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On January 12, 2005, the Supreme Court held in *United States v. Booker* that Federal Sentencing Guidelines violate the Sixth Amendment jury-trial right, and thereafter judges must only consider the Guidelines as advisory.[1] *Booker* therefore ended the eighteen-year era of mandatory Federal Sentencing Guidelines, in which judges were required to "plot" convicted criminals along an official Guideline table and then assign a sentence as specified in the appropriate "cell." The Supreme Court's gutting of legislatively-authorized mandatory sentencing guidelines – seen first in *Blakely's* 2004 holding against the constitutionality of Washington State's Sentencing Guidelines[2] and then in *Booker's* 2005 holding against Federal Sentencing

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1. United States v. Booker, 543 U.S. 220, 226-27 (2005).
2. Blakely v. Washington, 542 U.S. 296, 305 (2004).

Guidelines[3] – has prompted frenzied debates about the future of criminal sentencing. Former Supreme Court Justice Sandra Day O'Connor called *Blakely* a "No. 10 earthquake,"[4] political scientist Frank O. Bowman III characterized *Blakely* as a "train wreck,"[5] and the legal scholar Douglas A. Berman called *Blakely* and *Booker* "blockbuster rulings" that may be "the most consequential and important criminal justice decision[s] not just in recent terms, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court."[6] In contrast, Representative Maxine Waters (D-California) categorized *Booker* as "not a big issue." For Representative Waters, a member of the Congressional Black Caucus and the Subcommittee on Crime, Terrorism and Homeland Security, *Booker* was "not the major issue," especially for "those of us who understand what racism and discrimination are all about."[7]

With *Booker* alternately described as an earthquake, a train wreck, and not a big deal, this article considers the Supreme Court's ending to mandatory Sentencing Guidelines by reconsidering Congress's initiation of mandatory Sentencing Guidelines. Congress mandated the creation of Sentencing Guidelines with the Sentencing Reform Act of 1984,[8] but this article argues that members of Congress set the agenda for censuring judges at least three decades earlier. In the mid-1950s,

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3. *Booker*, 543 U.S. at 226-27.

4. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 54 (2005). Douglas A. Berman also characterizes *Blakely* as a legal earthquake shaking the foundation of structured sentencing reform. *Go Slow: A Recommendation for Responding to* Blakely v. Washington *in the Federal System Before the Senate Committee on the Judiciary* (July 13, 2004) (written testimony of Douglas A. Berman).

5. Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 217 (2004).

6. Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 41 (2005).

7. *Implications of the* Booker/Fanfan *Decisions for the Federal Sentencing Guidelines Before the Subcommittee on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 54 (2005). [hereinafter *Implications of the* Booker/Fanfan *Decisions*] Representative Waters argues that the controversy around *Booker* is ultimately far less important than mandatory minimum statutes and their disproportionate impact on African Americans.

8. 18 U.S.C. § 3559(c) (2000).

southern Democrats and Republicans launched politically prominent attacks on judges, denouncing judges as activist, tyrannical, elitist, out of touch with American values, and sympathetic to subversive groups. Indeed, since the Supreme Court's 1954 decision in *Brown v. Board of Education*,[9] national leaders have exploited the political profitability of judging judges. In 1954, southern Democrats and Republicans denounced judicial lenience in terms of lenience in loosening the racial order of Jim Crow; in 1984, that same demographic of members of Congress denounced judicial lenience in terms of lenience in criminal sentencing. In short, political resistance to judicial discretion in *Brown* shaped the agenda, rhetoric, and coalition of Congress's subsequent attacks on judicial discretion in criminal sentencing.

This article identifies the racial antecedents to Sentencing Guidelines over two sections. Section I situates Sentencing Guidelines within the broader sentencing revolution, and questions the standard account of what sparked the sentencing revolution. It has become almost conventional wisdom that Sentencing Guidelines were borne of a transformation of ideals, in which judicial discretion collapsed with the collapse of the rehabilitative ideal. In contrast, this section argues that Sentencing Guidelines were part of larger Congressional attacks on judges, and, moreover, Congressional attacks on judicial discretion were borne of political profitability linked to racial anxiety, not just disrupted ideals.

Section II reconsiders how Congress passed the Sentencing Reform Act. Rather than offering a traditional legislative history, this section identifies how pivotal members of Congress constructed and attacked the racially liberal judge. The two central conservative supporters of sentencing reform, Senators John McClellan and Strom Thurmond, attacked racial liberalization after *Brown* to the tune of three anti-judge themes: judges abuse power, judges wrongly employ sociological reasoning, and judges underestimate the need for stern discipline with blacks. Like other southern Democrats and Republicans, Senators McClellan and Thurmond echoed these themes in supporting sentencing reform and punitive crime policy. In simple terms, the political roots of the revolution in criminal sentencing can be

9. 349 U.S. 294 (1955).

found in neither crime nor sentencing; rather, the antecedents to the Federal Sentencing Guidelines are found in the longstanding legacy of attacking racially liberal judges. The arc of Congressional politics from *Brown* to *Booker* therefore underscores the necessity of following Representative Waters's directive: to understand sentencing reform, we must "understand what racism and discrimination are all about."[10]

I. THE SENTENCING REVOLUTION AS A REVOLUTION OF IDEALS?

From the nation's founding through the first three-quarters of the twentieth century, Congress and state legislatures rarely interfered with judicial control over criminal sentencing. With limited legislative oversight, judges decided the nature and length of punishment, constrained only by statutory maximum sentences and a handful of mandatory minimum sentences. Parole boards similarly held broad discretion in determining ultimate release dates, with prisoners usually eligible for release after serving one-third of the maximum sentence.[11] This section examines why Congress and state legislatures began hamstringing judicial discretion after such a long tradition of legislative laissez-faire.

Scholars of Sentencing Guidelines often explain the sentencing revolution as a revolution sparked by disrupted ideals. The important scholarship of Douglas A. Berman highlights how the sentencing revolution suffers from conceptual underdevelopment, and why he therefore seeks to "bring greater conceptual order to a field that now seems so disorderly."[12] Berman suggests that sentencing during the era of vast judicial discretion held philosophical coherence because it was "formally and fully conceptualized around the 'rehabilitative ideal.'"[13] Under this ideal, trial judges and parole officials held broad discretion "to allow sentences to be tailored to the rehabilitation prospects and progress of each individual offender."[14] Kate Stith and Jose A. Cabranes similarly argue that the longstanding tradition of sentencing flexibility reposes on the rehabilitative ideal, complicated by some uncertainty of the purposes of

10. *Implications of the* Booker/Fanfan *Decisions*, *supra* note 7.
11. MICHAEL TONRY, SENTENCING MATTERS 4-6 (1996).
12. Berman, *supra* note 6, at 2.
13. *Id.*
14. *Id.* at 3.

sentencing.[15] In these accounts, the rehabilitative ideal cemented the protocol of broad judicial discretion. And consequently, judicial discretion went adrift with the decay of the rehabilitative ideal. The sentencing revolution is therefore a "conceptual anti-movement," premised on the repudiation of rehabilitation and the elimination of sentencing disparities.[16]

Portrayed as a battle of ideas, the declining rehabilitative ideal of the 1970s is attributed to new research from experts and new statements from judges. Scholarship mattered. In 1974, Robert Martinson surveyed 231 studies of penal rehabilitation from 1945 to 1967 and found discouraging results.[17] Martinson's study was widely cited with the cynical synopsis "nothing works." In 1975, James Q. Wilson criticized the rehabilitative model as a symptom of failed social liberalism and lenience, and he therefore proposed fixed-term punishments.[18] In 1976, two major reports both proposed the end of indeterminate sentencing laws, restrictions on parole, and fixed-term sanctions geared to the offense and not the offender.[19] Scholars of sentencing reform cite this scholarship as centrally important to the declining rehabilitative ideal of the 1970s.[20]

Alongside scholars, judges were also pivotal in the ideational

15. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 14 (1998). Stith and Cabranes offer a deep genealogy of ideals by tracing the 1970s impulse for certainty and uniformity to Enlightenment ideals. One of the most prominent Enlightenment thinkers on punishment, Cesare Beccaria, argued that deterrence was best served by legislatures proscribing each offense and its corresponding penalty. In this impressive lineage of ideals, Stith and Cabranes show that "like Beccaria in the eighteenth century, the federal Sentencing Guidelines today seek to replace the discretionary power of judges with an elaborate, less intuitive, and more scientific system for the elaboration of penal sanctions." *Id.* at 11-13.

16. Berman, *supra* note 6, at 10-11.

17. Robert Martinson, *What Works? – Questions and Answers About Prison Reform,* 35 THE PUBLIC INTEREST 22, 24-25, 48 (1974).

18. *See* JAMES Q. WILSON, THINKING ABOUT CRIME 170-71 (1975).

19. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS – REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976); TWENTIETH CENTURY FUND TASK FORCE, FAIR AND CERTAIN PUNISHMENT (1976).

20. For example, Douglas Berman highlights most of the above scholars as central to the declining rehabilitative ideal. Berman, *supra* note 6, at 8. Michael Tonry also identifies these scholars as central to the end of broad judicial discretion. TONRY, *supra* note 11, at 9.

move away from discretionary rehabilitation. In his 1973 book, Judge Marvin E. Frankel proposed limiting judicial discretion to end "justice without law."[21] After fifteen years as a U.S. District Judge, Frankel rejected unfettered judicial discretion as antithetical to the rule of law, and proposed the creation of an administrative "Commission on Sentencing" that would enact "binding guides" on courts. [22] Senator Edward M. Kennedy, the chief sponsor of the Sentencing Reform Act of 1984, called Frankel "the father of sentencing reform," and scholars of sentencing reform echo the expression as a measure of how ideas mattered.[23]

In short, the commonplace and commonsense explanation for the sentencing revolution suggests the following causal chain. Scholars and judges razed the rehabilitative ideal through the 1970s. Senator Edward Kennedy's subsequent sustained campaign for sentencing reform, initiated in 1975, put sentencing on the congressional agenda. Therefore the initial transformation of ideals caused congressional intervention.

Though intuitive, the ideals-centered account has several problems. The sociologist David Garland proffers a compelling three-point critique. First, research contesting the viability and value of rehabilitation has been widespread since the 1930s, and therefore research of the 1970s carries no unique transformative power. Second, research findings in the mid-1970s offered no definitive pronouncements of the failure of rehabilitation. Even though Martinson's study incurred the summary "nothing works," the study actually shows that some things do work, and Martinson later reformulated his claims to offer a far more optimistic account of rehabilitation.[24] Third, challenges to the rehabilitative ideal could have been met with reasonable defenses, such as the claim that rehabilitation programs are under-funded, under-staffed, and undermined by the punitive context of prison.[25] In the vast battle of ideals, Garland makes a compelling case that critiques of

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21. MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 122 (1973).

22. *Id.* at 122, 123.

23. *See, e.g.*, STITH AND CABRANES, *supra* note 15, at 35-36; Berman, *supra* note 6, at 9; TONRY, *supra* note 11, at 9-10, 12-13, 24-26.

24. Robert Martsinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

25. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 63, 65 (2001).

rehabilitation were neither new, nor unequivocal, nor irrefutable in the 1970s.

More fundamentally, it was Congress and state legislatures, not disembodied ideals, that ultimately promulgated the sentencing revolution. Critiques of the rehabilitative ideal were not new to the 1970s, but massive legislative activism in curtailing judicial discretion was. In the last third of the twentieth century, legislatures undercut judicial discretion with unprecedented passage of mandatory minimums, three-strikes, and sentencing guidelines. During this period, Congress and all state legislatures passed new mandatory minimums, in which the legislative statute rather than the trial judge sets the minimum sentence length. Most state legislatures have passed mandatory minimums for repeat offenders (40 states), for crimes committed using a deadly weapon (38 states and the District of Columbia), for drug possession or trafficking (36 states and the District of Columbia), and for drunk driving (31 states).[26] Congress has passed mandatory minimum statutes for all of these offenses and then some. Three-strikes laws are a similarly popular legislative constraint on judicial discretion. Washington enacted the first three-strikes law in 1993, Congress followed suit in 1994, and another 23 states had adopted two- and three-strikes laws by 1996.[27] With sentencing guidelines, legislatures charge an extra-

26. BUREAU OF JUSTICE ASSISTANCE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 17 (1998) [hereinafter 1996 Survey].

27. *Id.* Alongside contraction of judicial discretion, legislatures have curbed administrative discretion by eliminating parole boards and limiting parole discretion through truth-in-sentencing statutes. PAULA M. DITTON & DORIA JAMES WILSON, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS: TRUTH IN SENTENCING IN STATE PRISONS 3 (Jan. 1999) [hereinafter TRUTH IN SENTENCING]. Since the turn of the century, parole boards have exercised final authority in deciding when to release a prisoner. Twelve states have eliminated discretionary parole, beginning with Maine in 1975. *Id.* at 3. In 1984, Congress abolished the U.S. Parole Commission, which had been entrusted to release selected inmates from federal prisons since 1910. *Id.*; U.S. SENTENCING GUIDELINES MANUAL §1A1.1 (2004). Moreover, Congress has effectively encouraged states to reduce the discretionary power of parole boards through financial incentives for truth-in-sentencing statutes. TRUTH IN SENTENCING, at 1. Truth-in-sentencing refers to sentencing practices that reduce the uncertainty about the length of time that offenders will serve in prison. In 1994, Congress offered financial incentives for states to establish truth-in-sentencing, set at a benchmark of eighty-five percent time-served for violent offenders. *Id.* Prior to 1994, only five states had truth-in-sentencing

judicial body with creating uniform sentencing standards for judges to follow. Seventeen states have created sentencing guidelines, beginning with Utah in 1979.

Spearheaded by re-election-seeking legislators, the sentencing revolution manifests the political profitability of attacking judges as much as it manifests incentive-free ideals. The remainder of this article therefore moves toward a political account of the sentencing revolution by examining the political antecedents of how Congress passed the Sentencing Reform Act of 1984. Why did members of Congress begin judging the judges so harshly? How did members of Congress characterize the problem of judicial discretion? When did such major Congressional attacks on judicial discretion gain political momentum? The next section addresses these questions.

II. THE SENTENCING REVOLUTION AS A REVOLUTION OF RACIAL POLITICS

With the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission and charged it with developing Sentencing Guidelines for all federal offenders. This section identifies how and why members of Congress came to advocate Sentencing Guidelines, even when doing so meant breaking the near two-century tradition of entrusting judges with broad sentencing discretion. My central claim is that Congressional support for Sentencing Guidelines was indeed borne of discontent with judges, but that this discontent was not limited to the policy arena of criminal sentencing. Instead, members of Congress, particularly southern Democrats and Republicans, launched salient attacks against judges after judges began loosening the legal order of Jim Crow. Where legal scholars make impressive connections to find underlying conceptual clarity in sentencing reform, my account identifies disconnected and tortured logic at the core of Congressional support for Sentencing Guidelines. In the last half of the twentieth century, the history of Congress's attack on judges is built on this critical disjuncture: in the mid-1950s, judicial discretion on racial desegregation ignited attacks

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statutes; after Congress, in 1994, established financial incentives, an additional fourteen states passed truth-in-sentencing statutes set at the eighty-five percent time-served benchmark. *Id.*

on judges as liberal, lenient, elitist, susceptible to psychological and sociological claims, and detached from the values of ordinary Americans; in the mid-1980s, judicial discretion on criminal sentencing incurred the same political attacks on judges set in motion three decades earlier. The target – judges – remained stable, while the issue slipped from lenience in Jim Crow to lenience in criminal sentencing.

A. *The Racial Roots of Attacking Judges*

Congress passed the Sentencing Reform Act of 1984 by bringing together an odd coalition with divergent interests in sentencing reform. Sentencing reform's chief advocate, the liberal Senator Edward Kennedy (D-Massachusetts), forged key partnerships with the southern conservative Senators John McClellan (D-Arkansas) and Senator Strom Thurmond (R-South Carolina).[28] Sentencing reform gained momentum in 1975, when Senator Kennedy hosted a dinner for Judge Frankel and subsequently introduced a bill to form a U.S. Commission on Sentencing to issue sentencing guidelines.[29] In subsequent legislation, Senator Kennedy worked closely with his conservative allies. In 1977, Senators Kennedy and McClellan introduced a similar bill, which passed in the Senate but died after a subcommittee hearing in the House.[30] In 1980, Senators Kennedy and Thurmond, joined by Senator Orrin Hatch (R-Utah), introduced a bill that retained the proposal to establish a sentencing commission and added an additional measure to abolish parole; neither chamber acted on the bill.[31] In 1983 and 1984, Senators Kennedy and Thurmond worked together on the bill that finally passed both houses, the Comprehensive Crime Control Act of 1984, which included the Sentencing Reform Act of 1984 in its second section.[32] President Ronald Reagan signed the

28. STITH AND CABRANES, *supra* note 15, at 39. Stith and Cabranes argue that Kennedy was the central advocate of sentencing reform, and he enlisted the support of McClellan and Thurmond as key critical conservative advocates.

29. S. 2699, 94th Cong. The National Commission on Reform of Federal Criminal Laws recommended the classification and grading of offenses in 1971, but bills in the 92nd and 93rd Congress won little support.

30. S. 1437, 95th Cong. (1977).

31. S. 1722, 96th Cong. (1979)

32. S. 1762, 98th Cong. (1983). U.S. SENTENCING COMM'N, FIFTEEN YEARS

bill into law on October 12, 1984.[33]

Typical of the liberal and northern Democrats who supported sentencing reform, Senator Kennedy's decade-long campaign emphasized the need for rationality and racial fairness in sentencing. Senator Kennedy consistently criticized federal sentencing as "hopelessly inconsistent," "arbitrary," and "desperately" in need of reform.[34] Senator Kennedy characterized his 1984 bill as "revis[ing] Federal sentencing procedures to achieve a rationality, uniformity, and fairness that does [sic] not exist in the current system."[35] To evidence his claims of inconsistency, Senator Kennedy cited the famous 1974 study of fifty Federal Second Circuit judges who, when given twenty identical files based on actual cases, imposed wildly different sentences. In one extortion case, for example, judges assigned sentences ranging from three years imprisonment to twenty years imprisonment plus a $65,000 fine.[36] In line with ideals-centered explanations, it appears that Judge Marvin Frankel persuaded Senator Kennedy to recalibrate policy to new ideas.

For many conservative supporters of Sentencing Guidelines, however, the political history of mistrusting judges goes far deeper. Consider the lineage of attacking judges as it developed over the long careers of sentencing reform's two key conservative supporters, Senators McClellan and Thurmond. Senators McClellan and Thurmond launched sustained criticism of judges after the Supreme Court's 1954 decision in *Brown v. Board of Education.* Historically, it is nothing new for members of Congress and other national leaders to target judges as objects of praise or censure, and national political campaigns centralized the Supreme Court as an object of political controversy in 1860, 1896, 1924, and 1936.[37] On May 17, 1954, when the Supreme Court issued its

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OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 5 (Nov. 2004), *available at* http://www.ussc.gov/15_year/15year.htm.

33. STITH AND CABRANES, *supra* note 15, at 38.

34. *Id.*

35. 130 CONG. REC. 1644 (1984).

36. 130 CONG. REC. 1644 (1984). *See* ANTHONY PARTRIDGE AND WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO JUDGES 1-3, 9 (1974).

37. *See generally* Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and the Supreme Court: The Goldwater Campaign*, 32 PUB. OPIN.

decision in *Brown,* the next wave of politically prominent judge-bashing began.[38] In *Brown*, the Supreme Court unanimously held that the "separate but equal" standard of *Plessy v. Ferguson*[39] was no longer acceptable, and racial segregation in public schools was therefore unconstitutional.[40] The day of the *Brown* decision, known to segregationists as "Black Monday," ignited disdain of the Warren Court amongst southern Democrats. Epitomizing the south's reaction was Senator Harry Byrd's (D-Virginia) reference to Earl Warren as "the modern Thaddeus Stevens, now cloaked in the robes of the Chief Justice of the United States Supreme Court."[41] Southern Democrats even drafted the Southern Manifesto of 1956, a joint resolution signed by 101 members of Congress from eleven southern states, which claimed that the Court's "exercise of naked power" had supplanted "personal, political, and social ideas for the established law of the land."[42]

Like their southern colleagues, Senators McClellan and Thurmond expressed their anger over a changing racial order as contempt for judges. Their criticisms hit three particular themes: first, judges abuse their power; second, judges allow sociological evidence to trump legal precedent; and third, judges ignore Jim Crow's vital role in minimizing crime and maintaining a safe social order. Floor statements illustrate that McClellan and Thurmond criticized the racial liberalism of judges through these three themes.

The first post-*Brown* theme is that judges abuse their power. After the Supreme Court rejected "separate but equal," Senators McClellan and Thurmond accused the Supreme Court of extending its power over states' rights and over Congressional intent. Senator McClellan called *Brown* an "infamous decision" in which the Supreme Court made it "the public policy of the United States to undermine the traditional state and local control of public education."[43] Senator Thurmond argued that *Brown* violated Congress's intent behind the 14th Amendment, because

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QUART. 31 (1968).

38. CLIFFORD M. LYTLE, THE WARREN COURT & ITS CRITICS 10 (1968).
39. 163 U.S. 537 (1896).
40. *Brown*, 347 U.S. at 494-95.
41. LYTLE, *supra* note 38, at 6.
42. *Id.* at 12.
43. 110 CONG. REC. 7872 (1964).

"the 39th Congress, which in 1866 framed the 14th Amendment to the Constitution . . . also provided for the operation of segregated schools in the District of Columbia." Senator Thurmond concluded that "this is positive evidence that the Congress did not intend to prohibit segregation by the 14th Amendment."[44]

In this view, the judges had subsumed the traditional powers of states and Congress only to become a tyrant for black rights. Senator Thurmond interpreted *Brown* as the Supreme Court's choice between two diametrically opposed forces: on one side was the Constitution, and on the other side were civil rights "propagandists" who sidestepped legislative intent and forced people to "bow meekly to the decree of the Supreme Court."[45] Senator Thurmond stated that "while we are thinking of tyranny in Hungary, I wish to take a few minutes to discuss tyranny in the United States; and when I say that, I mean the tyranny of the *judiciary* in the United States."[46] In his opposition to the Civil Rights Bill of 1960, Senator Thurmond characterized *Brown* as an "underhanded blow" and a "dastardly undercutting of constitutional fabric" that had prompted "widespread and high placed" public criticism of judges.[47] The proper role of the judge, in Senator Thurmond's account, is to interpret the Constitution based on "thought at the time of its adoption, without so much as a glance at 'current conditions.'"[48] What case exemplifies sound judicial interpretation? According to Senator Thurmond, *Dred Scott v. Sandford*[49] well represents the modest judicial reasoning of examining original intent rather than current conditions. Perhaps it was a perk for Senator Thurmond that *Dred Scott* also held that blacks are not citizens.[50]

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44. 102 CONG. REC. 4461 (1956).
45. *Id.*
46. 103 CONG. REC. 10333 (1957) (emphasis added).
47. 106 CONG. REC. 7620, 7622 (1960).
48. *Id.* at 7621.
49. Dred Scott v. Sandford, 60 U.S. 393 (1857).
50. Senator Thurmond quoted the syllabus of the *Dred Scott* opinion as an example of proper original intent jurisprudence. The syllabus (notably not a part of the majority opinion) in *Dred Scott* stated, "The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution, cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted." *Id.* (quoting *Dred Scott*, 60 U.S. at 393).

The second post-*Brown* theme is that judges rely on evidence from sociologists and psychologists, and therein judges have abandoned narrow legal reasoning for the expansive reasoning of social well-being. The *Brown* decision cited social science research such as Gunnar Myrdal's *An American Dilemma* and Kenneth Clark's doll studies, in which black children expressed preferences for white dolls over black dolls.[51] Senator Thurmond declared that "what the courts have done was without color of law under the Constitution. Instead the decisions hinged on the testimony of sociologists and psychologists."[52] By considering the consequences of segregation in psychological and sociological terms, judges made themselves arbiters of social status.

The third post-*Brown* theme is that racial liberalization itself – in the form of judicial holdings, legislative acts, and social protests – generates more crime. Judges are centrally but not exclusively indicted in this claim. Senator McClellan argued that forced race-mixing invites crime, and even civil rights legislation creating a Federal Employment Protection Commission would incite crime.[53] In opposing the "evil legislation" of the Civil Rights Bill of 1964, Senator McClellan suggested that the bill "illegally – unconstitutionally – deprives American citizens of their fundamental right to be free from governmental coercion with respect to the unhampered use and enjoyment of the fruits of their labor, or the selection of their employees, and in the choice of their associates."[54] Illegal coercion and race-mixing means "serious crime will greatly increase rather than diminish following the passage of this measure."[55] Senator Thurmond also held that

51. Brown v. Board of Educ., 347 U.S. at 495 n.11. Southern Democrats like Senator James Eastland (D-Miss.) chastised the Court for basing its opinions on the teachings of a "Swedish Carbetbagger" like Gunnar Myrdal. LYTLE, *supra* note 38, at 22.

52. 101 CONG. REC. 1064 (1955).

53. 95 CONG. REC. 2086 (1949). McClellan stated that "enactment of the FEDC, if it ever attempted to break down the segregation laws of the country, would be a greater step toward incitement to crime in America than anything else the Congress could do." *Id.*

54. 110 CONG. REC. at 14304.

55. 110 CONG. REC. at 14305. McClellan contended that "we have only to look at the experience of those States which have enacted statutes containing provisions similar to those in this act. Those States have no better race relations. In fact, in many instances they have greater tensions and worse race relations than do those States which have not legislated in this field. We

segregation was natural, and therefore forced race-mixing would have violent consequences. In opposing the Civil Rights Bill of 1959, Thurmond argued that "political demands for integration of the races" would bring a "wave of terror, crime, and juvenile delinquency." As proof for this claim, Thurmond pointed to "crime after crime in integrated New York" and other "integrated sections of the country."[56]

The logic here is striking: race-mixing produces crime, and therefore judges who facilitate racial integration have unleashed a coming crime wave. Mechanisms remain opaque. Black civil rights could breed crime via several avenues: perhaps race-mixing is dangerous because blacks are inherently criminal; perhaps forced integration will prompt white backlash; perhaps the philosophy of civil disobedience itself undercuts the power of law. Perhaps ambiguous mechanisms sustained the illogical and visceral power of the claim.

Immediately after the Supreme Court's 1954 *Brown* decision, southern Democrats launched attacks on judges for lenience in the arena of racial integration. Two conservative supporters of sentencing reform, Senators McClellan and Thurmond, drew the lines of the debate with three basic oppositions – the Constitution versus civil rights propagandists, strict legal reasoning versus ever-expansive sociological reasoning, and law-and-order with Jim Crow versus crime and chaos with civil rights. In this racialized rhetoric of good versus evil, judges choose the wrong side of the equation.

B. *The Legacy of Attacking (Racially) Lenient Judges*

As the Supreme Court issued more controversial decisions through the 1950s and 1960s, early criticisms of racially lenient judges gained prominence even as their racial specificity became more subtle. Rhetorical attacks on judges as lenient, elitist, and supportive of subversive elements remained stable as the issue at hand slipped from allegedly pro-integration decisions, to allegedly pro-Communist decisions, to allegedly pro-criminal decisions.

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read daily of racial strife, of demonstrations, of aggravated assaults, of murders, and of all manner of crime being committed in those States having so-called civil rights laws." *Id.*

56. 105 CONG. REC. 18382, 18385 (1959).

Southern Democrats attacked the Supreme Court early, often, and fiercely after *Brown,* but Republicans joined in the attack as the Supreme Court issued decisions that were widely interpreted as pro-Communist and pro-criminal.[57] In 1957, the Warren Court handed down a series of decisions that ultimately protected the procedural rights of Communists and persons suspected of being Communist. The day in 1957 that the Court handed down its decisions in *Watkins*, *Yates*, *Sweezy* and *Service* was known to many Republicans and southern Democrats as "Red Monday," due to the characterization by critics that the decisions represented the Court's defense of Communist conspirators.[58]

Between 1957 and 1966, the Supreme Court's "pro-criminal decisions" expanded the rights of prisoners, criminal defendants, and criminal suspects, many of whom were poor and black, some of whom had confessed guilt.[59] In *Mallory* v. *United States*, the Supreme Court unanimously voided a District of Columbia rape conviction.[60] Violation of procedure was at the heart of the decision: the Warren Court found that the police violated the Federal Rules of Criminal Procedure by failing to arraign the defendant before questioning him for seven hours, subjecting him to a lie-detector test, and recording his confession for conviction.[61] In a sense, the case pitted the value of procedural justice (following the process) against the value of substantive justice (convicting the guilty), and the Supreme Court upheld procedural justice, declared the rape confession inadmissible, and thereby voided the conviction – and for a black man no less! After *Mallory*, Thurmond declared that the Court "has now issued an edict which will give greater protection to such heinous criminals

57. C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 126-27 (1961); LYTLE, *supra* note 38, at 6-7, 29.

58. Watkins v. United States, 354 U.S. 178, 204-06, 215 (1957) (limited the power of the House of Un-American Activities Committee); Yates v. United States, 354 U.S. 298, 312 (1957) (decriminalized communist organizing); Sweezy v. New Hampshire, 354 U.S. 234, 253-55 (1957) (invalidated state order that required a professor to disclose the nature of his past expressions and associations); Service v. Dulles, 354 U.S. 363, 388-89 (1957) (guaranteed those under investigation for loyalty and standing the right to a review with evidence and an independent determination).

59. THOMAS BYRNE EDSALL AND MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 110 (1992).

60. Mallory v. United States, 354 U.S. 449, 455-56 (1956).

61. *Id.*; LYTLE, *supra* note 38, at 43.

as rapists and murderers."[62]

After *Mallory*, the Supreme Court extended procedural protections for all kinds of politically dangerous groups such as drug addicts, poor criminal defendants, and criminal suspects. In *Trop v. Dulles*, the Supreme Court held that "cruel and unusual punishment" is determined by the "evolving standards of decency that mark the progress of a maturing society."[63] In *Robinson v. California*, the Supreme Court held that imprisonment for drug addiction was "cruel and unusual punishment" because drug addiction warrants treatment rather than punishment in the form of incarceration.[64] In *Gideon v. Wainwright*, the Supreme Court held that poor state defendants were entitled to state-provided legal counsel for all felony offenses.[65] In *Escobedo v. Illinois*, the Supreme Court held that police must inform suspects of the right to remain silent and the right to consult an attorney before answering questions.[66] The Supreme Court reaffirmed the rights of the accused in *Miranda v. Arizona*, which provided guidelines for carrying out *Escobedo*.[67]

These Supreme Court decisions were widely viewed as judicial assaults on crime control, and members of Congress mobilized a kind of counterassault against judges.[68] After "Black Monday," "Red Monday," and *Mallory* and its "pro-criminal" progeny, members of Congress introduced bills to gut the impact of recent decisions, to tighten judicial jurisdiction, and to raise judicial qualifications. In terms of gutting recent decisions, there were fifty-five bills introduced between 1954 and 1961 to slow the desegregation process, and all but two bills were introduced by southern members of Congress; not one of these bills was enacted into law. In terms of tightening jurisdiction, there were approximately two hundred bills introduced between 1954 and 1961 to reform the judicial process, particularly by limiting judicial appellate jurisdiction, and more than 150 bills were introduced by southern members of Congress.[69] In terms of

62. 103 CONG. REC. at 10471.
63. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
64. Robinson v. California, 370 U.S. 660, 666-67 (1962).
65. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
66. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).
67. Miranda v. Arizona, 384 U.S. 436, 469 (1966).
68. EDSALL AND EDSALL, *supra* note 59, at 111.
69. PRITCHETT, *supra* note 57, at 26-27; LYTLE, *supra* note 38, at 11.

judicial qualifications, there were fifty-four bills introduced between 1954 and 1961 to tighten qualifications, with fifty-one bills introduced by southern members of Congress. Qualification bills attempted to require all future appointees to the Supreme Court to have at least five years judicial experience in a lower federal court or in the highest tribunal of the states; both qualifications would make the pool of potential appointees more likely to be politically and socially conservative.[70]

By the time Congress gave its final roll-call votes on the Sentencing Reform Act of 1984, the narratives of discontent about judicial discretion had been in place for three decades, beginning sharply with southern Democrats' criticism of *Brown v. Board of Education* in 1954 and gaining momentum after seemingly pro-Communist and pro-criminal Supreme Court decisions. Criticisms of judges in the 1950s and 1960s informed the criticisms that continued through the 1970s and 1980s. Recall the three arguments launched against judges after *Brown*: judges abuse their power, judges worship sociological evidence, and judges disregard the beneficial constraints of Jim Crow. These arguments, issued first in debates over racial integration in the context of low crime rates, had lasting power three decades later in debates over sentencing reform and crime control. Some supporters of Sentencing Guidelines emphasized a fairness rationale, such as northern Democrat Senator Kennedy. But other supporters of Sentencing Guidelines revealed a far more complex rationale, such as southern Democrat Senator McClellan and Republican Senator Thurmond.

The first *Brown*-inspired charge – judges abuse power – retained its accusatory power throughout the second half of the twentieth century, moving from the arena of black civil rights in the 1950s to the arena of crime and sentencing policy in the 1960s and beyond. Recall that in the mid-1950s southern Democrats interpreted integration as a battle between the Constitution and civil rights propagandists, and, so the political story goes, judges sided with civil rights bullies. A decade later, Republicans courted resentful white voters, particularly white southern Democrats, by interpreting law-and-order as a battle between police and criminals, and, so the political story goes, judges sided with

70. LYTLE, *supra* note 38, at 18.

criminal rights bullies. In the rhetoric of southern Democrats and Republicans, the charge of judicial misuse of power transmogrified from "judges wrongly empower black civil rights" to "judges wrongly empower (black) criminal rights." For example, in his 1968 Republican presidential campaign, Richard Nixon urged "respect" for "courts and those who serve on them," only then to warn that "some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country."[71] In line with this attack on liberal judges, Nixon endorsed limiting judicial discretion with "modernization" of the federal criminal code, the policy precursor to the Sentencing Guidelines. In his 1973 State of the Union Address, Nixon advocated "modernizing" the "inadequate, clumsy, and outmoded" federal criminal code. He added a punitive punch: "When I say 'modernize,' incidentally, I do not mean to be soft on crime; I mean exactly the opposite. Our new code will give us tougher penalties and stronger weapons in the war against dangerous drugs and organized crime."[72] That is, "modernization" entails both rationalizing the criminal code and disciplining the liberal judge.

In partisan rhetoric, the Warren Court's allegedly soft-on-race and soft-on-crime decisions were seen as the progeny of the Democratic Party, and Democrats struggled with the image that their crime policies were dictated by liberal legal experts, Ivy League-educated judges, and the American Civil Liberties Union. When Charles Schumer (D-New York) was first elected to the House in 1980, he explained crime's role in the Reagan Revolution: "I didn't understand why Reagan won until I got to Washington. Crime was ripping apart my district. And who is writing the crime legislation? The A.C.L.U. They weren't just at the tale; they were *writing* it."[73]

During final debates over the Sentencing Reform Act of 1984, supporters of Sentencing Guidelines trumpeted judicial incompetence as a truism. Mistrust of judges took different forms: the mild mistrust of liberal Democrats indicted judges for

71. Richard Nixon, Nomination Acceptance Address (Aug. 8, 1968).

72. Radio Address About the State of the Union Message on Law Enforcement and Drug Abuse Prevention, 74 PUB. PAPERS 180 (March 10, 1973).

73. James Traub, *Party Like It's 1994*, THE N.Y. TIMES MAGAZINE 44 (March 12, 2006).

coordination difficulties resulted in disparities, while the more vitriolic mistrust of Republicans and conservative Democrats indicted judges for liberal elitism that results in lenience. As a classic example of mild mistrust, Senator Edward Kennedy suggested, "with all due respect...judges themselves have not been willing to face this issue and . . . remedy this situation."[74] Vitriolic mistrust, however, categorized judicial misuse of power as a problem of arrogance. A Reagan Administration official endorsed Guidelines by emphasizing that judges are out of touch with homespun common sense, explaining that "[t]he judge, while trained in the law, has no special competence in imposing a sentence that will reflect society's values."[75]

The second *Brown*-inspired charge – judges worship sociological evidence – carried a central epistemological criticism that remained prominent through the sentencing revolution. Recall that in the mid-1950s southern Democrats chastised judges for forsaking narrow legal reasoning in favor of expansive sociological reasoning. Sociological reasoning, as employed by judges and others, became stigmatized in both civil rights policy and in crime policy as a marker of lenient structural explanations. As Stuart Scheingold elaborates, crime is generally explained by either structural or volitional accounts. Structural explanations, Scheingold states, attribute crime to "social disorganization with its roots in hierarchy, deprivation, coercion, and alienation." Taking society as the unit of analysis, structural explanations take aim at the prevailing economic order and other kinds of marginalization, and therefore structural crime control is "a matter of formulating redistributive economic policies and generating consent for them."[76] In contrast, volitional explanations attribute crime to "individual pathologies – be they moral, emotional, or genetic." Taking the individual as the unit of analysis, volitional explanations take aim at the offender, generally suggesting punishment of the defective person. According to Scheingold, political discourse tends to favor volitional criminology, because punishment of the individual is "easy, reassuring, and morally satisfying," even if it is not the

74. 130 CONG. REC. at 975; STITH AND CABRANES, *supra* note 15, at 44.
75. STITH AND CABRANES, *supra* note 15, at 44.
76. STUART SCHEINGOLD, THE POLITICS OF STREET CRIME 23 (1991).

most effective policy in the long-run. Scheingold calls this political preference for volitional accounts "the myth of crime and punishment," in which the immediate satisfaction of punishing the individual trumps the glacial and elusive goal of creating social justice through structural reform.[77]

In line with Scheingold's analysis, southern Democrats and Republicans from the 1960s onward cast their pro-punitive policy agenda as a much-needed turn away from sociological theory that attributes crime to structural forces like poverty and racism. House Leader Gerald Ford (R-Michigan) asked in 1966, "How long are we going to abdicate law-and-order – the backbone of any civilization – in favor of a soft social theory that the man who heaves a brick through your window is simply the misunderstood and underprivileged product of a broken home?"[78] Presidential candidate George Wallace similarly questioned how judges rely on psychology in this exaggerated scenario: "If a criminal knocks you over the head on your way home from work, he will be out of jail before you're out of the hospital and the policeman who arrested him will be on trial. But some psychologist will say, well, he's not to blame, society is to blame."[79] Just as judges of the 1950s exploited sociological accounts to show lenience toward blacks, the argument goes, so too judges and liberal Democrats of the 1960s and later exploited sociological accounts to show lenience toward criminals.

The third post-*Brown* charge – judges generate crime by loosening the beneficial constraints of Jim Crow – holds a subtle and complex connection to sentencing and crime policy. In overarching terms, the second half of the twentieth century well illustrates the pivotal role of crime policy in the unsteady march of racial equality. With *Brown* in 1954, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, national leaders confronted legal barriers to black political citizenship, and the years that followed saw waning support for overt doctrines of white superiority.[80] During this same period of celebrated progress toward racial equality, the racial composition of prisons fully

77. *Id.* at 4-7.

78. EDSALL AND EDSALL, *supra* note 59, at 51.

79. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 34 (1997).

80. JOHN SKRENTNY, THE MINORITY RIGHTS REVOLUTION 65 (2002).

reversed, with prisons turning from seventy percent white in 1950 to seventy percent black and Latino in 2000.[81] Racialized punishment expansion affects black communities with staggering magnitude. Since 1995, roughly one in three black men between the ages of twenty and twenty-nine are under some form of criminal supervision on any given day.[82] Through felon disfranchisement laws, an estimated thirteen percent of all African American men cannot vote.[83] Since 2000 more black men are in jail and prison than are in higher education, and between 1980 and 2000 three times as many African American men were added to the prison system than were added to colleges and universities nationwide.[84] Black women face similar racial disparity by sex: African American women have incarceration rates six to seven times those of white women, a ratio roughly equal to the disparity between African American and white men.[85]

This massive demographic rupture manifests more than the end of rehabilitation in the history of ideals; in real terms, the ever-expansive criminal justice state manifests another weapon in the history of racial power. The fall of racially explicit exclusions restructured national politics to give rise to race-laden crime policy. Political attacks on judicial lenience – alongside a more punitive electorate and the Democratic Party's abandonment of both black civil rights and progressive crime policy – constitute a thread that ties together anti-black segregationism in the 1950s to anti-black punitiveness in the present.

III. CONCLUSION

When the Supreme Court's 2005 *Booker* decision ended mandatory Federal Sentencing Guidelines, Justice Stephen

81. Loic Wacquant, *Deadly Symbiosis, Rethinking Race and Imprisonment in Twenty-First Century America*, 27 BOSTON REV. 23, 23 (2002).

82. MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995); PAIGE M. HARRISON & ALLEN BECK, PRISONERS IN 2002, T. 13 (2003).

83. JAMIE FELLNER AND MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).

84. JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN (2002).

85. *Id.*

Breyer addressed the fate of criminal sentencing by writing: "Ours, of course, is not the last word. The ball now lies in Congress' court. The national legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice."[86] This article contends that, if the sentencing revolution is a game between Congress and federal judges, then Congress has controlled the ball for at least the last third of the twentieth century. After the Supreme Court's 1954 *Brown* decision ended the separate-but-equal doctrine, southern Democrats and the future conservative advocates of Sentencing Guidelines began censuring judges for playing fast and loose with the racial order of Jim Crow. Accusations of judicial lenience in racial control came as a trio of criticisms, namely that judges abuse their power, judges misuse sociological evidence, and judges enable crime through civil rights liberalization.

Attacks on the racially liberal judge set in the 1950s retained prominence through the sentencing revolution, and the rhetoric against judicial lenience shifted from lenience with blacks to lenience with criminals. By the time Congress mandated creation of Sentencing Guidelines in 1984, attacks on the racially liberal judge had gained even more credibility with Warren Court decisions that were widely perceived as pro-black, pro-Communist, and pro-criminal. It is commonly noted that Federal Sentencing Guidelines garnered support from liberals like Senator Kennedy as well as conservatives like Senators McClellan and Thurmond, but this article does more than show how liberals wanted rationalized moderate sentences while conservatives wanted rationalized harsh sentences. Instead, this article suggests that support for Sentencing Guidelines goes deeper than preferences on sentencing; that is, there is a deeper and decidedly racial legacy to attacking judicial discretion. In attacks on liberal judges from *Brown* to *Booker*, Congress has judged the judges for transgressing racial guidelines.

86. John Gibeaut, *All Sides Wary of Sentencing Ruling: Changes in Store as Supreme Court Revokes Mandatory Guidelines*, ABA JOURNAL E-REPORT, Jan. 14, 2005.