldon L. Messinger and Philip E. Johnson, *California’s Determinate Sentencing Statute: History and Issues* (1977), reprinted in Franklin E. Zimring and Richard S. Frase, *The Criminal Justice System* (1980), at 954 (reporting criticisms from “groups concerned with civil liberties and prisoners’ rights” that California’s indeterminate sentencing scheme “resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms”); American Friends Services Committee, *Struggle for Justice A Report on Crime and Punishment in America* (1971) (“During a period when the treatment ideal was maximized [in California] . . . more than twice as many persons served twice as much time.”); Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 *Law & Contemp. Prob.* 528 (1958), at 531-532, 535 (“individuals in these [indeterminate] jurisdictions are subject to the possibility, and often to the fact, of greatly extended imprisonment. Elsewhere, much lower sentences are imposed for similar crimes.”) (footnote omitted) (study finds time served 20 percent longer in indeterminate jurisdictions than in systems of “definite” sentences); John C. Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 *Mich. L. Rev.* 1361, 1364-1365 n.8 (1975) (collecting studies); American Bar Association, *Standards for Criminal Justice, Sentencing Alternatives and Procedures*, Second Edition (1980), at 18-66 (“In general, the rehabilitative model appears also to have encouraged longer authorized sentences, and it is symptomatic that average sentence lengths have been longest in jurisdictions that have subscribed most thoroughly to the rehabilitative model”); Samuel Walker, *Popular Justice: A History of American Criminal Justice* (1998), at 120 (“The tendency of the indeterminate sentence to lengthen prison terms became one of the major criticisms of the practice voiced by liberals in the 1960s”); Rothman, *Conscience and Convenience*, at 194-197 (surveying state reports and concluding that “the bulk of the data does justify the conclusion that parole was not a matter of leniency”).

⁹⁵ See Walker, *Popular Justice*, at 122.

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1 enlarged by 832 percent compared to national population growth of 351 percent.⁹⁶ There were
2 brief periods of declining incarceration rates, however, most notably around World War II and
3 during the 1960s. Indeed, the performance of America's sentencing systems of the 1960s was
4 quite striking, and may have been etched indelibly in the minds of deincarceration advocates:
5 Prison rates went down in that decade despite skyrocketing crime rates and a boom economy.
6 The nation could have paid easily for more prisoners, but indeterminate sentencing systems
7 were (temporarily) not delivering that result.⁹⁷

8 In studying the track records of indeterminate versus determinate punishment
9 structures, this section will focus on the current era of prison expansionism beginning in 1972
10 through 2009. During this period, state and federal prison counts swelled nearly eight times
11 over from a combined population of 196,092 to 1,548,721, and the national imprisonment rate
12 (corrected for population change) rose fivefold from 94 per 100,000 in 1972 to 504 in 2009.⁹⁸

13 The main goal of the analysis below will be to refute the conventional wisdom that
14 determinate sentencing reforms such as parole-release abolition and sentencing guidelines
15 have fueled the incarceration explosion to any greater degree than "unreformed"
16 indeterminate systems. In the following pages, state-by-state analysis will support the
17 following conclusions:

- 18
- 19 • **Although all state prison systems have grown appreciably in the last four**
- 20 **decades, rates of imprisonment and prison growth vary widely**
- 21 **across jurisdictions.**
- 22 • **Prison growth has been most explosive in states that have retained**
- 23 **indeterminate sentencing structures, and the highest incarceration**
- 24 **rates nationwide are also found in indeterminate jurisdictions.**
- 25 • **On average, states that have abolished parole-release discretion have had**
- 26 **less prison growth than states that have retained such discretion.**

⁹⁶ Margaret Warner Cahalan, *Historical Corrections Statistics in the United States, 1850-1984* (1986), at 29, table 3-2; U.S. Dept. of Justice, Bureau of Justice Statistics, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* (1988), at 13, table 1; U.S. Department of the Census, *Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition* (1975), part 1, at 8 Series A 6-8; U.S. Bureau of the Census, *Monthly Estimates of the United States Population: April 1, 1980 to July 1, 1999, with Short-Term Projections to November 1, 2000* (2001), <http://www.census.gov/population/estimates/nation/intfile1-1.txt> (last visited Mar. 16, 2011).

⁹⁷ The long-term history of U.S. incarceration policy is recounted at greater length in Henry Ruth and Kevin R. Reitz, *The Challenge of Crime: Rethinking Our Response* (2003), at 18-22, 77-80.

⁹⁸ U.S. Dept. of Justice, Bureau of Justice Statistics, *Historical Statistics*, at 11 table 1; U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2009*, at 19 app. table 4.

- 1 • **Prison growth has been most restrained in those states that have**
 2 **abolished parole-release discretion in conjunction with the**
 3 **adoption of sentencing guidelines.**⁹⁹

4
 5 Franklin Zimring and Gordon Hawkins, in their classic book, *The Scale of*
 6 *Imprisonment*, pointed out that the punishment systems in the 50 states and U.S. federal
 7 system were so markedly different from one another that they should be seen as “fifty-one
 8 different countries.” Working with figures from 1980, the state with the highest imprisonment
 9 rate (then North Carolina) had more than 10 times the prison rate of the state with the lowest
 10 rate (New Hampshire).¹⁰⁰ By 2009, decades of prison explosion had compressed the ratios a
 11 little, but the state at the top of the scale (Louisiana with a prison rate of 881 per 100,000) out-
 12 incarcerated the state at the bottom (Maine, 150 per 100,000) by nearly a factor of six.¹⁰¹
 13 Looked at another way, there are some U.S. jurisdictions today whose incarceration practices
 14 are roughly in the same ballpark as the most punitive Western European nations.¹⁰² There are
 15 other states, however, that outstrip any known standard of confinement on the planet, even in
 16 the Third World.¹⁰³ When researchers point out that the United States is the world leader in
 17 incarceration, the observation is driven by states like Louisiana and Texas, but the
 18 characterization does not fit jurisdictions like Vermont and Minnesota.

19 It is therefore essential to study the prison-growth courses of individual states, and
 20 compare the track records of states that have been using different types of sentencing systems.
 21 From many different angles, this investigation absolves determinate sentencing reforms of
 22 any special responsibility for the U.S. prison explosion.

⁹⁹ This is the type of sentencing system proposed by the revised Model Penal Code, see generally Tentative Draft No. 1 (2007); Model Penal Code: Sentencing, Report (2003), at 41-115.

¹⁰⁰ Zimring and Hawkins, *The Scale of Imprisonment*, at 137, 149.

¹⁰¹ U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2009*, at 21, 19, app. table 4.

¹⁰² The highest incarceration rate among Western European nations in 2009 was Luxembourg, with a rate of 155 per 100,000 population, followed closely by England and Wales with a rate of 153. See Roy Walmsley, *World Prison Population List*, 8th ed. (International Centre for Prison Studies, 2009), at 5 Table 4, available at <http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8> (last visited Mar. 14, 2011). These high-end confinement nations line up with low-end imprisonment states in the United States for the same time period (e.g., Maine with a prison rate of 150 per 100,000), although a truer comparison between European and American practices should refer to total confinement rates that incorporate jail as well as prison. While state-by-state total incarceration counts are not annually compiled, the low-end states in 2001 were Maine (222 per 100,000) and Vermont (226). U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001* (2002), at 13 table 16.

¹⁰³ In 2009, the U.S. total confinement rate was 756 per 100,000. The nearest competitor worldwide was Russia with a rate of 629 per 100,000. See Walmsley, *World Population List*, at 1. In 2001, 13 U.S. states surpassed the Russian standard in total confinement per capita—some by as much as 40-to-50 percent. U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, at 13 table 16.

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1 While it is true that determinate sentencing system reforms originated during, or
2 overlapped with, the expansionist period, it is a logical fallacy to equate temporal coincidence
3 with causation.¹⁰⁴ The years of burgeoning incarceration in America have been for the most
4 part years in which indeterminate sentencing remained the structure of choice nationwide.
5 Indeterminate systems were in use in more than 80 percent of all “jurisdiction-years” during
6 the period.¹⁰⁵ It is highly unlikely that determinate reforms could have been a major
7 contributor to any nationwide trend. They were of too recent origin, and are insufficiently
8 widespread, to have massed into a dominant force behind national prison growth.

9 Looking to individual jurisdictions, suspicion quickly shifts to indeterminate systems.
10 Nine of 10 states with the highest standing imprisonment rates at yearend 2009 were
11 indeterminate jurisdictions. The 10th state, Arizona, experienced most of its prison expansion
12 prior to 1994, when it too was an indeterminate state.¹⁰⁶ The five states with the largest per
13 capita prison rates in 2009 included carceral powerhouses Louisiana, Texas, Oklahoma, and
14 Georgia—all indeterminate jurisdictions. The fifth state among the top five, Mississippi, used
15 an indeterminate system from 1972 through 1995, and the state’s per capita prison rate more
16 than quintupled during that 23-year period.¹⁰⁷

¹⁰⁴ See David Hackett Fischer, *Historians’ Fallacies: Toward a Logic of Historical Thought* (1971), 164-186 (on “fallacies of causation”). Indeed, if there is a causal link, it is more likely that prison growth caused state sentencing reforms than the other way around. The most frequently-discussed motivation for state reforms since the 1980s has been the desire to contain ungoverned prison growth, largely for fiscal reasons. Rachel Barkow and Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 105 *Colum. L. Rev.* 1973, 1985-1990 (2005); Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Systems*, 64 *U. Colo. L. Rev.* 679 (1993); Leonard Orland and Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 *U. Colo. L. Rev.* 837 (1993).

¹⁰⁵ See Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven By Other Forces*, 84 *Tex. L. Rev.* 1787, 1795 (2006) (calculating, for all 50 states, the District of Columbia, and the federal system, there were a total of 1664 jurisdiction years during the high-prison-growth period from 1972 to 2004; only 288 of these jurisdiction years, or 17 percent of the total, were jurisdictions with determinate sentencing systems).

¹⁰⁶ Arizona’s prison rate grew more than six fold from 1972 through 1994, when it still retained an indeterminate sentencing system. U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, table 6.29.2009; U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1990* (1991), at 605 table 6.56. Arizona abolished parole-release discretion in 1994. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003), at 66–67. From 1994 through 2009, the state’s prison rate increased by only 26 percent. U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, table 6.29.2009.

¹⁰⁷ See U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1990*, at 605 table 6.56 (providing state-by-state prison rates from 1971 to 1989); U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online* (2005), table 6.29.2004 (providing state-by-state prison rates from 1980 to 2004). Mississippi currently has a split system (determinate prison terms for violent offenses only). See JFA Institute, *Reforming Mississippi’s Prison System* (2010), available at http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=56957 (last visited Mar. 14, 2011).

1 If we ask which states have had the most per capita prison *growth* over time, the track
 2 record of indeterminate states is equally un-lenient. From 1980 to 2009, 9 of the “top” 10
 3 prison-growth states were indeterminate jurisdictions.¹⁰⁸ The top 10 prison-growth states were
 4 Louisiana, Mississippi, Oklahoma, Texas, Alabama, Connecticut, Missouri, Idaho, California,
 5 and Colorado. Of these, only California currently has a determinate sentencing system.

6 It is revealing to compare changes in prison use over time, categorizing states
 7 according to the type of sentencing system they use. It would not be sensible, however, to
 8 compare one state with another (or with a nationwide average) in terms of raw growth in
 9 prison populations. For instance, the state of Maine has seen its prison populations increase by
 10 1370 inmates since 1976, when Maine became a determinate sentencing state through the
 11 abolition of its parole board’s prison-release discretion. In the same period from 1976 to 2009,
 12 the state of Texas, working with an indeterminate sentencing structure that included parole-
 13 release discretion, added 141,469 inmates to its prison populations.¹⁰⁹ A Maine–Texas
 14 comparison based on these statistics alone tells us almost nothing useful for evaluating the
 15 relative incarceration histories of the two jurisdictions. To make a gross comparison on a
 16 common scale, we must correct for the different populations of the two states, and for
 17 population change over time.

18 In an attempt to make such corrections, Figure 1 charts the experience of all states that
 19 have abolished the parole board’s release authority, using the states’ pre-abolition prison rate
 20 as a common baseline.¹¹⁰ For each state, the chart displays the *increment of growth* in the
 21 state’s imprisonment rate (prison population against general population) from the effective
 22 date of parole abolition through 2009. For comparison, the chart also provides the national
 23 baseline (total marginal growth in state-prison populations against total U.S. population) for
 24 the identical time period—displayed separately for each state. Thus, Figure 1 asks, “How
 25 many inmates has each state added since removing parole-release discretion from its
 26 sentencing system?” and gives an answer on a per capita basis.

27 For example, assume that *State A* eliminated the release discretion of its parole board
 28 in 1985. If *State A* had a prison rate of 100 per 100,000 in 1985 and a prison rate of 300 per

¹⁰⁸ U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009.

¹⁰⁹ The changes in absolute prison populations in both states were calculated from U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1988), at 12 table 1, and U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), at 19 table 4.

¹¹⁰ The sources for Figures 1, 2, and 3 are: U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1988) (for rate calculations before 1980); U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990 (1991), at 605 table 6.56 (for 1981 through 1983); U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009 (for all other years through 2009).

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1 100,000 in 2009, the increment of change in the state’s prison rate over that full-time period
2 would be displayed as 200. This state-specific increment of change would also be paired in
3 Figure 1 with the incremental change in the national prison rate among all states over the
4 same period, 1985 to 2009. Thus, the figure makes a series of apples-to-apples comparisons
5 while holding the time frames for comparisons constant.

6 Figure 1 delivers a surprising message. Of the 14 parole-abolition states, only three
7 (California, Indiana, and Arizona) have experienced growth in prison rates that has
8 outstripped that among all states in the years since abolition took effect. Eleven of the
9 determinate states fall below the national average, and 2 of them (North Carolina and
10 Wisconsin) have experienced net reductions in their imprisonment rates since the
11 discontinuation of parole release.¹¹¹

12 Figure 1 is at odds with the common wisdom that parole release promotes lenity, but
13 its findings would not shock all observers of the parole process in America. The most
14 sophisticated proponents of discretionary release have long asserted that determinate
15 sentencing structures tend to deliver shorter prison terms than parole-release systems. Indeed,
16 a central argument raised by advocates of parole-release retention is that indeterminacy
17 permits tougher sentences for offenders identified as dangerous by parole boards. Peggy
18 Burke wrote in 1995 that “in every state that has abolished parole, the alternative has resulted
19 in shorter, definite sentences.”¹¹² In their 2005 study of 33 jurisdictions, Ireland and Prause
20 found that time served for most offenses was longer in indeterminate than in determinate
21 systems:

22 Determinate sentencing and the accompanying mandatory release mechanism
23 have not delivered the increased punitiveness and public safety promised with
24 the tough-on-crime movement. Instead, the data indicate discretionary release
25 may be more “tough” than mandatory release.¹¹³

¹¹¹ Florida operated with a determinate system from 1983 to 1997, and experienced 16 percent less prison growth than the national average during that period. Since reinstating an indeterminate system in 1997, Florida’s prison rate has grown by an increment of 121 prisoners per 100,000 population, while state prisons as a whole grew by only 37 per 100,000—or more than three times the national increase. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009; U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990, at 605 table 6.56 (for 1983 rates).

¹¹² Peggy B. Burke, *Abolishing Parole: Why the Emperor Has No Clothes* (1995), at 14 (Burke argued that the relatively fixed sentences in determinate systems were undesirable because the system had “no ability to extend sentences to reflect the risk of the offender”).

¹¹³ Stivers Ireland and Prause, *Discretionary Parole Release*, at 45. For example, homicide offenders spent on average 8 months less time in prison in determinate states; rape offenders 2 months less; robbery offenders 3 months less; burglary offenders 8 months less; assault offenders 6.5 months less; drug-possession offenders 6 months less, and petty-theft offenders 6.5 months less. For a handful of offenses, it appeared that time served tended to be longer in determinate jurisdictions than in parole-release jurisdictions. For instance,

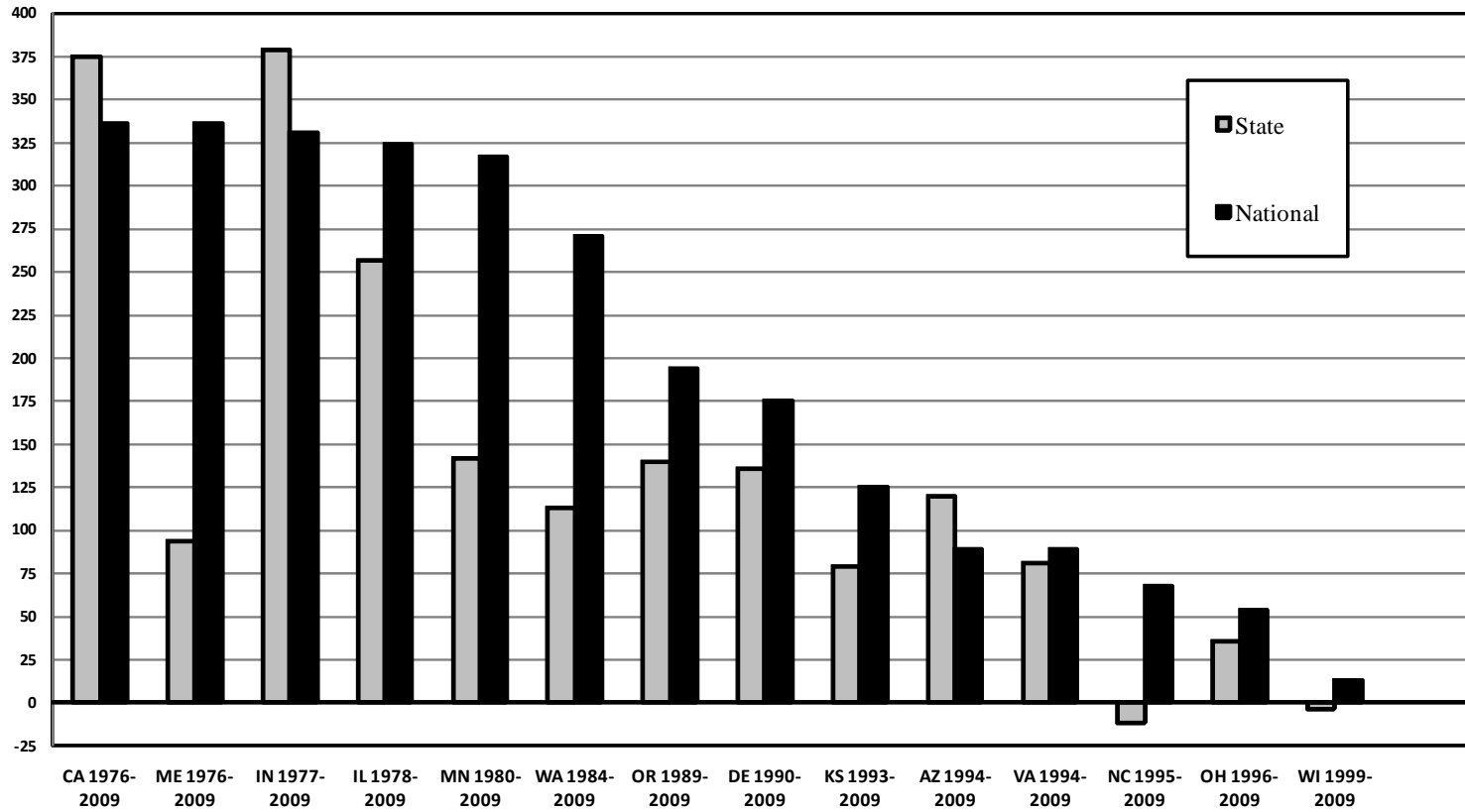
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Parole Abolition and Sentencing Guidelines

Beginning with Minnesota in 1980, a total of nine guidelines states have deliberately reapportioned sentencing authority over prison durations by removing it entirely from parole boards at the back end of the decisional chronology and repositioning it at the front end of the system, where it is now concentrated in the sentencing commission and the courts. If the guidelines are not too restrictive, the judiciary acquires a substantial amount of new authority in such a system, since judicial sentences will now bear close resemblance to the punishments actually experienced by offenders. If sentencing courts comply with guidelines most of the time, either voluntarily or because the guidelines have a degree of legally binding force, the sentencing commission also inherits some of the discretion formerly possessed by a parole-release agency.

drug-sale offenders spent on average 1 month more time in prison in determinate states; weapons offenders 3 months more; and DUI offenders 2 months more. *Id.* at 41 table 4. Stivers Ireland and Prause argued on policy grounds: “In sum, mandatory release may not only be more ‘soft’ on crime than discretionary release, it may also prevent paroling authorities from ensuring that the most dangerous offenders are retained in prison.” *Id.* at 45.

**Figure 1. Per Capita Prison Growth in States with No Parole Release Discretion
From Date of Parole-Release Abolition Through 2009**



1 We are here concerned with the impact of sentencing reforms on the course of prison
2 population growth. Figure 2 speaks directly to that issue, using the same methodology as
3 Figure 1. It charts the histories of prison expansion in nine determinate-guidelines states with
4 more than five years of operation, from the date of reform through 2009, and compares those
5 states against national trends over the same time. Florida, the only state to have instituted such
6 a system and abandon it later, is included in Figure 2 for the years in which it operated with
7 the determinate-guidelines structure.¹¹⁴

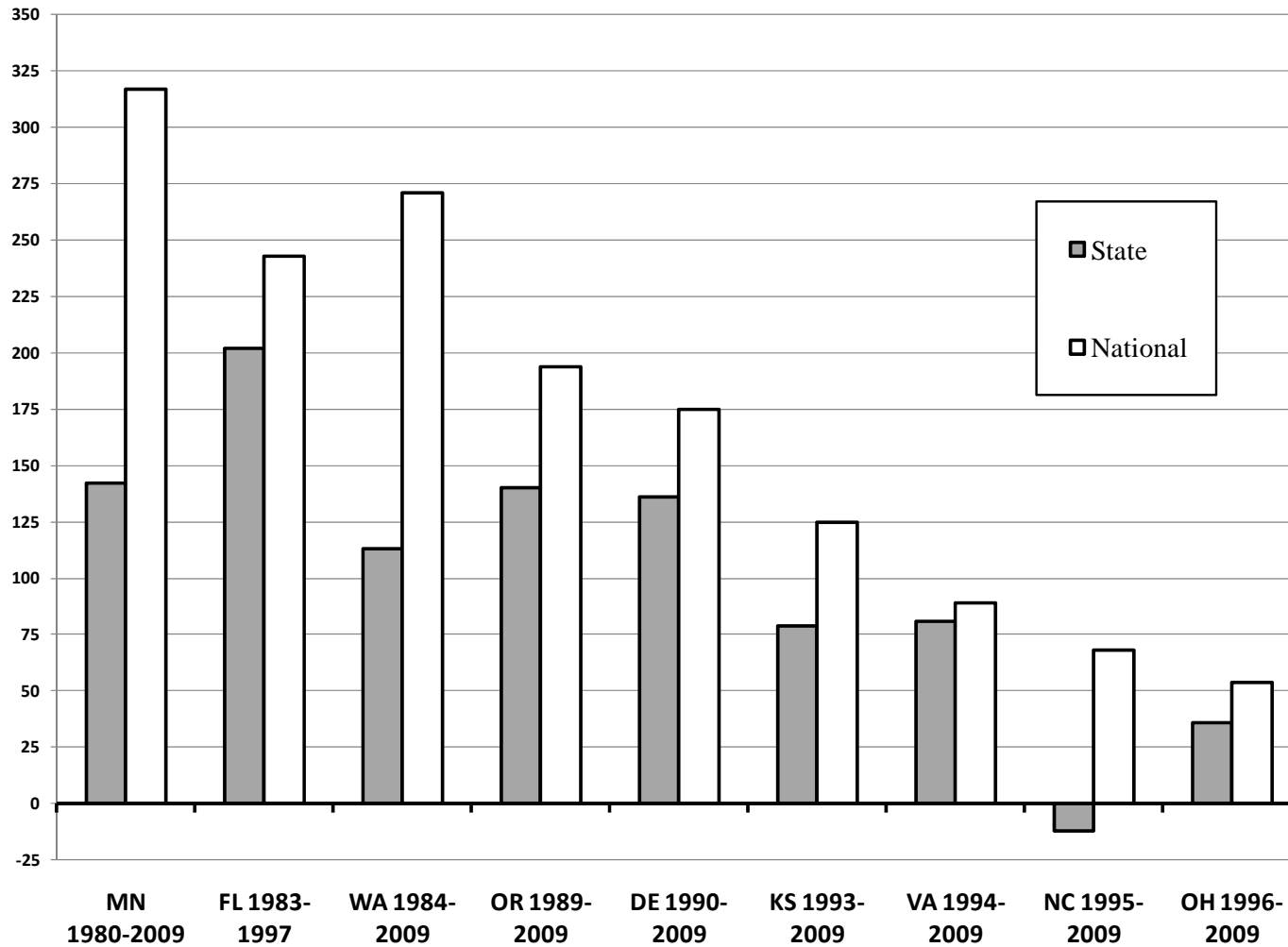
8 The major finding in Figure 2 is that nine out of nine determinate-guidelines states
9 have experienced post-reform prison expansion, corrected for population, below the national
10 benchmarks for equivalent periods.

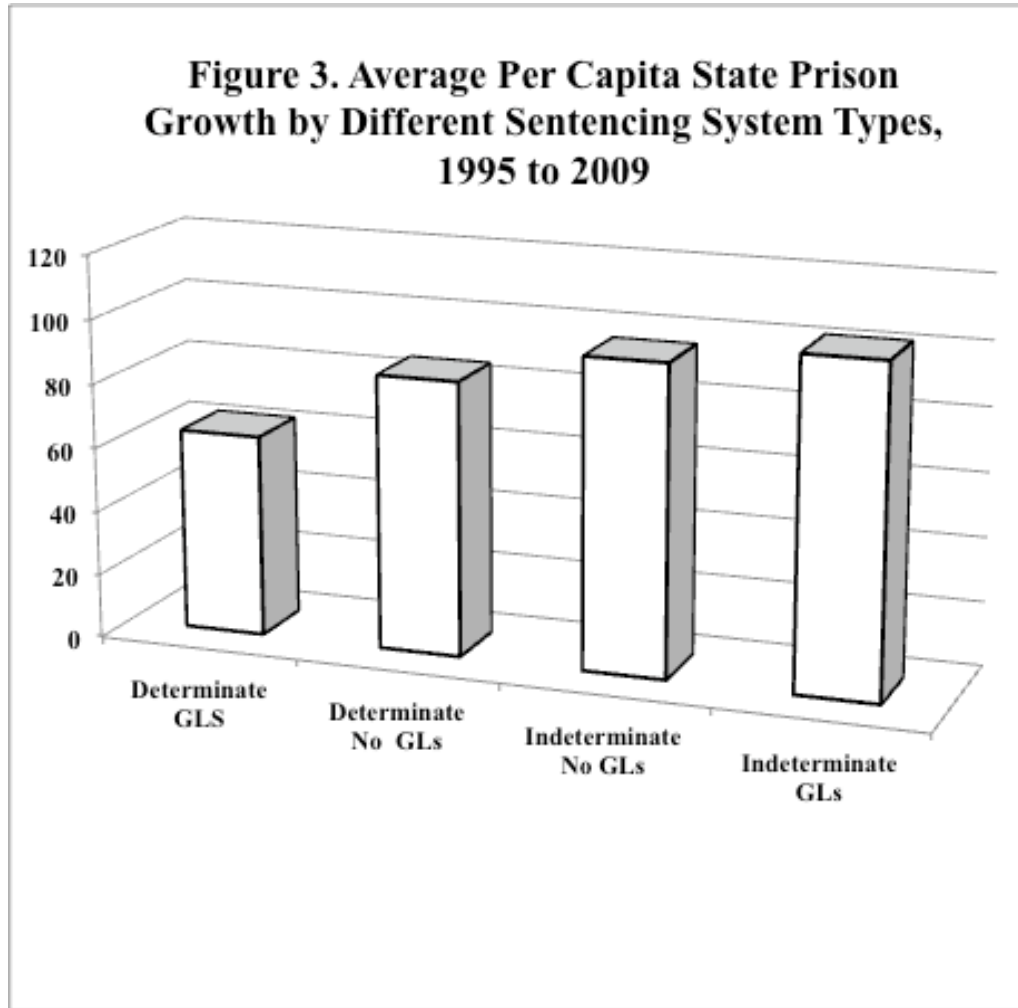
11 Figure 3 then groups all 50 states into 4 basic sentencing-system types, according to
12 the system in operation in 2009, and shows the average growth in prison rates for each group
13 since 1995. Determinate states have experienced less prison buildup than their indeterminate
14 counterparts, with the least occurring in determinate states with sentencing guidelines.
15 Substituting data back to 1980 yields the same rank ordering.¹¹⁵

¹¹⁴ Since abandoning the determinate-guidelines structure, Florida has had higher prison growth than the average among other states. See note 111, *supra*.

¹¹⁵ From 1980 to 2009, the per capita increment of prison population growth (per 100,000 general population) among indeterminate-guidelines states was 330; for traditional indeterminate states it was 301; for determinate-no-guidelines states it was 281; and for determinate-guidelines states it was 227. One problem with this crude measurement over the longer period is that so many states have changed their sentencing systems since 1980, so net prison growth for many states occurred under two or more different schemes. This difficulty is not nearly so great when going back to 1995. Other studies have addressed the issue of changing systems with more sophisticated methodologies, but their results lend credence to the gross observations reported here. See Don Stemen and Andres F. Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004*, 28 *Justice Quarterly* 174 (2011); Reitz, *Don't Blame Determinacy*, 84 *Tex. L. Rev.* at 1794-1801.

Figure 2. Per Capita Prison Growth in Guidelines States with No Parole Release Discretion From Date of System Adoption Through 2009





Among social scientists, using a variety of statistical methods, there is an emerging consensus that determinate sentencing reforms, presumptive sentencing guidelines, and especially systems that combine the two, have been associated with lower incarceration rates and less prison growth over the past three decades than other sentencing system types.¹¹⁶ In a 2005 study sponsored by the Vera Institute of Justice, principal investigator Don Stemen and his coauthors concluded:

¹¹⁶ Stemen and Rengifo, *Policies and Imprisonment*, at 190-194; William Spelman, Crime, Cash, and Limited Options: Explaining the Prison Boom, 8 *Criminology & Public Policy* 29 (2009); Kevin G. Smith, The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates, 66 *The J. of Politics* 925, 933-935 (2004); Sean Nicholson-Crotty, The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time, 50 *Crime and Delinq.* 395 (2004); David F. Greenberg and Valerie West, State Prison Populations and Their Growth, 1971-1991, 39 *Criminology* 615, 638 (2001); David Jacobs and Jason T. Carmichael, The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates, 80 *Social Forces* 61, 81 (2001); Thomas B. Marvell and Carlisle E. Moody, Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime, 34 *Criminology* 107, 120, 122 (1996).

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We consistently found that states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states. . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates. The stability of the combined policies was noticeable in all analyses conducted, after controlling for all other policies and social variables.¹¹⁷

Such findings have been heralded by one seasoned researcher as “a refreshing departure from the usual negative results when evaluating criminal justice reforms.”¹¹⁸

Past experience does not guarantee that parole-release abolition has an inherent tendency to push inmate counts up or down. It appears that either outcome is possible, and many factors other than the state’s prison-release mechanism are surely at work. The history of determinate sentencing in America over the last 30 years, however, is wholly *unsupportive* of the claim that parole-release abolition always, or usually, speeds up incarceration growth when compared against systems of parole-release retention. The general drift of things over several decades has been in the other direction.

Both history and data suggest that the abolition of parole-release discretion has been a particularly important component of the success of some sentencing commissions in deliberately managing the use of correctional resources. Why should this be so? Part of the answer is the happenstance of policy preferences in determinate-guidelines states. Most jurisdictions that have created such systems have done so in the hope of slowing or stopping preexisting cycles of incarceration expansion, prison construction, and spiraling correctional expenditures.¹¹⁹ But there is no necessary connection between the determinate-guidelines machinery and restraint in the use of confinement. If the same states had chosen to use an identical framework to accelerate their use of incarceration, they likely would have succeeded in that goal as well.¹²⁰

Still, it is important to emphasize that determinate-guidelines reforms, in most of the places they have taken root, including a majority of all parole-release abolition states, have not

¹¹⁷ Don Stemen et al., *Vera Inst. of Just., Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975–2002* (2005), at 143.

¹¹⁸ Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 *J. of Crim. L. and Criminology* 696, 707 (1995).

¹¹⁹ See Leonard Orland and Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 *U. Colo. L. Rev.* 837, 839-840 (1993).

¹²⁰ See Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 *U. Colo. L. Rev.* 713 (1993) (arguing that federal and state sentencing commissions have had markedly different policy goals, but they have largely succeeded in achieving those goals). There are only two sentencing-guidelines systems that were created deliberately to work sharp increases in aggregate punishments—the federal system and the guidelines system in Pennsylvania. Both succeeded, although the Pennsylvania commission turned its efforts to managing and rationing prison growth in later years. See Kevin R. Reitz, *The Status of Sentencing Guideline Reforms*, in Michael Tonry ed., *Penal Reform in Overcrowded Times* (2001).

been intended to accelerate the growth of incarceration or push up the average length of prison stays. The academic literature often gets this wrong. Indeed, the Reporter knows of no determinate-guidelines reform propelled by such a policy goal except the federal system.

From a deincarceration perspective, this may not be reassuring, since the policymakers who brought in determinate-guidelines reforms with one set of expectations may easily change their minds in later years—or be replaced by other officials who decide to turn the system toward greater severity. In 1976, before any American sentencing-guidelines system had taken effect, Franklin Zimring noted that the character of determinate sentencing systems could be changed in an instant by erasing one set of sentence prescriptions and substituting larger numbers. Zimring thought this was likely to happen, given political pressures on criminal-justice decisionmakers and the acute temptation to make sweeping “get-tough” changes in law.¹²¹ The hypothesized vulnerability of determinate punishment systems to punitive policy shifts is sometimes abbreviated as “Zimring’s eraser.”¹²²

There is no way to refute suspicions about the possible future, but we now have 35 years of experience since Zimring coined the eraser metaphor, and these were decades of unprecedented toughness in crime response. Even during the expansionist period, however, the vast majority of determinate-guidelines systems were not visibly overwhelmed by draconian impulses when compared with other system types.

History is always complicated, so it is important to qualify the above statement. The typical state that has employed a determinate-guidelines structure for any length of time has experienced some years in which state policymakers wanted to turn the system toward greater severity, and other years in which different priorities have prevailed. In Minnesota, for example, in the late 1980s, three high-profile crimes in Minneapolis parking lots caused the legislature to instruct the sentencing commission to ratchet up guideline penalties for serious violent offenses. The changes were dramatic, doubling presumptive sentence ranges in some categories.¹²³ For some years following the amendments, the rate of growth in the Minnesota prisons outstripped national averages. On the other side of the coin, however, many years under the Minnesota guidelines have been periods of relative restraint in the use of prison resources. The sentencing commission, in Minnesota as in other determinate-guidelines states, provides the legislature with correctional population projections on a periodic basis, and these also accompany proposed

¹²¹ See Zimring, *Consumer’s Guide to Sentencing Reform*, at 16-17 (with determinate sentencing legislation, “it takes only an eraser and pencil to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense”).

¹²² See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 933-934 (1991).

¹²³ See Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 Wake Forest L. Rev. 345, 359-360 (1993).

changes in sentencing legislation or guidelines.¹²⁴ Legislatures have been known to balk at the high-cost forecasts that can attend new laws, or to soften the laws' terms before they are enacted. Or else they have found ways to offset punishment increases in one part of the criminal code with a lightening of penalties elsewhere.¹²⁵ During some years, therefore, the determinate-guidelines systems provide effective tools to retard punitive expansionism that would otherwise occur—and this ends up being significant even if it does not happen every year. Over the long term, the broken cadence of punitiveness in some years, and restraint in others, seems to yield a pattern of slower prison growth than in indeterminate jurisdictions that always, year-in and year-out, lack the systemic controls of the determinate-guidelines system. Despite intermittent stretches of rapid prison growth, Minnesota remains 49th out of all states for its prison rate (and 49th for its combined prison and jail rate).¹²⁶

As a matter of abstract theory, a parole board could be just as effective at managing the use of prison resources as a sentencing commission, but this has not often happened in practice over the past 35 years.¹²⁷ Part of the reason, noted by Michael Tonry, is that sentencing commissions are able to address “in-out” decisions as well as sentence durations. Parole boards, in contrast, have no say over who comes into the prisons in the first place, and thus are lacking one critical lever for the management of prison use.¹²⁸ An even more important concern may be the susceptibility of parole boards to political influence and a natural institutional drift toward severity in practice. There is no catchy term like “Zimring’s eraser” to describe the phenomenon, but most parole boards since the 1980s have become stingier in their release decisions.¹²⁹

¹²⁴ This mechanism has been made a part of the revised Code. See § 6A.07 (Tentative Draft No. 1, 2007).

¹²⁵ For detailed state-specific discussions, see Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, in Michael Tonry ed., *Crime and Justice: A Review of Research*, vol. 32 (2005), at 131-219; Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, in Michael Tonry ed., *Crime and Justice: A Review of Research*, vol. 29 (2002), at 39-112; David Boerner and Roxanne Lieb, *Sentencing Reform in the Other Washington*, in Michael Tonry ed., *Crime and Justice: A Review of Research*, vol. 28 (2001), at 71-136.

¹²⁶ See Frase, *Sentencing Guidelines in Minnesota*.

¹²⁷ For one plausible account, see Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1840 (2006) (footnotes omitted):

Since its beginnings, however, parole has had unforeseen repercussions for prisoners. Dating back to the turn of the century, effective prison sentences in states that adopted parole grew longer rather than shorter. Two phenomena help explain this seeming paradox. First, legislatures and judges felt free to impose higher sentences when they knew that those sentences might not be served in full. Second, staying on good behavior during parole is no easy task The end result is often that the creation of parole leads to the imposition of longer sentences.

¹²⁸ Tonry, *Sentencing Matters*, at 27. An important part of the prison-resource control strategy in North Carolina, for example, has been to make slight reductions in the probability of incarceration following a conviction at the low end of the felony scale, while increasing the probability of a prison term for more serious felonies. Presentation of Thomas Warren Ross, Meeting of ALI Advisers, Model Penal Code: Sentencing Project, September 20, 2002 (data on file with author).

Sometimes parole-release practice has changed dramatically in reaction to a single publicized incident, as in Pennsylvania following the police killing committed by parolee Robert “Mud Man” Simon in 1995, or the 2007 Petit family murders in Connecticut.¹³⁰ Parole boards have become more risk averse than they used to be, and are aware that they will seldom draw criticism for holding someone in prison too long.¹³¹

Beyond the parole boards, other government officials in indeterminate systems may face subtle encouragement to act in ways that contribute to prison growth. Legislators may feel little reluctance to enact new laws providing for draconian maximum penalties—thus winning public approval for their “toughness” on crime—on the supposition that the parole board will soften the law’s effects by releasing most prisoners far short of the new maximum. Similar thinking could lessen a sentencing judge’s qualms over imposition of a high maximum term—also on the theory that the parole board is the real decisionmaker, and will act with appropriate restraint when the time comes. The question of whether the parole board will deliver on its expected part of the bargain will not be answered for many years, when the offenders in question reach their parole-eligibility dates. If release rates drop markedly in the intervening period, if the parole process is subjected to increased scrutiny, if fear of crime rises on the political agenda, if boards come to place greater premium on risk-averse decisions—all of which happened in the United States of the 1980s and 1990s—then the psychological freedom to be severe at the front end will have no genuine offset at the back end. The pleasant illusion of indeterminacy as a pro-lenity program, with more “bark” than “bite,” could itself be one cause of swelling prison populations.

In contrast, most parole-release abolition jurisdictions, including all determinate-guidelines states, decided to build in the “early release” probabilities of a discretionary release system when they moved to determinate release. The expected behavior of a parole board was incorporated into the new determinate or guideline sentences when the systems were redesigned. This requires considerable explanation to the public, who have to be made to understand that a two-year prison sentence under the new regime is actually more severe than, say, a five-year sentence under the former law. Provided this hurdle can be surmounted, the release assumptions embedded in the typical guidelines system are harder to erode than are the behaviors of line officials who make discretionary release decisions. In the latter instance, a telephone call from the governor would probably suffice. In a sentencing-commission state, meetings, public notice,

¹²⁹ See James Austin, *The Need to Reform Parole Board Decision-Making* (2002), at 3.

¹³⁰ See Pennsylvania Gov. Ridge Announces Probation and Parole Reforms; New Mission Community Safety, PR Newswire, June 27, 1995; Judge: Inmates are Unfairly Denied Parole, *Pennsylvania Law Weekly*, October 26, 1998, at 2 (citing statistics that 77 percent of prisoners eligible for parole release were given parole in the early 1990s before the Mud Man case, but this had dropped to 44 percent of eligible prisoners by 1997); Alison Leigh Cowan, Path to Parole Becomes Issue in [Petit] Murder Case, *New York Times*, July 31, 2007; Christine Stuart, [Connecticut] Gov. Rell Bans Parole for Crimes of Violence, *New York Times*, Sept. 23, 2007.

¹³¹ These are not new observations. Norval Morris noted the same dynamic many years ago in *The Future of Imprisonment*, at 48.

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fiscal-impact projections, and open debate must precede any change of similar consequence—and representatives from all sectors of the criminal-justice system and across the political spectrum will have the opportunity to weigh in. Determinacy, with its concomitant advantages of systemic planning, may not be severity-prone by nature. And Zimring’s eraser is perhaps not so worrisome an office supply as may have appeared 35 years ago.

Conclusion

This Study has suggested that, based on the underlying goals of the sentencing system, and values of fair legal process, it is difficult to justify the routine allocation of large authority over prison durations to a parole board. The Study has further shown that common preconceptions that parole release inclines toward lenity in prison sentences, and that parole-release abolition goes hand-in-hand with greater severity, are not supported by actual experience. Prison populations have grown more slowly in parole-release-abolition jurisdictions than elsewhere, and the slowest growth patterns among all American sentencing system types in recent decades have been found in parole-abolition states that have also instituted sentencing guidelines.

The Code’s preference for a determinate sentencing structure is not absolute—when good reasons for a different approach exist. The availability of good-time credits for most prisoners is a routine departure from pure determinacy, but is justified by the needs to maintain prison discipline and encourage inmate participation in rehabilitative programming. See § 305.1 (this draft). Provisions for the “compassionate release” of elderly inmates, or physically or mentally infirm prisoners, are commonplace in jurisdictions that otherwise adhere to determinate sentencing principles. The revised Code recognizes the propriety of both of these familiar qualifications to a determinate framework. Indeed, the Code includes a “compassionate release” provision that is broader than any existing provision of the kind. See § 305.7 (this draft). In addition, there was consensus among the Advisers, Members Consultative Group, and Council that extremely long prison sentences (measured in decades rather than years) present unique concerns even if one has concluded that parole-release discretion, as it has existed in the past, does not belong in the criminal-justice system. Societal conceptions of proportionate punishments can change over the course of a generation (or comparable period); and the technologies of utilitarianism—one hopes—are constantly evolving. Very long sentences ought to inspire humility that premises that appear justified in one era may be doubted in the next. For the limited group of prisoners serving extremely long terms, the revised Code allows for reexamination of their sentences under § 305.6 (this draft) after they have spent 15 years in confinement. With these exceptions, however, it is a cornerstone philosophy of the revised Code that sentencing courts should have discretion to individualize penalties in specific cases, and should know to a reasonable approximation what the severity of their chosen sentences will be.