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## SENTENCING GUIDELINES AT THE CROSSROADS OF POLITICS AND EXPERTISE

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### INTRODUCTION

When Minnesota created the first sentencing commission in 1978 and the first sentencing guidelines in 1980, it was hard to predict where the guidelines movement would go. More than three decades

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and twenty sentencing guideline regimes later,<sup>1</sup> it is still not easy to foresee what will become of sentencing commissions and guidelines. The past decade alone has witnessed tremendous changes in sentencing law and policy that were hard to imagine even just a few years before they occurred. The Supreme Court's landmark sentencing decisions in *Apprendi v. New Jersey*,<sup>2</sup> *Blakely v. Washington*,<sup>3</sup> and *United States v. Booker*,<sup>4</sup> the reform of federal crack cocaine laws, and a financial crisis that has sparked significant sentencing reforms have all been monumental and, to some extent, unexpected developments. These seismic shifts will undoubtedly alter the landscape going forward in similarly unpredictable ways.

As this Symposium looks to the future and what it holds for sentencing guidelines, it is important to proceed with caution and a healthy dose of modesty. None of us really knows what will happen. But one helpful way to approach the future is to reflect on some of the key lessons we have learned in the more than thirty years with sentencing commissions and guidelines. There have been consistent themes and struggles, and there is no reason to believe these core issues will dissipate going forward. In this Article, I highlight these struggles and analyze how they can productively guide the future of sentencing guidelines.

Although I divide this Article into four different topics, they are united under one umbrella: the tension that arises from the fact that sentencing commissions must produce guidelines that are simultane-

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<sup>1</sup> See Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1994 tbl.1 (2006) (listing eighteen guideline regimes as of publication in June 2006). Alabama's guidelines became effective in the fall of 2006, and the District of Columbia has guidelines as well. See Act of Apr. 5, 2006, No. 312, § 2, 2006 Ala. Acts 663, 663 (codified at ALA. CODE § 12-25-34.1 (2006)); D.C. SENTENCING & CRIMINAL CODE REVISION COMM'N, VOLUNTARY SENTENCING GUIDELINES MANUAL (2011), available at [http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/2011\\_Voluntary\\_Sentencing\\_Guidelines\\_Manual.pdf](http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/2011_Voluntary_Sentencing_Guidelines_Manual.pdf).

<sup>2</sup> See 530 U.S. 466, 490 (2000) ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. . . . [S]uch facts must be established by proof beyond a reasonable doubt." (first alteration in original) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1998) (Stevens, J., concurring)) (internal quotation marks omitted)).

<sup>3</sup> See 542 U.S. 296, 304-05 (2004) (holding a 90-month sentence invalid under the Sixth Amendment where the sentencing scheme required the judge to make additional factual findings beyond the jury verdict to impose that sentence).

<sup>4</sup> See 543 U.S. 220, 237 (2005) (applying *Blakely's* Sixth Amendment analysis to Federal Guidelines cases).

ously reflective of the best empirical and expert knowledge about sentencing and acceptable to political overseers. The battle between expertise and politics is a familiar one for all administrative agencies, but it is particularly fraught for sentencing commissions. This is because the politics of crime is, in William Stuntz's memorable phrasing, "pathological,"<sup>5</sup> and because the expertise involved is less scientific—or at least appears to be less scientific—than in other regulatory fields.<sup>6</sup> Striking the proper balance between these often-competing forces must be the central mission of every sentencing commission as it crafts guidelines. This Article's central inquiry is how commissions manage the tension between expertise and politics given what we know about commissions and guidelines.

Part I begins by considering a topic that provides common ground for both experts and politicians: data. Guidelines are at their best and most effective when they are based on sound empirical data and professional expertise. Achieving that outcome often requires commissions to consider what empirical information most influences political actors. Whether the data represent the fiscal impact of proposed sentencing laws or the effect of sentencing laws on different populations, empirical information has had a profound impact on sentencing law and policy and will undoubtedly continue to do so.

Part II turns to a related empirical question: the relationship between race and sentencing guidelines. A concern with racial disparities was a driving force of the guidelines movement, and it is thus a topic of political importance. Yet we remain uncertain today whether guidelines have eased or exacerbated racial disparities. Sentencing commissions can no longer stand on the sidelines of this question. While commissions cannot make policy calls about what to do with the racial disparities in the criminal justice system, they are ideally placed to study sentencing patterns and practices to better understand the relationship between sentencing guidelines, their enforcement, and the racial composition of the prison population. It should be the goal of every sentencing commission to use its expertise to arm elected representatives with as much data as possible on the question of race and criminal justice so those officials can make decisions informed by facts, not assumptions or inaccurate impressions.

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<sup>5</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>6</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 734-35 (2005) (explaining why legislators might view sentencing as more accessible than more technical fields of regulation).

While Parts I and II focus on the ways in which expertise and politics can come together, Part III confronts the question of what commissions should do when there is a conflict between politics and expertise in crafting guidelines. Commissions must adapt to the political environment in which they operate to achieve real-world change. But commissions should not let politics override the agency's expert mission unless the agency's political overseers demand it and no other viable options present themselves. The relationship between guidelines and mandatory minimums offers an example of this dynamic. Mandatory minimums are often set by legislatures based on political factors that conflict with a commission's expert judgment about how best to set guidelines. This Part argues that guidelines should stay true to expert assessments and that mandatory minimums should trump the guidelines only in cases in which the mandatory minimums are expressly applicable. An entire system of guidelines should not be determined by legislative judgments that are contrary to sentencing expertise unless the legislative body makes it clear that it desires this outcome. Commissions must respond to political will, but that does not mean that they should compromise their professional judgments unless the legislature directly commands them to do so.

Part IV concludes by exploring important limits on what guidelines can accomplish. If we have learned anything from the past that can inform our future expectations, it is that there are limits to what guidelines can do, even when they are based on the best empirical information available. Guidelines must strike the difficult balance between individualization and uniformity. Ultimately, it is critical to recognize that no amount of expertise can fully resolve this tension. Guidelines will never be perfect and comprehensive, and there will always need to be some play in the joints.

Guidelines have been limited in another way: they govern judges, and sometimes parole officials, but they do not address prosecutorial discretion. To be sure, commissions could and should do more to address the relationship between guidelines and prosecutorial power. But here too there are limits to what a commission can accomplish with guidelines, even when armed with all the data in the world. Because some amount of prosecutorial discretion is necessary and inevitable, guidelines must account for that reality.

Finally, it is important for commissions and guidelines not to neglect an often forgotten actor in the criminal justice system: the jury. The jury is the quintessential foil to a model based on expertise, as it is comprised of lay people with no specialized knowledge of crime or

punishment. Yet it is important to remember that at the heart of any criminal justice system are questions of morality and justice that are not amenable to charts and data but rather are suited for juries comprised of members of the community. Commissions must be attuned to the jury's role as well.

## I. DATA

Although political judgment and expert opinion often conflict, in the sentencing guidelines context they come together through data. Many kinds of data might reflect expert knowledge, yet only certain types of data have currency in political debates over crime. Information on the costs of proposed sentencing reforms is the most effective data sentencing commissions can produce to obtain legislative approval of guidelines.

Nearly every state with a sentencing commission has made a cost projection system a central part of its mission. Minnesota's demonstrated success in pioneering and using fiscal forecasting to maximize the effectiveness of the state's limited resources has led other states to follow suit.<sup>7</sup> These state sentencing commissions and their respective legislatures value cost projection data because the data allow them to allocate efficiently their limited crime-fighting resources to establishing guidelines.<sup>8</sup> State legislators have frequently modified proposed laws in light of expert forecasting by a state sentencing commission. Sometimes states increase sentences in light of cost data, knowing that they can afford the expense. Other times, states decrease sentences for some crimes, often nonviolent crimes, to prioritize scarce prison resources for violent crimes and to reduce crime at a lesser cost. The data thus assist elected officials no matter what their policy goals.

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<sup>7</sup> See Letter from the Ctr. on the Admin. of Criminal Law, N.Y. Univ. Sch. of Law, to the U.S. Sentencing Comm'n 3 (Aug. 29, 2008), available at [http://www.law.nyu.edu/ecm\\_dlv3/groups/public/@nyu\\_law\\_website\\_\\_centers\\_\\_center\\_on\\_administration\\_of\\_criminal\\_law/documents/documents/ecm\\_pro\\_058383.pdf](http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__centers__center_on_administration_of_criminal_law/documents/documents/ecm_pro_058383.pdf) (noting that "virtually every sentencing commission has followed" Minnesota's sentencing commission model, which included cost projections in its mandate).

<sup>8</sup> See Barkow, *supra* note 6, at 809 (noting that "[a]lmost every state to adopt a guideline system since the middle of the 1980s has opted to require some version of an impact statement" and that these cost estimates have "proven to be effective in cutting costs by slowing incarceration rates and prison overcrowding"); Letter from the Ctr. on the Admin. of Criminal Law, *supra* note 7, at 3 (arguing that cost projections allow lawmakers to "[a]chieve a more rational and effective criminal justice system that maximizes . . . crime reduction benefits from . . . criminal justice expenditures").

States that have used these forecasts to maximize their resources have not experienced an increase in crime rates. Indeed, during the last twenty years—the period over which most states have made use of these estimates—crime rates have largely declined or stabilized. Between 1992 and 1999, homicide rates declined to 1960s levels.<sup>9</sup> The national crime rate reached a historic low in 2000.<sup>10</sup> During this period of lower crime rates, states used cost projections to make the most of their limited resources by slowing both the growth of their incarceration rates and the rate of spending on corrections.<sup>11</sup> Indeed, these forecasts have been so useful that the American Bar Association has included the use of cost forecasts as a key recommendation in its proposed Model Sentencing Act.<sup>12</sup> The Act requires an impact analysis on the theory that “it is in every state’s interest to coordinate resource and policy decisions.”<sup>13</sup>

These forecasts have not only influenced particular sentencing debates, they have also improved the overall political standing of state commissions with their respective legislatures. State commissions that use forecasts “have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever greater stock in their forecasts, affording the commissions a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations.”<sup>14</sup>

Cost forecasting is particularly important in today’s strained economic climate. The states spent \$51.1 billion on corrections in 2010, constituting 3.1% of their annual budgets.<sup>15</sup> After a brief dip between 2009 and 2010, state corrections budgets resumed their upward climb last year; early tallies for fiscal year 2011 put the total at \$51.7 billion.<sup>16</sup> At the federal level, where the government spends over \$5 billion on

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<sup>9</sup> See Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in *THE CRIME DROP IN AMERICA* 1, 3-4 (Alfred Blumstein & Joel Wallman eds., 2000).

<sup>10</sup> Emma Schwartz, *Crime Rates Shown to Be Falling*, U.S. NEWS & WORLD REP., June 11, 2008, <http://www.usnews.com/news/national/articles/2008/06/11/crime-rates-shown-to-be-falling>.

<sup>11</sup> See Barkow & O’Neill, *supra* note 1, at 2008-09.

<sup>12</sup> STANDARDS FOR CRIMINAL JUSTICE: SENTENCING § 18-2.3 (1994).

<sup>13</sup> Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA’s New Sentencing Standards*, 78 JUDICATURE 189, 194 (1995).

<sup>14</sup> Kevin R. Reitz, Am. Law Inst., *Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 592-93 (2002).

<sup>15</sup> NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 2010, at 52 (2011), available at <http://nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf>.

<sup>16</sup> *Id.*

corrections,<sup>17</sup> these expenditures are rising rapidly. From 1982 to 2003, the federal government increased corrections expenditures by 925%.<sup>18</sup> Moreover, between 1995 and 2004, the federal prison population increased at an annual average rate of 7.8%, compared to an average annual increase of 2.7% in the states.<sup>19</sup> The federal system, which is the largest prison system in the country,<sup>20</sup> exceeds its capacity by 36%.<sup>21</sup> Using cost forecasting, the federal and state governments could realize fiscal rationality and implement better, and more cost-effective, criminal justice policies. And the commissions providing this information could potentially improve their standing and influence with their respective legislatures by providing valuable information on the costs of any policy under consideration.

Because legislative debates often overlook the availability and best use of resources, this enforced cost projection is particularly valuable. The extent to which many sentencing laws require large capital expenditures—such as the maintenance and construction of prison facilities or the hiring of staff—often goes unrecognized. Although the costs of longer terms of imprisonment might be worth it for many offenses and offenders, the money spent on some extended prison terms could be better spent somewhere else: for example, confining more serious offenders, providing alternatives to incarceration for some nonviolent offenders, or making more money available for policing or education. Because the political process does not always reasonably consider how to allocate its resources,<sup>22</sup> commission-provided cost data

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<sup>17</sup> See KRISTEN A. HUGHES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 3, 9, available at <http://www.bjs.gov/content/pub/pdf/jeeus03.pdf> (reporting total federal spending on corrections—defined broadly to include incarceration, community supervision, and rehabilitation programs—at \$5.55 billion in 2003). Federal expenditures in 2003 were \$2.59 trillion dollars. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012, at 22 tbl.1.1 (2011), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-TAB/pdf/BUDGET-2012-TAB.pdf>.

<sup>18</sup> See HUGHES, *supra* note 17, at 2.

<sup>19</sup> PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2004, at 2 tbl.1 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim04.pdf>.

<sup>20</sup> *Id.* at 1.

<sup>21</sup> PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2010, at 7 (2011) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

<sup>22</sup> See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1292 (2005) (“The current political process is disproportionately likely . . . to ignore or pay far less attention to the costs of incarceration.”).

can focus attention on fiscal concerns and provide politicians with the information they need to ensure that limited government funds are spent wisely.

This vision of a sentencing commission's role comports with the overall place of agencies in government and their ability to use expertise to serve political goals. Cost-benefit analysis is a centerpiece of the modern regulatory state, particularly at the federal level. For example, the Office of Management and Budget engages in a cost-benefit analysis for regulations proposed by executive agencies.<sup>23</sup> The Federal Sentencing Commission is not subject to this oversight, but its Guidelines should be influenced by efficiency concerns all the same. Sentencing policies, like all other government policies, should seek to make government as efficient and effective as possible. States are not as attentive to cost-benefit analysis as the federal government, but in many states, policies are similarly evaluated for their effect on state budgets.<sup>24</sup> It is essential to good governance, at both state and federal levels, to ensure that any proposed policy maximizes welfare at the lowest cost.<sup>25</sup>

The data that unite politics and expertise are not limited to costs. A sound evaluation of sentencing laws must look at not only the costs but also the benefits of these laws. To that end, in addition to producing information on the costs of various sentencing proposals, commissions are well positioned to collect data on the effect various sentencing proposals have on recidivism and crime rates. This information is salient in political debates and can motivate political action.

Some sentencing commissions, including those in Pennsylvania, North Carolina, and Kansas, have explicit mandates to release this kind of information. Pennsylvania empowers its commission to “[c]ollect

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<sup>23</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>24</sup> JASON A. SCHWARTZ, INST. FOR POLICY INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKING 87 (2010), available at [http://policyintegrity.org/files/publications/52\\_Experiments\\_with\\_Regulatory\\_Review.pdf](http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf) (noting that “45 states require some form of economic impact analysis” when considering the implementation of new regulations).

<sup>25</sup> See STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 228-29 (1999) (arguing that public deliberation should be focused on, among other things, how much to spend on a given right and “the optimal package of rights, given that the resources that go to protect one right will no longer be available to protect another right”); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 12-13 (2008) (discussing the advantages of cost-benefit analysis in government decisionmaking, even for government regulation motivated by goals other than efficiency, because it achieves more rational government programs, increases accountability and transparency, and structures and channels exercises of discretion by government decisionmakers).



systematically and disseminate information regarding effectiveness of parole dispositions and sentences imposed.”<sup>26</sup> In 2006, the Pennsylvania Commission on Sentencing began a multiyear study of sentencing’s effect on recidivism.<sup>27</sup> Similarly, North Carolina’s commission has a statutory command to collect data and regularly report on both adult and juvenile recidivism.<sup>28</sup> Kansas’s mandate to its commission is even broader. Its statute requires the agency to “analyze . . . and make recommendations for improvements in criminal law, prosecution, community and correctional placement, programs, release procedures and related matters including study and recommendations concerning the statutory definition of crimes and criminal penalties and review of proposed criminal law changes.”<sup>29</sup>

The Washington State Institute for Public Policy provides the preeminent model for how data collection can improve public policy. The Institute analyzes alternatives to incarceration, measures sentencing laws’ effects on recidivism, and assesses the cost effectiveness of criminal justice programs.<sup>30</sup> Created by the state legislature in 1983, the Institute researches a wide array of public policy issues.<sup>31</sup> In the area of criminal law, the Institute works directly with state agencies and lawmakers to provide data and concrete recommendations on specific policies. For example, the Washington Department of Corrections contracted with the Institute to determine best practices for community supervision of offenders,<sup>32</sup> and the state legislature asked for an evaluation of the effects of a 2003 law on recidivism rates.<sup>33</sup>

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<sup>26</sup> 42 PA. CONS. STAT. ANN. § 2153(a)(11) (West Supp. 2011).

<sup>27</sup> *Effectiveness of Sentencing Project*, PA. COMM’N ON SENTENCING, <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/special-reports/effectiveness-of-sentencing-project> (last visited Mar. 15, 2012).

<sup>28</sup> N.C. GEN. STAT. ANN. § 164-48 (West 2007); N.C. GEN. STAT. ANN. § 164-47 (West, Westlaw through S.L. 2012-1 at the 2011 Regular Session of the General Assembly).

<sup>29</sup> KAN. STAT. ANN. § 74-9101 (West Supp. 2010).

<sup>30</sup> See generally WASH. STATE INST. FOR PUB. POLICY, <http://www.wsipp.wa.gov/default.asp> (last visited Mar. 15, 2012).

<sup>31</sup> *Id.*

<sup>32</sup> See ELIZABETH K. DRAKE, WASH. STATE INST. FOR PUB. POLICY, “WHAT WORKS” IN COMMUNITY SUPERVISION: INTERIM REPORT 1 (2011), available at <http://www.wsipp.wa.gov/rptfiles/11-12-1201.pdf> (outlining the research questions posed by the Department of Corrections for the Institute’s report on community supervision).

<sup>33</sup> See ELIZABETH K. DRAKE ET AL., WASH. STATE INST. FOR PUB. POLICY, INCREASED EARNED RELEASE FROM PRISON: IMPACTS OF A 2003 LAW ON RECIDIVISM AND CRIME COSTS, REVISED 1 (2009), available at <http://www.wsipp.wa.gov/rptfiles/09-04-1201.pdf> (providing an overview of the legislature’s request and finding that the 2003 law decreased recidivism overall, lowered prison costs, and increased earnings through labor).

To be sure, arguments based on cost-benefit analyses will not always win the day in political debates. The politics of crime remain too heated for that. But when the time is politically right, even once-ignored data can reemerge to influence policy.

Consider in this regard the U.S. Sentencing Commission. Congress has vested the Commission with a research and data collection function, instructing it to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing”<sup>34</sup> and to “collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process.”<sup>35</sup> The Sentencing Commission has produced extensive and well-researched reports on issues such as mandatory minimum sentencing laws,<sup>36</sup> the disparity between crack and powder cocaine,<sup>37</sup> alternatives to incarceration,<sup>38</sup> and a host of other topics.<sup>39</sup> Congress has often ignored the Commission’s advice and recommendations<sup>40</sup>—as it did when the Commission proposed eliminating the disparity between sentences for crack and powder cocaine in 1995.<sup>41</sup> But Commission reports that Congress and the Executive branch initially ignored have, over time, influenced the debate over sentencing. For example, with the passage of the Fair Sentencing Act of 2010,<sup>42</sup> Congress finally revised its approach to the disparate treatment of crack and powder co-

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<sup>34</sup> 28 U.S.C. § 991(b)(2) (2006).

<sup>35</sup> *Id.* § 995(a)(13).

<sup>36</sup> See, e.g., U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/199108\\_RtC\\_Mandatory\\_Minimum.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm).

<sup>37</sup> See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>38</sup> See U.S. SENTENCING COMM’N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2009), available at [http://www.ussc.gov/Research/Research\\_Projects/Alternatives/20090206\\_Alternatives.pdf](http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf).

<sup>39</sup> See generally U.S. SENTENCING COMM’N, GUIDE TO PUBLICATIONS & RESOURCES (2010–2011), available at [http://www.ussc.gov/Publications/2010\\_Guide\\_to\\_Publications\\_and\\_Resources.pdf](http://www.ussc.gov/Publications/2010_Guide_to_Publications_and_Resources.pdf) (providing a list of reports that the Commission has prepared).

<sup>40</sup> See Barkow, *supra* note 6, at 767-70.

<sup>41</sup> See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm).

<sup>42</sup> Pub. L. No. 111-120, 124 Stat. 2372.

caine offenses, referring to the Commission's research on the subject when it did so.<sup>43</sup>

## II. RACE

The emergence of sentencing guidelines is in large measure a story about the desire for racial justice.<sup>44</sup> Unfortunately, even a cursory look at criminal justice in the United States—in states with or without guidelines—demonstrates that questions of racial justice have hardly been answered. The numbers show a widely disproportionate impact on some racial and ethnic minorities. Blacks and Hispanics are disproportionately incarcerated relative to their numbers in the general population. While the American population is 12.6% black and 16.3% Hispanic,<sup>45</sup> blacks comprise 37.9% of the American prison population, and Hispanics 22.3%.<sup>46</sup> Of 216,361 federal prisoners, 81,211 individuals (37.5%) are black and 74,931 (34.6%) are Hispanic.<sup>47</sup> In 2010, 71.4% of federal drug offenders were black or Hispanic.<sup>48</sup> More than 11% of black men under the age of 40 are imprisoned, and more than 20% of black men born since the late 1960s have spent at least a year, and typically two, in prison for a felony conviction.<sup>49</sup> Some cities have 40-50% of their young black men under some form of criminal justice system supervision.<sup>50</sup> “If brought together in one incorporated region,

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<sup>43</sup> Attorney General Holder referred to the Commission's report on the crack-powder disparity in his speech reaffirming the Department's commitment to seeking an end to that disparity. See Eric Holder, Att'y Gen., Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium: Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act (June 24, 2009) [hereinafter Holder Speech], available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html>.

<sup>44</sup> See Barkow, *supra* note 6, at 742 (“The left supported sentencing reform based on a concern . . . that minorities and the poor were being disproportionately penalized.”); cf. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2011) (stating that race, among other factors, is “not relevant in the determination of a sentence”).

<sup>45</sup> U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>46</sup> U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 26 tbl.12 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

<sup>47</sup> FED. BUREAU OF PRISONS, *Quick Facts About the Bureau of Prisons*, <http://www.bcp.gov/news/quick.jsp> (last visited Mar. 15, 2012).

<sup>48</sup> See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010 tbl.34, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table34.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table34.pdf).

<sup>49</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 19 tbl.2, 26 (2006).

<sup>50</sup> See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 744 (1993) (noting that 42% of black men in their twenties in

the black males who are now in prison would instantly become the twelfth-largest urban area in the country.”<sup>51</sup> Almost one-third of black men can expect to be incarcerated during their lifetimes under current trends. Black children are more than seven times more likely to have a parent in prison than white children.<sup>52</sup>

Some states have begun to investigate why the numbers are so disproportionate. For example, in 2008, Iowa was the first state in the country to pass legislation requiring a minority impact statement for any proposed criminal law.<sup>53</sup> Both parties overwhelmingly endorsed the law—the Iowa House voted unanimously in favor of it, and the Senate approved the law 47-2.<sup>54</sup> The law requires that all new criminal laws be examined before they are passed to determine how they will impact minorities.<sup>55</sup> The minority impact statement requirement allows Iowa legislators to anticipate disparities and, where possible, pursue an alternative path to accomplishing its goals to avoid those disparities.

Connecticut and Illinois have also recently passed legislation that mandates a legislative evaluation of the racial and ethnic impact of certain criminal justice legislation. Connecticut requires racial impact statements as part of a broader statute that creates remedies for wrongfully convicted individuals.<sup>56</sup> It passed overwhelmingly in the House (126-11) and unanimously in the Senate, and was signed into law in June 2008.<sup>57</sup> Illinois followed suit a few months later when Governor Rod Blagojevich signed Senate Bill 2476 into law.<sup>58</sup> The bill as

Washington, D.C., and 56% in Baltimore are “under the control of the criminal justice system on any day”).

<sup>51</sup> DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 183 (2004).

<sup>52</sup> THE SENTENCING PROJECT, *INCARCERATED PARENTS AND THEIR CHILDREN* 2 (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_incarceratedparents.pdf). This problem promises to become only more acute because “[e]thnic and racial minorities will comprise a majority of the nation’s population in a little more than a generation, according to new Census Bureau projections.” Sam Roberts, *A Generation Away, Minorities May Become the Majority in U.S.*, N.Y. TIMES, Aug. 14, 2008, at A1.

<sup>53</sup> Act of Apr. 17, 2008, 2008 Iowa Acts 312 (codified at IOWA CODE § 2.56 (2009)).

<sup>54</sup> See H. JOURNAL, 82nd Gen. Assemb., Reg. Sess., at 897-98 (Iowa 2008), available at <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/March%2025,%202008.pdf#page=27>; S. JOURNAL, 82nd Gen. Assemb., Reg. Sess., at 869 (Iowa 2008), available at <https://www.legis.iowa.gov/docs/pubs/sjweb/pdf/March%2031,%202008.pdf#page=19>.

<sup>55</sup> 2008 Iowa Acts 312.

<sup>56</sup> See 2008 Conn. Acts 489 (Reg. Sess.).

<sup>57</sup> *Id.*

<sup>58</sup> See Commission to Study Disproportionate Justice Impact Act, Pub. Act 095-0995, 2008 Ill. Laws 3698.

introduced mandated legislative racial impact reports;<sup>59</sup> the form that eventually passed instead created a panel to study the problem.<sup>60</sup> This commission disbanded after issuing its report in December 2010, which included a recommendation that lawmakers reconsider racial impact statements.<sup>61</sup>

In Wisconsin, Governor Jim Doyle did not wait for legislative action to mandate racial impact statements for agency regulations. In May 2008, he issued an executive order that required all state agencies to track the racial impact of their policies and created a Racial Disparities Oversight Commission.<sup>62</sup> The panel was not empowered to issue racial impact statements per se but was tasked with reducing racial disparity across the criminal justice system.<sup>63</sup>

Some sentencing commissions have also explored the impact of the guidelines on different racial groups.<sup>64</sup> Even before Iowa's legislature mandated racial impact statements, Minnesota's sentencing commission was the first body actually to provide such estimates. It began doing so on its own initiative in early 2008.<sup>65</sup> The U.S. Sentenc-

<sup>59</sup> S.B. 2476, 95th Gen. Assemb., Reg. Sess. (Ill. 2007–2008).

<sup>60</sup> Commission to Study Disproportionate Justice Impact Act § 5, 2008 Ill. Laws at 3699.

<sup>61</sup> See ILL. DISPROPORTIONATE JUSTICE IMPACT STUDY COMM'N, FINAL REPORT 42-43 (2010), available at [http://www.centerforhealthandjustice.org/DJIS\\_FullReport\\_FINAL.pdf](http://www.centerforhealthandjustice.org/DJIS_FullReport_FINAL.pdf) (recommending that disproportionate minority contact with the justice system should be addressed through state-level policy, statutory changes, additional funding, and the reduction of the harmful long-term effects of conviction).

<sup>62</sup> See Wis. Gov. Exec. Order No. 251 (May 2008), available at [https://docs.legis.wisconsin.gov/code/executive\\_orders/2003\\_jim\\_doyle/2008-251.pdf](https://docs.legis.wisconsin.gov/code/executive_orders/2003_jim_doyle/2008-251.pdf) (noting that the Commission on Reducing Racial Disparities in Wisconsin “was created to determine whether discrimination is built into the criminal justice system at each stage of the criminal justice continuum”).

<sup>63</sup> See *id.* (ordering the Commission “to exercise oversight and advocacy concerning programs and policies to reduce disparate treatment of people of color across the spectrum of the criminal justice system”). In early 2010, Governor Scott Walker disbanded the Commission as part of a broader austerity program. Alex Ebert, *State Cuts Poet Laureate Board; He'll Keep Job*, WISCONSINNEWS.COM, Mar. 8, 2011, 11:45 PM, [http://www.wiscnews.com/portagedailyregister/news/article\\_6d75a0bc-4a11-11e0-9255-001cc4c002e0.html](http://www.wiscnews.com/portagedailyregister/news/article_6d75a0bc-4a11-11e0-9255-001cc4c002e0.html).

<sup>64</sup> For general overviews of noncommission research on the relationship between race and sentencing, see JOHN H. KRAMER & JEFFERY T. ULMER, SENTENCING GUIDELINES: LESSONS FROM PENNSYLVANIA 90-101 (2009), which surveys research on Pennsylvania's sentencing disparities, and Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUSTICE 427, 429 (2000), which lists studies in this area.

<sup>65</sup> See MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 14 (2009), available at [http://www.msgc.state.mn.us/data\\_reports/jan\\_leg\\_report/leg\\_report\\_jan09.pdf](http://www.msgc.state.mn.us/data_reports/jan_leg_report/leg_report_jan09.pdf); Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUSTICE, Winter 2009, at 16, 17 (naming Iowa as the first state to pass a law mandating such considerations).

ing Commission has also studied the relationship between the federal guidelines and race.<sup>66</sup> The sentencing commissions in Maryland and North Carolina have both mounted comprehensive investigations into racial disparity and sentencing in the past,<sup>67</sup> though neither has returned to the issue in detail in recent years.<sup>68</sup> Depending on the institutional design of a state's sentencing commission, the commission may be the best-placed agency not only to investigate potential racial disparities in sentencing but also to apply what it learns to its future policy choices.

But more should be done. Given the critical role guidelines play in jurisdictions where they exist, it is crucial to understand the effect guidelines have on defendants of different races. Exploring this question falls within the statutory mandates of most sentencing commissions, as they are often charged with avoiding unwarranted

<sup>66</sup> See, e.g., U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT*'S MULTIVARIATE REGRESSION ANALYSIS 23 (2010) (analyzing the disparity in sentences between different racial and ethnic groups over time); U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 113-35 (2004) [hereinafter *FIFTEEN YEAR REVIEW*] (providing an in-depth analysis of the Guidelines' racially disparate effects and identifying the sentencing rules that create the most significant adverse impacts on African Americans). For a criticism of the Sentencing Commission's 2010 Report, see Jeffery T. Ulmer et. al, *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y 1077 (2011).

<sup>67</sup> See DEBORAH DAWES ET AL., N.C. SENTENCING & POL'Y ADVISORY COMM'N, SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS 4 (2002), available at [http://www.nccourts.org/courts/crs/councils/spac/documents/disparityreportforweb\\_060209.pdf](http://www.nccourts.org/courts/crs/councils/spac/documents/disparityreportforweb_060209.pdf) (attempting to establish the presence of sentencing disparities in North Carolina); CLAIRE SOURYAL & CHARLES WELLFORD, REPORT TO THE MARYLAND COMMISSION ON CRIMINAL SENTENCING POLICY, AN EXAMINATION OF UNWARRANTED SENTENCING DISPARITY UNDER MARYLAND'S VOLUNTARY SENTENCING GUIDELINES 9-22 (1997), available at [http://www.msccsp.org/Files/Reports/Souryal%20and%20Wellford%20\(1997\)%20An%20Examination%20of%20Unwarranted%20E2%80%A6.pdf](http://www.msccsp.org/Files/Reports/Souryal%20and%20Wellford%20(1997)%20An%20Examination%20of%20Unwarranted%20E2%80%A6.pdf) (evaluating the prevalence of racial disparities in sentencing in Maryland).

<sup>68</sup> North Carolina's commission does issue annual reports with sentencing statistics that include breakdowns based on race. See, e.g., AMY CRADDOCK & TAMARA FLINCHUM, N.C. SENTENCING & POL'Y ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2009/10, at 9 fig.D (2011), available at [http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt\\_fy09-10.pdf](http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy09-10.pdf). The most recent treatment of this issue by Maryland's Commission on Racial and Ethnic Fairness in the Judicial Process was in a 2004 study based on the experiences of actual litigants, witnesses, and jurors and their perceptions of bias in the criminal justice system, but the study did not focus on sentencing. REPORT OF THE MD. COMM'N ON RACIAL & ETHNIC FAIRNESS IN THE JUDICIAL PROCESS (2004), available at <http://www.courts.state.md.us/publications/raciaethnicfairness04.pdf>.

disparities.<sup>69</sup> These data will undoubtedly be enormously important to elected officials. If a legislator knows that a proposed sentencing law will disproportionately affect a particular group, he can consider alternatives that achieve the same goals without the disparate effects.

More research is also needed on the relationship between prosecutorial discretion, sentencing, and race. The work of the Vera Institute of Justice provides a helpful model. The Institute has been working with district attorneys in Milwaukee, San Diego, and Mecklenburg County, North Carolina as part of its Prosecution and Racial Justice initiative.<sup>70</sup> The pilot program uses statistical indicators and empirical evidence in an attempt to increase transparency and uniformity in prosecutors' charging decisions by alerting them when their offices' aggregate decisionmaking appears to exhibit racial or ethnic biases.<sup>71</sup>

The goal of all this research is to unearth the causes of the striking disparities we see in the population under penal supervision and understand how shifts in sentencing policy could ameliorate these disparities.

### III. WHEN POLITICS AND EXPERTISE CONFLICT

Although there will be many opportunities for commissions to use expert data in a way that influences political overseers, inevitably there will be conflicts. Legislative sentencing determinations are a mixed lot. Some determinations are the product of deliberation and consideration of relevant data. Others—perhaps most—are the product of political posturing based on little-to-no research.<sup>72</sup> The question for commissions is how this latter type of legislative judgment should affect the formulation of guidelines. Many times, the answer is clear because the legislature has left no role for the commission. This happens when

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<sup>69</sup> See, e.g., 28 U.S.C. § 991(b)(1)(B) (2006) (“The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct . . .” (emphasis added)).

<sup>70</sup> See *Prosecution and Racial Justice*, VERA INST. JUST., <http://www.vera.org/project/prosecution-and-racial-justice> (last visited Mar. 15, 2012) (describing a pilot program designed to identify evidence of racial or ethnic bias among district attorney's offices).

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., Brief of Amicus Curiae Center on the Administration of Criminal Law, New York University School of Law, Supporting Petitioners at 6-10, *Dorsey v. United States & United States v. Hill*, at \*5-10, Nos. 11-5683 & 11-5721 (consolidated) (U.S. Feb. 1, 2012), 2012 WL 362807 (detailing the absence of research to support Congress's decision to create the 100-to-1 crack/powder ratio in cocaine sentencing).

a legislature passes a statute demanding a particular guideline amendment or enacts a sentencing law that trumps a guideline.

In other situations, however, there may be a political judgment that is at odds with the commission's judgment. Then there is an open question for the commission to resolve: should the commission extend the political judgment into a related area or limit the political decision to its sphere and take it no further? In this context, the best approach for a commission—unless the legislative body explicitly orders otherwise—is to accept legislative judgments based on political factors but not to extend them further than the legislature commands if doing so would conflict with the commission's expert judgment.

The relationship between sentencing guidelines and mandatory minimum sentences set by legislatures without careful study provides a prime illustration of this point. If the mandatory minimum is not the product of careful study or research, then keying all guidelines to that minimum exacerbates the harms of a failure to reflect on the consequences and goes against an agency's mission to base its decisions on empirical information and studies.

The U.S. Sentencing Commission's treatment of mandatory minimums for drug crimes provides a cautionary tale. When the Commission developed its initial set of sentencing guideline ranges for drug trafficking, it incorporated statutory mandatory minimum sentences into the federal sentencing grid so that the trafficking guidelines, like mandatory minimum laws, were driven largely by the drug quantity involved.<sup>73</sup> Moreover, the sentences for all quantities have been set based on the sentences Congress selected for mandatory minimums.<sup>74</sup> Thus, offenses involving five or more grams of crack cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, which corresponded to a guideline range of 63-78 months for a defendant in the lowest criminal history category.<sup>75</sup> Likewise, drug offenses carrying a ten-year mandatory minimum penalty were assigned a base offense level of 32, which corresponded to a sentencing guideline range of 121-151 months for a defendant in the lowest criminal history category.<sup>76</sup>

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<sup>73</sup> See FIFTEEN YEAR REVIEW, *supra* note 66, at 15, 48-49 (noting that "statutory minimum penalties" drove drug trafficking guidelines and that the minimums were often "triggered" by the weight of the substance containing the drug, not just the amount of the pure drug found).

<sup>74</sup> *Id.* at 49.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



“[N]o other decision of the Commission,” the Commission has noted, “has had such a profound impact on the federal prison population.”<sup>77</sup> Indeed, this initial set of judgments accounts for much of the increase in the federal prison population and for a large measure of the racial disparities in its composition.<sup>78</sup> Judges have widely condemned these Guidelines as too harsh.<sup>79</sup> And yet the Commission has offered little to defend this choice. The Commission did not explain at the time this fundamental decision was made what was the motivating rationale.

So why did the Commission take this path? Most likely, it was trying to be respectful of its political overseers. Once Congress set these sentences, the Commission seems to have wanted to respect the role of mandatory minimums in the overall sentencing landscape and avoid “cliffs” in sentencing, where offenders find themselves with vastly different penalties depending on whether they reached the mandatory minimum threshold or fell just below it.<sup>80</sup> The discussion at one of its regional hearings suggested that the Commission might have taken this approach to comply with 28 U.S.C. § 994, which requires the Commission to issue guidelines “consistent with all pertinent provisions of any federal statute,” including mandatory minimum sentencing statutes.<sup>81</sup>

There are, however, several problems with the Commission’s decision to give mandatory minimum laws such a broad influence on the Federal Guidelines. First, a particular sentencing statute, such as a statute requiring mandatory minimums, is often at odds with other

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<sup>77</sup> *Id.*

<sup>78</sup> *See id.* at 76 (“Given that drug trafficking constitutes the largest offense group sentenced in the federal courts, the two-and-a-half time increase in their average prison term has been the single sentencing policy change having the greatest impact on prison populations.”); *see also id.* at 132 (“This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination.”).

<sup>79</sup> *See id.* at 52 (discussing a 2002 survey that found that 31% of district judges ranked “drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing” and that “73.7% of district court judges and 82.7[%] of circuit court judges rated drug punishments as greater than appropriate to reflect [their] seriousness”).

<sup>80</sup> *See id.* at 50. Another explanation posited in the Commission’s *Fifteen Year Review* is that the Commission imposed these mandatory minimums because the quantities are reasonable measures of harm. *See id.* at 49-50. But the report goes on to note, “Drug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making.” *Id.* at 50.

<sup>81</sup> 28 U.S.C. § 994(a) (2006).

general statutory commands that a commission must follow. This situation holds true for the U.S. Sentencing Commission, which is required under 28 U.S.C. § 991(b)(1)(A) to establish guidelines that meet the sentencing purposes set out in 18 U.S.C. § 3553(a)(2).<sup>82</sup> These purposes include providing punishments that “reflect the seriousness of the offense,” “promote respect for the law,” and “provide just punishment.”<sup>83</sup> The Commission would violate the command of § 3553(a)(2) by using mandatory minimums to set other sentences if those mandatory minimums did not fulfill one of the statute’s goals. This conclusion is consistent with § 994 because the Guidelines can set sentences tied to drug quantities without reference to mandatory minimums while emphasizing that relevant mandatory minimums will trump a different Guidelines sentence. Indeed, this is the only approach that reconciles § 3553(a)(2) and § 994, and it justifies any cliffs that this sentencing scheme would create.

Further these types of cliffs are hardly new to criminal law. At common law, the line between grand larceny and petit larceny rested on whether the value of the property stolen exceeded twelve pence.<sup>84</sup> If the stolen amount was above this threshold, the larceny was a capital offense. But stealing any amount below twelve pence received a punishment of only a forfeiture and a whipping.<sup>85</sup> A sentencing scheme in which applicable mandatory minimums would trump sentences otherwise set by guidelines would not create such dramatic differences in punishment. Moreover, any time the legislature opts to set mandatory penalties on the basis of bright-line thresholds, it anticipates that cliffs will result. Thus, there is no reason for commissions to focus on avoiding these disparities in sentencing at the expense of their expert judgments about where sentences should be set.

More fundamentally, although allowing mandatory minimums to trump guidelines sentences would create some disproportionate sentences, the alternative approach of keying sentences to mandatory minimums leads to even greater disproportionality<sup>86</sup> and undercuts the value of using empirical information and expertise to establish sentences. Neither solution results in perfect sentencing across the board, so the best a commission can do is create a sentencing regime that is based as much as possible on its expert judgment. In the case

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<sup>82</sup> See *id.* § 991(b)(1)(A).

<sup>83</sup> 18 U.S.C. § 3553(a)(2)(A).

<sup>84</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 335 (3d ed. 1982).

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* notes 73-79 and accompanying text.

of the U.S. Sentencing Commission, statutory commands make this preference for expertise explicit. The Commission's guidelines must "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."<sup>87</sup> The Commission cannot ignore its statutory mandate to create a just sentencing regime based on knowledge and expertise and simply accept Congress's view about the sentence for one particular offense as the appropriate baseline for every other similar offense.

Congress did not consult the Commission in setting its mandatory minimums, and it did not base them on "advancement in knowledge of human behavior."<sup>88</sup> While mandatory minimums are binding, Congress has never explicitly stated that these minimums were meant to replace the Commission's expertise in setting all other guidelines sentences for which there are no mandatory minimums. Congress's failure to provide a simple directive indicating otherwise suggests that it left the question of appropriate sentences for offenses without mandatory minimums to the Commission's judgment.

There are good reasons to adopt a presumption that limits statutes based on political judgments to their narrowest interpretation unless there is evidence to the contrary. First, because legislators obtain valuable information from commissions, narrow interpretations of legislative enactments allow legislatures to update their policies in light of a commission's conclusions. If, for instance, a commission's expert judgment reveals that drug sentencing should vary from the legislative mandatory minimums, the legislature may use that information to revise its own approach to sentencing. Under the U.S. Sentencing Commission's current approach, in contrast, the legislature would not receive that feedback because its mandatory minimums would be accepted and incorporated wholesale into the guideline structure without the Commission's independent analysis. This wide application of legislative judgments stifles dialogue between the Commission and the legislature and fails to capitalize on the value of the expert assessments.

The Supreme Court's decision in *Kimbrough v. United States*<sup>89</sup> lends further support to this view. In *Kimbrough*, the Supreme Court held that federal district judges could deviate from a guidelines sentence based on a policy disagreement with the disparate treatment of crack

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<sup>87</sup> 28 U.S.C. § 991(b)(1)(C).

<sup>88</sup> *Id.*

<sup>89</sup> 552 U.S. 85 (2007).

and powder cocaine.<sup>90</sup> In reaching this conclusion, the Court pointed to the Commission's own research disagreeing with the disparity.<sup>91</sup> The Court rejected the notion that federal statutes mandating minimum sentences that treated crack and powder differently "[i]mplicit[ly]' require[] the Commission and sentencing courts" to treat the drugs differently.<sup>92</sup> The Court observed that the "statute, by its terms, mandates only maximum and minimum sentences," but "says nothing about the appropriate sentences within these brackets."<sup>93</sup> Consistent with the argument here, the Court "decline[d] to read any implicit directive into that congressional silence," especially when "Congress has shown that it knows how to direct sentencing practices in express terms."<sup>94</sup>

The Court further intimated that the Guidelines merit greater respect when they are based on the Commission's institutional expertise than when they are not. Because the guidelines addressing crack and powder cocaine were not based on empirical data but were solely tied to the congressional mandatory minimums, the Court noted that variances from those guidelines would not amount to an abuse of discretion if a district court concluded that adhering to them would yield a sentence greater than necessary to achieve the purposes of sentencing laid out in 18 U.S.C. § 3553(a).<sup>95</sup> Some lower courts have agreed that guidelines based on expertise and empirical data deserve more respect than those that are not.<sup>96</sup> It is likely that regardless of the standard of

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<sup>90</sup> *Id.* at 110.

<sup>91</sup> *Id.* at 97-100 (citing Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,571-72 (May 21, 2007); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075-77 (May 10, 1995); U.S. SENTENCING COMM'N, *supra* note 37, at 8-10; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at iv, viii, 93-94, 96, 100-03 (2002); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997); and U.S. SENTENCING COMM'N, *supra* note 41, at 66-67, 174).

<sup>92</sup> *Id.* at 102 (first and second alterations in original) (quoting Brief for the United States at 32, *Kimbrough*, 552 U.S. 85 (No. 06-6330), 2007 WL 2461473, at \*32).

<sup>93</sup> *Id.* at 102-03.

<sup>94</sup> *Id.* at 103.

<sup>95</sup> *Id.* at 109-10.

<sup>96</sup> See, e.g., *United States v. Reyes-Hernandez*, 624 F.3d 405, 418 (7th Cir. 2010) ("Kimbrough instructs sentencing courts to give less deference" where the Commission is not acting "in its characteristic role," in which it typically implements guidelines only after taking into account 'empirical data and national experience.'" (quoting *Kim-brough*, 552 U.S. at 109)); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 150 (3d Cir. 2009) (expressing agreement with the First Circuit's interpretation of *Kim-brough* in *United States v. Rodriguez*); *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) ("[G]uidelines and policy statements [not based on empirical data and national experience] deserve less deference . . ." (citing *Kim-brough*, 552 U.S. at 109-10)). *But see*,

review, judges will have greater respect for guideline sentences grounded in empirical research than for those based on congressional decisions that rest on anecdotal cases instead of a comprehensive review of all relevant facts.

#### IV. THE LIMITS OF GUIDELINES

Having discussed the role of expertise in setting guidelines, it is important to note the limits of expertise itself when it comes to sentencing. Indeed, perhaps the greatest lesson to take away from the experience with the guidelines is that they can only do so much, even if they are grounded solely in expertise and are uncorrupted by pathological political dynamics. This Part discusses three important limits to any guidelines regime.

##### A. Guidelines Cannot Capture All Human Behavior

Any successful guidelines system must strike a balance between individualization and uniformity.<sup>97</sup> Put another way, guidelines should treat like cases alike but also acknowledge real differences. There is, at the risk of understatement, an inherent tension between these two goals.<sup>98</sup>

The guidelines movement grew out of dissatisfaction with discretionary and indeterminate sentencing regimes that focused too much on individualization and not enough on avoiding unjust disparities.<sup>99</sup>

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*e.g.*, United States v. Gonzales-Zotelo, 556 F.3d 736, 740-41 (9th Cir. 2009) (holding that *Kimbrough* authorized downward departures if the district court disagreed with the Commission's reasoning behind the Guidelines, not if the court disagreed with congressional policy).

<sup>97</sup> 28 U.S.C. § 991(b)(1)(B), for example, directs the U.S. Sentencing Commission to establish sentencing policies that

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B) (2006).

<sup>98</sup> See, *e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (explaining that “[s]ince the early days of the common law, the legal system has struggled to accommodate these twin objectives” of individualization and consistency).

<sup>99</sup> See FIFTEEN YEAR REVIEW, *supra* note 66, at xviii (citing the perceived unfairness of indeterminate sentencing as a factor behind the adoption of federal sentencing guidelines); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1202 (2005) (describing state sentencing guidelines as “always motivated at least in part by a desire to make sentencing more

Unfortunately, the movement's reaction against the prior regime often placed too much emphasis on uniformity and not enough on individualization.

Exhibit A for this obsessive focus on uniformity is the federal system. The federal system has concentrated almost exclusively on eliminating judicial discretion, too often resulting in the exclusion of remedies that are proportionally based on individual conduct. Congress bears primary responsibility for this lopsided approach. For example, the congressional "25 percent rule" provides that the maximum of a sentencing guidelines range for a term of imprisonment "shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months."<sup>100</sup> This law was meant to promote uniformity and restrict judicial discretion in sentencing.<sup>101</sup>

Congress further sought to limit judicial discretion to individualize sentences by enacting laws that trump the Guidelines. Mandatory minimum laws were the most significant measures aimed at curbing judicial discretion.<sup>102</sup> However, these mandatory minimums have not resulted in greater equality in sentencing because prosecutors retain unreviewable discretion as to whether or not they will charge an individual with an offense bearing a mandatory minimum sentence, a point that the Commission itself has noted.<sup>103</sup> When prosecutors do elect to charge defendants with offenses carrying mandatory minimums, they prevent judges from sentencing defendants proportionately based on individualized factors. Congress has enacted other statutes, like the

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uniform and to eliminate unwarranted disparities"). *See generally* MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973) (describing judicial discretion in sentencing as "terrifying and intolerable").

<sup>100</sup> 28 U.S.C. § 994(b)(2).

<sup>101</sup> *See* S. REP. NO. 98-225, at 168-69 (1983); *see also* U.S. Sentencing Comm'n, *The Sentencing Reform Act of 1984: Principal Features* (Nov. 1996) (unpublished Simplification Draft Paper), available at [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Simplification/SRA.HTM](http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SRA.HTM) (reviewing how the Sentencing Commission has interpreted the 25 percent rule, and considering alternative readings to ensure fairness but to permit some discretion).

<sup>102</sup> *See* U.S. SENTENCING COMM'N, *SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8-9* (1991) (tracking the evolution of mandatory minimum laws in the context of the Guidelines).

<sup>103</sup> *See id.* at 89 ("[D]efendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon race, circuit, and prosecutorial practices . . .").

PROTECT Act,<sup>104</sup> that similarly limit judicial discretion to sentence based on individualized factors.

When they were mandatory, the Guidelines themselves prevented judges from achieving proportional punishments in many cases because they dramatically limited the grounds on which judges could depart from the guidelines. Since the Supreme Court's decision in *Booker*,<sup>105</sup> however, the federal system has placed more emphasis on individualizing sentences.<sup>106</sup> *Booker* gives judges some room to adjust sentences based on relevant individual differences in setting punishments by allowing them to deviate from the Guidelines to achieve the purposes of sentencing in 18 U.S.C. § 3553(a).

It is noteworthy that rates of within-guidelines sentences are roughly comparable throughout the country, regardless of whether the guidelines are mandatory or advisory, with most states seeing compliance rates around eighty percent.<sup>107</sup> The post-*Booker* experience in the federal system is consistent with this overall trend.<sup>108</sup> This con-

<sup>104</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, 42, and 47 U.S.C.).

<sup>105</sup> United States v. Booker, 543 U.S. 220 (2005).

<sup>106</sup> See D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 98 (2007) ("*Booker* has clearly wrought a new era in sentencing. Federal judges . . . again retain discretion to sentence individual offenders based on individual determinations."); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 17 & fig.2 (2010) (noting a gradual but marked increase in the percentage of federal sentences falling outside the Guideline ranges).

<sup>107</sup> See Ronald F. Wright, Professor of Law & Assoc. Dean for Academic Affairs, Wake Forest Univ. School of Law, Statement Before the U.S. Sentencing Commission, Regional Hearings Marking the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984: The Power of Information Versus the Power of Enforcement, at 6-7 (Feb. 11, 2009), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090210-11/Wright\\_statement.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Wright_statement.pdf) (noting that guidance compliance rates for Pennsylvania, North Carolina, and Minnesota guidelines hovered around seventy-five percent despite dramatic differences in their legal force). States with purely advisory guidelines report similar compliance rates. See, e.g., VA. CRIMINAL SENTENCING COMM'N, 2008 ANNUAL REPORT 16 fig.2 (2008), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/\\$file/RD415.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf) (showing that Virginia's advisory guidelines have a compliance rate of 79.8%); Nat'l Ass'n of Sentencing Comm'ns, *Maryland*, SENTENCING GUIDELINE, Feb. 2009, at 7, available at [http://thenasc.org/images/2009\\_February\\_Issue.pdf](http://thenasc.org/images/2009_February_Issue.pdf) (reporting that Maryland's advisory guidelines have a compliance rate of approximately 80%, based on data from fiscal year 2008); David Oldfield, Mo. Sentencing Advisory Comm'n, Using the New Sentencing Tools 5 (June 26, 2006), available at <http://www.mosac.mo.gov/file.jsp?id=45415> (reporting Missouri's 81.9% compliance rate with its advisory guidelines).

<sup>108</sup> The Commission's most recent quarterly report shows that judges are sentencing outside the guideline range without a government motion in 17.5% of cases. U.S.

sistency in the proportion of cases sentenced within guidelines and those sentenced outside of them reflects the fact that while there is a core of cases that guidelines can capture, there remains a substantial minority of cases that do not fit the grid. That the numbers are consistent across varied jurisdictions suggests that there is a strong pull for individualizing sentences.

The U.S. Sentencing Commission recently recognized this dynamic when it relaxed the limits on considering individual circumstances in sentencing. Before 2010, a defendant's age, mental and emotional conditions, physical condition, and military service were deemed "not ordinarily relevant."<sup>109</sup> Now the Commission's policy statement provides that these factors "may be relevant" in determining whether a departure is permitted if these factors are "present to an unusual degree and distinguish the case from the typical cases."<sup>110</sup> This shift was in many ways a product of judges' reliance on these individualized factors in the wake of *Booker* and of the Commission taking notice of the fact that these factors could be relevant in finding meaningful distinctions between cases.

It is, of course, hard to know where to strike the balance between individualization and uniformity. But a main lesson of the guidelines is that expertise only goes so far in identifying where that line should be drawn.

### B. *Acknowledging the Power of Prosecutors*

Discretion in the criminal justice system does not disappear simply because judges are subject to greater control. On the contrary, placing greater limits on judges has led to other actors gaining power. This is the story of sentencing reform: as judges and parole officials have lost discretion, prosecutors have gained it. Once again, the federal story offers the lesson through a negative example. As Professor

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SENTENCING COMM'N PRELIMINARY QUARTERLY DATA REPORT: 1ST QUARTER RELEASE 1 tbl.1 (2012) [hereinafter 2012 QUARTERLY DATA REPORT], available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2012\\_1st\\_Quarter\\_Report.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_1st_Quarter_Report.pdf)

<sup>109</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2009); see also *id.* §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11.

<sup>110</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2011); see also *id.* §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11.



Kate Stith has persuasively detailed, federal prosecutors have gained tremendous power since the Guidelines were adopted.<sup>111</sup>

Prosecutorial influence goes far beyond just the plea power. Federal prosecutors have enormous formal powers under the Guidelines through their ability to file substantial-assistance motions that lead to sentence reductions.<sup>112</sup> Government-sponsored motions are the primary reason sentences are set below the Guidelines. This occurs in roughly 26.4% of all cases.<sup>113</sup> This dwarfs all other bases for downward departures, which together amount to 17.5% of all cases.<sup>114</sup>

The Department of Justice often points to the Commission's statistics on sentences imposed within the Guideline range when expressing concern with the post-*Booker* disparities.<sup>115</sup> In a recent speech, Assistant Attorney General Lanny Breuer noted that "since the *Booker* decision, judges have increasingly been sentencing defendants to prison sentences outside the ranges prescribed by the guidelines."<sup>116</sup> As an example, he pointed to the wide disparity between the Southern and Western Districts of Texas, where 71.5% of federal sentences in fiscal year 2010 fell within the Guidelines ranges, and the Southern District of New York, where only 32.6% did.<sup>117</sup> "[M]ore and more," Breuer said, "the length of a defendant's sentence depends primarily on the identity of the judge assigned to the case, and the district in which he or she is in."<sup>118</sup> He went on to note the Commission's finding that racial and ethnic sentencing disparities increased in the wake of *Booker*.<sup>119</sup>

<sup>111</sup> See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1425 (2008) (arguing that the Guidelines "provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines").

<sup>112</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

<sup>113</sup> 2012 QUARTERLY DATA REPORT, *supra* note 108, at 1 tbl.1.

<sup>114</sup> *Id.*

<sup>115</sup> See, e.g., Holder Speech, *supra* note 43 ("The percentage of defendants sentenced within the guidelines has decreased [since *Booker*].").

<sup>116</sup> Lanny A. Breuer, Assistant Att'y Gen., Speech at the American Lawyer/National Law Journal Summit (Nov. 15, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111115.html>.

<sup>117</sup> *Id.*; see also U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 SOUTHERN DISTRICT OF TEXAS 11 tbl. 8 (2010); U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 WESTERN DISTRICT OF TEXAS 11 tbl. 8 (2010); U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 SOUTHERN DISTRICT OF NEW YORK 11 tbl. 8 (2010).

<sup>118</sup> Breuer, *supra* note 116.

<sup>119</sup> See U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 2 (2010), available at [http://www.ussc.gov/Research/Research\\_Publications/](http://www.ussc.gov/Research/Research_Publications/)

However, government officials almost invariably overlook the fact that the vast majority of sentences outside the Guideline range are given at the government's request—because of either the government's fast-track policy or a prosecutor's substantial assistance motion, or for some other reason.

It is therefore simplistic and potentially misleading to suggest there is a problem with judicial discretion based on departure rates without looking into the impetus for those departures. For example, in the districts compared by Lanny Breuer, government-sponsored motions produce the greatest disparity.<sup>120</sup> In addition, districts cannot be meaningfully compared without accounting for differences in the cases that arise in different geographic areas. In the Southern and Western Districts of Texas, roughly 75% of the federal docket consists of low-level immigration and marijuana smuggling—cases where the sentences are relatively low under the guidelines and therefore judges feel no need to depart. The Southern District of New York, in contrast, has a large number of cases on the docket involving long guideline sentences for drug offenses because of the quantity involved that take little account of a defendant's personal culpability.<sup>121</sup> Prosecutors in these districts are therefore bringing different types of cases and filing different departure motions at different rates.

These statistics illustrate the breadth of prosecutorial discretion under the Guidelines. Prosecutors have broad power to dictate sentencing outcomes because they can determine how to charge an individual without facing judicial review of that decision.<sup>122</sup> Federal prosecutors are also the gatekeepers of key departure motions and therefore have additional power to determine whether an individual's sentence should deviate from the Guidelines. Substantial assistance motions are the most common reason for a defendant to receive a sentence outside the Guidelines. Moreover, on average, judges will de-

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2010/20100311\_Multivariate\_Regression\_Analysis\_Report.pdf ("Black male offenders received longer sentences than white male offenders. The differences in sentence length have increased steadily since *Booker*.").

<sup>120</sup> Letter from David E. Patton, Exec. Dir., Fed. Defenders of N.Y., Inc., et al., to Lanny A. Breuer, Assistant Att'y Gen., U.S. Dept. of Justice 2 (Nov. 22, 2011), available at <http://sentencing.typepad.com/files/letter-to-lanny-breuer-from-defenders.pdf>.

<sup>121</sup> *Id.* at 2-3.

<sup>122</sup> See FIFTEEN YEAR REVIEW, *supra* note 66, at 85-92 (discussing presentencing techniques used by prosecutors that affect sentencing, such as charging decisions, plea bargaining, and fact bargaining); Stith, *supra* note 111, at 1430 ("[T]he prosecutor, through her discretionary charging authority, effectively determines what the defendant's Guidelines sentencing range will be.").

part from the Guidelines to a “far greater” extent for substantial assistance motions than they will for other reasons.<sup>123</sup> Thus, whether a prosecutor views a defendant as sufficiently cooperative remains the number one basis by which a court distinguishes two defendants guilty of the same crime, and a favorable determination will more likely result in a greater departure from the Guidelines than any other reason.

Yet neither Congress nor the Commission has established guidelines for how prosecutors should assess cooperation for the purposes of sentencing discounts. In fact, all of the evidence suggests that districts differ greatly as to how they evaluate this factor and how they discount sentences for defendants who have provided substantial assistance to prosecutors. Some evidence also suggests that these district-level decisions may be influenced by race and gender—factors that should be irrelevant to the cooperation inquiry.<sup>124</sup> The fast-track program also differs by region,<sup>125</sup> and it too is a common basis for distinguishing among otherwise similarly situated defendants.

As long as guidelines apply only to judges, they will never resolve the disparity in the system and in fact may end up exacerbating the disparity by failing to provide a valuable check on prosecutors. This

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<sup>123</sup> See FIFTEEN YEAR REVIEW, *supra* note 66, at 102-03 (conducting an analysis of sentences imposed in 2001 and noting that “[t]he mean departure length for substantial assistance was 43 months . . . while the mean departure length for other downward departures was just 20 months”).

<sup>124</sup> See LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM’N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 13-14 & exhibit 9 (1998), available at [http://www.usc.gov/Research/Research\\_Publications/Substantial\\_Assistance/199801\\_5K\\_Report.pdf](http://www.usc.gov/Research/Research_Publications/Substantial_Assistance/199801_5K_Report.pdf) (illustrating that nonminorities and women are more likely to receive substantial assistance motions than racial or ethnic minorities and men); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 900 (2009) (discussing evidence that “personal characteristics” affect prosecutors’ decisions about which defendants receive substantial assistance motions). *But see* FIFTEEN YEAR REVIEW, *supra* note 66, at 105 (discussing a reevaluation of the Maxfield & Kramer data that calls into question their findings regarding the role of race and gender).

<sup>125</sup> Alison Siegler, Observations, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT’G REP. 299, 299-301 (2009) (describing both the regional disparities that result from fast-track sentencing and a circuit split over judges’ authority to reduce this disparity); Memorandum from James M. Cole, Deputy U.S. Att’y Gen., on Department Policy on Early Disposition or “Fast-Track” Programs 2 (Jan. 31, 2012), available at <http://www.justice.gov/dag/fast-track-program.pdf> (“The existence of these programs in some, but not all, districts has generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced.”). In January 2012, the Department of Justice started requiring all districts to offer fast-track programs and implemented “uniform, baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted.” *Id.*

need for prosecutorial checks is another key lesson illustrating the limitations of guidelines.

### C. *Respecting the Role of the Jury*

The Supreme Court has emphasized the jury's central relationship to sentencing since its decision in *Apprendi*.<sup>126</sup> However, its jurisprudence has thus far failed to address one of the starkest threats to the jury's role: sentencing guidelines that require judges to increase sentences on the basis of conduct for which the defendant has been acquitted. Only the Federal Guidelines take this approach, and the Sentencing Commission implemented it without a directive from Congress.

Congress has never specified—either in the Sentencing Reform Act or anywhere else—whether the Guidelines should follow a sentencing model that uses “real” offenses or “charge” offenses. A charge offense system bases the defendant's punishment on the charges for which he was convicted.<sup>127</sup> A real offense sentencing scheme looks to the defendant's actual conduct and is not limited to conduct that the jury finds to be criminal.<sup>128</sup> The original Sentencing Commission adopted a real offense sentencing model for the Guidelines. Therefore, many factors, not just the charged offenses, determine an individual's sentence. Relevant conduct that was not charged—or even relevant conduct that forms the basis of a charge of which the defendant was acquitted—can determine the Guidelines base offense level and can increase the sentence through upward adjustments and departures. In fact, in many cases relevant conduct can outweigh the charged offense in determining the defendant's sentence.<sup>129</sup>

For relevant conduct to have a bearing on the defendant's sentence, the prosecutor need only prove that conduct by a preponder-

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<sup>126</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>127</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988).

<sup>128</sup> *Id.* at 10 (noting that a real offense system “bases punishment on the elements of the specific circumstances of the case”).

<sup>129</sup> See Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 FED. SENT'G REP. 16, 18 (1997) (relating the results of an empirical study on the vastly different sentencing ranges that can result from “relevant conduct” considerations); Jon M. Sands & Cynthia A. Coates, *The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines*, 23 ARIZ. ST. L.J. 61, 71-72 (1991) (describing the importance of relevant conduct in federal sentencing and finding that most courts have held that “any criminal conduct alleged should be factored into the sentence”).

ance of the evidence, even if a jury has already examined the evidence and acquitted the defendant of a charge based on that conduct. If the prosecutor meets this burden, the Guidelines instruct judges to increase the defendant's sentence on that basis, regardless of what happened at trial.<sup>130</sup> This instruction can substantially change a defendant's case. For example, the defendant in *United States v. Manor* was charged with one count of conspiracy to distribute 250 grams of cocaine and other distribution counts involving an additional 19 grams.<sup>131</sup> The jury acquitted him on the conspiracy count but convicted him on the intent to distribute 19 grams.<sup>132</sup> The sentencing judge found that the conspiracy to distribute 250 grams was relevant conduct, a finding that tripled the defendant's sentence exposure.<sup>133</sup> The jury's acquittal had no effect because the defendant faced the same punishment range as he would have had he been convicted of the conspiracy charge.

Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury. Under our Constitution, it is the defendant's right to have a jury definitively decide, beyond a reasonable doubt, whether or not he is guilty of a crime. When the law instructs a judge to override a jury acquittal based on the judge's own findings, it undermines both the effort jurors put into evaluating cases and the defendant's constitutional rights. Thus, even before the Court's *Apprendi/Booker* line of cases, judges and scholars criticized the Commission's decision to use acquitted conduct to set sentencing ranges.<sup>134</sup>

In *Booker*, the Court found that the Guidelines' mandate to use relevant conduct in sentencing proceedings violated the Constitution's

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<sup>130</sup> See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1325 (2005) (explaining how the relevant conduct inquiry requires judges to consider a defendant's "uncharged, dismissed, and sometimes even acquitted conduct"). See generally William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990) (providing an overview of the rationale behind the relevant conduct rules and describing their practical application).

<sup>131</sup> 936 F.2d 1238, 1242 (11th Cir. 1991).

<sup>132</sup> *Id.*

<sup>133</sup> See *id.* (explaining that the district court's consideration of the conspiracy claim increased the defendant's "base offense level from 12 to 20").

<sup>134</sup> See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 94 (2003) (discussing judges and commentators who have criticized the real offense sentencing scheme).

Sixth Amendment jury guarantee.<sup>135</sup> Thus, the Court ruled that judicial consideration of the Sentencing Guidelines would be advisory rather than mandatory.<sup>136</sup> However, *Booker* did not eliminate the consideration of acquitted conduct in determining defendants' sentences. Thus, the Guidelines preserve the problem of acquitted conduct increasing sentences. Advising judges to increase a sentence on the basis of relevant conduct, even when a jury acquitted a defendant of that conduct, may no longer violate the Constitution in fact,<sup>137</sup> but it stands in sharp tension with the jury's constitutional role because judges continue to comply with the Guidelines,<sup>138</sup> and the Guidelines continue to instruct judges to consider relevant conduct in sentencing.<sup>139</sup>

Congress did not command this result, nor is there any evidence in the Sentencing Reform Act's legislative history that suggests Congress even intended this outcome. Instructing judges to consider "real" conduct was a discretionary decision by one set of Commission members who seemed to believe that Guidelines could and should occupy the entire field.<sup>140</sup>

Other commissions have taken a more modest view of how far guidelines should sweep. More than a third of all states now have some form of guidelines, most of which were passed after the federal guidelines.<sup>141</sup> No state has followed the federal approach to real offense sentencing. States have achieved all the same successes with guidelines as the federal system, but without substantially intruding on the jury's function. As in the federal system, states have been able to increase the predictability and uniformity of their sentencing through guide-

<sup>135</sup> See 543 U.S. 220, 245 (2005) ("[T]he provision of the federal sentencing statute that makes the Guidelines mandatory . . . [is] incompatible with today's constitutional holding.").

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *United States v. Watts*, 519 U.S. 148, 154 (1997) ("[W]e are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."); *Witte v. United States*, 515 U.S. 389, 406 (1995) (upholding the use of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range).

<sup>138</sup> See *supra* notes 107-08 and accompanying text.

<sup>139</sup> See, e.g., *United States v. Waltower*, 643 F.3d 572, 577 (7th Cir. 2011) (upholding, once again, the constitutionality of considering acquitted conduct for sentencing and noting that every circuit to consider the question has ruled the same way).

<sup>140</sup> See Breyer, *supra* note 127, at 8-12 (describing the decisionmaking process behind the Commission's choice of a modified "real offense" system).

<sup>141</sup> See Barkow & O'Neill, *supra* note 1, at 1994 tbl.1 (listing eighteen states that use sentencing guidelines and their dates of adoption). Alabama joined the list when its sentencing guidelines went into effect in October 2006. Act of Apr. 5, 2006, No. 2006-312, § 2, 2006 Ala. Acts 663 (codified at ALA. CODE § 12-25-34.1 (2006)).

lines. There is no evidence that any state's failure to mandate the consideration of a defendant's acquitted conduct has led to increased crime rates. Furthermore, many states have experienced decreases in their incarceration rates since they passed their guidelines.<sup>142</sup>

The states' experiences thus show that a real offense sentencing scheme is not necessary for maintaining low crime and incarceration rates. The Commission's rationale that broadly worded federal criminal laws lack sufficient detail to form the basis for a charge offense system<sup>143</sup> may support the use of uncharged conduct in general, but it fails to support the use of acquitted conduct to increase sentences.

The Commission's other rationale for adopting the modified real offense system also fails to excuse the Guidelines' use of a defendant's acquitted conduct. The Commission justified this approach by arguing that a real offense sentencing scheme would curb the ability of prosecutors to manipulate sentences through their decisions on charging and their power to hide facts relevant to the case.<sup>144</sup> But that justification does not account for the Guidelines' use of acquitted conduct because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already. If anything, the ability to use acquitted conduct bolsters the power of prosecutors in this framework because it allows them to increase sentences after trials have taken place, using a lower standard of proof and without deferring to the rules of evidence. The use of acquitted conduct also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense.

Again, the lesson is that guidelines have limits and other actors must be considered. In our constitutional system, the jury occupies a place of prominence, and guidelines should respect its role.

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<sup>142</sup> See Barkow & O'Neill, *supra* note 1, at 2009 (explaining that "sentencing commissions act to curb growth rates of incarceration").

<sup>143</sup> See, e.g., FIFTEEN YEAR REVIEW, *supra* note 66, at 25 ("[T]he statute-defined elements of many federal crimes fail to provide sufficient detail about the *manner* in which the crime was committed to permit individualized sentences that reflect the varying seriousness of different violations.").

<sup>144</sup> See *id.* ("[T]he Commission remained concerned that the charges to which defendants were subject would continue to depend to some extent on which prosecutors were assigned to each case or in which district the offense was prosecuted, leading to unwarranted sentencing disparity.").

## CONCLUSION

The future of sentencing guidelines may depend on variables as diverse as the strength of the economy, appointments to the Supreme Court, and fluctuations in crime rates. But if we have learned anything from our experience thus far with guidelines, it is that the future will also continue to present to any sentencing authority the tension between expert assessments based on data and empirical facts, and political judgments based on popular will. This Article seeks to make some modest suggestions for navigating that divide based on what we know so far.