

Check for
updates

38

Rules Versus Discretion in Criminal Sentencing

AQ1

Daniel J. D'Amico

Introduction

The United States' prison population quintupled between the late 1970s and the early 2000s. With over two million incarcerated, the net amount of inmates within the U.S. at peak rivaled the historic cases of both the Soviet Gulag system and the Nazi concentration camps (Mitchell 1988; Applebaum 2003). In 2007, the U.S. hosted over 760 prisoners per 100,000 citizens—the largest per capita rate on planet Earth (UNODC 2018).

The comparative magnitude, rapidity, and obvious social relevance of mass incarceration have thus generated common concerns that the trend is excessive and demands reform. But, at the foundation of all such activist efforts sits the pressing need for a thorough operational understanding. Before society can hope to fix a supposed problem, we must first know its causes and consequences accurately. What shapes

A1 D. J. D'Amico (✉)

A2 Brown University, Providence, RI, USA

A3 e-mail: daniel_damico@brown.edu

AQ2



2 D. J. D'Amico

prison growth? Why do some nations incarcerate so many more individuals than others? What viable alternatives to the status quo could assure a more proportionate distribution of criminal punishments? These questions are intensely researched and debated across a variety of academic disciplines. But, the current status of these literatures remains uncertain, under specified, and incomplete.

One major area of debate surrounds a tension regarding how much criminal sentences should be determined by the rule of law or in contrast, the discretionary authority of judges and other criminal justice officials. Does a system of fixed punitive rules or an adaptive system of discretionary authority better assure proportionate outcomes? Do fixed rules or discretionary interventions better avoid the social consequences of mass incarceration? On the one hand, punishments and law enforcement efforts operate as offsetting incentives against criminal behavior (Becker 1968). Such equilibrating dynamics suggest a useful function for adaptations and interventions to better gauge punishment magnitudes and assure social efficiency. On the other hand, discretion begets capture and manipulation by special interests. Furthermore, a consistent and unbiased rule of law is a necessary condition for fairness and equity, especially when such a system is administered across a large and diverse population (Waldron 2016). **AQ3**

In recent decades, different streams of research have attributed rules and discretion in turn, each as contributing factors to over criminalization and mass incarceration. Racial and class biases were common features of policing, prosecution, and criminal sentencing in early American history (Alexander 2012). In response, criminal justice procedures and appeals became more formalized and subject to federal design throughout the twentieth century (Murakawa 2014). In their original intentions, federal sentencing rules and guidelines were aimed to supplant racial prejudice and excessive severity at the state and local level (Abramson 2000). More recently, research has apparently “come full circle,” (Klein 2005, p. 1) now suggesting that these efforts tended towards greater severity, longer punishments, and larger prison populations.

This tension between rules and discretion is not unique to matters of criminal justice, as similar debates churned throughout macroeconomic research between the 1960s and 1990s. I argue that strong parallels exist



38 Rules Versus Discretion in Criminal Sentencing

3

55 across the rules versus discretion debates within monetary and criminal
56 justice policy arenas. Substantial insight can be garnered from the for-
57 mer literature to inform the latter.

58 Monetary debates regarding rules versus discretion take one of three
59 main argumentative positions. First, many recognize an obvious need
60 for adaptive and stabilizing adjustments to the money supply via mac-
61 roeconomic interventions.¹ Interest rates operate within the loanable
62 funds market akin to ordinary prices in consumer markets. Hence,
63 adaptable means of adjusting interest rates via monetary interventions
64 are seen as critical methods to assure proportionate supplies and general
65 market equilibration.

66 Second, Friedman (1948) argued against discretion-based monetary
67 policy, as the long and variable lags of monetary policy outcomes pro-
68 vide poor incentives and feedback for authorities to optimize interven-
69 tions. Dominantly accepted economic theory may call for monetary
70 actions orthogonal to what electoral politics and embedded bureaucratic
71 incentives promote. In so far as actors throughout the economy recog-
72 nize this tension, nominal policy changes are unlikely to reshape real
73 expectations or outcomes. Hence, Friedman proposed stable and trans-
74 parent monetary rules akin to constitutional amendments.

75 Third, Buchanan (1983) in part transcended this debate by focus-
76 ing upon the practical enforceability of rules and the incentives that
77 govern over those entrusted to enforce them. In principle, Buchanan
78 agreed with Friedman that rule-based monetarism was preferable, as
79 discretionary authority created opportunities for rent seeking and ulti-
80 mately the expectations of real market actors matter most. However,
81 agents throughout the economy must believe that authorities will
82 abide by the rules once they are in place. Rules only evoke stable expect-
83 ations when agents perceive enforcers to be bound by credible com-
84 mitments. Buchanan noted this challenge was uniquely difficult for
85 monetary compared to other policy areas, as manipulating the money
86 supply represents an extreme and unique potential for governmental
87 expansion. Thus, even with a constitutionally inscribed monetary rule,

¹See Simmons (1936), Lerner (1944), and Modigliani (1977).



4 D. J. D'Amico

governments are directly incentivized to manipulate the macro-economy for private and or political gain. In result, he viewed the challenge of efficient monetary policy to be ultimately about effective constitutional checks and balances. Such insight, begs the practical question as to how self-enforcing constitutions are best arranged? In turn, we must ask by what organizational structures might the different powers of government be arranged so as to assure good monetary rules and enforcements?

Similar ideas regarding credible commitments have been leveraged to understand the challenges of discretionary legal reforms (Rizzo 1980), the failures of full scale economic planning amidst Perestroika (Boettke 1993), and post war reconstruction (Coyne 2008). This essay represents an additional social arena wherein the core insights of constitutional political economy bear relevance. In short, the long and variable lags of punitive policies make for a similar tension between rules and discretion as is commonly discussed regarding monetary policy. While there are strong conceptual reasons to support rule-based sentencing policy over discretionary authority, the task of punitive policy making also lacks credible commitments akin to the self-seeking potentials of monetary power. Rule-based criminal sentencing proposals rely upon governmental decision makers to police themselves, thus it is not surprising that rule-based policies have historical results like over criminalization, police brutality, punitive severity, and mass incarceration.

The remainder of this paper is organized as follows. Section “[Rules Versus Discretionary Monetary Policy](#)” surveys the rules versus discretion debate amongst macroeconomists. Section “[Rule-Based Versus Discretionary Criminal Sentencing](#)” parallels section “[Rules Versus Discretionary Monetary Policy](#)” by surveying the similar arguments for rule-based and discretionary criminal sentencing. Section “[The Long and Variable Lags of Sentencing Policy](#)” explains how rule-based criminal sentencing similarly suffer Buchanan’s critique in so far as they lack credible commitments. Given their currently hierarchical and relatively centralized organizational forms, criminal justice institutions lack effective checks and balances to offset political incentives towards bureaucratic growth, capture, and rent-seeking. Section “[Conclusions](#)” concludes.



Rules Versus Discretionary Monetary Policy

This section surveys the three main arguments within the rules versus discretion debates surrounding macroeconomic interventions. I label these as follows, (1) democratic or independent discretion, (2) the need for stable expectations via rule-based policy, and (3) the constitutional challenge of credible commitments. Each is summarized within its own brief sub section below.

1. Democratic or Independent Discretion

In the early twentieth century, Keynes (1936) displaced the classical vision of the self-adjusting macro economy via an alternative “hydraulic” framework. In addition to identifying a series of causal relationships to account for historic and contemporary outcomes, the Keynesian model also promoted a tool kit for adjusting national economic performance. Expanding the money supply, increasing public spending, or reducing taxes were all believed to increase aggregate output and visa versa. The macro economy was seen to be inherently prone to disequilibrium conditions and thus suffered systemic unemployment, underproduction, and bouts of cyclicity. Hence, the economic role of government came to be thought of as holding the discretionary responsibility and authority to both identify over or under performance and apply the appropriate policy lever(s) when needed.

The earliest debates regarding efficient macroeconomic management presumed the obvious potentials and needs of intervention, and thus focused primarily upon which sphere of authority would best manage discretionary power. Simmons (1936) surveyed and accepted the desirability of stable rule-based constitutions, but also admitted the necessity of timely efforts to adjust price levels, improve employment outcomes, and avoid recessions. Later, Modigliani (1977) argued for the potentials of intervention, but ceded the need for some independence of monetary authority apart from political interests. In short, the practical social needs of macroeconomic stabilization are distinct from the political interests of democratic decision makers. If political careers can be made



6 D. J. D'Amico

or broken by leveraging cheap credit, targeted subsidies, and or debt-based financing (Wagner 1977), then there is little hope for fiscal or monetary interventions to be deployed optimally when they are needed. Thus, a Federal Reserve system, supposedly independent of democratic politics, can better align monetary policy with real economic needs rather than pander to political interests or populist demands.

2. The Need for Stable Expectations Via Rule-based Policy

By the mid-1970s, stagflation and the seeming inefficacy of Keynesian interventions weakened the belief that fiscal policy (taxing and spending) held more corrective potency relative to monetary policy (adjusting the money supply and interest rate).² Thereafter the monetarists, largely spearheaded by Friedman (1968), argued in contrast a greater influence from monetary policy. The presumed potentials of macroeconomic interventions remained intact. Hence, a subsequent debate evolved to address the relations between macroeconomic adjustments and expectations throughout the market economy.

A practical independence of monetary policy apart from political influence is easier said than done. First, spheres of political authority apart from the Federal Reserve also possess interventionist influence upon monetary and macroeconomic outcomes. Second, political authorities can and do impose real pressures upon Federal Reserve decision makers despite supposed Fed independence. Last, Federal Reserve officials like all other market actors are subject to their own interests and political biases. In result, some substantial political influence upon monetary policy is inevitable and ought to be taken into consideration by any broader interventionist framework.

Because investors seek to profit maximize through time, mere expectations of policy changes may suffice to reshape real macroeconomic

²Friedman and Shwartz's (1963) work also provided substantial historic empirics demonstrating the relatively strong role of monetary policy in shaping business cycles and macroeconomic outcomes.



outcomes. Small errors of estimating future interest rates or interest rate changes can have large effects on profits and losses. Inversely, policy efforts may fall flat if market participants do not genuinely believe they will persist or yield real results. Furthermore, the timing of politics is a wholly different process from the real fluctuations of macroeconomic phenomena and or the real changing needs for monetary interventions. Current office holders can implement policies while imposing costs onto future regimes. Similarly, present office holders may bear the force of negative or positive perceptions still remnant from long-past policy changes. Hence, Friedman focused upon the unique implications surrounding the “long and variable lags of monetary policy” (Friedman 1965).

In short, the omnipresence of these incentive structures creates an environment wherein political decision-makers face loose and indirect feedback regarding what macroeconomic problems exist, which interventions are effective, and how political constituents will approve or disapprove of outcomes. In stride, Friedman ceded the inevitability of political influence upon monetary pressure by conceptualizing and arguing for monetary rules to be framed as constitutional measures. Hence, Friedman is often summarized to have suggested an explicit constitutional amendment stipulating a constant 2% inflation rate. In short, it was believed that the benefits of reliability would outweigh the downsides of a fixed rate (Friedman and Goodhart 2003).

3. The Constitutional Challenge of Credible Commitments

Buchanan divided his framework of constitutional choice into two primary levels of analysis: the pre and post constitutional moments of decision-making. In other words, citizens face strategic incentives during ordinary post-constitutional processes within a relatively fixed setting of rules and enforcements, but they also face strategic opportunities during the rule making process itself or pre-constitutional moment (Buchanan 1977; Brennan and Buchanan 2000 [1985]). Hence, any policy change wherein individuals can foresee personal losses from a new rule creates a challenge of consent, as the constituency of losers has little incentive to support the rule change.



With regard to Friedman's constitutional proposal for monetary rules, Buchanan's dichotomy is most relevant. First, from the status quo condition, political authorities face a pre-constitutional dilemma that may obstruct the potential of presumably "good" monetary rules from being accepted and implemented. If current rules, or a lack thereof, benefit particular interest groups at the expense of social wellbeing, then those groups are inclined to impede or redirect reforms towards "better" rules. Second, even if accepted and implemented effectively, monetary rules are specifically at odds with many basic incentives governmental bureaucracies face: to grow and expand fiscal, monetary, and executive authority when possible (Niskanen 1971). Effective rules require that those entrusted with enforcement authority be well inclined to abide and actually enforce the rules.

Buchanan's insight thus refocuses the debates surrounding monetary policy towards the question of consistent enforceability. By what mechanisms of effective checks and balances might good monetary rules succeed in maintaining reliable expectations of credible enforcements. Or, more broadly, "what are the rules of rule-making?" (Buchanan 1987). In general, it is well acknowledged that organizational patterns matter (Williamson 1985) and that monopolistic hierarchies are more prone to rent seeking and capture than decentralized alternatives (Tullock 1967; Sah and Stiglitz 1986). Akin to the general market place, robust and adaptable institutional outcomes tend to coincide with more pluralistic and competitive environments (Ostrom 2005). Thus, the persistence of relative monetary stability can be attributed to the degree of effective jurisdictional competition in the global market for currencies. **AQ4**

Rule-Based Versus Discretionary Criminal Sentencing

The criminal sentencing debate between rules and discretion has a long and varied history. Current criminal sentencing practices and outcomes have been commonly perceived as excessive for several decades. However, causal frameworks for understanding these trends are varied, contested, and sometimes stand in contradiction to one another.



Both rule-based and discretionary policies have each been accredited for driving excessive imprisonments in America. Frankel (1972, p. 29) complained that “indeterminate sentences,” lead to longer incarcerations and a vast prison growth. More recently, several writers blame the neoclassical paradigm and formal sentencing guidelines as a major cause behind increased incarceration rates.³

In their earliest stages, American colonies practiced the British system of determinate sentences. Crimes typically carried a specific penalty set by law (Friedman 1993). Thereafter, but still relatively early in American history, local judges were given far more discretion regarding punishment types and sentence lengths. During these latter colonial periods, the rehabilitation paradigm was widespread. It was believed that discretionary sentencing could help gauge punishments for the specific needs of criminals and their respective behaviors (Hirsch 1992, pp. 8–40; Rothman 1971, p. 49). Given the presumed roles of individual rationality and the potentials for incentive adjustments, excessively severe and sub-optimal punishments were recognized as socially dangerous. If punishments are not gauged proportionately across mild and severe crimes, excessively severe laws encourage rather than deter criminal behavior (Beccaria 1764; Bentham 1988 [1843]). Continuously adaptable punishments were seen as necessary to fit the unique conditions of criminal behavior across diverse localities and individuals. Thus, the debates at this time paralleled later monetary debates in that they accepted a presumed potential for discretion to achieve proportionate outcomes. But, what sphere of political authority will most effectively leverage such discretionary punitive authority remained uncertain. Should criminologist and psychological experts design penalties, or should political authorities adhere to public opinion (Comment 1950; Wright 1999)?

The first practical shift away from discretion came late with the development of parole boards and probation agencies at the dawn of the twentieth century. By 1942 every state and the Federal government utilized parole boards (Samaha 2005). Such was not intended as

³Braithwaite and Pettit (1990), Christie 2000 [1993], Tonry (1996), and Garland (2001).



283 opposition to judicial discretion per se, but these groups subsumed de
284 facto sentencing authority from judges nonetheless, as they could release
285 a prisoner early or change the type of penalty endured. Later the shift
286 towards rule-based sentencing was more explicitly motivated against
287 judicial power, as absolute discretion was seen as “terrifying and intolerable for a society that professes devotion to the rule of law (Frankel AQ5
288 1973, p. 8)”. With few to no practical assurances against judicial bias,
289 citizens had little reason to expect fair trials, stable rates of criminal
290 deterrence, or consistent rectification when victimized. Crime rates and
291 public opinions varied in stride; disjointed from policy trends and punitive magnitudes (Flanagan and Longmire 1996). Hence, the abilities of
292 individuals to strategically optimize their personal and political investments across private and public security efforts suffered from systemic
293 uncertainty.
294

297 From the 1970s through the 1990s American criminal sentencing
298 shifted strongly towards rule-based sentencing guidelines. Sentencing
299 grids were a codified attempt to make the sentencing process objective and predictable across diverse localities. The federal government
300 designed and imposed pervasive system of guidelines in 1984 and the
301 vast majority of states followed suit with individual systems shortly
302 thereafter. Sentencing grids design indexes of criminal history and individual scales of criminal severity. Together these axes produce a formal
303 and narrow sentencing range that judges are meant to stay within. There
304 was no widespread opposition to the initial adoption of sentencing
305 guidelines because previous paradigms had failed to produce significant and tangible reductions of crime rates (Martinson 1974). But since
306 their inception, sentencing guidelines have received wide spread criticism, mixed results, and they have even been argued to have exaggerated
307 disparity and prison growth.⁴ Commentators infer that sentences are
308 higher than they otherwise would be without guidelines. Thus, recent
309
310
311
312

⁴Klein and Steiker (2002), survey Thomson (1962), Nagel and Hagan (1982), Seidman and Zeisel (1975), Cook (1973), Wilkins et al. (1991), Nagel (1990), and Clancey et al. (1981) who all support sentencing guidelines as a response to disparity originating from judicial discretion. See also Campbell (1991) and Breyer (1988).



Supreme Court cases have re-awarded discretionary power to federal judges in criminal cases.

The Long and Variable Lags of Sentencing Policy

The process of establishing socially efficient criminal justice policies confronts many of the same challenges as those inherent to the task of designing optimal monetary interventions. In short, both monetary and criminal justice policies similarly endure long and variable lags. Hence, the political processes of identifying real needs for criminal justice reform, designing effective interventions, and implementing real policies all suffer from imperfect incentives and weak feedback mechanisms. Thus, conceptually citizens have little reason to expect predictability or stability from the criminal justice system writ large. Again, akin to monetary policy debates, a strong conceptual case can be made for formal codifications of criminal punishments via codified sentencing norms. However, the stabilizing effects of rule-based criminal sentences are easier to nominally implement than practically assure. First, the organizational structure of political decision making within the criminal justice system suffers long and variable lags comparable to monetary policy making. Second, the unique potentials for criminal justice authority to expand governmental size and authority lacks a credible commitment that fiscal and punitive contractions will be adhered to when needed. In result, the criminal justice system, much like monetary policy, conforms to a strong and persistence bias towards expansion and excess.

The long and variable lags of criminal sentencing policies stem from a variety of sources. Sentencing norms and outcomes can change through several procedural channels such new Supreme Court rulings, legislated acts, sentencing commission decisions, local policy changes, law enforcement norms, and internal parole board statutes. First there exists a lag between the real need for reform on the one hand, and the recognition or discovery of that need on the other. Second, between the recognition of a supposed need for adjustments, the effective design of adaptive policies, and the final application of reforms, time must

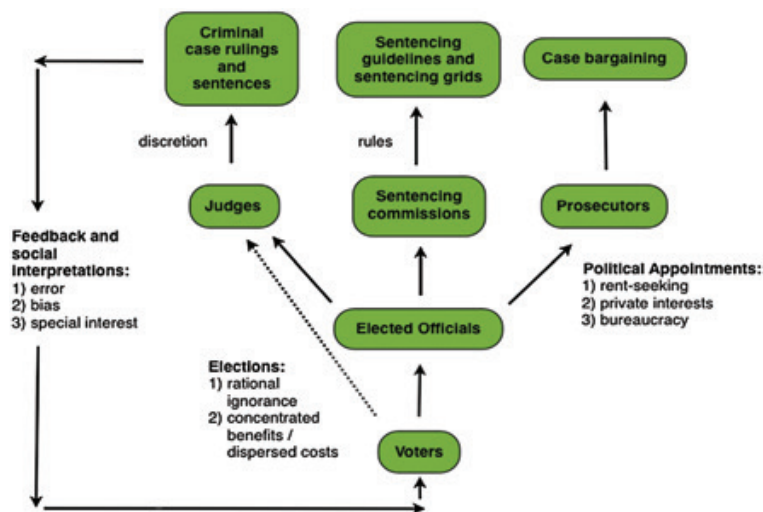


Fig. 38.1 The structure of decision making within American criminal justice

pass. Lastly, time also passes between a policy's inception and its actual effects.

The American criminal justice system is currently organized as a relatively vertical hierarchy of decision making. This arrangement inevitably carries with it lags and delays in implementing reforms. Figure 38.1 is a visual diagram of the flow of decision-making and the feedback at play within all local criminal justice jurisdictions.

At the base of the hierarchy, is the general public represented by voters. Voters participate in elections and choose political officials who they infer to be most in line with their political interests. The dotted-line between voters and judges is meant to indicate that some states select judges by independent voting whereas other states select judges by political appointment.

In the case of proportionate criminal punishment outcomes, voters would have to exert an explicit preference for a candidate concerned with this issue over alternative political goals. This is unlikely. First, because criminal sentencing issues are often second seat political concerns next to unemployment, economic welfare, health care, foreign policy etc. Second, the election process suffers from rationally ignorant voters and political coalitions. Voters have little incentive to be informed about political issues because they bear a direct cost significantly higher than their actual influence upon the election



(Congleton 2002). Special interest groups more easily resolve collective action problems, can vote in relative unison, and thus reap concentrated benefits for their particular coalitions while dispersing costs across the entire citizenry (Wagner 1989). Thus a motivated voter concerned with punitive proportionality would have to compete for coalition members amongst notably more popular political issues. Hence, the political process reveals a status quo bias, because the costs of implementing political reform are inhibiting to the creation of minimal winning coalitions to implement social change (Buchanan and Tullock 1962). The current political process expresses a bias towards growth and expansion in so far as special interest groups recognize direct incentives for punitive expansion and excess. Such examples likely include police and correctional officer unions, professional prosecutors, along with material contractors for police and prison equipment.

At the next level of the decision-making hierarchy, elected officials appoint decision makers in several separate but related fields of criminal sentencing. This is represented in Fig. 38.1 by the three arrows stemming from elected officials towards judges, sentencing commissions, and prosecutors. Different states rely upon different arrangements to structure their local criminal justice systems and the federal criminal court system has its own structure as well. In some states judges and sentencing commissions co-exist, which is to say judges reign over the trials of cases while commissions set formal rules that determine narrow possible ranges for judges to assign sentences within. States without commissions and guidelines award a greater role of discretion to judges. Hence the diagram labels the decision-making arrow from judges to case rulings as “discretion,” and the decision-making arrow from sentencing commissions to guidelines and sentencing grids as “rules.” Prosecutors are another set of key decision makers when it comes to criminal sentencing. Through bargaining before and during the trial process prosecutors shape the real outcomes of criminal sentences. Though prosecutors are not necessarily awarded a de jure level of discretionary authority, they do carry a significant level of de facto power to bias sentencing decisions upwards or to circumvent the formal rule systems of sentencing guidelines with mitigating evidence—also biasing the level of criminal sentences upwards (Pfaff 2017).



The process of political appointments allows for further time lags and systematic tendencies that depart from optimal criminal justice outcomes. Once in authority an official has the opportunity and the incentives to maximize the budgets of his particular bureaucracy (Tullock 1965, pp. 120–220; Niskanen 1971). He is also inclined and capable to promote his private interests regardless of social welfare (Tullock 1967). Available resources within the provision of criminal sentences get allocated apart from proportionate optimality—some are wasted as expended efforts to curry political favor, some are wasted as bureaucratic inefficiency, and some are captured for private interests.

Finally, the actual decision making of each of the three appointed official types takes time and erupts further systematic political interests at odds with proportionality. Actual cases can take several years from the initial application of criminal charges through the trial process, verdict, and appeals and finally sentencing. Sentencing commissions have been known to take several years in order to formally be developed, meet with one another, agree upon a system of sentencing guidelines or sentencing grids, draft those proposals and finally implement them into stable policy. In fact the majority of states that have attempted to create sentencing grids out of sentencing commissions have failed to do so even after several years of deliberation (Tonry 1991). These long lags allow for opportunism and rent-seeking much like the process of political appointments in so far as they have been observed to bias the sentencing process upwards. As Zimring (1976) has noted “asking legislators to develop fine-tuned sentencing standards offers an irresistible opportunity for political posturing and pandering to get-tough sentiments.” Lastly prosecutors use bargaining power to influence the actual outcomes of criminal sentences. As rational maximizing agents, prosecutors seek to maximize their convictions and strategically offer high initial sentencing requests in order to induce plea-bargaining.

Notice that there is no significant difference between the incentives invoked under discretionary judicial sentencing compared to rule-based sentencing by commission guidelines. In both cases the actual results must be re-interpreted as feedback perceived by the voting public. The public can either accept the outputs of the criminal justice process or they can perceive a problem and express their own dissatisfaction. In



the case of the latter, individuals face significant costs to organize and express their refined political opinions. This process itself carries its own lag and systematic effects against proportionality.

These long and variable time lags suggest that rule-based criminal sentencing has some preferable potential to assure proportionate outcomes. The time delays associated with criminal sentencing policies imply a bias that they will be either ineffective, or if effective unaccepted. By selecting stable and generally applicable rules, citizens, criminals, security entrepreneurs and even political agents would have a better estimation of future criminal sentencing policies and could therefore invest in long term production plans and allocations of criminal justice resources to ensure that the level of criminal punishments reflected societal preferences as revealed by the market prices of those resources. Unfortunately so long as criminal justice institutions are arranged in similarly centralized hierarchies, decision makers face no self-enforcing constraint from breaking and perpetually reforming the allegedly established rules. The broader incentives for bureaucratic growth and expanded authority transcend temporal and practical needs for punitive reductions or fiscal constraint.

Conclusions

Theoretical arguments were surveyed from the debate within macroeconomics regarding the potentials and limitations of rule-based relative to discretionary monetary interventions. Despite the presumed potentials of monetary interventions to maintain efficient economic output, the long and variable lags of monetary policies create a strong theoretical case that rules rather than discretions provide a superior environment for the maintenance of reliable expectations. Market actors need clear and reliable indicators of profitability via interest rates over time to plan accordingly. However, implementing effective monetary rules is easier said than done.

As Buchanan's public choice approach brought to light, the organizational authorities responsible for designing and enforcing monetary rules are often one and the same. Given the extreme potentials for



capture and rent seeking embodied within monetary authority, nominal rules create and confront explicitly bad incentives for decision makers to abide and or enforce rules once in place. The challenge of effective monetary rule enforcement is ultimately about understanding how the organizational structure of constitutions promotes effective checks and balances.

Similar arguments were identified and summarized within the criminal justice arena. Criminal sentencing policies are similarly characterized by long and variable lags. Individuals living within any given criminal justice regime have unreliable sources of information and indirect incentives for investing private and political efforts optimally towards maintaining efficient and proportionate punishment outcomes. Regardless of the nominal commitments to rule-based or discretionary sentencing policies the incentives towards bureaucratic growth, rent seeking and capture are ultimately shaped by the consistently hierarchical structure of criminal justice decision-making.

This model accords to the available historical record. Criminal justice resource allocations and key phenomena like mass incarceration, over criminalization, and police militarization have persistently tended towards expansion despite wide variations of policy intents. Further research is needed to investigate and understand the relationship between the organizational patterns of criminal justice institutions, political decision making within the criminal justice system, and patterns of punishment outcomes across variously organized institutional settings.

References

- Abramson, J. (2000). *We, the Jury: The Jury System and the Ideal of Democracy*. Cambridge, MA: Harvard University Press.
- Alexander, M. (2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.
- Applebaum, A. (2003). *Gulag: A History*. New York: Random House.
- Benson, B. (1998). *To Serve and Protect: Privatization and Community in Criminal Justice*. New York: New York University Press.



38 Rules Versus Discretion in Criminal Sentencing

17

- 506 Bentham, J. (1988 [1843]). *Principles of Morals and Legislation, Fragment on*
 507 *Government, Civil Code, Penal Law*. Indianapolis, IN: Liberty Fund.
- 508 Beccaria, C. (1764). *Of Crimes and Punishments* (E. D. Ingraham, Trans.).
 509 Philadelphia, PA: Nicklin Printer.
- 510 Block, M., & Robert, L. (1975a). An Economic Analysis of Crimes Punishable **AQ9**
 511 by Imprisonment. *The Journal of Legal Studies*, 4(2), 479–492.
- 512 Block, M., & Robert, L. (1975b). Crime and Punishment Reconsidered. *The* **AQ10**
 513 *Journal of Legal Studies*, 4(1), 241–247.
- 514 Boettke, P. (1993). *Why Perestroika Failed: The Politics and Economics of*
 515 *Socialist Transformation*. New York: Routledge.
- 516 Braithwaite, J., & Pettit, P. (1990). *Not Just Deserts: A Republican Theory of*
 517 *Justice*. Oxford: Oxford University Press.
- 518 Brennan, G., & Buchanan, J. M. (2000 [1985]). *The Reason of Rules:*
 519 *Constitutional Political Economy* (Collected Works of James Buchanan,
 520 Vol. 10). Indianapolis, IN: Liberty Fund.
- 521 Breyer, S. (1988). The Federal Sentencing Guidelines and the Key
 522 Compromises Upon Which They Rest. *Hofstra Law Review*, 17(1), 1–50.
- 523 Buchanan, J. (1977). *Freedom in Constitutional Contract*. College Station and
 524 London: Texas A&M University Press.
- 525 Buchanan, J. (1983). Monetary Research, Monetary Rules, and Monetary
 526 Regimes. *Cato Journal*, 3(1), 143–146.
- 527 Buchanan, J. (1987). The Constitution of Economic Policy. *American*
 528 *Economic Review*, 77, 243–250.
- 529 Buchanan, J., & Tullock, G. (1962). *Calculus of Consent, Logical Foundations of*
 530 *Constitutional Democracy*. Michigan: University of Michigan Press.
- 531 Campbell, A. (1991). *Law of Sentencing (Criminal Law Library)*. New York:
 532 Clark Boardman Callaghan.
- 533 Christie, N. (2000 [1993]). *Crime Control as Industry: Towards Gulags, Western*
 534 *Style*. London: Routledge.
- 535 Clancy, K., Bartolomeo, J., Richardson, D., & Wellford, C. (1981). Sentence
 536 Decision Making: The Logic of Sentence Decisions and the Extent
 537 and Sources of Sentence Disparity. *The Journal of Criminal Law and*
 538 *Criminology*, 72(2), 524–554.
- 539 Comment. (1950). Consideration of Punishment by Juries. *University of*
 540 *Chicago Law Review*, 17(2), 400–409.
- 541 Congleton, R. (2002). The Median Voter Model. In C. K. Rowley &
 542 F. Schneider (Eds.). *The Encyclopedia of Public Choice*. Kluwer Academic
 543 Press. **AQ11**



18 D. J. D'Amico

- 544 Cook, B. (1973). Sentencing Behavior of Federal Judges: Draft Cases—1972.
 545 *University of Cincinnati Law Review*, 42, 597–615.
- 546 Coyne, C. (2008). *After War: The Political Economy of Exporting Democracy*.
 547 Stanford: Stanford University Press.
- 548 Easterbrook, F. (1983). Criminal Procedure as a Market System. *The Journal of* **AQ12**
 549 *Legal Studies*, 12(2), 289–332.
- 550 Flanagan, T., & Longmire, D. (Eds.). (1996). *Americans View Crime and*
 551 *Justice, A National Public Opinion Survey*. London: Sage.
- 552 Frankel, M. (1972). Lawlessness in Sentencing. *Cincinnati Law Review*, 41(1),
 553 1–54.
- 554 Friedman, L. (1993). *Crime and Punishment in American History*. New York:
 555 Basic Books.
- 556 Friedman, M. (1948). A Monetary and Fiscal Framework for Economic
 557 Stability. *The American Economic Review*, 38(3), 245–264.
- 558 Friedman, M. (1965). A Program for Monetary Stability. In M. Ketchum
 559 (Ed.), *Readings in Financial Institutions* (pp. 189–209). Boston: Houghton
 560 Mifflin.
- 561 Friedman, M. (1968). The Role of Monetary Policy. *The American Economic*
 562 *Review*, 58(1), 1–17.
- 563 Friedman, M., & Goodhart, C. (2003). *Money, Inflation and the Constitutional*
 564 *Position of the Central Bank*. London: Institute for Economic Affairs.
- 565 Friedman, M., & Schwartz, A. (1963). *A Monetary History of the United States,*
 566 *1867–1960*. Princeton, NJ: Princeton University Press.
- 567 Garland, D. (2001). *The Culture of Control: Crime and Social Order in*
 568 *Contemporary Society*. Oxford: Oxford University Press.
- 569 Hirsch, A. (1992). *The Rise of the Penitentiary: Prisons and Punishment in Early*
 570 *America*. New Haven: Yale University Press.
- 571 Keynes, J. (1936). *The General Theory of Employment, Interest and Money*.
 572 Basingstoke: Palgrave. **AQ13**
- 573 Klein, S. (2005). The Return of Federal Judicial Discretion in Criminal
 574 Sentencing. *Valparaiso University Law Review*, 39, 693–741.
- 575 Klein, S., & Steiker, J. (2002). The Search for Equality in Criminal
 576 Sentencing. *The Supreme Court Review*, 2002, 223–272.
- 577 Lerner, A. (1944). *The Economics of Control: Principles of Welfare Economics*.
 578 London: Macmillan.
- 579 Levitt, S. (2004). Understanding Why Crime Fell in the 1990s: Four Factors **AQ14**
 580 That Explain the Decline and Six That Do Not. *Journal of Economic*
 581 *Perspectives*, 18(1), 163–190.



38 Rules Versus Discretion in Criminal Sentencing

19

- 582 Martinson, R. (1974). What Works?—Questions and Answers About Prison
583 Reform. *Public Interest*, 25, 22–35.
- 584 Mitchell, O. (1988). *Hitler's Nazi State: The Years of Dictatorial Rule, 1934–*
585 *1945*. New York: Lange.
- 586 Modigliani, F. (1977). The Monetarist Controversy or, Should We Forsake
587 Stabilization Policies? *The American Economic Review*, 67(2), 1–19.
- 588 Murakawa, N. (2014). *The First Civil Right: How Liberals Built Prison*
589 *America*. Oxford: Oxford University Press.
- 590 Nagel, I. (1990). Forward: Structuring Sentencing Discretion: The New
591 Federal Sentencing Guidelines. *The Journal of Criminal Law and*
592 *Criminology*, 80(4), 883–943.
- 593 Nagel, I., & Hagan, J. (1982). The Sentencing of White-Collar Criminals
594 in Federal Courts: A Socio-Legal Exploration of Disparity. *Michigan Law*
595 *Review*, 80(7), 1427–1465.
- 596 Niskanen, W. (1971). *Bureaucracy and Representative Government*. Chicago:
597 Aldine-Atherton.
- 598 Ostrom, E. (2005). *Understanding Institutional Diversity*. Princeton, NJ:
599 Princeton University Press.
- 600 Posner, R. (1981). *The Economics of Justice*. Cambridge: Harvard University **AQ15**
601 Press.
- 602 Rizzo, M. (1980). Law Amid Flux: The Economics of Negligence and Strict
603 Liability in Tort. *Journal of Legal Studies*, 9(2), 291–318.
- 604 Rothman, D. (1971). *The Discovery of the Asylum, Social Order and Disorder in*
605 *the New Republic*. New Brunswick, NJ: Transaction.
- 606 Sah, R., & Stiglitz, J. (1986). The Architecture of Economic Systems:
607 Hierarchies and Polyarchies. *American Economic Review*, 76(4), 716–727.
- 608 Samaha, J. (2005). *Criminal Justice*. Belmont, CA: Wadsworth Publishing.
- 609 Seidman, D., & Zeisel, H. (1975). Sentencing Councils: A Study of Sentence
610 Disparity and Its Reduction. *The University of Chicago Law Review*, 43(1),
611 109–149.
- 612 Simons, H. (1936). Rules Versus Authorities in Monetary Policy. *The Journal of*
613 *Political Economy*, 44(1), 1–30.
- 614 Thomson, R. (1962). Sentencing in Income Tax Cases. *Federal Probation*, 26,
615 10–13.
- 616 Tonry, M. (1991). The Politics of and Processes of Sentencing Commissions.
617 *Crime and Delinquency*, 37(3), 309–329.
- 618 Tonry, M. (1996). *Sentencing Matters*. New York: Oxford University Press.



- 619 Tullock, G. (1965). *The Politics of Bureaucracy*. Lanham, MD: University Press
620 of America.
- 621 Tullock, G. (1967). The Welfare Costs of Tariffs, Monopolies, and Theft.
622 *Economic Inquiry*, 5(3), 224–232.
- 623 United Nations Office on Drug and Crime. (2018). [http://www.unodc.org/
624 unodc/en/data-and-analysis/crime-and-criminal-justice.html](http://www.unodc.org/unodc/en/data-and-analysis/crime-and-criminal-justice.html).
- 625 Wagner, R. (1977). Economic Manipulation for Political Profit:
626 Macroeconomic Consequences and Constitutional Implications. *Kyklos*, 30,
627 394–410.
- 628 Wagner, R. (1989). *To Promote the General Welfare*. San Francisco: Pacific
629 Research Institute.
- 630 Waldron, J. (2016). The Rule of Law. *Stanford Encyclopedia of Philosophy*.
631 <https://plato.stanford.edu/entries/rule-of-law/>.
- 632 Wilkins, W., Newton, P., & Steer, J. (1991). The Sentencing Reform Act of
633 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem.
634 *Criminal Law Forum*, 2(2), 359–362.
- 635 Williamson, O. (1985). *The Economic Institutions of Capitalism*. New York:
636 Free Press.
- 637 Wright, R. (1999). Review: Rules for Sentencing Revolutions. *The Yale Law
638 Journal*, 108(6), 1355–1387.
- 639 Zimring, F. (1976). *A Consumer's Guide to Sentencing Reform* (Occasional
640 Paper #16). University of Chicago Law School.

Author Query Form

Book ID: **447004_1_En**
Chapter No: **38**

Please ensure you fill out your response to the queries raised below and return this form along with your corrections.

Dear Author,

During the process of typesetting your chapter, the following queries have arisen. Please check your typeset proof carefully against the queries listed below and mark the necessary changes either directly on the proof/online grid or in the 'Author's response' area provided

Query Refs.	Details Required	Author's Response
AQ1	Kindly note that there is a mismatch in 'Chapter Title' between Manuscript and Table of Contents. We have followed the title provided in the manuscript. Please check and correct if necessary.	use this title
AQ2	Please check and confirm if the author affiliation has been correctly identified. Amend if necessary.	correct as is
AQ3	Reference 'Becker (1968)' is cited in the text but not provided in the reference list. Please provide the respective reference in the list or delete this citation.	see email
AQ4	Kindly note that 'Sah and Stiglitz (1984)' has been changed as 'Sah and Stiglitz (1986)' so that this citation match the list.	correct
AQ5	Reference 'Frankel (1973)' is cited in the text but not provided in the reference list. Please provide the respective reference in the list or delete this citation.	should read 1972
AQ6	Kindly note that reference 'Nagel (1991)' has been changed as 'Nagel (1990)' so that this citation match the list.	correct
AQ7	Reference 'Pfaff (2017)' is cited in the text but not provided in the reference list. Please provide the respective reference in the list or delete this citation.	see email
AQ8	Reference 'Bensen (1998)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete
AQ9	Reference 'Block and Robert (1975a)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete
AQ10	Reference 'Block and Robert (1975b)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete

Query Refs.	Details Required	Author's Response
AQ11	Please provide publisher location for the reference 'Congleton (2002)'.	see email
AQ12	Reference 'Easterbrook (1983)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete
AQ13	Please confirm if the inserted publisher location is correct for the reference 'Keynes (1936)'.	correct
AQ14	Reference 'Levitt (2004)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete
AQ15	Reference 'Posner (1981)' is given in the list but not cited in the text. Please cite in text or delete from the list.	delete
AQ16	Please confirm if the inserted publisher location is correct for the reference 'Williamson (1985)'.	correct