

THE ROLE OF JUDICIAL POLITICAL AFFILIATION IN CRIMINAL SENTENCING OUTCOMES

WENDY R. CALAWAY,[†] JENNIFER M. KINSLEY,[‡] & TAYLOR WADIAN^{*}

ABSTRACT	347
I. INTRODUCTION	348
II. JUDICIAL ROLES IN SENTENCING	351
<i>A. Judicial Selection Models</i>	351
1. <i>Appointment</i>	352
2. <i>Retention</i>	353
3. <i>Election</i>	354
<i>B. The Changing Role of Judicial Discretion in Sentencing</i>	355
1. <i>Historical Indeterminate Sentencing Models</i>	356
2. <i>The Determinate “Truth in Sentencing” Movement</i>	356
3. <i>Modern Guided Discretion Sentencing Models</i>	358
4. <i>A Case Study in Sentencing: Ohio</i>	359
III. POLITICAL AFFILIATION AND JUDICIAL SENTENCING	361
<i>A. Research on Party Affiliation and Sentencing Outcomes</i>	361
<i>B. The Harvard Political Sentencing Study</i>	363
<i>C. Research on State Court Judges and Political Affiliation</i>	364
IV. THE CURRENT STUDY	365
<i>A. Study Methodology</i>	366
<i>B. Study Results</i>	369
<i>C. Study Conclusions</i>	372
V. RECOMMENDATIONS FOR FUTURE SENTENCING REFORM.....	374
<i>A. Data-Based Solutions</i>	374
<i>B. Public Information</i>	376
<i>C. Judicial Peremptory Strikes</i>	377
VI. CONCLUSION.....	379

ABSTRACT

Legislative efforts to bring consistency to criminal sentencing outcomes have been much discussed in academic literature and

[†] Associate Professor of Criminal Justice, University of Cincinnati Blue Ash.

[‡] Professor of Law, Northern Kentucky University Salmon P. Chase College of Law. The author wishes to thank Emily Robbins and Raegan Freeman for their excellent research assistance and extensive efforts in collecting and organizing data for this paper, as well as Jacob Erdman for his assistance in researching peremptory strikes.

^{*} Assistant Professor of Psychology, University of Cincinnati Blue Ash.

congressional hearings alike. Despite these efforts, disparate sentencing outcomes persist. Researchers have studied many variables seeking to understand these disparities but have been unable to form a consensus around the cause. Perhaps because of the lack of a firm understanding of the issue among researchers, legislative intervention at both the state and federal level has largely failed to address the issue of judicial characteristics that may drive sentencing disparities. As a result, empirical and anecdotal evidence about how judges make determinations within the range of outcomes specified by the legislature is absent from the conversation on criminal sentencing reform. New data on federal sentencing outcomes collected by Harvard researchers, however, found a direct connection between the political party of the president who appointed the federal judge and the length of a defendant's sentence. As the Harvard study reported, federal judges appointed by Republican presidents sentence defendants, on average, to three more months in prison than federal judges appointed by Democratic presidents. Republican-appointed judges in the federal system also sentence Black defendants more harshly than Democratic-appointed judges.

As this Article will discuss, the central premise of the Harvard political sentencing study—that judicial political affiliation influences sentencing outcomes, even those that are highly guided by legislative criteria—also holds true at the state level with elected, rather than appointed, judges. Empirical evidence from the state of Ohio demonstrates that elected Republican judges sentence defendants to lengthier terms of incarceration than elected Democratic judges by a statistically significant margin. This evidence suggests that, rather than being entirely guided by specified statutory criteria, judges bring preexisting sentencing ideologies to the bench and make decisions with a range of sentencing outcomes, based at least in part on their individual philosophies and beliefs. Based on these findings, we argue that to address the issue of sentencing disparities, reform efforts should be made to specifically address the behavior and motivation of individual judges.

I. INTRODUCTION

Like no other aspect of the American legal system, criminal sentencing outcomes lie at the intersection of the executive, legislative, and judicial branches.¹ To be sure, no criminal defendant is sentenced

1. Julia L. Black, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After Mistretta v. United States*, 75 IOWA L. REV. 767, 778–85 (1990) (discussing separation of powers aspects of criminal sentencing and noting that

without the involvement of all three branches of government. At the outset, the executive branch plays both a gatekeeping role—by determining which individual defendants and which legal matters are brought before the courts—and an advisory role—by making sentencing recommendations to the court in individual cases.² In both regards, the executive branch retains a high degree of discretion and wide-ranging powers.³ The legislative branch also plays an advisory role by enacting statutes that establish sentencing outcomes for particular crimes and people and by guiding judicial decision making in the realm of criminal sentencing.⁴ Lastly, the judicial branch directly imposes criminal sentences in the cases brought before it by the executive branch and within the constraints imposed upon it by the legislative branch.⁵

Despite the triumvirate nature of criminal sentencing, the conversation around sentencing reform—particularly as it relates to documented disparate outcomes across populations and regions—has focused almost exclusively on legislative action.⁶ To this end, the statutory schemes underlying sentencing have migrated from indeterminate ranges loosely specified by the legislature to determinate sentencing schemes in which judicial discretion is highly constrained—all with the stated goal of

“criminal sentencing historically has been considered within the scope of all three branches”).

2. Jayne Thompson, *The Three Components of the Criminal Justice System*, LEGAL BEAGLE (Dec. 10, 2019), <https://legalbeagle.com/6554727-three-components-criminal-justice-system.html>

[<http://web.archive.org/web/20201008180620/https://legalbeagle.com/6554727-three-components-criminal-justice-system.html>].

3. Much has been said about the role of prosecutors in driving sentencing outcomes. Because prosecutors in many jurisdictions choose the charges to render in a particular case and the level of those charges within tiered felony and misdemeanor statutes, in many respects, a defendant’s sentence will be driven by the charges the prosecutor elects to pursue. Prosecutors also exercise broad discretion in the plea bargaining phase, where they may elect to dismiss or reduce certain charges to drive a particular sentencing outcome. *See, e.g.*, Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017) (discussing the heightened role of prosecutorial discretion in plea bargaining and proposing additional checks and balances by the other branches of government). In some instances, prosecutors even dictate a specific sentence or sentencing range as part of a defendant’s plea agreement, and they may also use a defendant’s perceived degree of cooperation or information-sharing as a factor in reaching a given sentencing outcome. *See, e.g.*, U.S. SENTENCING COMM’N, FED. SENTENCING GUIDELINES MANUAL § 5K1.1 (1989) (permitting federal prosecutors to recommend downward sentencing departure where defendant provides substantial assistance to the government).

4. *See, e.g.*, S.B. 2, 121st Gen. Assemb., Reg. Sess. (Ohio 1996) [hereinafter Senate Bill 2].

5. *See, e.g.*, OHIO REV. CODE ANN. §§ 2929.12–.72 (LEXIS through 133rd Gen. Assemb.).

6. Black, *supra* note 1, at 785–87 (discussing federal legislative sentencing reform).

ensuring that criminal sentences are proportionate, fair, and adequately reflect the defendant's conduct and history.⁷ As a result of prolonged and sustained legislative reform, modern sentencing statutes typically impose a range of sentencing outcomes and alternatives from which the sentencing judge may choose and then offer a detailed list of factors or criteria to guide the judge's selection within that range.⁸

At times absent from the conversation on criminal sentencing reform, however, is empirical and anecdotal evidence about how judges make determinations within the range of outcomes specified by the legislature. New data on federal sentencing outcomes, collected by Harvard economist Alma Cohen and Harvard Law Professor Crystal Yang and reported in the *American Economic Journal*, found a direct connection between the political party of the president who appointed the presiding federal judge and the length of a defendant's sentence.⁹ As the Harvard political sentencing study reported, federal judges appointed by Republican presidents sentence defendants to three more months in prison than federal judges appointed by Democratic presidents, on average.¹⁰ Republican-appointed judges in the federal system also sentence Black defendants more harshly than Democratic-appointed judges.¹¹

As this Article will discuss, the central premise of the Harvard political sentencing study—that judicial political affiliation influences sentencing outcomes, even those that are highly guided by legislative criteria—also holds true on the state level with respect to elected, rather than appointed, judges.¹² As we report, empirical evidence from the state of Ohio demonstrates that elected Republican judges sentence defendants to lengthier terms of incarceration than elected Democratic judges by a statistically significant margin.¹³ This evidence suggests that rather than being entirely guided by specified statutory criteria, judges bring preexisting sentencing ideologies to the bench and make decisions with a range of sentencing outcomes based at least in part on their individual philosophies and beliefs.¹⁴

7. See, e.g., Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 382–86 (2005) (discussing relative attributes of determinate and indeterminate sentencing schemes); 11 DAVID LOUIS RAYBIN, CRIMINAL PRACTICE AND PROCEDURE § 32.2 (Tennessee Practice Series 2019) (discussing history of sentencing reform in Tennessee and the progression from indeterminate to determinate sentencing practices).

8. See, e.g., §§ 2929.12–.72.

9. Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J. 160 (2019).

10. *Id.* at 162.

11. *Id.*

12. See *infra* Part III.

13. See *infra* Part III.B.

14. See *infra* Part III.C.

Drawing from this new data, this Article will discuss the role of political affiliation in judicial sentencing. Part Two will discuss the various models by which judges are selected—including appointment, retention, and election—and the role of political affiliation in each model. Part Two will also summarize legislative sentencing reforms over the past four decades and how the role of the judiciary and its discretion in criminal sentencing have shifted over time. Part Three will summarize the emerging schools of thought around sentencing reform and the existing data on the role politics plays in sentencing outcomes, including the findings of the Harvard political sentencing study. Part Four will describe the results of the current Ohio empirical sentencing study, including a discussion of the study methodology and conclusions that can be drawn from the available data around the role of judicial political affiliation in criminal sentencing outcomes. Lastly, Part Five concludes that legislative reforms are an insufficient mechanism for obtaining proportional sentencing outcomes, given that judges sentence within a range of alternatives at least in part based upon preexisting political ideologies. In Part Five, the Article proposes additional remedies to achieve sentencing fairness, including improved data collection and public education regarding individual judicial sentencing patterns and the use of judicial peremptory strikes by prosecutors and defendants. As this Article posits, purely legislative attempts to reform criminal sentencing will be ineffective absent recognition of the role judicial political affiliation plays in driving sentencing outcomes.

II. JUDICIAL ROLES IN SENTENCING

A. Judicial Selection Models

There is no consistent method by which individuals come to serve as judges, although there do exist a number of common models for judicial selection. Among these, the most notable are: 1) appointment, where a particular branch or branches of government have the sole authority to select and seat judges; 2) retention, where an initial judicial appointment is made by the government subject to a later retention election by the people; and 3) popular elections, which can either be partisan or non-partisan.¹⁵ Even within a single jurisdiction, multiple models may be used

15. See, e.g., *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS. http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=
[https://web.archive.org/web/20201008192138/http://www.judicialselection.us/judicial_s

to select judges at different levels of the judiciary.¹⁶ New York, for example, selects its appellate court judges by appointment but selects its trial court judges by election.¹⁷ The role of judicial partisan affiliation varies within each model, although all methods of selection at least implicitly, if not explicitly, account for a judge's chosen political party.

1. Appointment

One model for the selection of judges vests one or both of the non-judicial branches of government with judicial appointment authority. The most recognizable version of this model lies with the federal judiciary, where federal judges are nominated by the president of the United States and confirmed by the Senate.¹⁸ Once appointed, federal judges serve for life.¹⁹

A number of states also employ an appointment model for the selection of judges.²⁰ In these states, judicial appointment is made by the executive branch after confirmation by the legislative branch.²¹ On the state level, gubernatorial appointment systems are also used to fill short-term judicial vacancies, such as when an elected judge resigns or otherwise leaves the bench before her term has expired.²²

Politics plays a role in both scenarios. As with the federal system, judges are selected by bureaucrats with existing political party affiliations who tend to appoint judges that are aligned with their particular political party.²³ In addition, in some appointment systems, governors must select

election/methods/selection_of_judges.cfm?state=] (last visited July 16, 2020) [hereinafter *Methods of Judicial Selection*].

16. See, e.g., *id.*

17. *Id.*

18. U.S. CONST. art. II, § 2, cl. 2.

19. U.S. CONST. art. III, § 1.

20. See, e.g., *Methods of Judicial Selection*, *supra* note 15.

21. In Maine, for example, district court judges are appointed to seven-year terms by the governor and must be confirmed by the state Senate. ME. CONST. art V, § 8; art. VI, § 4. New Jersey follows a virtually identical appointment process. See N.J. CONST. art. VI, § 6.

22. See, e.g., OHIO CONST. art. IV, § 13 (requiring judicial vacancies be filled by gubernatorial appointment).

23. See, e.g., Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016) (studying the loyalty effect between appointed Supreme Court justices and the President who appointed them and concluding that Democratic justices exhibit stronger loyalty to presidents who appointed them compared to future Democratic administrations than do Republican justices). Interestingly, Epstein and Posner attribute the results of their study in part due to their hypothesis that Republican justices remain more ideologically committed over time than Democratic justices, leaving

appointed judges solely from a list of candidates provided by a nominating committee, which may itself be subject to partisan influence.²⁴ Increasingly, legislative confirmation of judicial nominees is highly politicized, resulting in votes that are almost perfectly divided along party lines.²⁵ The legislative confirmation process typically involves public hearings, at which a nominee's political, social, moral, and ethical views are debated and vetted.²⁶ The appointment process is therefore largely political, and a judicial candidate's political affiliations are likely to be a strong consideration in her appointment.²⁷

2. Retention

In judicial retention schemes, an initial judicial appointment is made by the government, and the decision whether to retain or remove a judge following an initial term of appointment is made by the electorate.²⁸ Retention elections are uncontested, meaning that voters cast either a yes or no ballot to retain the judge in her appointed position.²⁹ Initial appointments are typically made after vetting by a nominating commission, which is often itself appointed by the governor.³⁰

less room for Republicans to demonstrate loyalty to the particular president who appointed them. *Id.* at 428–29.

24. See, e.g., *Methods of Judicial Selection*, *supra* note 15.

25. John M. Walker Jr., *The Unfortunate Politicization of Judicial Confirmation Hearings*, *ATLANTIC* (July 9, 2012), <https://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/> [<http://web.archive.org/web/20201008195610/https://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/>].

26. See, e.g., Sabrina Hersi Issa, *Brett Kavanaugh's Confirmation Reveals the Moral Rot That Allows America to Ignore so Many Assault Survivors*, *NBC NEWS* (Oct. 6, 2018), <https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-confirmation-reveals-moral-rot-allows-america-ignore-ncna917341> [<http://web.archive.org/web/20201008200212/https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-confirmation-reveals-moral-rot-allows-america-ignore-ncna917341>].

27. See Epstein & Posner, *supra* note 23, at 427–30.

28. See, e.g., *What Is a Judicial Retention Election?*, *IOWA JUD. NOMINATING COMMISSIONS*, <https://www.iowajnc.gov/judicial-retention-elections/what-is-a-judicial-retention-election> [<http://web.archive.org/web/20201008201901/https://www.iowajnc.gov/judicial-retention-elections/what-is-a-judicial-retention-election>] (last visited Oct. 8, 2020).

29. See, e.g., *MONT. CODE ANN.* § 13-14-212(2) (1979) (specifying the ballot form in judicial retention elections as a “yes” or “no” vote).

30. See, e.g., *IOWA CODE* § 46.1(1), (2) (1969) (Iowa employs a State Judicial Nominating Commission, staffed with nine members serving six-year terms appointed by the governor and confirmed by the state Senate). See also, e.g., § 46.1(3), (4) (instructing that commissioners be appointed without regard to political affiliation and banning “more

While, in theory, retention elections are non-partisan and therefore less subject to political influence than other judicial selection methods, recent high-profile campaigns to unseat appointed judges in retention elections cast doubt on the apolitical nature of these regimes.³¹ In Florida, for example, an outside super PAC (political action committee) supported by prominent Republicans waged a large-scale campaign to oust so-called sitting activist judges.³² Similar efforts have taken place in Iowa, Illinois, Tennessee, Michigan, and North Carolina in recent years as well.³³

3. Election

While a slight majority of states employ appointment or retention systems for selecting judges, a sizeable minority allow the electorate to choose who sits on the bench.³⁴ Judicial elections in these states are either partisan or non-partisan, with candidates declaring a party affiliation in the former but not in the latter.³⁵

Even in states with non-partisan judicial elections, political party affiliation still plays a major role in election outcomes.³⁶ For one thing, although candidates do not run under party designations, judicial races are often funded by political parties and political action committees with partisan leanings.³⁷ In addition, even non-partisan judicial candidates have often previously aligned themselves with one party or the other or have

than a simple majority” of members from being the same gender). Aside from this, there are no regulations to ensure ideological diversity on the Commission. *See* § 46.1.

31. *See, e.g.*, Chris McGreal, *Florida Republicans Wage Campaign to Oust Judges from State Supreme Court*, *GUARDIAN* (Oct. 29, 2012), <https://www.theguardian.com/world/2012/oct/29/florida-gop-state-supreme-court-campaign> [<http://web.archive.org/web/20201008203626/https://www.theguardian.com/world/2012/oct/29/florida-gop-state-supreme-court-campaign>].

32. *Id.*

33. *See* Norm Ornstein, *Courting Corruption: The Auctioning of the Judicial System*, *ATLANTIC* (Oct. 15, 2014), <https://www.theatlantic.com/politics/archive/2014/10/courting-corruption-the-auctioning-of-the-judicial-system/381524> [<http://web.archive.org/web/20201008204148/https://www.theatlantic.com/politics/archive/2014/10/courting-corruption-the-auctioning-of-the-judicial-system/381524/>] (describing largely Republican-led efforts to unseat appointed judges in retention elections).

34. *Judicial Selection in the States*, *BALLOTPEDIA*, https://ballotpedia.org/Judicial_selection_in_the_states [http://web.archive.org/web/20201008204530/https://ballotpedia.org/Judicial_selection_in_the_states] (last visited July 15, 2020).

35. *Id.*

36. *Clearly, Nonpartisan Judicial Elections Remain Partisan*, *ASSOCIATED PRESS* (Nov. 11, 2018), <https://apnews.com/article/4a0735020c594aef8487562428c03c0a> [<http://web.archive.org/web/20201008210045/https://apnews.com/article/4a0735020c594aef8487562428c03c0a>].

37. *Id.*

expressed positions on perceived political issues.³⁸ In these cases, voters often form impressions about a judicial candidate's political leanings and implicitly identify them with one political party or the other.³⁹

B. The Changing Role of Judicial Discretion in Sentencing

Criminal sentencing is generally guided by the rhetorical commitment to consistency, fairness, and non-discrimination.⁴⁰ Legislative efforts both at the state and federal level purport to operationalize these values by enacting sentencing schemes to direct judicial sentencing outcomes.⁴¹ However, regardless of the method of judicial selection, trial court judges come to play a pivotal role in criminal sentencing outcomes as a result of inherently political processes.⁴² Theoretically, then, judges as human beings bring with them predisposed ideologies about crime, public safety, policing tactics, and other political issues when they take the bench.⁴³ But the current and historical statutory sentencing schemes fail to account for these individual ideological differences, focusing instead in recent years on guiding judicial sentencing discretion through detailed lists of sentencing factors and more historically on holistic characteristics about the defendant and societal norms in the judge's geographic area.⁴⁴ A review of modern and historical sentencing models is instructive, demonstrating the ways in which the role of judges in criminal sentencing has shifted over time.

38. See, e.g., Anthony Champagne & Kyle Check, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URB. L.J.* 907, 916–18 (2002) (discussing ways in which political parties contribute to and support non-partisan judicial elections); see also, e.g., John Fuddy, *Ohio's Judicial Races Are Nonpartisan in Name Only, Expert Says*, *COLUMBUS DISPATCH* (Oct. 20, 2017), <https://www.dispatch.com/news/20171020/ohios-judicial-races-are-nonpartisan-in-name-only-expert-says> [<http://web.archive.org/web/20201008211018/https://www.dispatch.com/news/20171020/ohios-judicial-races-are-nonpartisan-in-name-only-expert-says>].

39. See Laurence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 *OHIO ST. L.J.* 13, 21–23 (2003) (discussing ways in which voters form perceptions about judicial candidates in elections).

40. See e.g., Protect Act, Pub. L. No. 108-21, § 151, 117 Stat. 650 (2003) (identifying principles of consistency and fairness advanced by federal sentencing policy).

41. See BRIAN J. OSTROM ET AL., U.S. DEP'T JUST. NO. 223854, *ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES* (2008).

42. See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 *U. CHI. L. REV.* 901 (2015) (providing a comprehensive discussion on how judicial ideology informs decision making).

43. See, *id.*

44. See, e.g., OHIO REV. CODE ANN. §§ 2929.12–.72 (LEXIS through 133rd Gen. Assemb.).

1. *Historical Indeterminate Sentencing Models*

Indeterminate sentencing models predominated state and federal criminal justice systems prior to the 1970s and 1980s.⁴⁵ Under indeterminate sentencing regimes, defendants were sentenced to imprisonment within a range of a minimum and maximum term of incarceration for the offense.⁴⁶ A defendant's actual release from prison within the range specified by the court was typically determined by a parole board or other administrative agency.⁴⁷ The focus in indeterminate sentencing schemes was on rehabilitation, premised on the notion that a defendant would improve himself and be compliant in prison to avoid serving the maximum limit of his indeterminate sentence.⁴⁸ Releasing defendants on parole following an indeterminate sentence was also thought to diminish recidivism and enhance effective reentry into society, although later research called that assumption into question.⁴⁹

The role of judges in indeterminate sentencing was marginal at best. While judges were responsible for issuing an indeterminate sentencing range, the ultimate decision as to a defendant's release from incarceration was made by extrajudicial governmental actors, typically a parole board.⁵⁰ Indeterminate sentencing schemes fell out of favor in the mid-twentieth century and by the late 1990s were nearly all but abolished.⁵¹

2. *The Determinate "Truth in Sentencing" Movement*

In place of indeterminate sentencing, American legal systems shifted towards definite terms of imprisonment imposed by trial court judges.⁵²

45. Joshua Logan Pennel, *The End of Indeterminate Sentencing in New York: The Death and Rebirth of Rehabilitation*, 58 *BUFF. L. REV.* 507, 507–08 (2010).

46. As an example of an indeterminate sentence, a defendant convicted of felony robbery might receive twenty-seven months to ten years in prison.

47. Michelle Pifferi, *Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe Between the 19th and the 20th Century*, 52 *AM. J. LEGAL HIST.* 325, 338–39 (2015).

48. Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 *U. PA. L. REV.* 297, 301–03 (1974) (identifying institutional incentives for rehabilitation post-sentencing in indeterminate sentencing schemes).

49. Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 89 (1990).

50. Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 *AM. CRIM. L. REV.* 1247, 1259–60 (2011) (describing respective roles of the sentencing court and parole board in indeterminate sentencing schemes).

51. Pennel, *supra* note 45.

52. WILLIAMS J. SABOL ET AL., *NAT'L INST. JUST. #NIJ 98-CE-VX-0006, THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATE'S SENTENCING PRACTICES AND PRISON POPULATIONS* (2002) (examining the federal government's role in

Underlying the change was criticism from the right that defendants sentenced to indefinite terms of imprisonment wound up serving too little time and that early release was contributing to rising crime rates.⁵³ In contrast, left-leaning advocates argued that indeterminate sentences were too harsh and that broad judicial discretion to impose wide sentencing ranges produced unfair disparity in sentencing outcomes.⁵⁴ The result was a push towards definite terms of imprisonment imposed by the trial court after considering a range of factors, often referred to as the “truth in sentencing” movement.⁵⁵

In the federal system, sentencing reform resulted in the adoption of the federal sentencing guidelines.⁵⁶ A bipartisan effort of Congress, the guidelines, in essence, reduced criminal sentencing outcomes to a mathematical calculation that considered both the severity of the crime and the defendant’s criminal history.⁵⁷ By looking at a chart, which contains the offense score on one axis and the defendant’s criminal history score on the other, federal judges were given a narrow range of months of imprisonment from which they were all but required to select.⁵⁸

The “truth in sentencing” movement coincided with renewed emphasis in criminal law on retribution as opposed to rehabilitation.⁵⁹ At the same time, both state and federal criminal law expanded more

attaching grant money to a state’s legislative commitment to, among other things, replace indeterminate sentencing schemes with determinate sentencing).

53. Joseph A. Colquitt, *Can Alabama Handle the Truth (in Sentencing)?*, 60 ALA. L. REV. 425, 430 (2009).

54. Colquitt stated:

Liberal-minded individuals complained that terms of imprisonment were too long and harsh and that judges had too much discretion, which resulted in widely disparate sentences even for similar offenses. More conservative opponents of the system objected to lenient sentences and early parole releases, and they blamed the existing practices for the perceived skyrocketing crime rate.

Id.

55. *Id.* at 428.

56. 18 U.S.C. § 3553 (2018); 28 U.S.C. § 994 (2018).

57. See David Krajicek, *Birth of a Prison State: The Bipartisan Disaster That Put America Behind Bars*, SALON (June 4, 2015), https://www.salon.com/2015/06/04/birth_of_a_prison_state_the_bipartisan_disaster_that_put_america_behind_bars_partner/ [http://web.archive.org/web/20201015205545/https://www.salon.com/2015/06/04/birth_of_a_prison_state_the_bipartisan_disaster_that_put_america_behind_bars_partner/]; see also U.S. SENTENCING COMM’N, FED. SENTENCING GUIDELINES MANUAL § 5A (2018) [hereinafter U.S.S.G. SENTENCING TABLE].

58. U.S.S.G. SENTENCING TABLE, *supra* note 57; see also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324 (2005).

59. Colquitt, *supra* note 53, at 428–29.

generally to either increase the scope of what conduct was considered criminal or to lengthen the terms of incarceration associated with particular crimes—or both.⁶⁰ Incarceration rates skyrocketed, and, along with them, so did the cost of housing millions of inmates across the United States.⁶¹

3. Modern Guided Discretion Sentencing Models

Shortly after the introduction of determinate sentencing schemes focused on sentencing factors, the United States Supreme Court decided *United States v. Booker*⁶² and *Blakely v. Washington*.⁶³ In *Blakely*, the Court held that state sentencing schemes that enable a judge to impose sentences based upon factual findings not determined by a jury violate the Sixth Amendment.⁶⁴ The Court extended that holding to the federal sentencing guidelines in *Booker*.⁶⁵ Numerous state supreme courts also reached similar holdings with respect to the constitutional validity of judicially-determined sentencing factors.⁶⁶ As a result of the *Booker/Blakely* line of cases, the sentencing factors used by courts to guide determinate sentences are now deemed to be advisory rather than mandatory.⁶⁷

60. See SABOL ET AL., *supra* note 52.

61. Susan Turner et al., *The Impact of Truth-In-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 79 (1999).

62. *United States v. Booker*, 543 U.S. 220 (2005).

63. *Blakely v. Washington*, 542 U.S. 296 (2004).

64. *Id.* at 305.

65. *Booker*, 543 U.S. at 226–27.

66. See, e.g., *State v. Foster*, 845 N.E.2d 470 (Ohio 2006), *abrogated by Oregon v. Ice*, 555 U.S. 160 (2009) (applying *Booker* and *Blakely* to Ohio's determinate sentencing scheme).

67. *Booker*, 543 U.S. at 233; *Kimbrough v. United States*, 552 U.S. 85 (2007). The Court later clarified that state court judges can utilize factors to guide their decision whether to run sentences consecutively or concurrently without running afoul of the Sixth Amendment. *Ice*, 555 U.S. at 160. The impact of *Booker* on federal sentencing decisions is still under debate; however, disparities in federal sentencing decisions continue to be widespread, and the United States continues to lead the world in incarceration rates. See, e.g., David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?* 41 J. LEGAL STUD. 347 (2012); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012); *Trends in U.S. Corrections*, SENT'G PROJECT, <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<http://web.archive.org/web/20201015213849/https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>] (last visited July 21, 2020).

4. *A Case Study in Sentencing: Ohio*

Prior to 1995, most criminal sentences in Ohio, at least for serious felony cases, were indeterminate.⁶⁸ Defendants were sentenced within a statutory range by the sentencing court and automatically served the minimum amount of the indeterminate range, less any credit for “good time” in prison.⁶⁹ After the minimum term expired, defendants were eligible for parole and were automatically released at the expiration of the indeterminate sentencing range if they had not yet been granted release by the parole board.⁷⁰

In 1996, the Ohio Legislature passed comprehensive sentencing reform legislation that all but mandated definite sentencing for all but a very small minority of cases involving life imprisonment or serious sex offenses.⁷¹ The purpose of the law was to shift primary responsibility in determining sentencing outcomes away from the parole board, an appointed, not elected body, and back to trial court judges elected by the people.⁷² Known as Senate Bill 2, this “truth in sentencing” bill “established a type of determinate sentencing structure called a presumptive system that required minimum sentences with judicial discretion from a range of possible punishments.”⁷³

Within a decade following the 1996 sentencing overhaul, Ohio’s prison population soared to numbers never seen before and larger than predicted.⁷⁴ These higher numbers were driven by longer periods of incarceration rather than an increase in the number of offenders sentenced to prison.⁷⁵ At the same time, the determinate sentencing scheme enacted in Senate Bill 2 became the subject of widespread criticism.⁷⁶ Denounced as too complex and expensive, Ohio’s “truth in sentencing” scheme itself became the subject of reform efforts.⁷⁷

68. LEWIS R. KATZ ET AL., *CRIMINAL LAWS AND RULES (BALDWIN’S OHIO PRACTICE)* § 118:3 (3d ed. 2019), Westlaw.

69. *Id.*

70. *Id.*

71. *Id.*

72. See OHIO REV. CODE ANN. § 3505.04 (LEXIS through 133rd Gen. Assemb.) (indicating that Ohio selects judges through non-partisan elections); *Criminal Justice Reform in Ohio*, OHIO CRIM. SENT’G COMM’N (April 12, 2019), <http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp> [<http://web.archive.org/web/20201005165642/http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp>].

73. *Criminal Justice Reform in Ohio*, *supra* note 72, at 2.

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. *Id.*

Adopted in 2011 and amended in 2012, House Bill 86 made a number of modifications to Senate Bill 2, the net result of which was to reduce the skyrocketing incarceration terms characteristic of “truth in sentencing” reforms.⁷⁸ Notably, the bill elevated felony theft thresholds, in effect reducing the prison terms that apply to low-level theft offenses.⁷⁹ In addition, House Bill 86 eliminated the sentencing disparity between crack possession and powder cocaine possession, eliminated certain sentencing enhancements for drug offenses, and capped sentence lengths for drug and mid-level felony property offenses.⁸⁰ After its implementation, Ohio’s prison population dropped to its lowest point since 2008.⁸¹ However, despite these efforts, Ohio’s prison population continues to outpace projections.⁸²

Criminal sentencing in Ohio today remains a complex endeavor. Trial court judges are guided by statutory presumptions of either prison, in the case of serious felonies, or probation, in the case of low-level felonies.⁸³ To depart from a presumption of probation, a judge must make detailed factual findings supporting an enhanced criminal penalty.⁸⁴ If a judge elects to sentence a defendant to prison, the sentencing statutes provide ranges of months or years in prison by level of felony.⁸⁵ In deciding the term of imprisonment within the range, judges must consider a lengthy list of factors related to the offense and the offender.⁸⁶ Despite these legislative directives, there is very little oversight of judicial sentencing decisions.⁸⁷

78. *Id.* at 4–5.

79. *Id.* at 5.

80. *Id.*

81. *Id.*

82. Marty Schladen, *Ohio’s Prison Population Grows Despite Justice Reform*, *Studies Find*, COLUMBUS DISPATCH (Mar. 28, 2019), <https://www.limaohio.com/news/348223/ohios-prison-population-grows-despite-justice-reform-studies-find> [<http://web.archive.org/web/20201005170056/https://www.dispatch.com/news/20190328/ohios-prison-population-grows-despite-justice-reform-studies-find>]; (citing All. for Safety & Justice et al., *Building on Ohio’s Sentencing Changes to Keep Prison Populations in Check*, ALL. SAFETY & JUST. (July 2019), https://allianceforsafetyandjustice.org/wp-content/uploads/2019/03/OhioReport-Booklet-FINAL_PREVIEW-PAGES.pdf [http://web.archive.org/web/20201005170404/https://allianceforsafetyandjustice.org/wp-content/uploads/2019/03/OhioReport-Booklet-FINAL_PREVIEW-PAGES.pdf]).

83. OHIO REV. CODE ANN. § 2929.13(B)(1)(a), (D)(1) (LEXIS through 133rd Gen. Assemb.).

84. § 2929.13(B)(1).

85. § 2929.14.

86. §§ 2929.12, 2929.14.

87. For example, an Ohio appellate court’s review of criminal sentences is quite limited:

The appellate court may [increase, reduce, otherwise modify, or vacate a sentence] if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court’s findings under division (B) or (D)

Although highly guided by the Legislature, the elected judiciary in Ohio retains broad discretion in imposing criminal sentences.

III. POLITICAL AFFILIATION AND JUDICIAL SENTENCING

A. Research on Party Affiliation and Sentencing Outcomes

Existing scholarly and social science research demonstrates that sentencing disparities exist both at the state and federal level.⁸⁸ Efforts to understand these varied sentencing outcomes have been studied from a variety of perspectives, both within and outside the legal academy. Characteristics of individual sentencing judges have provided inconsistent results. While early research in this area focuses on differences in judicial sentencing philosophy, it now appears that these differences can be more narrowly explained by affiliation as a primary driver of judicial decision making in criminal sentencing.⁸⁹

The primary focus of prior academic research has been aimed at explaining decision making at the federal level, especially at the Supreme Court.⁹⁰ There have been a few efforts to understand criminal sentencing decisions in federal district courts. For example, in a study published by the University of Chicago Law Review, Professors Schanzenbach and Tiller looked at serious drug offenses by randomly selecting dates in the

of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; (b) That the sentence is otherwise contrary to law.

OHIO REV. CODE ANN. § 2953.08(G)(2).

Courts have interpreted this statutory provision to mean that reviewing courts must “clearly and convincingly find” that either (1) “the record does not support the sentencing court’s findings,” or (2) that “the sentence is otherwise contrary to law” to overrule a sentence on appeal. *State v. Marcum*, 59 N.E.3d 1231 (Ohio 2016); *see also State v. White*, 997 N.E.2d 629 (Ohio Ct. App. 2013).

88. *See, e.g.,* Ryan D. King & Michael T. Light, *Have Racial and Ethnic Sentencing Disparities Declined?*, 48 *CRIME & JUST.* 365 (2019) (summarizing historical and existing sentencing disparities based on race); *see also* Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 *COLUM. L. REV.* 2095 (2006) (discussing disparities between state and federal sentences for similar crimes).

89. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997); LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* (2013); Lydia Tiede et al., *Judicial Attributes and Sentencing Deviation Cases: Do Sex Race and Politics Matter?*, 31:3 *JUST. SYS. J.* 249 (2013); *c.f.* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24:2 *J. LEGAL STUD.* 257 (June 1995) (arguing against political party as a predictor of judicial decisions in federal civil rights litigation).

90. *See, e.g.,* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals*, 107 *YALE L.J.* 2155 (1998).

federal database.⁹¹ Using a sample of 2,265 cases, they found that there were statistically significant differences in how judges make decisions based on the party affiliation of the president who appointed the judge. Their research found that judges appointed by Democratic presidents reduced offense level and lowered sentences more often than their counterparts appointed by Republican presidents. This study confirmed prior research by the same authors, who examined sentencing decisions aggregated at court-level variation in the percent of Democratic or Republican-appointed judges within a district court to study the impact of political affiliation on sentencing.⁹² In this original study, researchers found that political affiliation of both the circuit and the district courts affects sentencing decisions. The authors replicated the study to correct for a reliance on aggregate court level data. As the authors and others have noted, the use of aggregate court level data can lead to skewed results.⁹³ Republican judges (coded as judges appointed by Republican presidents) gave higher sentences than Democratic judges (those appointed by Democrat presidents). The authors acknowledged that the implications of the study were limited by the inability to connect sentencing decisions to individual judges. The follow-up study addressed this issue by examining individual sentencing outcomes. Other researchers have noted that the Schanzenbach and Tiller studies were the first known to look at how political party affiliation of the appointing president impacts sentencing outcomes.⁹⁴

Attempting to ascertain the effect of *United States v. Booker* on sentencing outcomes, another group of researchers reviewed sentencing decisions by federal court judges between 1997 and 2008 and specifically studied the decision of the judge to depart from the sentencing guidelines.⁹⁵ The research found that the political party of the president appointing the judge affects the probability of voting for defendants in sentencing deviation cases.⁹⁶ Judges associated with the Republican party

91. Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence and Reform*, 75 U. CHI. L. REV. 715, 731 (2008).

92. Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J. L. ECON. & ORG. 24, 24–56 (2007) [hereinafter *Strategic Judging Under the U.S. Sentencing Guidelines*].

93. See Cohen & Yang, *supra* note 9, at 160–91 (arguing that court level data can lead to biased results “if courts with different compositions differ in ways that affect all judges in the district court, or if the partisan composition of a court is correlated with unobservables that affect sentencing”).

94. Tiede et al., *supra* note 89; see also Cohen & Yang, *supra* note 9.

95. Tiede et al., *supra* note 89.

96. *Id.*

were less likely to make sentencing departures in favor of defendants than judges associated with the Democratic party.⁹⁷

B. The Harvard Political Sentencing Study

Following these studies, Cohen and Yang (the authors of the Harvard political sentencing study) examined over five hundred thousand cases of individual judge-level sentencing outcomes between 1999 and 2015.⁹⁸ The cases were drawn from across the federal courts and included 1,398 judges.⁹⁹ Using databases from the United States Sentence Commission, the Transaction Access Clearinghouse, and the Federal Judicial Center, the authors were able to collect data for a variety of offender, case, and judge characteristics. Cohen and Yang investigated whether the political affiliation of a judge impacts sentencing outcomes.¹⁰⁰ Specifically, the authors hypothesized that judicial political party affiliation can explain the racial and gender disparities in sentencing.¹⁰¹ The study looked at how judges appointed by a Republican president sentence Black offenders compared to non-Black, or female versus male offenders, relative to judges appointed by a Democratic president.¹⁰² Cohen and Yang confirmed prior research by finding “economically meaningful and statistically significant evidence that judge political affiliation is a source of disparities in federal sentencing.”¹⁰³ The study concentrated on racial and gender disparities and was able to control for other judicial characteristics such as judge race, gender, former prosecutorial experience, or proxies for racial bias.¹⁰⁴ Importantly, the study found that the sentencing disparity, both between Republican judges and Democratic judges and between race and gender, increases with greater sentencing discretion.¹⁰⁵ Researchers isolated this finding by looking at federal sentencing outcomes in the pre-*Booker* and post-*Booker* settings.¹⁰⁶

97. *Id.*

98. Cohen & Yang, *supra* note 9.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 162.

104. *Id.*

105. *Id.*

106. *Id.* at 163 (*Booker* held that mandatory sentencing guidelines violated the Sixth Amendment right to trial, and to avoid unconstitutional sentencing outcomes, *Booker* determined that the application of U.S. Sentencing Guidelines was solely advisory. *United States v. Booker*, 543 U.S. 220 (2005).).

C. *Research on State Court Judges and Political Affiliation*

Research on the political influences of judicial decision making in state courts has focused on the impact of politics generally on judicial behavior. These studies have not examined individual judge level sentencing outcomes related to party affiliation. In one comprehensive study of state court judges, Yale University researcher Gregory Huber and Sanford Gordon looked at over 22,000 sentencing outcomes in Pennsylvania to see if the election cycle had an impact on judicial decision making.¹⁰⁷ The study found robust evidence that elected judges become more punitive the closer they get to reelection.¹⁰⁸ The authors believed 1,818 to 2,705 additional years of incarceration were attributable to judicial reelection for the cases they examined.¹⁰⁹ In a similar study, Carlos Berdejó and Noam Yuchtman researched the impact of re-election on sentencing judges in Washington State.¹¹⁰ Relying on over two hundred thousand criminal cases heard by 265 trial court judges in Washington from 1995–2006, researchers concluded that sentences were ten percent longer at the end of a trial judge's political cycle than at the beginning.¹¹¹ In another study, Emory Law School's Joanna Shepherd and Michael Kang concluded that state supreme court justices are more likely to rule in favor of the state in criminal cases when faced with the threat of future attack ads.¹¹²

Researchers also compared the two selection systems in Kansas to measure the influence of the selection method on the behavior of state court judges and their criminal sentencing decisions.¹¹³ Using quantitative analysis to assess the preference heterogeneity versus reelection incentives in determining sentencing decisions, the study determined that the sentencing behavior of elected judges is far more variable than that of

107. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48:2 AM. J. POL. SCI. 247, 247–63 (2004).

108. *Id.*

109. *Id.*

110. Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 755 (2013).

111. *Id.*

112. Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, AM. CONST. SOC'Y (2014), <https://www.acslaw.org/analysis/reports/skewed-justice/> [<https://web.archive.org/web/20201118035934/https://www.acslaw.org/analysis/reports/skewed-justice/>] (last visited July 19, 2020).

113. Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103:4 AM. ECON. REV. 1360, 1360–97 (2013).

appointed judges.¹¹⁴ The study also found that sentencing severity of elected judges is strongly related to the political ideology of the voters in their districts, while that of appointed judges is not.¹¹⁵ Furthermore, appointed judges' preferences are far more homogenous than those of their elected counterparts.¹¹⁶ Like other research focused on state court judges, this study did not use individual level judge data but focused on sentencing decisions in the aggregate.¹¹⁷ Additionally, consistent with the majority of other studies, this research explored the interaction of sentencing decisions and elections.¹¹⁸ However, these studies are instructive because the results establish the foundational hypothesis for the Harvard political sentencing study on federal court judges and for the current study on state court judges and the impact of political affiliation.

IV. THE CURRENT STUDY

Research collected from individual judge level sentencing outcomes in the state of Ohio confirms the influence of political party affiliation on sentencing outcomes at the state level. Ohio provides an interesting study model, in that its judges are elected in non-partisan elections and, therefore, theoretically more removed from political influence than appointed federal judges and state court judges selected through directly political processes.¹¹⁹ However, while Ohio judicial elections are labeled as non-partisan, recent legislative changes permit judicial candidates to receive party endorsements and to identify party affiliations on their campaign advertising.¹²⁰ As a result, Ohio judges are selected by an outwardly non-partisan method that is inwardly and inherently political.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See *Judicial System Structure*, OHIO SUP. CT., <https://www.supremecourt.ohio.gov/JudSystem/#:~:text=Two%20Justices%20are%20chosen%20at,or%20appointed%20to%20the%20Court> [https://web.archive.org/web/20201005170741/https://www.supremecourt.ohio.gov/JudSystem/#:~:text=Two%20Justices%20are%20chosen%20at,or%20appointed%20to%20the%20Court] (last visited July 19, 2020).

120. See Ohio Code of Jud. Conduct, Canon 4 (2009). Widespread change to judicial election rules took place in the wake of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which found a First Amendment violation when judicial candidates are barred from speaking about their political party affiliations. See also *Voting and Democracy*, 119 HARV. L. REV. 1133 (Feb. 2006) (discussing impact of *White* on judicial elections and arguing that “doctrinal developments will affect more than just the long-running—and perhaps insoluble—debate about the proper balance of democratic accountability

As we report below, similar to appointed federal judges, Ohio's elected trial court judges sentence defendants to disparate terms of imprisonment based on their political party affiliation, with Republican-affiliated judges sentencing defendants more harshly than Democratic-affiliated judges. In this regard, our research extends the findings of the Harvard political sentencing study to state courts.

A. Study Methodology

The current sentencing study examines the impact of judicial political party affiliation on sentencing outcomes for state court judges. Consistent with the findings reported by the Harvard political sentencing study and others, we hypothesized that sentencing outcomes for Republican judges would be more severe than for Democratic judges. This study is unique in its analysis of judicial sentencing and political affiliation, as the vast majority of studies rely on readily available data collected and maintained at the federal level. The lack of comprehensive available data to review and measure judicial sentencing outcomes appears to be a common problem for many states, including Ohio.¹²¹ The current study is also distinct in that we were able to connect individual judges to sentencing outcomes, which addresses a gap in the research literature related to the sentencing practices of particular judicial officials.¹²²

This study examined the sentencing practices of forty sitting Ohio trial court judges, twenty from each political party, in at least twenty cases per

and judicial impartiality . . . [and] will also play a large role in distributing power among groups vying for influence in judicial elections.”).

121. See Neal B. Kauder & Brian J. Ostrom, *Sentencing Guidelines Profiles and Continuum*, NAT'L CTR. FOR ST. CTS. (2008). Some judges in Ohio have recognized the lack of a centralized repository of information on sentencing in the state; however, the Ohio Supreme Court has yet to take corrective action or to mandate consistent data collection practices in the state trial courts. Michael P. Donnelly & Ray Headen, *Create Centralized Criminal Sentencing Database to Reduce Mass Incarceration in Ohio*, CLEVELAND.COM, (Jan. 8, 2020) <https://www.cleveland.com/opinion/2020/01/create-centralized-criminal-sentencing-database-to-reduce-mass-incarceration-in-ohio-michael-p-donnelly-and-ray-headen.html> [<https://web.archive.org/web/20201101105308/https://www.cleveland.com/opinion/2020/01/create-centralized-criminal-sentencing-database-to-reduce-mass-incarceration-in-ohio-michael-p-donnelly-and-ray-headen.html>].

122. See, e.g., Max M. Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-level Judicial Demographics*, 34 J. LEGAL STUD. 57, 85–90 (2005) (relying on variation of sentencing outcomes at the district level.); Cohen & Yang, *supra* note 9 (noting that efforts to estimate the impact of judge political affiliation on sentencing decisions have been complicated by the lack of data linking judge identifiers to defendant characteristics and case outcomes.).

judge.¹²³ For each of the twenty cases for each judge, the case docket for the individual defendant was accessed through the county clerk's publicly available website.¹²⁴ For each case, the docket was examined for the sentencing entry, which we looked at to determine the length of sentence, which was then recorded for the sentencing judge.¹²⁵ Each sentencing decision was coded on a nine-point scale using one for probation and nine for a life sentence. The sentence decision coding reflects an approximation of potential sentencing outcomes by degree of offense according to Ohio sentencing legislative directives.¹²⁶ The considerable investment required to access quality data is a significant barrier to the analysis of state judges' sentencing outcomes.

A sample of 796 court cases were randomly selected for inclusion in the current study. Selection was conducted using multistage-cluster sampling techniques in which we first identified the 391 common pleas court judges in Ohio and then categorized each judge as either Republican-affiliated or Democratic-affiliated based on political party endorsement.¹²⁷ Next, we randomly selected forty judges based on their political affiliation to have an equal representation of Republican-affiliated (n = 20) and Democratic-affiliated (n = 20) judges. Then, we selected approximately twenty cases at random from each of the forty judges during a three-year time span ranging from October 2017 to May 2020. Cases were selected for inclusion in the data set based on case filing rather than sentencing date.¹²⁸ We were able to achieve random case selection by relying on Ohio's use of the random assignment system for criminal cases in the common pleas division.¹²⁹

The resulting sample included 395 cases that were sentenced by Republican-affiliated judges and 401 cases sentenced by Democratic-affiliated judges.¹³⁰ Most of the cases (i.e., approximately 98%) ended in

123. See Research Notes and Excel Data Collection Spreadsheets (on file with authors).

124. *Id.*

125. *Id.*

126. Sentencing options in Ohio are proscribed by statute and dictated by offense level. OHIO REV. CODE ANN. § 2929.13 (LEXIS through 133rd Gen. Assemb.). Our research categorized sentencing outcomes based upon the ranges set forth in the state sentencing statutes.

127. As discussed *supra* Part IV, Ohio judicial candidates are permitted to receive and advertise a party endorsement, although the ballot entries remain non-partisan.

128. See Schanzenbach & Tiller, *supra* note 91, at 731.

129. RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO R. 36.01-.020 (2020) (available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf> [[/web/20201211044925/http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf](http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf)]).

130. See Research Notes and Excel Data Collection Spreadsheets (on file with authors).

a plea deal.¹³¹ Only 20 of the 796 cases included in the sample went to trial.¹³² The average age of defendant was approximately thirty-four years ($SD = 10.40$ years).¹³³ A large majority (i.e., 81%) of the defendants were male.¹³⁴

At the outset, a number of obstacles made our research more difficult than that undertaken by the Harvard political sentencing study. For example, Ohio lacks a uniform sentencing database from which to analyze sentencing outcomes. Each of the eighty-eight counties maintains its own databank linked only to each individual criminal defendant.¹³⁵ Many demographic factors are not reported, and, if the factors are captured, there is no uniformity in reporting methods.¹³⁶ Collecting the data necessary to study sentencing outcomes, therefore, necessitated individual records searches on non-uniform websites operated at the individual county level.

This study attempted to collect race, gender, and age information; however, the lack of consistency and accuracy in reporting race data across county clerk of court systems made it impossible to report race with precision.¹³⁷ As a result, the Ohio study was unable to replicate the findings of the Harvard political sentencing study relative to racially disparate sentencing outcomes based on judicial party affiliation.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135.

See, e.g., Records Search, WWW.COURTCLERK.ORG, <https://www.courtclerk.org/records-search/> [web/20201211045852/<https://www.courtclerk.org/records-search/>] (Hamilton County, Ohio criminal case public access database); *Search for Cases*, CLERKWEB.SUMMITOH.NET, <https://clerkweb.summitoh.net/RecordsSearch/SelectDivision.asp> [web/20201211050454/<https://clerkweb.summitoh.net/RecordsSearch/SelectDivision.asp>] (Summit County, Ohio records search database).

136. For example, compare the search results for “John Smith” obtained through the Hamilton County, Ohio public access database (available by searching the name feature in the “records search” tab at www.courtclerk.org) and through the Summit County, Ohio public access database (available by using the “records search” tab at clerkweb.summitoh.net).

137. However, the overrepresentation of Black people in Ohio prisons is well documented. Black people constitute thirteen percent of the state population but comprise thirty-four percent of the county jail population and an astounding forty-five percent of the state prison population. *See Incarceration Trends in Ohio*, VERA INST. (2015), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-ohio.pdf> [<https://web.archive.org/web/20200714140806/https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-ohio.pdf>].

B. Study Results

The major outcome variable in this study is the judge's sentencing decision, which was coded using a one (probation) to nine (life in prison) scale with higher scores reflecting a more severe sentencing decision.¹³⁸ As seen in Table 1, the distribution of sentencing was positively skewed (see Table 1), with a majority of the defendants (i.e., approximately 49%) receiving the minimum sentence (i.e., probation).¹³⁹ The average severity of sentencing score across all judges and cases in the sample was 2.65 (SD = 2.13) on the nine-point scale. The median score, representing the midpoint of the distribution of all sentencing decisions, was two, which reflects a sentence of zero to six months.¹⁴⁰

Table 1. Frequency table describing sentencing decisions within the sample of 796 court cases

	Sentencing Decision	Number of Cases	Percent of Cases
(1)	Probation	392	49.2%
(2)	0–6 months	90	11.3%
(3)	7–12 months	87	10.9%
(4)	13–24 months	74	9.3%
(5)	25–35 months	20	2.5%
(6)	3–5 years	82	10.3%
(7)	6–10 years	30	3.8%
(8)	10 years or more	10	1.3%
(9)	Life	11	1.4%

The average prison sentence across Republican-affiliated and Democratic-affiliated judges was 4.25 on the nine-point scale, with a median score of four, which represents a prison sentence of thirteen to twenty-four months.¹⁴¹ This is consistent with data reported by the Bureau of Justice Statistics of the average time served by state prisoners.¹⁴² As seen in Table 2, additional frequency analyses examining the most frequently occurring sentencing decision to Republican-affiliated and Democratic-affiliated judges where the defendant was sentenced to serve time in prison revealed that, while the median sentencing score was the

138. *Id.*

139. See Research Notes and Excel Data Collection Spreadsheets (on file with authors).

140. *Id.*

141. See Research Notes and Excel Data Collection Spreadsheets (on file with authors).

142. Danielle Kaebler, *Time Served in State Prison, 2016*, BUREAU JUST. STAT. 1 (2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> [web/20201211051441/<https://www.bjs.gov/content/pub/pdf/tssp16.pdf>].

same for both groups (i.e., a prison sentence of thirteen to twenty-four months), the most frequently occurring sentencing decision among the Democratic-affiliated judges was less severe than those made by Republican-affiliated judges. More specifically, while the most frequently occurring sentencing decision for Democratic-affiliated judges was zero to six months, the most frequently occurring sentencing decision for Republican-affiliated judges was seven to twelve months.

Table 2. Frequency table describing Republican-affiliated and Democratic-affiliated judges sentencing decisions that resulted in prison time.

Sentencing Decision	Number (and Percent) of Cases	
	Republican-Affiliated	Democratic-Affiliated
(2) 0–6 months	45 (19%)	45 (27%)
(3) 7–12 months	61 (26%)	26 (15%)
(4) 13–24 months	41 (17%)	33 (20%)
(5) 25–35 months	14 (6%)	6 (4%)
(6) 3–5 years	44 (19%)	38 (23%)
(7) 6–10 years	17 (7%)	13 (8%)
(8) 10 years or more	6 (3%)	4 (2%)
(9) Life	7 (3%)	4 (2%)
Total	235	169

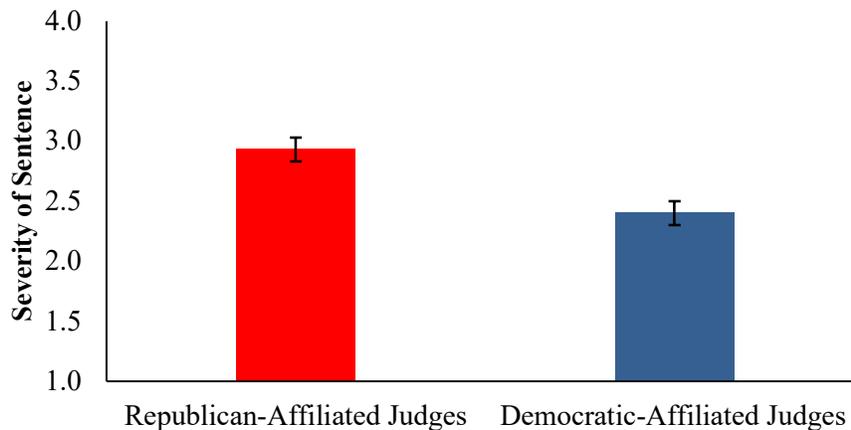
After examining the frequency of the judge's sentencing decisions, a series of preliminary correlations were conducted to examine the extent to which the defendant's age and gender, as well as his/her decision to go to trial, were associated with the judges' sentencing decisions. Results revealed that, although there was no association between the defendants' age and the severity of the defendants' sentence ($r = .03$, $p = .53$), males received more severe sentences than females ($r = .12$, $p = .001$), and defendants who went to trial received more severe sentences than those who decided to take a plea deal ($r = .24$, $p < .001$).¹⁴³ These findings confirm those of the prevailing literature.¹⁴⁴

143. *Id.*

144. See, e.g., Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, LAW & ECON. WORKING PAPERS 57 (2012) (studying federal sentencing outcomes and finding that female offenders are sentenced less harshly than male offenders); see also CHARLES W. OSTROM ET AL., U.S. DEP'T JUST., JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING, NIJ GRANT NO. 98-CE-VC-0008 (2004) (determining that female offenders are sentenced more harshly than males at the state level); Steven P. Grossman, *Making the Evil Less Necessary and the Necessary Less*

To determine the extent to which the political affiliation of the judge explained differences in the judge's sentencing decisions and to directly test the hypothesis of the study, a one-way Analysis of Covariance (ANCOVA) was conducted on the judge's sentencing decisions controlling for gender of the defendant and his/her decision to take a plea deal.¹⁴⁵ As seen in Figure 1, results were consistent with our prediction. After controlling for any variance in the judge's sentencing decisions that can be attributed to the defendant's gender and whether the defendant went to trial, Republican-affiliated judges were more severe in their sentencing ($M = 2.94$, $SD = 2.17$) than Democratic-affiliated judges ($M = 2.38$, $SD = 2.05$), $F(1, 787) = 13.05$, $p < .001$, $\eta_p^2 = .02$.¹⁴⁶

Figure 1. Average sentencing of Republican and Democratic-affiliated judges. Error bars represent standard error of the mean.



Although not central to the purpose of the current study, a series of exploratory independent sample t-tests were conducted to examine the extent to which Republican and Democratic-affiliated judges differed in their sentencing of male and female defendants. As seen in Figure 2, results revealed that there was no difference between male and female defendants among Democratic-affiliated judges, $t(394) = 1.59$, $p = .11$. However, and in contrast to their Democratic-affiliated counterparts,

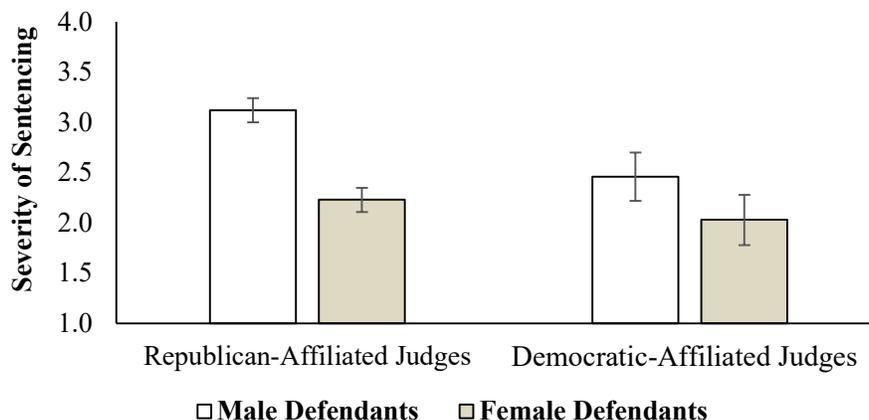
Evil: Towards a More Honest and Robust System of Plea Bargaining, 18 NEV. L.J. 769 (2018) (discussing the research findings on severity of sentence driven by case resolution of plea or trial).

145. See Research Notes and Excel Data Collection Spreadsheets (on file with authors).

146. *Id.*

Republican judges sentenced male defendants ($M = 3.11$, $SD = 2.23$) much more severely than female defendants, $t(393) = 3.03$, $p = .001$.¹⁴⁷

Figure 2. Average sentencing of male and female defendants as a function of political affiliation of judge. Error bars represent standard error of the mean.



C. Study Conclusions

The main findings of the current study confirm the research of the Harvard political sentencing study as well as that of Professors Schazenbach and Tiller. This study extends the findings of this previous research by determining that at the state level, Republican-affiliated judges sentence criminal defendants more severely than Democratic-affiliated judges. Consistent with the Harvard political sentencing study's conclusion regarding the influence of political affiliation on federal sentencing outcomes, this study finds a similar political bias in state court judges when it comes to sentencing outcomes in criminal cases.

The statistically significant findings of this study shed light on an unexplored area of judicial decision making and politics—the state courts. State courts handle more than ninety percent of the cases in the United States.¹⁴⁸ This analysis suggests that the influence of political party

147. It should be noted here that this effect may be skewed by the fact that there were significantly more male defendants in this data set than females. However, this finding does confirm the Harvard study finding that Republican judges give female defendants less prison time than similar male defendants compared to Democratic judges. Cohen & Yang, *supra* note 9, at 162.

148. COURT STAT. PROJECT, CONF. ST. CT. ADMIN. & NAT'L CTR. FOR ST. CTS. EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT

affiliation on judicial decision making is prevalent in the vast majority of criminal cases in the United States. While more research is needed in the state court arena, increasing the sample size and controlling for additional variables, including race and the seriousness of the crime, the conclusions of this study contribute significantly to the research on the influence of political party affiliation and sentencing outcomes.

The combined findings of the current state court sentencing study and the Harvard political sentencing study are troubling in light of the focus of modern legislative sentencing reform efforts to create sentencing consistency and fairness. In addition to legislative efforts to bring consistency to judicial decision making, scholars have expended substantial effort in making determinations about which method of judicial selection creates the most fairness on the bench.¹⁴⁹ The politicization of the federal court selection process has been well documented.¹⁵⁰ From the political nature of the presidential nomination process to the partisan divide in Senate confirmation hearings, political bias continues to be an issue in the federal judiciary.¹⁵¹ In an effort to curb the effect of these political influences on the judiciary, judicial elections were originally conceived as a way to address the partisanship of judicial appointments.¹⁵² However, as discussed above, prior research has demonstrated that judicial sentencing decisions have been overtly influenced by the presence of elections.¹⁵³ In addition, popular media as well as the American Bar Association have called attention to the partisanship of judicial elections noting that the selection of state court judges “has become increasingly politicized, polarized, and dominated by special interests”¹⁵⁴ If

CASELOADS, 3 (2016), http://www.courtstatistics.org/_data/assets/pdf_file/0022/23818/e-wsc-2015.pdf [<https://perma.cc/7HZ2-9J3D>].

149. See, e.g., Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1 (1995–1996); *In Defense of Judicial Elections*, ROUTLEDGE (2009), <https://www.routledge.com/In-Defense-of-Judicial-Elections/Bonneau-Hall/p/book/9780415991339> [[/web/20201211052433/https://www.routledge.com/In-Defense-of-Judicial-Elections/Bonneau-Hall/p/book/9780415991339](http://web/20201211052433/https://www.routledge.com/In-Defense-of-Judicial-Elections/Bonneau-Hall/p/book/9780415991339)]; see also F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Court Judges*, 28:1 J. LEGAL STUD. 205 (1999).

150. David Weiden, *Judicial Politicization, Ideology and Activism at the High Courts of the United States, Canada and Australia*, 42:2 POL. RSCH. Q. (2011).

151. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 66 (2002); see also Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365 (2000) (discussing the growing political nature of the federal bench).

152. JED HANDELSMAN SCHUGERMAN, *THE PEOPLE’S COURTS* (2012).

153. See Lim, *supra* note 113.

154. See *Rethinking Judicial Selection*, A.B.A. (Mar. 1, 2016), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-

consistency and the elimination of discrimination are sentencing values the Legislature seeks, the current sentencing study suggests that the focus should be less on judicial selection methodology or direct legislative solutions and more on empowering the public with information and mechanisms to ensure judicial decision making is consistent with these values.¹⁵⁵

V. RECOMMENDATIONS FOR FUTURE SENTENCING REFORM

Given that political sentencing disparities persist despite legislative sentencing reform efforts—a finding confirmed by both the Harvard political sentencing study and the current sentencing study—further sentencing reform efforts should be focused on eliminating sentencing disparities arising from judicial political affiliation. Three possible solutions—one focused on educating the judiciary, one focused on informing the public, and one focused on arming the parties in criminal cases with the ability to ensure more moderate sentencing outcomes—may advance the underlying goals of modern sentencing reform: fairness, consistency, and impartiality.

A. Data-Based Solutions

The use of data to inform sentencing decisions has gained popularity in the form of risk/needs assessments and other predictive algorithms.¹⁵⁶ However, less attention has been given to the use of judicial sentencing data at the individual level to shape sentencing outcomes. While there is robust data collected regarding the offender and judicial characteristics related to sentencing in federal courts, there is a lack of data linking judicial identifiers to defendant-specific characteristics and case

24-number-1/rethinking_judicial_selection/
[https://web.archive.org/web/20201115002903/https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/]; see also Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html> [https://web.archive.org/web/2020111232436/https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html].

155. Many scholars have advocated that sentencing be moved from the purview of judges to juries; however, this approach has also been criticized as yielding more disparate and severe sentences than those crafted by judges. See Nancy J. King & Roosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 332 (2005).

156. See, e.g., OHIO REV. CODE ANN. § 5120.114 (LEXIS through 133rd Gen. Assemb.) (mandating use of single validated risk assessment tool in Ohio criminal cases).

outcomes.¹⁵⁷ In the states, the availability of data on sentencing outcomes connected to individual judges varies greatly, and, as a result, the ability to connect sentencing outcomes to individual judges is largely absent.¹⁵⁸ Requiring individual jurisdictions to collect relevant offender characteristics, such as race, gender, and age, for each criminal case and to organize specific offender according to sentencing judge is a necessary first step. Making this information available to future researchers will allow further exploration on the significance of judicial characteristics, including political affiliation, on sentencing decisions at the judge-specific level. In addition, placing individual level judicial sentencing data organized by offender characteristics in the hands of individual judges would allow judicial actors to become informed about their sentencing practices relative to other judges in their county and state. Possession of this information would provide an opportunity for judges to self-correct implicit and potential unrecognized racial, gender, and proportionality biases in their own sentencing practices.¹⁵⁹ In theory, judges who are better informed as to their sentencing practices in the aggregate and potential implicit biases inherent in sentencing outcomes will make more principled decisions.

Assuming the disparate sentencing practices of judicial actors is the product of unconscious bias, shining light on an individual's patterns and practices would help inform judicial behavior.¹⁶⁰ To help place this information in context, aggregate sentencing data organized by offense level for sentencing outcomes across the state and within individual judicial jurisdictions should be made available. To further the impact of this data, for judges who substantially deviate from sentence averages, court rules should require counseling and training to assist judges in correcting sentencing biases.¹⁶¹

157. Cohen & Yang, *supra* note 9, at 161.

158. NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS., STATE SENTENCING GUIDELINES PROFILES AND CONTINUUM (2008), https://www.ncsc.org/_data/assets/pdf_file/0022/25474/state_sentencing_guidelines.pdf [https://web.archive.org/web/20201211053807/https://www.ncsc.org/_data/assets/pdf_file/0022/25474/state_sentencing_guidelines.pdf]; *The Data Disconnect: Adult Criminal Justice Data in Ohio*, OHIO CRIM. SENT'G COMM'N (Jan. 2019), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/dataBrief.pdf> [https://web.archive.org/web/20201016221958/https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/dataBrief.pdf].

159. See, e.g., Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007).

160. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1196 (2008–2009) (finding that while judges are influenced by implicit bias, they are motivated to avoid it); see also Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three State Study*, 57 VAND. L. REV. 886 (2004).

161. *Id.*

There is some evidence in the juvenile justice context that improved data collection around racial disparities in the criminal justice system can lead to systemic improvement. More specifically, the Juvenile Justice and Delinquency Prevention Act of 2002 (“the JJDP A”) required states accepting grant money to track disproportionate minority contact and to implement plans designed to reduce any disparities.¹⁶² States that fail to address disproportionate minority contact stand to lose up to twenty percent of grant funding in subsequent years.¹⁶³ While the results of the JJDP A are mixed, at least thirty-four states had implemented strategies to reduce disparities revealed from the JJDP A-mandated disproportionate minority contact data collection, and four states had tested the efficacy of those strategies.¹⁶⁴ While not a perfect example, the JJDP A reveals that measurable progress can be made towards eliminating criminal justice disparities following the improvement of data collection practices.

B. Public Information

The public availability of information on individual judicial sentencing outcomes could also serve as a mechanism for reform in its own right, allowing the electorate to make more informed choices in judicial elections. Judicial elections were, in part, formulated as a way to create judicial accountability.¹⁶⁵ However, the premise inherent in voter participation in the selection of judges is that voters understand the rule of law and appreciate how the judicial decisions in their jurisdictions fit within that framework. The problem is that voters are woefully uninformed in almost all elections and particularly in judicial elections.¹⁶⁶ Voter ignorance in judicial elections abounds because the majority of the work conducted by judges is done in the courthouse outside of the public eye, the way judges make decisions is mysterious to the public, and there is a “lack of useful cues and heuristics that allow voters to compensate for their lack of relevant knowledge.”¹⁶⁷ Voters specifically lack information about the identity of the judges in their jurisdiction, but they are also

162. See 34 U.S.C. §§ 11101–11322 (2018).

163. *Id.*

164. Megan Mason, *Judges’ Role in Correcting the Overrepresentation of Minority Youth in the Juvenile Justice System*, 28 GEO. J. LEGAL ETHICS 719, 720–21 (2015).

165. See, e.g., Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966); see also *Minnesota v. White*, 536 U.S. 765, 785 (2002) (finding that judicial elections were manifested in the state as a response to democratic concerns); CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 8 (2009).

166. Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 554 (2013).

167. *Id.* at 565–66.

unaware of what judges do and unable to compare what is actually happening in courtrooms to what should be happening under Constitutional and other judicial mandates.¹⁶⁸ Other scholars have proposed the implementation of judicial evaluations and the creation of judicial commissions to aggregate data on characteristics related to judicial temperament, promptness, and impartiality.¹⁶⁹ The dissemination of this information would surely be helpful to voters. However, the collection and distribution of data on the objective metrics of average sentence length by offense level, race, and gender compared with other judges in the state would provide voters with impartial and targeted information to inform voting decisions. This kind of information is readily intelligible by lay people and fits into a framework that the average voter already uses to make decisions.

C. Judicial Peremptory Strikes

An additional solution to sentencing disparities created by judicial political affiliation would be to provide the parties with a small number of judicial peremptory strikes. This idea has historical roots, dating back to a California civil procedure rule adopted nearly a hundred years ago.¹⁷⁰ The specific text of the rule stated:

Any party or his attorney to any cause or proceeding of any nature pending in a superior or municipal court, except the people or district attorney in a criminal case, may make and file with the clerk of the court in which the action is pending, and serve on the opposite party, a peremptory challenge in writing of the judge assigned to try or hear the cause or pending matter. Thereupon, without any further act or proof, the presiding judge in those counties where there is a presiding judge who assigns causes for hearing or trial, or the chairman of the judicial council in other counties, shall assign some other judge to try the cause or hear the pending matter, and such cause shall be continued on the calendar until the judge so secured or assigned can try the cause or hear the

168. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1825 (2005).

169. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 31–34 (2004).

170. See *Austin v. Lambert*, 77 P.2d 849 (Cal. 1938) (declaring California rule allowing judicial peremptory strikes unconstitutional on separation of powers grounds).

matter. If it is necessary to secure a judge from another county, the chairman of the judicial council shall assign such judge.¹⁷¹

Although the rule was ultimately declared unconstitutional on separation of powers grounds, it gained significant early scholarly support, particularly as an alternative to inefficient and cumbersome methods for seeking judicial recusal.¹⁷²

The idea of judicial peremptory challenges has resurged with new force over the past two decades¹⁷³ and a sizeable number of states in which judges are elected now allow some form of peremptory judicial exclusion.¹⁷⁴ Alaska, for example, requires mandatory disqualification of a judge if a party files an affidavit alleging that judge cannot be fair and impartial.¹⁷⁵

The expansion of judicial peremptory strikes in criminal cases, particularly following the collection and publication of sentencing data for individual judges, would make a measurable difference in reducing sentencing disparities. It is reasonable to assume that prosecutors would strike judges with the most lenient sentencing practices, and criminal defendants would strike judges with the most severe sentencing practices, thus causing sentencing outcomes to move towards the middle. This practice would also bolster the information feedback described above. Judges who are routinely disqualified from participating in criminal cases would be compelled to reflect on and to evaluate their case decisions in the context of this feedback from the parties. Care should be taken in crafting judicial peremptory challenge policies to ensure that parties do not make use of their challenges in discriminatory ways, thereby unintentionally exacerbating the very kinds of sentencing discrepancies judicial peremptory challenges are intended to avoid.¹⁷⁶

171. *Id.* at 850.

172. *See, e.g., Disqualification of Judges by Peremptory Challenge*, 47 *YALE L.J.* 1403, 1408 (1938) (“If the issue [of judicial bias] should arise in states accustomed to disqualify their judges by simple affidavit, the courts might well approve a shift to peremptory challenge as a comparatively minor simplification of the process.”).

173. *See, e.g., Debra Lyn Bassett, Judicial Disqualification in the Federal Appellate Courts*, 87 *IOWA L. REV.* 1213, 1251 (May 2002) (proposing the use of judicial peremptory strikes in the federal appellate courts).

174. Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 *GEO. L.J.* 1077, 1102 (Apr. 2007).

175. ALASKA STAT. § 22.20.022 (2019); Marla L. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 *ALASKA L. REV.*, 53 (2000) (providing a comprehensive overview of the Alaska rules of disqualification).

176. For a discussion of the ways in which the exercise of judicial peremptory challenges may perpetuate racial and gender bias, *see* Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenge of Judges*, 73 *CHI. KENT. L. REV.* 509 (1998).

VI. CONCLUSION

Judicial political affiliation undoubtedly plays a role in driving criminal sentencing outcomes. Empirical evidence of sentencing outcomes in both state and federal court shows that Republican-appointed and Republican-affiliated judges sentence defendants to longer prison sentences than Democratic-appointed and Democratic-affiliated judges. This is a critically important finding in a criminal justice system that grants wide discretion to judges in sentencing determinations. While legislative actors have attempted to enact guardrails around sentencing outcomes to achieve consistency and proportionality in sentencing, sentencing disparities persist. This is at least in part due to the failure of legislative sentencing reform to account for individual judicial political differences and the lack of creative statutory solutions—like expanded data collection and judicial preemptory strikes—to reduce sentencing disparities between judges with differing political leanings. Understanding that a primary driver of sentencing disparities is related to political party affiliation—even in determinate sentencing schemes where judicial sentencing discretion is highly guided—can aid policy makers in more effectively addressing these partisan divides.