CONGRESSIONAL MANIPULATION OF THE SENTENCING GUIDELINE FOR CHILD PORNOGRAPHY POSSESSION: AN ARGUMENT FOR OR AGAINST DEFERENCE?

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ABSTRACT

Many proponents of the Federal Sentencing Guidelines envisioned a system in which a politically insulated agency would craft guidelines based on empirical study. This vision of the now-advisory Guidelines survives in Supreme Court opinions that appear to accept that the work of the U.S. Sentencing Commission, the agency tasked with formulating the Guidelines, is driven largely by empirical analysis. This vision has created uncertainty, however, about how much deference courts should show particular Guidelines—such as Section 2G2.2, the Guideline applicable to possession of child pornography—that do not reflect empirical study by the Commission, but that have instead been shaped by aggressive congressional intervention in the Commission's policymaking process. This Note suggests an approach under which the level of judicial deference owed to a congressionally amended Guideline depends on the extent to which that Guideline reflects the institutional strengths or weaknesses of Congress. Applying this approach to Section 2G2.2, the Note argues that district courts should be willing to impose below-Guidelines sentences for possession of child pornography when they conclude that the applicable Guideline is too harsh. Although the child pornography Guideline warrants some deference as a product of democratic processes, the exercise of independent judgment by district courts can impose a useful check on institutional pathologies that afflict congressional sentencing policy.

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INTRODUCTION

District court judges are increasingly unwilling to follow the advisory Federal Sentencing Guidelines[1] when imposing sentences for possession of child pornography. In 2009, they issued below-Guidelines sentences in 43 percent of the cases governed by Section 2G2.2,[2] the Guideline for child pornography possession, compared with 15.9 percent of all cases.[3] Many district judges have apparently concluded not only that Section 2G2.2 is too harsh,[4] but also that it warrants little deference—that they should be free to favor their own judgment over the policy choices embodied in that Guideline.[5]

Although the merits of the Guideline for child pornography possession have been extensively debated,[6] the related issue of how much deference courts owe to that Guideline also requires careful attention. This issue is complicated by that Guideline's provenance. Reformers who led the push for the U.S. Sentencing Guidelines

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1. U.S. SENTENCING GUIDELINES MANUAL (2010).

2. *See* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2009, at 14 tbl.5 (2010), *available at* http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_Final.pdf (showing the number of cases governed by Section 2G2.2 in which district courts imposed sentences within, above, and below the Guidelines range). These figures do not include government-sponsored below-Guidelines sentences.

3. *Id.* at 1 tbl.1. Preliminary data for 2010 reinforce this pattern. The U.S. Sentencing Commission's preliminary third-quarter report shows below-Guidelines sentences in 43.8 percent of the cases governed by Section 2G2.2, *see* U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: 3RD QUARTER RELEASE 14 tbl.5 (2010), *available at* http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf, compared with 17.6 percent of all cases, *id.* at 1 tbl.1.

4. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, pt. III, tbl.8 (2010), *available at* http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf (finding that 70 percent of district judges surveyed believe the Guidelines range for possession of child pornography is too high).

5. *See infra* Part II.B.1.

6. For criticism of the child pornography Guideline, see generally Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 584–85 (2009); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); and Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, ODS TRAINING BRANCH (Jan. 1, 2009), http://www.fd.org/pdf_lib/child porn july revision.pdf. For a discussion of the controversy surrounding the child pornography Guideline, see generally Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54. For a defense of the Guideline, see generally Alexandra Gelber, *Response to "A Reluctant Rebellion,"* DEPARTMENT OF JUST.: CHILD EXPLOITATION & OBSCENITY SEC. (July 1, 2009), http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf.

originally hoped they would reflect the expertise of the U.S. Sentencing Commission (Commission), the agency established to promulgate the Guidelines.[7] The child pornography Guideline, however, has been amended numerous times at the express direction of Congress.[8] Thus, to decide how much judicial deference the Guideline warrants, one must determine how much deference is owed to a Guideline that reflects express congressional policy choices rather than the Commission's expertise.[9]

This Note advances the discussion of the child pornography Guideline by addressing that larger issue. Although many district courts have assumed that only the Commission's expertise can justify deference to the Guidelines,[10] this Note argues that when the Guidelines embody explicit congressional preferences, courts should consider not only the absence of the Commission's expertise, but also how the Guidelines reflect the institutional strengths or weaknesses of Congress. Courts should acknowledge Congress's democratic legitimacy and capacity for deliberation.[11] Courts should also remain alert, however, to the influence of interest-group politics and majoritarian pressures—influences that often skew congressional policymaking toward unwarranted severity.[12]

This approach recognizes that, in some cases, even Guidelines that do not reflect the Commission's expertise may warrant significant deference. This Note concludes, however, that the child pornography Guideline does not present such a case. Even if the general values underlying congressional amendments to that Guideline warrant some weight, courts should be willing to impose below-Guidelines sentences when they conclude that the child pornography Guideline is too severe.[13]

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7. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 8–11 (1991) (discussing the reasons for Congress's initial delegation of policymaking authority to the Commission through the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.)).

8. *See infra* Part II.A.

9. For a discussion of the ways in which some courts have approached this issue, see *infra* Part II.B.

10. *See infra* Part II.B.1.

11. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See infra* Part IV.

Part I provides background on the federal Guidelines system. Part II introduces the Guideline for possession of child pornography, explaining how it operates and showing how Congress has influenced its development. It then critiques approaches some courts have taken to the special problem this Guideline poses as an embodiment of congressional policy choices. Part III outlines an alternative approach that takes into account the institutional strengths and weaknesses manifested in Guidelines that result from congressional intervention. Finally, Part IV applies this approach to the child pornography Guideline. Part IV concludes that because of Congress's susceptibility to interest-group pressures and majoritarian anxieties, this Guideline reflects an institutional perspective skewed in favor of unnecessary harshness—a perspective that courts can usefully counterbalance.

I. THE FEDERAL GUIDELINES SYSTEM

This Part provides background on the federal sentencing system. It first describes the Guidelines system established by the Sentencing Reform Act of 1984 (SRA).[14] It then discusses the changes wrought by the Supreme Court's decision in *United States v. Booker*.[15]

A. The Sentencing Reform Act and the Guidelines

Before the SRA, sentencing courts enjoyed broad and essentially unreviewable discretion to impose sentences within wide statutory ranges.[16] Under a system geared toward rehabilitation, the sentencing court set a minimum and maximum for a defendant's prison term, leaving parole officials to determine, within those limits, when the defendant was sufficiently rehabilitated to leave prison.[17] Based primarily on concerns about the sentencing disparity that this system allowed,[18] the SRA eliminated parole[19] and created the

14. SRA, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

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

16. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993).

17. *Id.* at 226–27; *see also* Ilene H. Nagel, *Foreword*: *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894–95 (1990) (observing that under the pre-SRA rehabilitative model of sentencing, "Congress set the maximum penalty, the judge imposed a sentence from the appropriate range, and parole officials determined the actual length of imprisonment").

18. *See* S. REP. NO. 98-225, at 65 (1984) ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for

Commission.[20] Although the SRA prescribed the general goals for the federal sentencing system,[21] it delegated the task of formulating more-detailed rules—the Federal Sentencing Guidelines—to the Commission.[22] Sentencing-reform advocates hoped that this delegation would neutralize political pressures for unnecessarily harsh penalties and ensure that federal sentencing policy would reflect more-careful study than Congress could devote.[23]

According to a Commission report on the initial version of the Guidelines, the Commission used an empirical analysis of past sentencing practices as a starting point and then "accepted, modified, or rationalized" those practices to formulate the Guidelines.[24] Although the Supreme Court has apparently accepted this account of the Commission's policymaking process,[25] many scholars have argued

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reform."). For a thorough discussion of the legislative history and political context of the SRA, see generally Stith & Koh, *supra* note 16.

19. *See* 18 U.S.C. § 3624 (2006) (providing that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence" because of his compliance with the prison's disciplinary regulations); *see also* Mark Osler, *Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip*, 2009 BYU L. REV. 293, 308–09 (discussing the implications of the SRA's elimination of parole).

20. SRA § 217, 28 U.S.C. §§ 991–998 (2006) (establishing the Commission and defining its purposes and responsibilities); *see also* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 97–98 (1999) (describing the roles of Congress, the Commission, and the courts under the institutional framework established by the SRA).

21. Berman, *supra* note 20, at 97; *see also* 18 U.S.C. § 3553(a) (prescribing the factors to be considered by the district court in imposing a sentence); 28 U.S.C. § 994 (prescribing the factors to be considered by the Commission in promulgating the Guidelines).

22. 28 U.S.C. § 994.

23. *See* Wright, *supra* note 7, at 8–11 (discussing reasons for the SRA's delegation of policymaking authority to the Commission).

24. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16 (1987), *available at* http://www.fd.org/pdf_lib/Supplementary Report.pdf; *see also id.* at 16–23 (describing the data and analytical methods used by the Commission). The Commission chose this approach to avoid the challenge of agreeing on a coherent penological theory to guide sentencing policy. *Id.* at 15–16. For criticism of this decision, see, for example, Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 438–43 (1992); and see also Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 370–71 (1989).

25. *See* Rita v. United States, 127 S. Ct. 2456, 2464 (2007) (emphasizing the "empirical approach" that the Commission purportedly used to formulate the Guidelines); *see also* Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717, 726 (2009) (arguing that the Court's reasoning in *Kimbrough v. United States*, 128 S. Ct. 558 (2007)—that district courts should have more freedom to deviate from Guidelines that do not reflect the Commission's ordinary expertise—rests on the inaccurate assumption that most of the Guidelines reflect empirical analysis).

that the Guidelines reflect numerous poorly explained deviations from past practice, often resulting from attempts to harmonize the Guidelines with mandatory minimums or congressional directives.[26]

Under the Guidelines, judges determine sentences using a grid called the Sentencing Table.[27] Each box in the grid contains a range of sentences; within each range, the longest sentence is 25 percent longer than the shortest.[28] The appropriate box is selected by calculating the offense level, a *y*-axis variable that measures the severity of the offender's conduct, and the criminal history category, an *x*-axis variable that reflects the offender's conviction record.[29] To calculate the offense level, a court identifies the base offense level, which is determined by the crime of conviction,[30] and adjusts it based on specific offense characteristics prescribed for each offense[31] and adjustments applicable to all offenses.[32]

In addition to creating an agency to promulgate the Guidelines, the SRA further regulated sentencing decisions through directives to district courts.[33] One, now codified at 18 U.S.C. § 3553(a), requires the court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[34] This overarching command is often called the "parsimony provision."[35] Section 3553(a) also

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26. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 60–66 (1998) (criticizing the Guidelines' deviations from past practice); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 33–35 (2003) (explaining why the Guidelines deviate from past practice and characterizing them as "an amalgam of empirical results and explicit or implicit policy choices").

27. STITH & CABRANES, *supra* note 26, at 3; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2010) (providing the Sentencing Table for calculating sentence ranges under the Guidelines).

28. STITH & CABRANES, *supra* note 26, at 3.

29. *Id.*

30. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1) (2010) (prescribing a base offense level of eighteen if the defendant is convicted of certain child pornography offenses).

31. *See, e.g.*, *id.* § 2G2.2(b)(4) (prescribing a four-level increase for a child pornography offender whose crime involved sadomasochistic or violent images).

32. *See, e.g.*, *id.* § 3A1.1 (prescribing offense level adjustments based on characteristics of the victim).

33. *E.g.*, SRA § 212(a)(2), 18 U.S.C. § 3553 (2006).

34. 18 U.S.C. § 3553(a).

35. *E.g.*, Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 745 (1999) (internal quotation marks omitted).

requires the sentencing court to "consider" other factors, such as "the nature and circumstances of the offense," "the need to avoid unwarranted sentence disparities," and the Guidelines range for the offense.[36] This provision seems to treat the Guidelines as advisory.[37] But another directive, which, as explained in the next Section, has been invalidated, required the court to "impose a sentence of the kind, and within the range," specified by the Guidelines, except in certain narrow circumstances.[38] This provision, § 3553(b)(1),[39] made the Guidelines effectively mandatory.[40]

B. The Supreme Court's Advisory Guidelines Jurisprudence

In *United States v. Booker*, however, the Supreme Court invalidated § 3553(b)(1) to reconcile the system with recently developed Sixth Amendment doctrine.[41] Under *Apprendi v. New Jersey*[42] and *Blakely v. Washington*,[43] a jury must find any fact, other than a prior conviction, that is necessary to raise the penalty above the maximum permitted based on the jury verdict alone.[44] *Booker* applied this principle to the federal Guidelines. The Court held that the sentencing system was inconsistent with the Sixth Amendment because judicial fact findings were necessary to apply specific offense

36. 18 U.S.C. § 3553(a).

37. *See* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 776 (2006) (observing that the language of § 3553(a) "seems to suggest . . . that a judge might decline to impose a guidelines sentence in a particular case if the judge determined that the guidelines sentence was inconsistent with the statutory purposes of sentencing").

38. 18 U.S.C. § 3553(b)(1), *invalidated by* United States v. Booker, 543 U.S. 220, 245–46 (2005).

39. This provision was originally codified at 18 U.S.C. § 3553(b). It became § 3553(b)(1), however, when the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, created new provisions under § 3553(b). *Id.* § 401(a), 117 Stat. at 667–68 (codified as amended at 18 U.S.C. § 3553 (2006)).

40. *Booker*, 543 U.S. at 233–34; *see also* O'Hear, *supra* note 37, at 776–77 (observing that "the SRA contemplated mandatory guidelines" but noting the ambiguity created by the apparently conflicting directives in § 3553(a) and § 3553(b)).

41. *Booker*, 543 U.S. at 245.

42. Apprendi v. New Jersey, 530 U.S. 466 (2000).

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

44. *Id.* at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."); *Apprendi*, 530 U.S. at 490 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.").

characteristics or adjustments that raised the Guidelines range beyond the range authorized by a guilty verdict.[45]

To correct the Sixth Amendment violation, in a separate remedial opinion signed by a different majority, the Court invalidated § 3553(b)(1), the provision of the SRA that made the Guidelines effectively mandatory.[46] After *Booker*, § 3553(a) still requires district courts to consider the Guidelines range.[47] But because the Guidelines are no longer mandatory,[48] no judicial finding of fact is necessary to increase a sentence above the range authorized by the Guidelines based on the jury verdict.[49] A more natural remedy might have been to require juries to find any facts supporting a specific offense characteristic or adjustment.[50] The remedial majority concluded, however, that preserving judicial fact finding within a discretionary system would be more consistent with Congress's intent in establishing the Guidelines system.[51] Notably, the Court also invalidated the provision prescribing the standard for appellate review of sentences, reasoning that the provision presupposed mandatory Guidelines.[52] In its place, the Court established a deferential form of appellate review for "unreasonableness."[53] The

45. *Booker*, 543 U.S. at 235.

46. *See id.* at 245–46 (severing and excising 18 U.S.C. §§ 3553(b)(1) and 3742(e), and observing that § 3553(a), a surviving SRA provision, requires a sentencing court to consult the Guidelines but "permits the court to tailor the sentence in light of other statutory concerns as well").

47. *Id.*; *see also* 18 U.S.C. § 3553(a)(4) (2006) (requiring district courts to consider the range recommended by the Guidelines when imposing sentences).

48. *Booker*, 543 U.S. at 245.

49. *Cf. id.* at 233 (noting that advisory Guidelines would not pose a constitutional problem and reaffirming the Court's holding in *Apprendi* and *Williams v. New York*, 337 U.S. 241 (1949), that judges may constitutionally "exercise broad discretion in imposing a sentence within a statutory range").

50. Commentators have not failed to notice the irony in remedying a Sixth Amendment violation by increasing the power of judges, rather than juries. *See, e.g.*, Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 345 (2006) ("[T]o culminate a jurisprudence seemingly seeking to vindicate the role of the *jury* in modern sentencing systems, *Booker* devised a remedy which ultimately gave federal *judges* new and expanded sentencing powers.").

51. *Booker*, 543 U.S. at 246 (reasoning that only preserving extensive judicial fact finding would "maintain[] a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve"); *see also id.* at 254 ("[T]he sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended.").

52. *Id.* at 259.

53. *Id.* at 264.

Court would later clarify in *Gall v. United States*[54] that sentences should be reviewed under an abuse-of-discretion standard.[55]

Since *Booker*, the Court has struggled to define the role of the Guidelines and the breadth of district courts' sentencing discretion.[56] When wrestling with these issues, the Court has suggested that the Commission's expertise justifies some limits on district courts' discretion to deviate from the Guidelines.[57] Significantly, the Court's decision in *Kimbrough v. United States*[58] suggests, as an apparent corollary, that those purportedly exceptional[59] Guidelines that do *not* reflect the Commission's expertise warrant relatively little deference.[60]

In *Kimbrough*, the Court held that district courts could deviate from the drug-trafficking Guidelines based on a disagreement with the Commission's decision to treat any amount of crack cocaine as equivalent to 100 times as much powder cocaine.[61] The key premise of

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54. Gall v. United States, 128 S. Ct. 586 (2007).

55. *Id.* at 594.

56. Sentencing always begins with the calculation of the defendant's Guidelines range, *id.* at 596, but how much that range should influence a district court's final sentencing decision is open to some debate. For a discussion of how some courts have approached this question when the applicable Guideline reflects express congressional policy choices, see *infra* Part II.B. For a proposed alternative approach, see *infra* Part III.

57. *See* Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) (suggesting that because of the Commission's expertise and capacity for empirical study, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case" (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007))); *Gall*, 128 S. Ct. at 594, 597 (suggesting that because the Guidelines are "the product of careful study based on extensive empirical evidence," a more significant deviation from the Guidelines requires a stronger justification); *Rita*, 127 S. Ct. at 2464–65 (invoking the Commission's "empirical approach" as a justification for an appellate presumption that within-Guidelines sentences are reasonable, a device that would tend to encourage district courts to adhere to the Guidelines).

58. Kimbrough v. United States, 128 S. Ct. 558 (2007).

59. For criticism of the notion that the Guidelines by and large reflect the Commission's expertise and empirical study, see, for example, STITH & CABRANES, *supra* note 26, at 60–66; and see also Hofer & Allenbaugh, *supra* note 26, at 33–35.

60. *See Kimbrough*, 128 S. Ct. at 574–75 (suggesting that a district court should have greater freedom to deviate from the Guidelines based on its own view that they are too severe when the Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role").

61. *See id.* at 564 (holding that "the Court of Appeals erred in holding the crack/powder disparity effectively mandatory"); *see also* Spears v. United States, 129 S. Ct. 840, 843 (2009) (per curiam) (clarifying that "the point of *Kimbrough*" was "a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case").

this holding was that the 100-to-1 ratio did not reflect the Commission's "characteristic institutional role."[62] Because the Guidelines typically reflect empirical analysis, the Court noted, appellate review should ordinarily be more searching when a district court deviates from the Guidelines simply because it disagrees with them than when a court deviates because the Guidelines are a poor fit for an unusual case.[63] The Guidelines' treatment of crack cocaine, however, did not reflect the Commission's expertise.[64] Rather, it reflected the Commission's attempt to harmonize the Guidelines with statutory minimums and maximums that adopted the same ratio.[65] Because the 100-to-1 ratio did not manifest the Commission's unique strengths, district courts could more readily reject it.

Notably, the *Kimbrough* Court did not decide what sort of deference courts owe to clear congressional policy choices expressed through the Guidelines. Although the government argued that the 100-to-1 ratio was a "specific policy determinatio[n]" by Congress and therefore beyond district courts' discretion to reject,[66] the Court concluded that the 100-to-1 ratio could not be attributed to a congressional policy judgment: Congress had expressed a preference only for certain minimums and maximums, not for a specific ratio that should govern all sentences within those limits.[67]

II. THE SPECIAL PROBLEM OF THE CHILD PORNOGRAPHY GUIDELINE

The Guideline for possession of child pornography raises an issue the Court has never explicitly addressed: after *Booker*, how much should district courts defer to Guidelines that embody explicit congressional policy choices? *Kimbrough* is suggestive. Like the 100-to-1 ratio at issue in *Kimbrough*,[68] the child pornography Guideline does not reflect the expertise of the Commission. As this Part shows, numerous specific congressional directives have left little room for empirical analysis to guide the Commission's policymaking.[69] Yet

62. *Kimbrough*, 128 S. Ct. at 575.
63. *Id.* at 574–75.
64. *Id.* at 575.
65. *Id.*
66. *Id.* at 570 (alteration in original).
67. *Id.*
68. *See supra* text accompanying notes 61–65.
69. *See infra* Part II.A.

Kimbrough is not directly on point. Because of those specific congressional directives, most provisions of the child pornography Guideline embody the unequivocally expressed will of Congress. As previously explained, *Kimbrough* does not settle what degree of deference courts owe to explicit congressional policy choices embedded in the Guidelines.[70]

This Part introduces the unique problem posed by congressional policy choices embedded in the child pornography Guideline. It first describes Congress's role in shaping that Guideline. It then considers how courts have approached the problem of determining how much deference is due in applying that Guideline.

A. The History and Substance of the Child Pornography Guideline

Although the SRA originally delegated the details of federal sentencing policy to the Commission,[71] Congress has in many cases reclaimed that power by directing the Commission to make specified amendments to the Guidelines.[72] The child pornography Guideline, in particular, is notable for the pervasiveness of congressional influence. As both the Commission and Troy Stabenow, an Assistant Federal Public Defender and critic of the Guideline, have documented,[73] the Guideline for possession of child pornography has been amended numerous times, often at the behest of Congress.[74] This history reveals

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70. *See supra* text accompanying notes 66–67.

71. *See supra* note 22 and accompanying text.

72. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1491 (2008) (noting that there have been "hundreds of amendments to the original Guidelines, most of which increased penalties at the express direction of Congress"). For lists of congressional directives to the Commission, see generally 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 app. B (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf; *Congressional Directives to Sentencing Commission: 1988–2009*, ODS TRAINING BRANCH (June 2010), http://www.fd.org/pdf_lib/congressional directives.pdf.

73. *See generally* U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), *available at* http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf (describing in detail the history of the child pornography Guideline); Stabenow, *supra* note 6, at 3–22 (describing the history of the child pornography Guideline and criticizing it as the product of irrational political posturing).

74. *See, e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(i), 117 Stat. 650, 672 (codified as amended at 28 U.S.C. § 994 note (2006)) (amending the Guidelines directly to create an enhancement based on the number of images); Sex Crimes Against Children Prevention Act of 1995 (SCACPA), Pub. L. No. 104-71, §§ 2–3, 109 Stat. 774, 774 (codified as amended at 28 U.S.C. § 994 note) (requiring the Commission to increase the base offense level for child

that the child pornography Guideline expresses clear congressional preferences.

Early incarnations of the child pornography Guideline were driven by the Commission's autonomous policy decisions.[75] Before possession of child pornography was a federal crime, Section 2G2.2 applied only to trafficking and receipt of child pornography, and it prescribed a base offense level of thirteen.[76] Distribution of child pornography triggered an increase of five or more levels, depending on the retail value of the material distributed.[77] Images of children under twelve triggered a two-level increase.[78] Soon after the promulgation of the original Guidelines, the Commission expanded the two-level enhancement to include images of prepubescent children[79] and added a four-level enhancement for sadomasochistic or violent images.[80]

In 1990, when Congress criminalized the possession of child pornography,[81] the Commission proposed a separate Guideline for possession and receipt, leaving Section 2G2.2 to govern only trafficking cases.[82] The new Guideline, Section 2G2.4, would have prescribed a base offense level of only ten for possession and receipt.[83]

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pornography offenses and create a two-level enhancement for offenses involving the use of a computer); Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1991) (codified as amended at 28 U.S.C. § 994 note) (requiring the Commission to raise the base offense level for child pornography offenses).

75. *See* U.S. SENTENCING COMM'N, *supra* note 73, at 10–16 (describing how the Commission shaped Section 2G2.2 before Congress began to intervene).

76. *Id.* at 10 (citing U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (1987)).

77. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (1987) (prescribing specific offense characteristics for distribution and receipt of child pornography).

78. U.S. SENTENCING COMM'N, *supra* note 73, at 10; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (1987) (prescribing specific offense characteristics for distribution and receipt of child pornography).

79. U.S. SENTENCING COMM'N, *supra* note 73, at 12 (citing Notice of Submission of Regular Amendments to the Sentencing Guidelines and Commentary to the Congress for Review, 53 Fed. Reg. 15,530 (Apr. 29, 1988)).

80. *Id.* at 16; *see also* Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 55 Fed. Reg. 19,188, 19,198 (May 8, 1990) (amending Section 2G2.2 to include an enhancement for sadistic, masochistic, or otherwise violent images).

81. U.S. SENTENCING COMM'N, *supra* note 73, at 17 (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 323(a)–(b), 104 Stat. 4789, 4818–19 (codified as amended at 18 U.S.C. § 2252 (2006))).

82. *Id.* at 18–19 (citing Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. 22,762 (May 16, 1991)).

83. Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. at 22,770.

Responding to a perceived attempt to reduce penalties for child pornography offenders, Congress asserted control. In 1991, while most senators were occupied by committee meetings, Senators Jesse Helms and Strom Thurmond introduced an amendment to an appropriations bill that made several demands of the Commission, including, most notably, the following: continue to group receipt of child pornography with trafficking under Section 2G2.2, raise the base offense level under Section 2G2.2 to at least fifteen, raise the base offense level under Section 2G2.4 to at least thirteen, and create a five-level enhancement under Section 2G2.2 "for offenders who have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[84] Senator Helms emphasized that his amendment was supported by the Department of Justice (DOJ), as well as by religious and anti-pornography groups.[85] As a letter inserted into the record of the House debate shows, the Commission opposed grouping receipt with trafficking under Section 2G2.2.[86] The Helms-Thurmond Amendment passed, however, and the Commission amended the Guidelines to comply with its directives.[87]

In 1995, Congress enacted the Sex Crimes Against Children Prevention Act of 1995 (SCACPA).[88] Through SCACPA, Congress ordered the Commission to raise base offense levels for child pornography offenses by at least two levels and to create a two-level enhancement for computer use.[89] No congressional committee held any hearings on the bill.[90] Every member of Congress who made a statement in the floor debate supported penalty increases.[91] The bill's

84. 137 CONG. REC. 18,897–98 (1991) (reprinting the amendment as introduced during consideration of the appropriations bill); U.S. SENTENCING COMM'N, *supra* note 73, at 20; Stabenow, *supra* note 6, at 6.

85. 137 CONG. REC. 18,898 (1991) (statement of Sen. Helms).

86. Letter from William W. Wilkins, Jr., Chairman, U.S. Sentencing Comm'n, to Edward R. Roybal, Chairman, Subcomm. on Treasury, Postal Serv., and Gen. Gov't (Aug. 7, 1991), *reprinted in* 137 CONG. REC. 23,733–34 (1991); Stabenow, *supra* note 6, at 7.

87. Stabenow, *supra* note 6, at 8; *see also* Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1991) (codified as amended at 28 U.S.C. § 994 note (2006)) (enacting the Helms-Thurmond Amendment into law); U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 435–36 (2010) (describing amendments to the Guidelines promulgated in response to the Helms-Thurmond Amendment).

88. SCACPA, Pub. L. No. 104-71, 109 Stat. 774 (codified as amended at 28 U.S.C. § 994 note).

89. U.S. SENTENCING COMM'N, *supra* note 73, at 26 (quoting SCACPA §§ 2–3).

90. H.R. REP. NO. 104-90, at 4 (1995).

91. *See* 141 CONG. REC. 10,977–78 (1995) (reproducing statements made in the floor

lone critic, Representative Zoe Lofgren, argued that it was too lenient.[92] To comply with SCACPA, the Commission raised the base offense level under Section 2G2.2 from fifteen to seventeen and the base offense level under Section 2G2.4 from thirteen to fifteen; it also added a two-level enhancement for computer use to both Guidelines.[93]

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act),[94] a popular bill implementing an Amber Alert system to respond to child kidnappings[95] and targeting virtual child pornography.[96] Late in the legislative process, Representative Tom Feeney introduced an amendment drafted by two DOJ lawyers.[97] After twenty minutes of debate, the amendment was attached to the House bill.[98] It was ultimately enacted in a modified form.[99] No committee held any hearings on the amendment.[100]

The most conspicuous features of the Feeney Amendment were its limitations on judicial authority to impose non-Guidelines sentences.[101] These sentencing-reform provisions consumed the floor

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debate on SCACPA); *id.* at 10,278–80 (same).

92. 141 CONG. REC. 10,279 (1995) (statement of Rep. Lofgren).

93. U.S. SENTENCING COMM'N, *supra* note 73, at 27; *see also* Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 61 Fed. Reg. 20,306, 20,307 (May 6, 1996) (implementing the changes required by SCACPA).

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

95. Stabenow, *supra* note 6, at 20; *see also* PROTECT Act §§ 301–305 (establishing the Amber Alert program).

96. Stabenow, *supra* note 6, at 20; *see also* PROTECT Act § 502 (amending federal statutes regarding child exploitation offenses to better deal with the problem of virtual child pornography).

97. Stabenow, *supra* note 6, at 20; *see also* 149 CONG. REC. 7640–43 (2003) (introducing the Feeney Amendment); Skye Phillips, Note, *Protect Downward Departures: Congress and the Executive's Intrusion into Judicial Independence*, 12 J.L. & POL'Y 947, 983 & n.185 (2004) (citing Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003, at A1) (noting the Feeney Amendment's origin in the DOJ).

98. Stabenow, *supra* note 6, at 20 (citing Phillips, *supra* note 97, at 983); *see also* 149 CONG. REC. 7643 (2003) (allowing twenty minutes for the floor debate on the Feeney Amendment).

99. *See* PROTECT Act § 401 (enacting a modified version of the Feeney Amendment); *see also* Stabenow, *supra* note 6, at 20–21 (describing the Feeney Amendment's progress through the House and Senate).

100. 149 CONG. REC. 9347–48 (2003) (statement of Sen. Kennedy).

101. 149 CONG. REC. 7640–41 (2003); *see also* Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 FED. SENT'G REP. 253, 254 (2004) (characterizing the Feeney Amendment as a "mad rush to further restrict judicial discretion" and noting that "[t]he

debate[102] and provoked opposition by the Judicial Conference of the United States (Judicial Conference) and the Commission.[103] Less noticed were provisions that directly amended the Guidelines to increase the penalties for child pornography offenses.[104] These provisions created an enhancement based on the number of images, as well as a four-level enhancement under Section 2G2.4 for possession of sadomasochistic or violent images.[105]

Subsequently, the Commission consolidated Sections 2G2.2 and 2G2.4 into a single Guideline because of the perceived similarity of the offenses of possession and receipt.[106] To harmonize this Guideline with a newly enacted five-year mandatory minimum for trafficking and receipt of child pornography,[107] the Commission also raised the base offense levels for possession and receipt to eighteen and twenty-two, respectively.[108]

Under the resulting Guideline, Section 2G2.2, a first-time offender convicted of possession of child pornography faces a base offense level of eighteen[109] and a Guidelines range of twenty-seven to

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Feeney Amendment was enacted to limit downward departures by barring some previously-allowable departures, establishing de novo appellate review of departures, prohibiting the Sentencing Commission from adding any new grounds of downward departure for two years, and directing the Sentencing Commission to amend the Guidelines to ensure that the number of downward departures are [*sic*] 'substantially reduced'").

102. *See* 149 CONG. REC. 7643–45 (2003) (reproducing the House debate about the Feeney Amendment); 149 CONG. REC. 9346–51, 9353–58, 9360–66 (2003) (reproducing the Senate debate about the Feeney Amendment).

103. *See* 149 CONG. REC. 9351–52 (2003) (reproducing letters expressing the objections of the Judicial Conference of the United States and the Commission).

104. Stabenow, *supra* note 6, at 21; *see also* PROTECT Act § 401(i)(B) (enacting a direct amendment to the Guidelines for child pornography offenses).

105. PROTECT Act § 401(i)(B).

106. U.S. SENTENCING COMM'N, *supra* note 73, at 42–43; *see also* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2004, 69 Fed. Reg. 28,994, 29,003 (May 19, 2004) (consolidating Sections 2G2.2 and 2G2.4).

107. U.S. SENTENCING COMM'N, *supra* note 73, at 44.

108. *See id.* at 49 (showing amendments to Section 2G2.2); *see also* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2004, 69 Fed. Reg. at 29,003 (increasing the base offense levels for possession and receipt of child pornography).

109. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1) (2010). The base offense level for trafficking or receipt is twenty-two, *id.* § 2G2.2(a)(2), but is reduced to twenty for simple receipt, *id.* § 2G2.2(b)(1). Though possession and simple receipt have different base offense levels, they are otherwise treated similarly by the Guidelines. *See id.* § 2G2.2(b) (enumerating the same specific offense characteristics for both offenses). For simplicity's sake, this Note focuses on possession.

thirty-three months.[110] In most cases, however, a number of specific offense characteristics increase the offense level, resulting in a higher range. One enhancement, applicable in 94.8 percent of the cases sentenced under Section 2G2.2 in 2009,[111] raises the offense level by two if the images portray a victim who is prepubescent or under the age of twelve.[112] As a result of Congress's directives to the Commission in SCACPA,[113] another enhancement, applicable in 97.2 percent of the cases,[114] raises the offense level by two if the offense involved the use of a computer.[115] Together, these enhancements result in an offense level of twenty-two and increase a first-time offender's Guidelines range to forty-one to fifty-one months.[116]

As a result of the direct congressional amendments to the Guidelines in the PROTECT Act,[117] Section 2G2.2 also prescribes an enhancement of two to five levels based on the number of images involved.[118] If the offense involved ten or more images, the increase is two levels;[119] if it involved six hundred or more images, the offense level is increased by five levels.[120] Assuming the enhancements for computer use and the age of the victim also apply,[121] the five-level enhancement, applicable in 63.1 percent of the cases in 2009,[122] results in an offense level of twenty-seven and raises a first-time offender's Guidelines range to seventy to eighty-seven months.[123]

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110. *Id.* ch. 5, pt. A, sentencing tbl.

111. U.S. SENTENCING COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2009, at 36 (2010), *available at* http://www.ussc.gov/gl_freq/09_glinexgline.pdf.

112. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2).

113. *See supra* notes 88–93 and accompanying text.

114. U.S. SENTENCING COMM'N, *supra* note 111, at 37.

115. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6).

116. *Id.* ch. 5, pt. A, sentencing tbl.

117. *See supra* notes 94–105 and accompanying text.

118. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7).

119. *Id.* § 2G2.2(b)(7)(A).

120. *Id.* § 2G2.2(b)(7)(D).

121. Recall that these enhancements almost always apply. *See supra* notes 111–15 and accompanying text.

122. U.S. SENTENCING COMM'N, *supra* note 111, at 37.

123. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl.

Also as a result of the PROTECT Act,[124] possession of images portraying "sadistic or masochistic conduct or other depictions of violence" triggers a four-level enhancement,[125] which applied in 73.4 percent of the cases sentenced under Section 2G2.2 in 2009.[126] Assuming the enhancements based on computer use and the age of the victim also apply, this enhancement results in an offense level of twenty-six and raises a first-time offender's Guidelines range to sixty-three to seventy-eight months.[127] Adding the common five-level enhancement for possession of six hundred or more images yields an offense level of thirty-one and a range of 108 to 135 months,[128] subject to the statutory maximum of 120 months.[129]

Finally, as a result of the Helms-Thurmond Amendment,[130] a less common enhancement, applicable in only 9.2 percent of cases,[131] increases the offense level by five "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[132] Added to the enhancements based on computer use and the age of the victim, this enhancement results in an offense level of twenty-seven and yields a range of seventy to eighty-seven months.[133]

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124. Although the Commission had previously promulgated an enhancement for violent images under the Guideline for distribution and receipt of child pornography, *see supra* note 80 and accompanying text, the PROTECT Act amended Section 2G2.4, the Guideline for possession, to include such an enhancement, *see supra* notes 104–05 and accompanying text.

125. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4).

126. U.S. SENTENCING COMM'N, *supra* note 111, at 37.

127. *Id.* ch. 5, pt. A, sentencing tbl.

128. *Id.*

129. 18 U.S.C. § 2252(b)(2) (2006).

130. *See supra* notes 84–87 and accompanying text.

131. U.S. SENTENCING COMM'N, *supra* note 111, at 37.

132. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(5).

133. *Id.* ch. 5, pt. A, sentencing tbl. Because Section 2G2.2 applies not only to possession of child pornography but also to trafficking and receipt, *see id.* app. A (providing that all offenses defined under 18 U.S.C. § 2252 are to be sentenced under Section 2G2.2), it also provides enhancements for distribution of child pornography for various purposes, *see id.* § 2G2.2(b)(3) (prescribing, at a minimum, a two-level offense level increase for distribution, with five- to seven-level increases for more pernicious circumstances). Because the distribution enhancements seem to target transportation, distribution, or sale offenses criminalized under 18 U.S.C. §§ 2252(a)(1)–(3), rather than possession, this Note does not dwell on the distribution enhancements.

B. Lower Courts' Responses to Congressional Policy Choices Embedded in the Federal Sentencing Guidelines

1. *Congressional Directives as Mere Meddling*. Because the child pornography Guideline reflects extensive congressional intervention rather than the Commission's empirical analysis, many district courts have concluded that this Guideline warrants little or no deference.[134] They appear to have taken the view that only the Commission's expertise can justify deference to the Guidelines.[135] *Kimbrough*'s suggestion that the Guidelines warrant the greatest respect when they reflect the Commission's "characteristic institutional role"[136] does lend support to this view.

But the history of the child pornography Guideline complicates any attempt to apply *Kimbrough* straightforwardly. In *Kimbrough*, the Court concluded that the 100-to-1 ratio could not be attributed to any clear expression of congressional preference.[137] The child pornography Guideline, on the other hand, results largely from specific congressional directives and even direct congressional

134. *See, e.g.*, United States v. Beiermann, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009) (concluding that the Guideline for child pornography offenses warrants little deference "because it is the result of congressional mandates, rather than the Commission's exercise of its institutional expertise and empirical analysis"); United States v. Hanson, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008) (concluding that the child pornography Guideline warrants little deference because the "respect [owed to the Guidelines] will be greatest where the Commission has satisfied its institutional role of relying on evidence and study to develop sound sentencing practices"); United States v. Baird, 580 F. Supp. 2d 889, 895 (D. Neb. 2008) ("Because the [child pornography] Guidelines do not reflect the Commission's unique institutional strengths, the court affords them less deference than it would to empirically-grounded guidelines."); *see also* Hessick, *supra* note 25, at 731 ("A number of district courts have concluded 'that the child-pornography guidelines' lack of empirical support provides sentencing judges the discretion to sentence below those guidelines based on policy disagreements with them.'" (quoting United States v. Huffstatler, 561 F.3d 694, 697 (7th Cir. 2009))). District Judge Lynn Adelman has also advocated this approach in a law review article. *See* Adelman & Deitrich, *supra* note 6, at 576 ("The extent to which a sentencing court should accord respect to a guideline will generally depend on whether, when it developed the guideline, the Commission functioned as Congress envisioned in the [SRA]. The idea that led to the establishment of the Commission was that an administrative agency, insulated from politics and composed of experts on sentencing, would enact guidelines that advanced the generally accepted purposes of sentencing (punishment, deterrence, incapacitation, and rehabilitation), eliminated sentencing disparity, and were regarded by participants in the sentencing process as fair and just." (footnote omitted)); *see also id.* at 584–85 (arguing that the child pornography Guideline warrants little deference because it is "based largely on congressional actions" instead of "Commission research or expertise").

135. *See supra* note 134.

136. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).

137. *See id.* at 570–74 (discussing and rejecting the government's argument that the 100-to-1 ratio reflected the will of Congress).

amendments.[138] In light of that fact, the assumption that, as *Kimbrough* appears to suggest,[139] only the Commission's expertise can justify judicial deference to the Guidelines is inappropriate. As an expression of congressional preferences, the child pornography Guideline may reflect institutional strengths of *Congress*. Arguably, Congress's democratic legitimacy and capacity for deliberation about complex policy choices warrant at least some judicial deference to Guidelines that embody congressional preferences.[140] Although perhaps a comparison of the institutional strengths of the courts and Congress would ultimately support significant judicial discretion, Congress's institutional strengths are weighty enough to deserve more serious attention than these district courts have given them.

2. *Congressional Directives as Binding Policy Choices*. Another possible approach to the same general problem—an approach at one time advocated by the government[141] and adopted by two circuits[142]—

138. *See supra* Part II.A.

139. *See Kimbrough*, 128 S. Ct. at 574–75 (reasoning that district courts should have greater discretion to deviate from the 100-to-1 ratio because it does not "exemplify the Commission's exercise of its characteristic institutional role").

140. *See infra* Part III.A.

141. *See Kimbrough*, 128 S Ct. at 570 (summarizing the government's argument that the courts should adhere to the 100-to-1 ratio); *see also* 2G2.2 REPLY TO GOVERNMENT 11 (n.d.), *available at* http://www.fd.org/pdf_lib/2G2.2 Reply to Govt.pdf (last visited Dec. 1, 2010) (responding to the government's argument that courts may deviate from the child pornography Guideline based only on individualized circumstances, not "based on policy disagreements with a particular guideline").

142. Courts have addressed an issue similar to the special problem raised by the child pornography Guideline in at least one other context. The SRA directs the Commission to set the Guidelines for certain categories of recidivists "at or near" the statutory maximum for the offense of conviction. 28 U.S.C. § 994(h) (2006). Until Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (to be codified at 21 U.S.C. §§ 841, 844), the statutory maximums for cocaine offenses incorporated the 100-to-1 crack/powder ratio. *See* 21 U.S.C. § 841(b) (2006) (amended 2010) (prescribing a maximum penalty of forty years in prison for manufacturing or distributing five hundred grams of powder cocaine or five grams of crack cocaine and a maximum penalty of life in prison for manufacturing or distributing five kilograms of powder cocaine or fifty grams of crack cocaine). As a result of these congressional policy choices, the career-offender Guideline inevitably reflected this disparity. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (2010) (providing that a career offender's offense level must be based on the statutory maximum for the offense of conviction). The Seventh and Eleventh Circuits once held that because, in this context, the disparity results from congressional policy decisions, *Kimbrough* does not free district courts to deviate from the career-offender Guideline based on a disagreement with this disparity. *See* United States v. Welton, 583 F.3d 494, 496 (7th Cir. 2009) ("[T]he career offender Guideline range *is* the product of a Congressional mandate."), *vacated*, 130 S. Ct. 2061 (2010), *and overruled by* United States v. Corner, 598 F.3d 411 (7th Cir. 2010) (en banc); United States v.

would be to accept explicit congressional policy choices embedded in the Guidelines as binding. Under this view, a district court could deviate from the Guidelines based on the presence of exceptional facts that made the applicable Guideline a poor fit for a particular case but not based on the court's own view that congessional policy choices expressed through the Guidelines were unsound—for example, that a congressionally amended Guideline is too harsh even in an ordinary case or that certain enhancements are generally unwarranted.

The circuits that at one time adopted this approach appear to have retreated from it,[143] and other circuits that have addressed the issue have not endorsed it.[144] Even so, one can imagine how the courts

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Vazquez, 558 F.3d 1224, 1229 (11th Cir. 2009) ("[U.S. SENTENCING GUIDELINES MANUAL] § 4B1.1—which was the result of 'direct congressional expression'—is distinguishable from *Kimbrough*'s crack cocaine Guidelines, which were the result of implied congressional policy."), *vacated*, 130 S. Ct. 1135 (2010).

143. The Seventh Circuit has overruled its decisions adopting this approach. *Corner*, 598 F.3d at 416. The Supreme Court has vacated the Eleventh Circuit case adopting this approach, in light of the government's decision to abandon the position that district courts may not reject the crack/powder disparity reflected in the career-offender Guideline. *Vazquez*, 130 S. Ct. at 1135; *see also* Brief for the United States at 7, Vazquez v. United States, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423929 (requesting that the Court vacate the Eleventh Circuit's decision in light of the government's recently adopted position that district courts may deviate from the career-offender Guideline based on policy disagreement with it).

144. *See* United States v. Stone, 575 F.3d 83, 89 (1st Cir. 2009) (citing United States v. Rodríguez, 527 F.3d 221, 230 (1st Cir. 2008)) (observing that circuit precedent has interpreted *Kimbrough* to allow district courts to deviate from the Guidelines based on disagreement with the policies they embody "even where a guideline provision is a direct reflection of a congressional directive"); *see also* United States v. Mitchell, No. 08-50429, 2010 WL 4105220, at *4 (9th Cir. Oct. 20, 2010) (holding that district courts may deviate from the career-offender Guideline based on their disagreement with the crack/powder disparity it reflects); United States v. Michael, 576 F.3d 323, 327 (6th Cir. 2009) (same), *cert. denied*, 130 S. Ct. 819 (2009); *cf.* United States v. Sanchez, 517 F.3d 651, 664–65 (2d Cir. 2008) (holding that Congress's directive to the Commission to set the career-offender Guideline near the statutory maximum does not "deprive the courts of authority to impose on a career offender a prison term that is not near the statutory maximum," though not explicitly deciding whether district courts may exercise that authority based on a categorical policy disagreement with Congress's view that career offenders should ordinarily be sentenced near the maximum). Although these courts have rejected the view that congressional policy choices embedded in the Guidelines are binding, they appear for the most part to have said little else about how much weight those policy choices warrant. *See Mitchell*, 2010 WL 4105220, at *4 (declining to provide any guidance regarding the weight owed to congressional policies embedded in the career-offender Guideline beyond the holding that district courts may disagree with those policies); *Michael*, 576 F.3d at 327 (same); *see also Sanchez*, 517 F.3d at 668 (noting only that "[c]ongressional policy judgment[s] . . . must be taken into account"). *But see Stone*, 575 F.3d at 93 ("After *Kimbrough*, the law allows one judge to find that congressional input makes a sentence less empirical, and so less appropriate, while another judge may reasonably find such input makes the sentence more reflective of democratic judgments of culpability, and so more reasonable.").

that have not yet settled the issue might be tempted by this approach's strengths. This approach respects the democratic legitimacy of congressional policy choices embedded in the Guidelines.[145] It also seems to acknowledge district courts' expertise in more fact-bound decisions.[146] Further, *Kimbrough* does not explicitly foreclose this approach. As noted previously,[147] the *Kimbrough* Court did not decide whether district courts could reject explicit congressional policy choices expressed through the Guidelines.[148]

But this approach, too, is unsatisfying. This approach is insensitive to—or perhaps unrealistic about—the institutional strengths and weaknesses of Congress, and to how the courts may complement them. Though faithful to the notion that district courts are best situated to appreciate the distinctive facts of each particular case,[149] this approach overlooks institutional reasons to welcome some exercises of independent policy judgment by district courts.[150] The next Part discusses these institutional reasons and suggests an approach that is more responsive to them.

III. A MORE PROMISING APPROACH: ACCOUNTING FOR CONGRESS'S INSTITUTIONAL STRENGTHS AND WEAKNESSES

Both approaches discussed in Part II fail to account for important institutional strengths. The less deferential approach[151] fails to account for the fact that congressional policy choices embedded in the Guidelines may reflect a democratic legitimacy and a capacity for deliberation that district courts cannot match. The more restrictive approach[152] ignores the possibility that the institutional perspective of district courts may have value beyond the courts' capacity to identify atypical cases.

A better approach would be for courts to decide how much deference to give to congressionally amended Guidelines by making a

145. For a discussion of the importance of recognizing the democratic legitimacy of congressional policy choices embedded in the Guidelines, see *infra* Part III.A.1.

146. *See infra* notes 168–70 and accompanying text.

147. *See supra* text accompanying notes 66–67.

148. *See* Kimbrough v. United States, 128 S. Ct. 558, 570–74 (discussing and rejecting the government's argument that the 100-to-1 ratio in the Guidelines reflected the will of Congress).

149. *See infra* text accompanying note 170.

150. *See infra* Part III.B.

151. *See supra* Part II.B.1.

152. *See supra* Part II.B.2.

realistic assessment of the institutional strengths and weaknesses they reflect. To the extent that the Guidelines reflect institutional strengths of Congress, courts should be reluctant to reject the judgments they embody. But when they reflect congressional weaknesses—and when courts can offer a useful institutional perspective—courts should be more willing to rely on their own judgment.

A. Congress's Relative Strengths

At least two institutional strengths counsel deference to Guidelines that track explicit congressional preferences. First, Congress is more democratically legitimate than courts. Second, the legislative process is often more conducive to deliberation about the broad range of relevant information and interests at stake than is the judicial process.

1. *Democratic Legitimacy*. Members of Congress, who are subject to periodic elections,[153] are more democratically accountable than federal judges.[154] Congress may thus be more responsive to the need to protect the public by deterring criminal conduct and incapacitating offenders.

Congress's democratic legitimacy may also make it more qualified than courts to express society's view of "the seriousness of the offense" and "just punishment."[155] Judicial decisionmaking may serve this goal less reliably, both because of its political independence and because it reflects the limited perspective of the sentencing judge, rather than a legislative compromise between competing constituencies.[156] Congressional choices embodied in the Sentencing

153. U.S. CONST. art. I, § 2; *id.* amend. XVII.

154. *See id*. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."); Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1388 (2009) ("Congress has democratic legitimacy; courts do not."); *cf.* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1391 (2006) ("The system of legislative elections is not perfect . . . but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary. Legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decisionmaking.").

155. 18 U.S.C. § 3553(a)(2)(A) (2006).

156. *See* Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the*

Guidelines that reflect value judgments about offenders' just deserts therefore warrant considerable respect.

Notably, however, congressional amendments to the Guidelines may not all warrant equal deference on this ground. A well-publicized amendment—or one that responds to an especially salient issue—is more likely to reflect the public's values.[157] Those less likely to garner public scrutiny are less likely to reflect the popular will, because in those cases legislators can deviate from public preferences with less concern about electoral consequences.[158] Thus, a district court should assess the strength of a Guideline's claim to deference on the ground of popular legitimacy in light of the provision's unique content and history.

2. *Legislative Deliberation*. Although Congress lacks the expertise of an independent agency, both the Supreme Court and scholars have recognized that legislatures are superior to courts as forums for the collection and analysis of large amounts of information.[159] For this reason, Congress may be better equipped than courts to make policy decisions about the deterrent value of

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Decisionmaker to the Decision Nature, 105 COLUM. L. REV. 1124, 1133 (2005) ("[T]o the extent that much of this decisionmaking requires a balancing of fundamental societal values . . . no single individual is likely to be able to capture and represent the range of views within the society."). Arguably, even the vaunted expertise of the Commission is of comparatively little value to this goal of sentencing. *Cf. id.* at 1134 ("[B]ecause the legislature is more representative of the society than a sentencing commission could be, the legislature might be a better choice to make what are essentially broad value judgments . . . ."). As Ronald Wright has argued, "[T]he vision of a scientific, apolitical sentencing policy is at once appealing and naive. Values not susceptible of empirical verification will always dominate sentencing decisions." Wright, *supra* note 7, at 12.

157. *See* Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175, 181 (1983) (finding that government policy is more likely to accord with public opinion on highly salient issues). Notably, a directive that addresses an especially salient issue is likely to closely approximate public opinion even if the directive itself is not well publicized. An unpopular vote on such a directive could easily become a liability in future reelection campaigns. *See* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 10 (1990) (quoting an unnamed congressman's expression of concern that his vote, though unlikely to attract notice at the time, could be used against him in a future campaign).

158. *See* ARNOLD, *supra* note 157, at 10–11 (suggesting that the import of "potential [public] preferences" is limited to "preferences which legislators believe might easily be created either by [interest groups] or by future challengers searching for good campaign issues").

159. Bartnicki v. Vopper, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994) (plurality opinion) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)); Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980); *see also* Bibas et al., *supra* note 154, at 1388 ("[C]ourts lack the institutional competence to make systemic policy choices.").

alternative sentencing policies,[160] as well as their social and budgetary costs.[161] Further, whereas judicial decisionmaking relies heavily on one person's limited perspective,[162] the legislative process fosters compromise among the wide variety of interests at stake.[163]

This legislative capacity for deliberation stands out even more in light of the permissive standard of appellate review developed in the cases that follow *Booker*. In practice, allowing courts to reject the Guidelines' recommendations because they believe those recommendations to be too severe means allocating policymaking authority to district courts with only limited policing by appellate courts.[164] The Supreme Court's sentencing jurisprudence thus departs from the ordinary practice of subjecting district courts' policy decisions to de novo review.[165] Under *Gall*, sentencing decisions, whether faithful to the Guidelines or not, are reviewed "under a deferential abuse-of-discretion standard";[166] an appellate court's disagreement with a sentence does not justify reversal.[167]

The permissiveness of appellate review supports the argument that district courts should often defer to the general policy choices reflected in the Guidelines and deviate only on the basis of more fact-bound, individualized considerations. Although appellate courts have some experience making prospective decisions with broad policy implications,[168] district courts have less opportunity to deliberate

160. *See* 18 U.S.C. § 3553(a)(2)(B) (requiring sentencing courts to consider the need for "adequate deterrence to criminal conduct"); Bibas et al., *supra* note 154, at 1388 ("Congress, not courts, can hear expert testimony about the dangers and harms of various crimes and the best ways to address them.").

161. *See* Bibas et al., *supra* note 154, at 1388 ("Congress, not courts, sets budgets and has to balance priorities such as funding for prisons and law enforcement.").

162. *See* Robinson & Spellman, *supra* note 156, at 1133 ("[N]o single individual is likely to be able to capture and represent the range of views within the society.").

163. *See id.* at 1134 (noting that because legislatures are "more representative of the society" than are sentencing commissions, they may be better able to weigh competing interests).

164. *See* William Otis, *Priority for a New Administration: Restore the Rule of Law in Federal Sentencing*, 20 FED. SENT'G REP. 345, 345 (2008) (arguing that in a line of cases "starting with *Apprendi v. New Jersey*, running through *Booker v. United States*, and ending in *Gall v. United States* and *Kimbrough v. United States*, the Supreme Court . . . . made clear that appellate review of district court sentencing decisions was to be deferential, if not, for most practical purposes, empty" (footnotes omitted)).

165. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 26 (2008).

166. Gall v. United States, 128 S. Ct. 586, 591 (2007).

167. *Id.* at 597.

168. *See* Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of*

about broad issues of law and policy.[169] Thus, district courts generally command the greatest deference when their decisions focus narrowly on the facts of particular cases.[170]

Because district courts are less institutionally equipped to engage in deliberative policymaking, the legislative process's suitability for amassing data and balancing competing interests may counsel deference to Guidelines that echo the will of Congress. But not all such Guidelines necessarily embody these strengths. A congressional amendment to the Guidelines enacted after robust debate and extensive hearings is likely to reflect a thoughtful weighing of the relevant interests. One passed with little discussion or analysis, however, warrants less deference. Congress's legislative agenda may often be too full to permit the investment of time and resources necessary to make carefully studied sentencing-policy decisions.[171] In such cases, district courts' firsthand experience with the federal sentencing system may put them in a better position to compare penalties for similar offenses or to assess whether the assumptions underlying sentencing policies hold true in most cases.[172] Consequently, district courts should be more reluctant to defer to congressional policy choices echoed in the Guidelines in the absence of meaningful legislative deliberation.

Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines, 35 AM. CRIM. L. REV. 1, 14 (1997) (noting that "appellate courts set forth general principles which lower courts must follow").

169. *See id.* (noting that appellate judges are better able to focus on legal questions and that appellate decisions usually have the benefit of deliberation by a panel of judges).

170. *See* Hessick & Hessick, *supra* note 165, at 25 ("[A]lthough courts of appeals review factual findings and applications of law to fact deferentially, they review purely legal determinations de novo."); Lee, *supra* note 168, at 13 ("Appellate courts generally defer to trial courts on factual matters, because the trial court is thought to be more competent than the appellate court to assess the facts."). Thus, a primary rationale for the discretion that district judges have historically enjoyed in sentencing is that they are in a better position than appellate courts to appreciate the nuances of particular cases. *See* MICHAEL TONRY, SENTENCING MATTERS 3 (1996) ("Until twenty-five years ago, the word 'sentencing' generally signified a slightly mysterious process which, it was all but universally agreed, involved individualized decisions that judges were uniquely competent to make. Sentencing laws were crafted to allow judges latitude to fashion penalties tailored to the circumstances of individual cases.").

171. Robinson & Spellman, *supra* note 156, at 1134; Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 3, 6 (1987).

172. *Cf.* Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14 ("[Judges] are able to see the consequences of judicial reform proposals that legislative sponsors may not be in a position to see." (quoting William Rehnquist, C.J., U.S. Supreme Court)).

B. Congress's Relative Weaknesses

In spite of Congress's institutional strengths, courts may often have good reasons to exercise independent judgment in sentencing. Congress, by institutional design, is likely to discount the principle underlying the parsimony provision—that punishment should be no greater than necessary.[173] As early proponents of sentencing commissions warned, legislative intervention in the sentencing system "is likely to lead to cruel, unnecessary, and expensive increases in prison populations."[174]

1. *Undervaluing Offenders' Interests.* Because the interests of offenders are poorly represented, the political process is biased in favor of harsher sentences. Public choice theory predicts that, because of their desire for reelection, legislators will act with the goal of maximizing political support.[175] Consequently, the legislative process will discount the interests of groups poorly situated to offer meaningful political support in the form of campaign contributions, canvassing, and votes.[176] Because offenders are often unable to offer political support of any significance,[177] Congress likely undervalues their interests.[178]

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173. 18 U.S.C. § 3553(a) (2006).

174. Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 233 (1984); *see also* Wright, *supra* note 7, at 8–9 (observing that early reformers advocated delegating authority to a sentencing commission because legislatures would be tempted to impose unnecessarily harsh sentences to take a popular stance).

175. Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 46 (1988).

176. As Professor William Landes and Judge Richard Posner explain, under interest-group theory, "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation"; "[p]ayment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes." William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975). Accordingly, legislators will tend to be deaf to the concerns of those unable to pay in this currency.

177. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 725–26 (2005).

178. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (arguing that because legislators "undervalue the rights of the accused," courts should actively develop constitutional norms of criminal procedure).

As a history of legislative punitiveness[179] suggests, a number of factors often combine to exclude offenders from the political process.[180] Because offenders often cannot identify themselves as such in advance[181]—and because they may underestimate the risk that they will be caught and convicted[182]—they are unlikely to be motivated to organize lobbying efforts. A desire to avoid the reputational harm of being identified as, or associated with, potential criminals may also discourage lobbying against tough-on-crime legislation.[183] Furthermore, given the apparent correlation between criminality and poverty,[184] campaign contributions probably do not proportionately represent offenders' interests. Generally, therefore, one would expect little interest-group maneuvering on behalf of those most directly burdened by harsh sentences.[185] By contrast, the DOJ engages in significant lobbying efforts[186] and has strong incentives to seek increased penalties to gain leverage in plea bargaining.[187] Interest groups representing the prison industry, crime victims, and law

179. *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 405–08 (2006) (describing punitive trends beginning in the 1980s); Berman, *supra* note 20, at 99 (describing the successive enactment of several federal mandatory minimum statutes in the 1980s and 1990s); *cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) ("American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory.").

180. *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, 1975 (2006) ("[A]ll of the powerful political groups and the electorate have lined up on the same side: They all seem to support tougher sentencing laws.").

181. Barkow, *supra* note 177, at 726.

182. *Id.*; *see also* Dripps, *supra* note 178, at 1090 ("[V]ery few people expect to commit crimes that come to the attention of the police.").

183. Stuntz, *supra* note 179, at 555.

184. *See* Chien-Chieh Huang, Derek Laing & Ping Wang, *Crime and Poverty: A Search-Theoretic Approach*, 45 INT'L ECON. REV. 909, 910–11 (2004) (enumerating studies that demonstrate links between crime and market wages, unemployment, and educational attainment).

185. Those who may face "corporate criminal sanctions, such as penalties for violations of securities and environmental laws," are one possible exception. Barkow, *supra* note 177, at 725.

186. *See id.* at 728 ("No other group comes close to [the DOJ with respect to] prosecutorial

enforcement officials have also successfully influenced the legislative process.[188]

Interest-group politics aside, offenders often have little voting power. Those who bear the brunt of tough sentencing legislation are significantly outnumbered by those who stand to gain from it.[189] Moreover, criminal offenders in many jurisdictions are deprived of the right to vote.[190] Congress thus has little incentive to attach any weight to their interests. For these reasons, the calculus of congressional policymaking can be expected to discount the harm caused by harsh penalties.

2. *Public Misperceptions.* On the other side of the political balance, public demand for increased penalties, perhaps surprisingly, may exaggerate the degree of punitiveness genuinely supported by majoritarian interests. Apart from the interest-group maneuvering already described, this can happen for at least two reasons.

First, circumstances often conspire to inflate the public's perception of the danger posed by crime.[191] Studies have shown that the public consistently believes crime rates are increasing, even when they are not.[192] The public also tends to overestimate crime rates,[193] as

188. Beale, *supra* note 179, at 471, 472 & nn.339–40.

189. *See* von Hirsch, *supra* note 171, at 6 ("Many voters fear crime and criminals, and few convicted offenders do (or even may) vote."); *cf.* Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 529–30 (1995) (offering an analogous explanation for the increasing federalization of criminal law).

190. *E.g.*, Berman, *supra* note 20, at 107.

191. The news media often overemphasize sensational crime stories as a cost-effective way of securing an audience. *See* Beale, *supra* note 179, at 422 (arguing that because of "economic factors," the news media's "coverage of crime—particularly violent crime—has increased dramatically, and . . . has shifted toward a tabloid style"). This practice can lead the public to overestimate the severity of the crime problem. *Id.* at 442. Public misperceptions are exacerbated by cognitive errors that may lead people to form inaccurate generalizations about the crime problem based on a few particularly salient examples. Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 60 (1997). For a discussion of how cognitive errors such as overgeneralization influence the public's views of crime and criminal justice, see *id.* at 57–64, and see also Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 121–24 (1992).

192. Roberts, *supra* note 191, at 110; *see also* JULIAN V. ROBERTS & MIKE HOUGH, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE 10–15 (2005) (suggesting that crime rates in several nations, including the United States, were actually falling even when people in those nations believed they were not).

193. Roberts, *supra* note 191, at 109.

well as the proportion of crimes involving violence.[194] Given the public's support for utilitarian goals of sentencing,[195] the public's exaggerated perception of the danger of crime may lead to demand for measures more drastic than the public would otherwise support.

Second, the public tends to underestimate the severity of prevailing sentences.[196] This misperception can breed public sentiment that sentences are inadequate even when the public, if properly informed, would be content to leave sentences as they are.[197] Although most Americans believe courts are too lenient[198]—and can therefore be expected to support legislative action to increase penalties—this attitude unreliably reflects public judgment about the appropriateness of sentences because the public generally has little idea how harshly criminals are actually treated.[199]

Congress's institutional design makes it responsive to such distorted public perceptions.[200] A politician's incentive is to appeal to

194. ROBERTS & HOUGH, *supra* note 192, at 12.

195. *See id.* at 9–10 (showing that 69 percent of those polled in a British study deemed the criminal justice system's function of "[c]reating a society where people feel safe" to be "absolutely essential").

196. JULIAN V. ROBERTS, LORETTA J. STALANS, DAVID INDERMAUR & MIKE HOUGH, PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 21 (2003); *see also* Roberts, *supra* note 191, at 112–13 (describing studies indicating that laypersons underestimate prevailing sentences and are typically ignorant of statutory maximums and minimums).

197. *See* ROBERTS ET AL., *supra* note 196, at 21 ("Calls for harsher sentencing may themselves be a reaction to public perceptions that sentencing is getting more lenient . . . .").

198. In 2002, two-thirds of the public believed that courts in their area did not deal harshly enough with criminals. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 141 tbl.2.47 (Ann L. Pastore & Kathleen Maguire eds., 2005), *available at* http://www.albany.edu/sourcebook/pdf/t247.pdf. Throughout much of the 1980s and 1990s, more than 80 percent of respondents held that same belief. *Id.* at 140–41 tbl.2.47.

199. *See supra* note 196. Some empirical evidence supports this explanation of public support for harsher penalties. In a number of studies in which judges and laypersons were asked to recommend sentences in particular cases, the laypersons' favored sentences were no more severe than the judges'. Roberts, *supra* note 191, at 150. Studies such as these undermine the suggestion that legislative intervention is needed to bring sentences up to levels consistent with majoritarian values. *See id.* at 149 ("Contrary, perhaps, to expectation, the preponderance of evidence supports the view that the public are not harsher than the courts . . . ."). A study of British attitudes toward sentencing found that those who underestimated the use of imprisonment were more likely to say that sentences were too lenient. Mike Hough & Julian V. Roberts, *Sentencing Trends in Britain: Public Knowledge and Public Opinion*, 1 PUNISHMENT & SOC'Y 11, 17–18 (1999). This finding suggests that voters may demand harsher sentences in part because they underestimate the severity of prevailing sentences.

200. *See* ROBERTS & HOUGH, *supra* note 192, at 15 ("People tend to be overly pessimistic about the extent of crime problems and markedly impatient with criminal justice responses to these problems. Not surprisingly, these features of public opinion tend to evoke characteristic

the public imagination, even if the public imagination and the public interest have become uncoupled.[201] Legislators may, in fact, stand to gain by further inflaming the public imagination. Acting in what might be called an entrepreneurial role,[202] legislators may drum up political support by simultaneously stoking public fear of crime and promising to extinguish the newly kindled fire with tougher sentencing policies.[203] Although policies adopted to respond to—or to manipulate—exaggerated fears of serious crime problems and inadequate governmental responses may resonate with the public mood, they may not reflect the public's deeper values or interests. All these influences add up to an excessively harsh legislative approach to sentencing policy.

3. *The Judicial Perspective as a Counter to Congress's Institutional Pathologies.* Courts, however, are well positioned to counter these punitive tendencies.[204] Consider the first problem discussed—that legislatures tend to undervalue offenders' interests. Besides enjoying political insulation, district judges encounter offenders as individuals: they are closest to the "human realities of sentencing."[205] They are therefore less likely than Congress to discount the harm caused by severe penalties.[206] Furthermore, although criminal offenders may not get a hearing in Congress,[207] their interests are represented in court by

responses from politicians.").

201. In the context of criminal justice issues, this phenomenon is well-recognized enough to have earned its own name: "penal populism," which is defined as "the pursuit of a set of penal policies to win votes rather than to reduce crime rates or to promote justice." *Id.* at 16.

202. *See* Macey, *supra* note 175, at 46 ("As an entrepreneur [the legislator] seeks to create groups that he can benefit, in order to receive political support from them.").

203. *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 14 (1999) (suggesting that heightened public concern about crime often coincides not with increased crime problems but with well-publicized political initiatives purporting to be tough on crime); *cf.* KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 63 (2d ed. 2004) (describing the efforts of government officials in the late 1980s to draw media attention to the spread of crack cocaine and noting that "heightened public concern about drugs reached its zenith immediately following President Bush's national address in 1989, in which he focused exclusively on the drug crisis").

204. Berman, *supra* note 20, at 110.

205. *Id.*

206. *Id.* Notably, a judicial tendency to be less punitive because of this proximity to the individual realities of sentencing may in fact be consistent with majoritarian public values. Studies have found that as people are given more information about the offender and the offense, they become less punitive. Roberts, *supra* note 191, at 125–26.

207. *See supra* text accompanying notes 179–90.

their attorneys.[208] Freeing district courts to impose below-Guidelines sentences when they conclude that Guidelines reflecting congressional policy choices are too harsh would thus counterbalance the punitive bias of the political process.

The exercise of independent judgment by district courts would also mitigate the second problem discussed—that public misperceptions breed excessive support for punitive policies. District judges have detailed knowledge of both individual offenses and the criminal justice system and consequently are less prone to the misperceptions that lead to pressure on Congress for harsher sentences. The exercise of independent judgment by district judges thus could counter the harmful effects of public misperceptions. Courts should hesitate to override public preferences. But when the Guidelines likely reflect a distortion of public values, courts should be willing to temper the resulting punitiveness.

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District courts should consider these institutional strengths and weaknesses when they decide how much deference to give to Guidelines that embody congressional policy choices. This approach allows sentencing decisions to incorporate the strengths of the institutions that share authority over the federal sentencing system. It accords congressional policies the respect they warrant. But it also leaves room for courts to contribute an independent judicial perspective. In this respect, this approach is superior both to the theory that congressional policy choices embedded in the Guidelines are always binding[209] and to the assumption that only the expertise of the Commission can justify deference to the Guidelines.[210]

208. *See* Berman, *supra* note 20, at 110 ("Before rendering a sentencing judgment in any case, judges have the benefit of arguments from both prosecutors and defense attorneys . . . which should provide (at least ideally) a thoughtful and reasoned presentation of all the competing interests and matters at stake in a particular case."); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 304 (1988) ("[T]here is less likely to be the same high degree of asymmetry of viewpoints in litigation that there routinely is in legislation. Courts generally have at least two parties representing opposing interests in a litigated case . . . .").

209. *See supra* Part II.B.2.

210. *See supra* Part II.B.1.

IV. APPLICATION TO THE CHILD PORNOGRAPHY GUIDELINE

The approach to congressionally amended Guidelines developed in Part III does not suggest that any single level of deference is appropriate for all such Guidelines. Rather, each Guideline attributable to congressional action demands an individualized assessment of the institutional strengths and weaknesses that it reflects. Many courts have already assessed whether the child pornography Guideline reflects the Commission's institutional strengths.[211] This Part provides a necessary supplement—an assessment of whether that Guideline reflects the institutional strengths and weaknesses of Congress. On the basis of this appraisal, this Part argues that courts should be willing to judge for themselves whether that Guideline is too harsh, rather than deferring to the congressional policy choices it embodies.

A. Congress's Institutional Strengths and the Child Pornography Guideline

1. *Deliberative Decisionmaking*. The child pornography Guideline falls far short of the ideal of legislative deliberation. Measures to increase penalties for child pornography offenses typically have enjoyed unanimous or nearly unanimous support among members of Congress. In the floor debate on SCACPA, for instance, every member of Congress who made a statement favored increased penalties.[212] Because such measures have faced little or no opposition, Congress has never had to come to grips with the competing interests they implicate. No opposition has forced Congress to think deeply about the justifications for increased penalties.

Further, as Stabenow shows, proposals to increase penalties have often been quietly attached to unrelated bills and sneaked through the legislative process without any meaningful discussion—not even the chorus of support that greeted SCACPA. The Helms-Thurmond Amendment, aptly dubbed a "morality earmark" by Stabenow, was attached to an appropriations bill while committee business occupied nearly every senator.[213] Similarly, the provisions of the Feeney

211. *See* cases cited *supra* note 134.

212. *See* 141 CONG. REC. 10,977–78 (1995) (recording statements made in the floor debate that discuss the merits of SCACPA); *Id.* at 10,277–81 (same).

213. Stabenow, *supra* note 6, at 6; *see also* 137 CONG. REC. 18,906 (1991) (statement of Sen.

Amendment that increased penalties for child pornography offenses received almost no attention in Congress. They were a relatively inconspicuous part of an amendment with much broader consequences for federal sentencing.[214] As Stabenow points out, "[n]o research, study, body of experience, or rationale" was offered for the specific Guidelines amendments.[215] Indeed, the Feeney Amendment was itself attached at the last moment to the popular Amber Alert bill.[216] Even the Feeney Amendment's broader sentencing-reform provisions were enacted without the benefit of hearings.[217]

Because the child pornography Guideline reflects neither any hard-won compromise between competing interests nor any serious analysis, the legislative process's suitability as a forum for deliberation does not justify deference in this context. Admittedly, judicial deliberation is subject to limitations of its own. Courts hear only the arguments made by the litigants, who may not put forth all relevant interests and information.[218] But the child pornography Guideline does not reflect such careful congressional deliberation that district judges, who can draw on their own sentencing experience and the arguments of the parties, should adhere to it unquestioningly.

2. *Popular Legitimacy.* On the other hand, the child pornography Guideline, as a product of congressional action, bears the imprimatur of the popular will. Congressional amendments to that Guideline have sometimes passed quickly and without much public scrutiny.[219] Still, sex crimes involving children are a highly

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Helms) ("Obviously I[] cannot get the yeas and nays with no other Senator on the floor. Everybody is in committee meetings.").

214. The twenty-minute House debate on the Feeney Amendment centered on the provisions governing downward departures and appellate review, *see* 149 CONG. REC. 7643–45 (2003) (detailing the House debate about the Feeney Amendment), as did the more extended debate in the Senate, *see id.* at 9346–51, 9353–58, 9360–66 (recording the Senate debate).

215. Stabenow, *supra* note 6, at 21.

216. *Id.* at 19–20.

217. 149 CONG. REC. 9347 (2003) (statement of Sen. Kennedy). Even SCACPA, a short bill devoted almost exclusively to penalties for child pornography offenses, passed without any hearings. H.R. REP. NO. 104-90, at 2–4 (1995).

218. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 77 (1991) (observing that courts may not "be presented with the full array of policy arguments" and that the parties are not guaranteed to "argue for the policy or rule that is best for society").

219. *See* Stabenow, *supra* note 6, at 3 (observing that most provisions of the child pornography Guideline result from "numerous morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or empirical study of any kind").

charged issue.[220] On such issues, congressional policy choices are likely to correspond fairly closely to public opinion.[221] A vote that contravenes strongly held popular preferences could easily become a liability in the next election campaign.[222] Consequently, the general values and concerns that animate congressional amendments to the child pornography Guideline warrant some weight, even if a lack of deliberation[223] counsels against hewing to the details.

Perhaps the best illustration is the enhancement for the use of a computer.[224] The underlying congressional directive reflects a legitimate public concern that computer technology facilitates the dissemination of child pornography.[225] Probably due to the lack of serious deliberation,[226] however, the directive, which requires an enhancement whenever "a computer was used to transmit the notice or . . . to transport or ship the visual depiction,"[227] sweeps too broadly.[228] Presumably most people would appreciate the distinction between those who receive an image via email and those whose online behavior is, as a Commission report put it, equivalent to "open[ing] an adult bookstore in every city in the world."[229] Although the underlying public concern warrants some weight, district judges, who are well-positioned to assess the dangers posed by individual offenders' computer use, should be wary of hewing unflinchingly to the broad scope of the enhancement.

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220. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 218 (2001) ("[T]he crisis over child sex abuse has taken center stage in our culture and politics, as the worst of all possible evils.").

221. *See* Page & Shapiro, *supra* note 157, at 181 (finding that government policy is more likely to accord with public opinion on highly salient issues).

222. *See* ARNOLD, *supra* note 157, at 10 (quoting an unnamed congressman's expression of concern that his vote, though unlikely to attract notice at the time, could be used against him in a future campaign).

223. *See supra* Part IV.A.1.

224. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2010) (providing a two-level increase for the use of a computer).

225. *See* 141 CONG. REC. 10,280 (1995) (statement of Rep. Gilman) ("From mail order services to computer access, child pornographers are finding it easier to distribute their illegal materials."); Michael M. O'Hear, *Perpetual Panic*, 21 FED. SENT'G REP. 69, 74 (2008) (observing that "the sex crime panic was reenergized by . . . the increasingly pervasive presence of the Internet," which "brought an unprecedented ease of access to" child pornography).

226. *See supra* Part IV.A.1.

227. SCACPA § 3, 28 U.S.C. § 994 note (2006).

228. Stabenow, *supra* note 6, at 15–16.

229. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 29 (1996), *available at* http://www.ussc.gov/r_congress/SCAC.pdf.

B. The Severity of the Guideline and Congressional Punitiveness

More importantly, congressional amendments to the child pornography Guideline exemplify the institutional pathologies that bias the legislative process in favor of excessively harsh penalties. Consequently, a district court should decline to defer to the child pornography Guideline when it judges that Guideline to be too severe.

The imbalance of political influence between users of child pornography and those favoring harsh punishments is great enough that Congress has probably attached no weight to the interests of the former group. Those who can reasonably anticipate being convicted of child pornography offenses in federal court are few enough that members of Congress need not be concerned about their voting power. In 2009, fewer than 1,700 cases were sentenced under Section 2G2.2.[230] As a result, there is probably no significant voting bloc of people who fear being subjected to harsh penalties for child pornography offenses. Further, hostility toward users of child pornography is sufficiently widespread and virulent that they have no hope of gaining the sympathy of any broader segment of the electorate.[231] Members of Congress need not fear that child pornography offenders' interests will be asserted at the ballot box.

Moreover, the interest groups influential enough to gain access to the legislative process have overwhelmingly supported increased sentences. When Senator Helms introduced the Helms-Thurmond Amendment, he noted the support of the DOJ, as well as a number of anti-pornography groups.[232] Notably absent is any recitation of the views of any opposing interest group.[233] Admittedly, the House debate mentioned the Commission's opposition to the Helms-Thurmond

230. U.S. SENTENCING COMM'N, *supra* note 111, at 36.

231. *See* PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 4 (2001) ("Since child pornography first entered the public consciousness in the mid-1970s, any involvement with such materials has commonly been regarded as an extreme and unforgivable form of deviance. Many other forms of deviant behavior have their reputable defenders or at least libertarians who assert that these activities should not be severely penalized . . . . For child pornography, however, there is no such tolerance . . . .").

232. 137 CONG. REC. 18,898 (1991) (statement of Sen. Helms). The Congressional Record also reproduces several letters from antipornography and child-advocacy groups, as well as the DOJ. 137 CONG. REC. 18,899–906 (1991).

233. The only possible exception is Helms's conjecture that the ACLU would ask, "What is the big deal with pornography?" 137 CONG. REC. 18,898 (1991) (statement of Sen. Helms).

Amendment.[234] But any influence that the Commission might have had was probably outmatched by the support of numerous religious leaders,[235] who could presumably mobilize public opinion against any official who might oppose their desired policy.

The Feeney Amendment is an especially forceful illustration of the influence wielded by interest groups that favor harsh penalties. The DOJ originally drafted the provision; Representative Feeney later admitted that he had only been the "messenger."[236] Hearings—potential forums for voices of opposition—were never held.[237] Neither the Judicial Conference nor the Commission had the opportunity to offer their criticisms of the proposal[238] before Representative Feeney introduced it in the House.[239] Although their opposition was discussed in the Senate floor debate,[240] the popularity of the Amber Alert bill to which the Feeney Amendment was attached had already made enactment a fait accompli.[241] Thus, the body responsible for prosecuting child pornography crimes dominated the legislative process.[242]

Even if the Feeney Amendment represents an exceptional case of the DOJ's influence, more extraordinary still is the fact that so august a figure as Chief Justice Rehnquist would take the side of child pornography users in the dispute over the legislation.[243] The Feeney

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234. 137 CONG. REC. 23,732–34 (1991).

235. *See id.* at 23,732 (statement of Rep. Wolf) (listing religious groups that supported the Helms-Thurmond Amendment).

236. Phillips, *supra* note 97, at 983 & n.185 (citing Cohen & Fields, *supra* note 97).

237. 149 CONG. REC. 9347–48 (2003) (statement of Sen. Kennedy).

238. Both opposed the Feeney Amendment. *See* 149 CONG. REC. 9351–52 (2003) (reproducing letters expressing the objections of the Judicial Conference and the Commission).

239. *See id.* at 9351 (reproducing a letter from the Judicial Conference complaining, after the Feeney Amendment passed the House, that "[n]either the Judicial Conference nor the Sentencing Commission has been given a fair opportunity to consider and comment on this proposal"); Phillips, *supra* note 97, at 986–87 ("The DOJ did not notify or consult with the Sentencing Commission in advance of the introduction of the Feeney Amendment in the House.").

240. 149 CONG. REC. 9347 (2003) (statement of Sen. Kennedy).

241. *See* Phillips, *supra* note 97, at 985 ("[A]ttaching . . . the Feeney Amendment to the AMBER Alert bill made it difficult for those legislators who opposed [the Feeney Amendment] . . . to oppose [the bill as a whole].").

242. *See* Emily Bazelon, Op-Ed., *With No Sentencing Leeway, What's Left to Judge?*, WASH. POST, May 4, 2003, at B4 ("A group of prosecutors in U.S. attorneys' offices and the Department of Justice pushed to get the Feeney amendment through Congress . . . . The unified opposition of judges appointed by both Republicans and Democrats counted for little because prosecutors have much more political clout.").

243. Chief Justice Rehnquist authored a letter to Senator Leahy expressing the Judicial

Amendment's broadly sweeping provisions that limited judicial discretion galvanized opposition from judges.[244] Similarly, the Commission apparently acted out of apprehension that the Feeney Amendment would upset the institutional structure established by the SRA.[245] Presumably less worrisome to both were the provisions raising the penalties for child pornography offenders.[246] The interests of judges, the Commission, and child pornography users coincided only by chance.[247] Thus, the fervent opposition to the Feeney Amendment—as ineffectual as it turned out to be—was not a typical response to legislation increasing penalties for child pornography offenders. Normally, child pornography offenders have no strong advocate in Congress.[248]

Another source of potentially unwarranted severity is that congressional responses to child pornography have been designed to satisfy—or perhaps to inflame—public fears stemming from an exaggerated perception of the danger of child pornography, as well as the more general problem of sex crimes involving children.[249]

Conference's opposition to the Feeney Amendment. 149 CONG. REC. 9351 (2003). The Chief Justice's opposition also received press coverage, *e.g.*, Cohen & Fields, *supra* note 97; Greenhouse, *supra* note 172, and was the source of some unease about the Feeney Amendment in the Senate, *see* 149 CONG. REC. 9365 (2003) (statement of Sen. Kennedy) (citing Chief Justice Rehnquist's "serious reservations" as evidence that the Feeney Amendment was flawed).

244. Charles Lane, *Rehnquist Decries Sentencing Law*, WASH. POST, Jan. 1, 2004, at A2; Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1.

245. *See* 149 CONG. REC. 9352 (2003) (reprinting a letter from the Commission arguing that "an issue of such magnitude" called for a more deliberative process that would include the preparation of a report to Congress by the Commission).

246. Both the Commission and the Judicial Conference opposed the practice of direct congressional amendments to the Guidelines, but neither expressed concern about increased penalties for child pornography offenses. *Id.* at 9351–52; *see also id.* at 9352–53 (reprinting the Commission's letter objecting that the Feeney Amendment "alter[s] the traditional way in which guideline revisions are implemented").

247. The broad sweep of the Feeney Amendment also led a perhaps surprising variety of interest groups to take the same side. *See Materials from Interested Groups Opposing Original Feeney Amendment*, 15 FED. SENT'G REP. 346, 350, 353–54 (2003) (reprinting letters and press releases from, among others, the NAACP, the National Petroleum Refinery Association, and Business Civil Liberties, Inc. criticizing the Feeney Amendment). There is little reason to expect such groups to mobilize against legislation that focuses more narrowly on penalties for child pornography offenders.

248. For an example of a case in which interest groups lined up in favor of harsher penalties, see *supra* text accompanying notes 232–35.

249. *See* Basbaum, *supra* note 6, at 1292–94 (arguing that the child pornography Guideline is the result of a "moral panic"); *see also* Adler, *supra* note 220, at 233 (describing the mounting public alarm about the supposedly increasing prevalence of child pornography during the late 1980s, even though "some critics maintain that the vigilance persisted without cause").

Congress's punitive approach to child pornography reflects spillover from public anxiety about contact offenses against children. Committee reports and statements from floor debates on child pornography legislation abound with invocations of the frightful specter of the child molester, who is thought to use child pornography to "stimulate[his] sexual appetite[]" and to entice his victims.[250] One striking, but hardly extraordinary, statement in the floor debate on a measure targeting child pornography warned of "child predators who lurk in every American community, armed with items of child pornography."[251]

The supposed link between possession of child pornography and physical child abuse is uncertain.[252] It is not clear that child pornography leads its consumers to abuse children.[253] Admittedly,

250. S. REP. NO. 108-2, at 3 (2003) (quoting S. Rep. No. 104-358, at 12–14 (1996)); *see also* H.R. REP. NO. 105-557, at 20 (1998) ("Law enforcement experts have testified before the Subcommittee on Crime that those who possess large quantities of child pornography are frequently child sex offenders and use such material to lure children into sexual encounters."); 149 CONG. REC. 9345 (2003) (statement of Sen. Hatch) ("[The bill] will protect our children from vicious criminals, pornographers, sexual abusers, and kidnappers. These types of individuals who prey on our Nation's youth are nothing less than the scum of the earth . . . ."); 137 CONG. REC. 18,898 (1991) (statement of Sen. Helms) ("[T]his amendment increases the sentences for smut peddlers convicted of transportation, receipt, or possession of child pornography.").

251. 144 CONG. REC. 12,047 (1998) (statement of Rep. Bachus).

252. *See* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. (forthcoming 2011) (manuscript at 34–48), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689507 (reviewing empirical evidence and finding insufficient support for a link between possession of child pornography and contact offenses against children); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. (forthcoming 2011) (manuscript at 24–28), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577961 (same); Basbaum, *supra* note 6, at 1294–98 (same). For an overview of the limited empirical literature on the connection between child pornography and child sex abuse, see Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790–806 (2007).

253. *See supra* note 252. After surveying the empirical literature, Professors Neil Malamuth and Mark Huppin conclude that "evidence does not support the proposition that there is a strong connection between being a child pornography offender and committing sexual molestation," but that "if a person has committed a child sex offense, then the use of pornography may constitute an additional risk factor for re-offending." Malamuth & Huppin, *supra* note 252, at 820. In a more recent study, researchers studied a sample of child pornography users, of whom only 1 percent had previously committed a known contact offense, and found that "only 1% were charged with a subsequent hands-on sex offense in the 6 year follow-up [period]." Jérôme Endrass, Frank Urbaniok, Lea C. Hammermeister, Christian Benz, Thomas Elbert, Arja Laubacher & Astrid Rossegger, *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 43 (2009), http://www.biomedcentral.com/content/pdf/1471-244X-9-43.pdf. The researchers concluded that consumption

there are other justifications for punishing the possession of child pornography. Consumption of child pornography may fuel a market for material that can only be produced by abusing children.[254] Furthermore, widespread possession of child pornography may exacerbate the psychological harm to the victims whose abuse that pornography depicts.[255] But the harsh congressional response to child pornography has evidently drawn significant strength from—and perhaps exploited—public fears arising from the questionable assumption that those who possess child pornography are themselves likely to be contact offenders. Indeed, public anxiety about child molestation itself reflects a distorted perception of the prevalence of the problem.[256] Thus, Congress's response to the problem of child pornography has probably exceeded even the demands of majoritarian interests.

In this context, the institutional perspective of district courts can play a useful balancing role. Confronted with the "human realities of sentencing,"[257] and with the advocacy of defense counsel, district courts are less likely than Congress to discount offenders' interests. Because district courts must focus their attention on the dangerousness of individual defendants, they are also less likely to be swayed by the hyperbolic generalizations about sex offenders that distort public opinion. Given these unique institutional strengths, district courts should have the discretion to impose below-Guidelines sentences for possession of child pornography when they judge the applicable Guideline to be too severe.

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of child pornography is not a predictor of future contact offenses among those with no previous contact offenses. *Id.*

254. Indeed, criminal prohibitions against possession of child pornography survive First Amendment scrutiny in large part because of the government's interest in eliminating the market for the material. *See* Osborne v. Ohio, 495 U.S. 103, 109–10 (1990) ("It is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.").

255. *See id.* at 111 ("[T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.").

256. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 7 (1998) (describing a cycle of increasing panic in which "[i]t comes to be believed that legions of sex fiends . . . stalk the land [and] that child pornography is an industry raking in billions of dollars and preying on hundreds of thousands of American youngsters every year").

257. Berman, *supra* note 20, at 110.

C. The Tradeoffs of Expansive Judicial Discretion

Although allowing district courts significant discretion to impose below-Guidelines sentences in child pornography cases may serve as a useful check on some of the institutional pathologies that tend to result in excessively harsh sentencing legislation, this discretion has disadvantages. Two criticisms, in particular, warrant discussion. Both are serious. Neither, however, is fatal to this Note's suggested approach to the child pornography Guideline.

First, despite the benefits associated with federal judges' insulation from electoral politics,[258] it may seem unacceptably antidemocratic for district courts to refuse to defer to clearly expressed congressional policy judgments.[259] But district courts may refuse to defer to those congressional policies only because Congress has expressed those policies through the advisory Guidelines. If Congress concludes that district courts are sentencing child pornography offenders too leniently, it can enact mandatory minimums.[260] The threat of a more forceful congressional intervention in sentencing thus serves as a democratic check that can keep sentences from venturing too far from public preferences.[261] A

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258. *See supra* Part III.B.

259. *See, e.g.*, Benjamin J. Priester, *Apprendi* Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing 47–48 (Mar. 28, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577243 ("[O]n matters of *non*-constitutional law, the role of the courts is to interpret and apply the policies adopted by the legislature or executive branch enforcement authorities, lest they substituted the views of unelected judges for the policy judgments of the political branches.").

260. Congress is hardly unfamiliar with the use of mandatory minimums. *See, e.g.*, 18 U.S.C. § 2251(e) (2006) (prescribing mandatory minimums for offenses involving the sexual exploitation of a child); 21 U.S.C. § 841(b) (2006) (prescribing mandatory minimums for drug offenses). For a list of federal statutes prescribing mandatory minimum sentences, see U.S. SENTENCING COMM'N, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING app. A (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf. Perhaps less realistically, there are also a number of ways in which Congress could restore the mandatory status of at least some elements of the Guidelines. *See* Berman, *supra* note 50, at 356–71 (analyzing and critiquing possible legislative responses to *Booker*).

261. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92–93 (1982) (suggesting that judicial lawmaking might be legitimate in part because "judge-made rules . . . are subject to legislative or popular revision," but noting that an additional argument is necessary to explain why judges should be able to make such provisional law in the first place); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 642–61 (1991) (developing and applying a positive political theory model predicting that the Supreme Court will interpret statutes to conform to its policy preferences to the extent that it can be confident of avoiding a legislative override).

common criticism of this type of argument is that institutional inertia makes a congressional response unlikely.[262] But as this Note's analysis suggests, there are usually relatively few political obstacles to legislation ensuring harsher criminal penalties, particularly for child pornography offenders.[263] Thus, the possibility of legislative override may provide a stronger check in this context than in many others.

Second, allowing district courts to impose below-Guidelines sentences based on their own conclusions that the child pornography Guideline is too harsh would threaten uniformity in sentencing.[264] Admittedly, eliminating unwarranted disparity in sentencing was a central purpose of the SRA.[265] As the Supreme Court has acknowledged, however, some disparity is a "necessary cost" of the constitutional remedy the Court adopted in *Booker*.[266] More fundamentally, as the structure of § 3553(a) suggests, uniformity is

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262. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524 (1987) ("[T]he possibility of legislative correction is not a true majoritarian check because it is not regularly invoked. Political theory and experience suggest that because of the many procedural obstacles to legislation in our bicameral committee-dominated Congress[and] the tendency of interest groups to block rather than advance legislation . . . such legislative correction will rarely occur."); *cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (arguing that the modern constitutional avoidance canon creates constitutional "penumbra[s]" that function as prohibitions because "Congress's practical ability to overrule a judicial decision misconstruing one of its statutes . . . is less today than ever before, and probably was never very great").

263. *See supra* Parts III.B, IV.B.

264. *See* Bibas et al., *supra* note 154, at 1389 (voicing concern that authorizing district courts to deviate from the Guidelines based on their own policy views will result in "greater dispersion of sentences due solely to judges' varying policy preferences"); Priester, *supra* note 259, at 41 ("[I]f policy nullification is legitimate at the level of each sentencing judge, then the proliferation of such divergences is inevitable."); *see also* Kevin Clancy, John Bartolomeo, David Richardson & Charles Wellford, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 552 (1981) (finding that sentences varied according to judges' views about the relative importance of various goals of sentencing and about the success of the criminal justice system in achieving those goals); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment*, 33 RUTGERS L. REV. 799, 811 (1981) (finding that judges who regarded general deterrence, special deterrence, and incapacitation as important goals of sentencing imposed harsher sentences than judges who did not). *But see* Alexander Bunin, *Reducing Sentencing Disparity by Increasing Judicial Discretion*, 22 FED. SENT'G REP. 81, 83 (2009) (arguing that under the advisory Guidelines, "[j]udges can now avoid both unwarranted disparity and unwarranted uniformity" because they can consider relevant factors neglected by the Guidelines).

265. *See* S. REP. NO. 98-225, at 65 (1984) ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform.").

266. Kimbrough v. United States, 128 S. Ct. 558, 574 (2007).

only one goal of sentencing.[267] Although district courts must consider the need to avoid unwarranted disparity,[268] they should not pursue uniformity to the exclusion of other goals such as parsimony and proportionality.[269] A system that imposed uniformly excessive sentences would hardly be an ideal one.[270] Judicial discretion to deviate from the child pornography Guideline may sacrifice some uniformity but can also provide a valuable check on institutional pathologies that threaten to skew the Guidelines in favor of unnecessarily harsh penalties.

CONCLUSION

Although many early proponents of sentencing reform envisioned a politically insulated Commission that would formulate guidelines based on empirical study, courts must face the reality that the Federal Sentencing Guidelines often reflect the influence of legislative politics. That influence is not all bad. Sentencing involves making value judgments about the seriousness of criminal conduct, as well as balancing society's interests in public safety against the costs of punitive measures. Consequently, Congress's democratic legitimacy and capacity for deliberation can potentially make its contributions to sentencing decisions valuable. On the other hand, Congress suffers from institutional pathologies that can lead it to disregard the harm caused by excessively harsh penalties. Courts should pay careful attention to these influences when the Guidelines reflect extensive congressional intervention.

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267. *See* 18 U.S.C. § 3553(a) (2006) (requiring sentencing courts to consider several factors alongside the need to avoid unwarranted disparity).

268. *Id.* § 3553(a)(6).

269. *See id.* § 3553(a)(2)(A) (imposing the parsimony requirement and requiring that the sentence imposed "reflect the seriousness of the offense"); *see also* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 249 (2005) ("No matter how attractive uniformity might be in theory, we should not exalt uniformity to the detriment of other important objectives . . . .").

270. Furthermore, the notion that deviation from the Guidelines threatens the goal of uniformity rests in part on the assumption that "adherence to the Guidelines . . . actually advances uniformity goals in a robust fashion." O'Hear, *supra* note 269, at 249. That assumption is not universally accepted. *See, e.g.*, *id.* at 250–53 (arguing that the Guidelines "do not embody a robust system of sentencing uniformity" and that consequently, "questions about the desirability of judicial adherence to the Guidelines *as they exist* cannot usefully be equated with questions about the desirability of uniformity in sentencing as an abstract proposition"); *cf.* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (arguing that the Guidelines lack "a coherent underlying theory of punishment," which is necessary to give meaning to the goal of "reducing sentencing disparity").

The child pornography Guideline illustrates the dangers of congressional intervention in the Commission's policymaking process. Although that Guideline may reflect legitimate public concern about the problem of child pornography, it also reflects the political system's structural bias in favor of harsher penalties, as well as passions inflamed by a cloudy public perception of the broader problem of sex offenses against children. In light of these problems, courts can provide a valuable balancing perspective. By exercising independent judgment about whether the child pornography Guideline is too harsh, district courts can impose a vital check on forces that skew congressional sentencing policy toward unwarranted severity.