

# LESSONS FROM TWO FAILURES: SENTENCING FOR COCAINE AND CHILD PORNOGRAPHY UNDER THE FEDERAL SENTENCING GUIDELINES IN THE UNITED STATES

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## I

### INTRODUCTION

The Federal Sentencing Guidelines adopted in the United States in 1987 and rendered advisory by the Supreme Court's decision in 2005 in *United States v. Booker*<sup>1</sup> have been the subject of a wide variety of criticisms over the past twenty-five years. But no specific aspects of the Guidelines have been more controversial than the treatment of offenders who possess or distribute cocaine and the treatment of offenders who download or transmit child pornography. The cocaine Guidelines have been controversial in part because of their harshness (resulting from Guidelines ranges scaled around separately enacted mandatory minimum penalties), but mostly because of the infamous "100-to-1" crack-powder disparity, in which crack cocaine triggered weight-based penalties that required 100 times as much powder cocaine to trigger, resulting in substantial racial disparities in cocaine sentencing. The child pornography Guidelines have been controversial because of the steep escalation of applicable penalties over a relatively brief period of time through direct intervention by Congress, coupled with the failure of the Guidelines to distinguish adequately between the most culpable offenders (that is, commercial producers and distributors of child pornography, or those who actually sexually entice or assault children) and less culpable offenders (that is, downloaders and file sharers who have no history of sexual activity with children). In each of these two contexts, the relevant Guidelines have drawn fire from a variety of critics who have spanned the bench, the bar, the academy, the U.S. Sentencing Commission itself, and even the political sphere. Despite the frequent and vociferous criticisms aimed at them, the cocaine and child pornography Guidelines have proven remarkably resistant to change. The stark

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1. 543 U.S. 220 (2005).

disparity between the treatment of crack and powder cocaine under the Guidelines was eventually ameliorated (though not eliminated) by formal revisions from both the Sentencing Commission and Congress, but only after a long and tortuous process. The child pornography Guidelines have not been formally revised, though some federal courts recently have taken unprecedented steps to reject them pursuant to their post-*Booker* license to treat the Guidelines as advisory rather than mandatory.

It is worth examining in some detail the histories of these two much-maligned aspects of the Guidelines in order to understand how the features that have invited so much criticism came into being, why they were so controversial, why they proved so resistant to change, and how (some) change nonetheless occurred. This account may prove helpful to countries like Israel as they consider establishing their own regimes of guided sentencing—even if only as a negative model or cautionary tale. In order to make the tale worth the telling, however, I will try to tease apart which strands of the story reflect distinctive aspects of American politics, law, or institutional structures, on the one hand, and which reflect challenges inherent in the project of guiding sentencing discretion, on the other. Moreover, I will try not only to criticize and draw negative lessons from these accounts of controversy, but also to propose some positive lessons for the general structure of guidelines regimes.

## II

### TWO FAILURES

The cocaine and child pornography Guidelines could be deemed “failures” based solely on the unprecedented amount and degree of criticism that they have received. However, this criticism is better viewed as a symptom of deeper failures. These aspects of the Guidelines have drawn such intense criticism because they represent failures on both an internal and a normative level. On a level internal to the Guidelines themselves, the cocaine and child pornography Guidelines have failed to promote the sentencing goals set forth in the Guidelines and codified by Congress in Section 3553 of the federal criminal code.<sup>2</sup> These statutory goals themselves reflect a commitment to “just punishment”<sup>3</sup>—an external normative commitment that the Guidelines at issue have likewise failed to meet. These internal and normative failures have been compounded by their resistance to amelioration, even in the face of significant and well-reasoned criticism.

#### A. Cocaine

The best accounts of the history of the treatment of cocaine under the Federal Sentencing Guidelines have been produced by the Sentencing Commission itself. The Commission has prepared four reports over the years on

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2. See 18 U.S.C. § 3553(a) (2006).

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

“Cocaine and Federal Sentencing Policy,” the most recent and comprehensive of which was published in 2007.<sup>4</sup> As the Commission explains, the story starts even before the Guidelines went into effect in 1987, with the passage of a separate piece of legislation called the Anti-Drug Abuse Act of 1986.<sup>5</sup> In this Act, Congress established two tiers of penalties for cocaine trafficking (five- and ten-year mandatory minimum sentences, depending on the amount of drugs trafficked), but differentiated between cocaine in its powder form and “crack” cocaine, a commonly consumed form of cocaine base that can be manufactured from powder cocaine by heating the powder and baking soda in water.<sup>6</sup> Under the 1986 Act, it took five grams of crack cocaine, but 500 grams of powder cocaine, to trigger the five-year penalty, and 50 grams of crack, but 5,000 grams of powder, to trigger the ten-year penalty.<sup>7</sup> The Guidelines for cocaine sentencing were based on the structure of the 1986 Act. Rather than generating Guidelines using data on past sentencing practices (as the Sentencing Commission did for most other offenses), the Commission anchored base offense levels for the full range of cocaine offenses around the mandatory minimum triggers, using the same weight-based formula as the 1986 Act, and maintaining the same 100-to-1 ratio between powder and crack cocaine. In 1988, Congress enacted another Anti-Drug Abuse Act<sup>8</sup> that further distinguished crack cocaine from both powder cocaine and other drugs by mandating that mere possession of five grams of crack would trigger the same five-year mandatory minimum penalty as trafficking<sup>9</sup>—the only federally mandated minimum penalty for a first offense of simple possession of a controlled substance.<sup>10</sup>

The sharp distinction between powder and crack cocaine and the draconian treatment of the latter were motivated by concerns about the special dangers that appeared to be associated with the widespread introduction of crack

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4. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007) [hereinafter 2007 COCAINE REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002) [hereinafter 2002 COCAINE REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997) [hereinafter 1997 COCAINE REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/19970429\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) [hereinafter 1995 COCAINE REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm).

5. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

6. 1995 COCAINE REPORT, *supra* note 4, at iv, vi.

7. Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3.

8. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

9. *Id.* § 6371.

10. See 1995 COCAINE REPORT, *supra* note 4, at v.

cocaine into American markets in the 1980s. In particular, congressional and public concerns focused on the violence associated with the crack trade, the greater use of women and young people to facilitate distribution, the increased incidence of infants exposed to cocaine in utero, the increase in maternal neglect of infants and children due to maternal drug addiction, and the generally increased risk of addiction from crack, due to its lower cost and its quicker and more-intense high.<sup>11</sup> The “devastating changes” that drug addiction and high rates of violent crime wrought in the 1980s became linked in the public mind to the proliferation of crack cocaine,<sup>12</sup> and this association drove the statutory differentiation between crack and powder (and between crack and other controlled substances).

However, by the early 1990s, both the majority of the Sentencing Commission and some members of Congress realized that the panicked public reaction to crack cocaine in the 1980s had led to the creation of a sentencing structure that was too rigid and not empirically supported. The first proposed bill to reduce the crack–powder disparity was introduced (to no avail) in Congress in 1993,<sup>13</sup> and similar bills followed (also unsuccessfully) almost every year until 2010,<sup>14</sup> when the Fair Sentencing Act was finally passed, which reduced but did not eliminate the disparity.<sup>15</sup> Although members of Congress concerned about the crack–powder disparity could not muster congressional will to amend it for nearly two decades, they did manage to pass directives to the Sentencing Commission to study and report back to Congress on the disparity. In the Violent Crime Control and Law Enforcement Act of 1994,<sup>16</sup> Congress passed the first such directive to the Commission to “report on the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences.”<sup>17</sup>

In the Commission’s 1995 *Special Report to Congress*, it recommended both that the Commission propose amendments to the Guidelines to address the crack–powder disparity and that Congress revisit its statutory 100-to-1 ratio and its mandatory minimum penalty for simple possession of crack in light of the new Guidelines that would be forthcoming.<sup>18</sup> The Commission based its recommendations on the fact that the rigid 100-to-1 quantity ratio failed to account for the relationship between powder and crack cocaine in the distribution chain: individual retail dealers of crack at the street level were

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11. *Id.* at xiii–xiv.

12. *Id.* at xiii.

13. Crack-Cocaine Equitable Sentencing Act of 1993, H.R. 3277, 103d Cong. (1993).

14. See Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 767 (2011) (listing the numerous proposed bills to reduce the crack–powder disparity that failed between 1993 and 2010).

15. Pub. L. No. 111-220, 124 Stat. 2372 (2010); see *infra* notes 55–57 and accompanying text.

16. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

17. 1995 COCAINE REPORT, *supra* note 4, at iii.

18. *Id.* at iv.

punished far more severely than powder cocaine suppliers who sold the powder from which multiple street dealers made crack.<sup>19</sup> Moreover, these disproportionate sentences led to large racial disparities in the treatment of cocaine offenders, given the substantial racial divide between those convicted of crack and those convicted of powder cocaine offenses.<sup>20</sup> The Commission acknowledged that crack cocaine was associated with increased harms (such as increased violence and youth and gang involvement), but felt that these harms could be better addressed by sentencing enhancements targeted to specific harms, rather than by automatic ratios and mandatory minimum sentences.<sup>21</sup>

As promised, the Commission followed its 1995 report with proposed amendments to the Guidelines a few months later. By a 4-to-3 vote, the Commission proposed changes that would have made the starting point for determining sentences for powder and crack offenders the same by adopting a 1-to-1 quantity ratio at the sentencing level then in place for powder cocaine, while providing sentencing enhancements for violence and other harms disproportionately associated with crack cocaine.<sup>22</sup> The minority dissented on the ground that the difference in general harms associated with the two forms of cocaine did not warrant the total elimination of a differential between base sentences, even with the possibility of enhancements for specific harms. Congress passed legislation rejecting the amendments proposed by the Commission,<sup>23</sup> but directing the Commission to offer new recommendations that reflected Congress's agreement with the minority view on the Commission that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."<sup>24</sup>

In 1997, the Commission complied with the congressional directive and made new recommendations, urging that the 100-to-1 ratio be reduced to a 5-to-1 ratio and (again) that the mandatory minimum penalty for simple possession of crack be eliminated.<sup>25</sup> This time, the Commission was unanimous in its recommendations. The 1997 report reiterated that the 100-to-1 ratio failed to distinguish between street-level dealers and mid-level or serious traffickers. The

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19. *Id.* at xii–xiii.

20. Blacks accounted for 88.3% of federal crack cocaine distribution convictions in 1993, while whites accounted for only 4.1% (and Hispanics for 7.1%). For powder cocaine distribution, blacks accounted for 27.4% of convictions, while whites accounted for 32% (and Hispanics for 39.3%). *Id.* at xi.

21. *Id.* at xii.

22. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074 (May 10, 1995).

23. This was the first time that Congress rejected a proposed amendment by the Sentencing Commission. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 104 (2005).

24. 1997 COCAINE REPORT, *supra* note 4, at 2.

25. This reduction would be achieved by reducing the trigger for the five-year mandatory minimum sentence for powder cocaine from 500 grams to between 125 and 375 grams, and increasing the trigger for crack from five grams to between 25 and 75 grams. *Id.* at 9.

Commission collected new data between 1995 and 1997 that supported its conclusion that “the five-gram trigger for crack cocaine is over inclusive.”<sup>26</sup> In addition to recommending an increase in the five-gram trigger for crack, the Commission also recommended a decrease in the weight trigger for powder cocaine, because of “the ease with which powder cocaine is converted to crack cocaine.”<sup>27</sup> The Commission also strongly urged that “less reliance [be] put on drug quantity”<sup>28</sup> in the penalty structure for cocaine, and more on specific aggravating factors, such as the use of a dangerous weapon, the use of juveniles to traffick cocaine, the defendant’s prior drug trafficking convictions, and the defendant’s role in the offense. These changes, argued the Commission, would direct limited federal resources toward the most serious offenders and would promote public perceptions of sentencing fairness by reducing the racial disparities wrought by the 100-to-1 ratio.<sup>29</sup>

Congress neither acted on the Commission’s recommendations nor asked the Commission for any further consideration of the structure of cocaine penalties. Nonetheless, the Commission prepared another much longer and more comprehensive report to Congress in 2002, after holding three public hearings. In this report, the Commission recommended that Congress increase the weight trigger for crack “at least” enough to reduce the disparity from 100-to-1 to 20-to-1, but without reducing the weight trigger for powder cocaine (that is, without raising the penalties for powder cocaine).<sup>30</sup> The Commission also again recommended specific sentencing enhancements and called for repeal of the mandatory minimum penalty for simple possession of crack.<sup>31</sup> In explaining its recommendations, the Commission drew on new data as well as the testimony offered at its public hearings to support its specific findings that “current penalties exaggerate the relative harmfulness of crack cocaine,” that “current penalties sweep too broadly and apply most often to lower level offenders,” that “current penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality,” and that “current penalties’ severity mostly impacts minorities.”<sup>32</sup> For example, the Commission explained how medical data debunked the myth of “an epidemic of ‘crack baby syndrome’”<sup>33</sup> by finding significantly less-severe negative effects of prenatal cocaine exposure than had previously been feared. Similarly, the Commission concluded that congressional concerns about an “epidemic of crack cocaine use by youth” also never materialized to the extent feared.<sup>34</sup> The same was true with regard to congressional concerns about violence: “More

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26. *Id.* at 5.

27. *Id.*

28. *Id.* at 6.

29. *See id.* at 6–8.

30. 2002 COCAINE REPORT, *supra* note 4, at 104.

31. *See id.* at 108–09.

32. *See id.* at 93–111 (capitalizations removed).

33. *Id.* at 94 (the internal quotation marks are the Commission’s own).

34. *Id.* at 96.

recent data indicate that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury documented in presentence reports, is associated with crack cocaine trafficking offenses than previously assumed.”<sup>35</sup> On the question of disparate race effects, the Commission noted that data was not available on the question of whether black crack traffickers were disproportionately prosecuted in federal courts, but it did acknowledge that the effects of the unduly severe federal sentencing scheme for crack offenses fell primarily upon black offenders and led to a “widely-held perception that the current penalty structure . . . promotes unwarranted disparity based on race.”<sup>36</sup>

Once again, Congress failed to respond (though unsuccessful bills continued to be introduced). Finally, in 2007, the Commission took the more aggressive step of not only urging Congress to amend the 100-to-1 ratio, but also adopting a change in the Guidelines. The Commission recognized that congressional action was needed to fully address the 100-to-1 ratio and to repeal the mandatory minimum penalty for simple possession of crack, but the Commission described the problems associated with the 100-to-1 ratio as “so urgent and compelling” that immediate action by the Commission was necessary “to somewhat alleviate” those problems.<sup>37</sup> Unlike the Commission’s previously rejected amendments in 1995, the 2007 amendments did not directly address the drug quantity ratio. Rather, the amendments adjusted downward by two base offense levels the Guidelines ranges for crack offenses without changing the base offense levels for powder cocaine, a change that somewhat reduced the disparity caused by the weight ratio.<sup>38</sup> The Commission described its amendment as “only . . . a partial remedy,” noting that “[a]ny comprehensive solution requires appropriate legislative action by Congress.”<sup>39</sup> This time, Congress did not reject the Commission’s amendments, which went into effect on November 1, 2007.

Only one month later, the Supreme Court joined the fray by issuing its decision in *Kimbrough v. United States*.<sup>40</sup> The Court held that, in the post-*Booker* era in which the Guidelines are advisory rather than mandatory, federal sentencing courts are free to deviate from the Guidelines based on their general disagreement with the crack-to-powder ratio (though they are still bound by the statutory mandatory minimum penalties). Relying heavily on the Commission’s reports documenting the problems with the 100-to-1 ratio and its largely unsuccessful efforts to reduce the disparity (other than the “modest” 2007

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35. *Id.* at 100.

36. *Id.* at 103.

37. 2007 COCAINE REPORT, *supra* note 4, at 9.

38. *Id.* at Appendix E-21 (showing that the proposed crack cocaine amendment would affect 69.7% of crack cases and yield an average sentence reduction of 12.4%). The amendment’s change in the crack-to-powder ratio varies (at different offense levels) between 25-to-1 and 80-to-1. *See* Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571–72 (May 21, 2007).

39. *Id.* at 10.

40. 552 U.S. 85 (2007).

amendment),<sup>41</sup> the Court held that the crack cocaine Guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role”<sup>42</sup> and thus are not entitled to the same kind of deference as more empirically grounded Guidelines in appellate “reasonableness” review of federal sentencing.

While *Kimbrough* permitted (but did not require) federal sentencing courts to reject the crack–powder disparity in individual sentencing decisions, the most powerful judicial check on congressional and executive power—constitutional review—remained dormant. The problems identified by the Commission and other critics of the crack–powder disparity gave rise to two possible constitutional challenges. First, the disparity could be challenged as inconsistent with the promise of “equal protection” inherent in the Due Process Clause of the Fifth Amendment. Second, individual crack sentences could be challenged as disproportionate punishment under the proscription of “cruel and unusual punishments” in the Eighth Amendment. However, the prevailing structure of “equal protection” and “proportionality” doctrine rendered each of these potential challenges essentially non-starters. Equal protection doctrine requires that legislation have only a “rational basis” (an extremely low bar) unless *purposeful* discrimination against a protected group is proven.<sup>43</sup> As the Court explained in rejecting an equal protection challenge to racially disparate capital sentencing outcomes in Georgia, a facially neutral statute qualifies for heightened constitutional scrutiny only if it was “enacted or maintained . . . because of an anticipated racially discriminatory effect.”<sup>44</sup> The case for purposeful discrimination in the formulation or preservation of the cocaine Guidelines is weak precisely because of the real differences (exaggerated though they were) that Congress found and that the Commission also recognized between crack and powder. Not surprisingly, despite a large number of equal protection challenges brought against the federal cocaine guidelines, “the defendants always have lost, and the opinions generally have been both unanimous and short.”<sup>45</sup>

Proportionality challenges have fared little better. In 1991, the Supreme Court upheld against a proportionality challenge a state sentence of life without possibility of parole for a first offense of possession of more than 650 grams of cocaine.<sup>46</sup> Explaining that the Eighth Amendment’s proscription of “cruel and

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41. *Id.* at 100.

42. *Id.* at 109.

43. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 517–21 (2d ed. 2002).

44. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

45. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283, 1303 (1995); see also Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 *STAN. L. & POL’Y REV.* 257, 279 n.90 (2009) (collecting equal protection challenges to the crack–powder disparity rejected because of plaintiffs’ inability to establish discriminatory intent).

46. *Harmelin v. Michigan*, 501 U.S. 957 (1991).



unusual punishments” encompasses only “a narrow proportionality principle”<sup>47</sup> in non-capital cases, the plurality opinion stressed that great deference should be shown to legislative choices and that courts should not compare the challenged sentence to sentences for other crimes within the same jurisdiction, or to sentences for the same crime in other jurisdictions, unless the challenged sentence gives rise on its face to an inference of “*gross* disproportionality.”<sup>48</sup> Because courts were reluctant to hold that crack sentences were grossly disproportionate on their face to the harms caused by the crack trade, they were prevented by the structure of the Court’s proportionality doctrine from even considering the distinctiveness of the harsh federal sentences for crack, not only in comparison to powder cocaine, but also in comparison to other drugs (and even other serious violent offenses) at both the federal and state level.<sup>49</sup>

Despite the judicial rejection of constitutional remedies for the crack–powder disparity, the *Kimbrough* Court’s authorization of a discretionary judicial remedy in individual sentencing proceedings may well have galvanized, at last, congressional action to reduce the disparity in 2010. The decision in *Kimbrough*, which permitted but did not require courts to reject the Guidelines’ 100-to-1 ratio, was a recipe for the return of the very unwarranted sentencing disparities that the Guidelines had been created to address, as some judges continued to support the 100-to-1 ratio, while others reduced it by varying amounts.<sup>50</sup> Although Congress resisted the Commission’s prodding to address the ratio, one commentator presciently asked, “Will *Kimbrough*, and the sentencing muddle it may create, be the straw that breaks Congress’ back?”<sup>51</sup> During the 2007–2008 legislative session, six crack cocaine reform bills were introduced<sup>52</sup>—one of them co-sponsored by then-Senator Barack Obama, already well on his way to his successful 2008 presidential bid.<sup>53</sup> That a presidential candidate could take a strong position in favor of reducing the crack–powder disparity was a sign of the times: after more than a decade of steeply falling violent crime rates, it was no longer unthinkable to support reduction or even elimination (as the Obama-sponsored bill did) of the crack–

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47. *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

48. *Id.* at 1005 (emphasis added).

49. See Sklansky, *supra* note 45, at 1304 (“Without exception, the [federal] courts of appeals have rejected arguments that the sentences [for crack] constitute cruel and unusual punishment in violation of the Eighth Amendment.”); see also *id.* at 1304 n.102 (citing cases).

50. One federal appellate judge noted the different approaches taken by two trial judges in the same federal district: “[O]ne active judge uses a 1:1 ratio between crack and powder cocaine when sentencing violators of crack cocaine laws while the other follows the sentencing guidelines—which here applied a 33:1 ratio.” *United States v. Brewer*, 624 F.3d 900, 910 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part).

51. Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-Kimbrough World*, 42 AKRON L. REV. 105, 132 (2009).

52. See *id.* at 133 n.231 (listing proposed bills and describing their key provisions).

53. See Alan Vinegrad & Douglas Bloom, *The Presidential Candidates: Views on Sentencing*, N.Y. L.J., Aug. 6, 2008, at 1.

powder disparity and to urge Congress to be “smarter” rather than tougher on crime.<sup>54</sup>

Consequently, there was fanfare, but not much surprise, when Congress finally passed and President Obama signed the Fair Sentencing Act of 2010.<sup>55</sup> The Act did not go as far as the unsuccessful bill proposed by Obama in 2007, but it did reduce the crack-to-powder ratio from 100-to-1 to 18-to-1,<sup>56</sup> and it also finally eliminated the mandatory minimum penalty for simple possession of crack that had been passed 22 years previously.<sup>57</sup> Although the Commission voted that its own amendments (those of 2007 and those implementing the Fair Sentencing Act of 2010) would apply retroactively, only Congress had the power to make the 2010 Act itself retroactive, and the federal courts of appeals initially disagreed about whether Congress intended to do so.<sup>58</sup> On the one hand, the Act was silent on the subject of retroactivity, which would ordinarily mandate non-retroactivity. On the other hand, Congress clearly intended—because it directed—immediate action by the Commission to amend the Guidelines, and thus it would seem inconsistent for Congress to have intended immediate application of the new 18-to-1 ratio in Guidelines-based sentencing but adherence to the old 100-to-1 ratio in sentencing pursuant to statutory mandatory minimums. One appellate judge, writing for a majority of the Seventh Circuit, rejected retroactive application of Act on the ground that Congressional silence may well have reflected a political “compromise” about the scope of the effect of the Act,<sup>59</sup> while another judge called such a result “gratuitously silly.”<sup>60</sup> The Supreme Court resolved this conflict among the circuits in June of 2012.<sup>61</sup> In a 5-to-4 decision, the Court held that Congress intended the Fair Sentencing Act’s provisions to apply to those whose criminal conduct occurred before the effective date of the Act but whose sentencing occurred after that date, basing its analysis “primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing.”<sup>62</sup>

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54. *Id.* (quoting Obama campaign material stating that, upon election, Obama would review mandatory minimum sentences “to see where we can be smarter on crime and reduce the ineffective warehousing of non-violent drug offenders”).

55. Pub L. No. 111-220, 124 Stat. 2372 (2010).

56. *Id.* § 2.

57. *Id.* § 3.

58. Compare *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011) (holding Act non-retroactive), with *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011), and *United States v. Rojas*, 645 F.3d 1234, (11th Cir. 2011) (holding Act retroactively applicable to those sentenced after the Act’s effective date, even though their offenses were committed before that date).

59. *United States v. Holcomb*, 657 F.3d 445, 451 (7th Cir. 2011) (rejecting en banc review of four retroactivity cases, despite the change in position on the issue by the U.S. Attorney General).

60. *Id.* at 463 (Posner, J., dissenting).

61. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

62. *Id.* at 2326.

## B. Child Pornography

While the story of the crack–powder disparity is largely a story of stasis (two decades of adherence to an extreme and unjustified sentencing structure before eventual partial amelioration by the Commission, the courts, and Congress), the story of the child pornography Guidelines is a story of radical change. From the inception of the Guidelines in 1987, the treatment of child pornography has been a one-way ratchet, repeatedly turned by Congress. In a little more than two decades, the child pornography Guidelines were substantively revised nine times, with each revision either extending the scope of the offense or making the penalty harsher.<sup>63</sup> In the span of a single decade (from 1997 to 2007), the mean sentence of child pornography offenders increased from 20.59-months to 91.30-months confinement—an increase of 443%.<sup>64</sup> Every legislative tool in the congressional toolkit was employed: Congress created new crimes, imposed mandatory minimum sentences, issued directives to the Commission to increase sentences under the Guidelines, and even bypassed the Commission entirely by directly legislating changes to the Guidelines.

The child pornography story does not end with congressional reconsideration, as the crack cocaine story did. Rather, most of the resistance to the escalation of penalties has come from the courts, with some lesser resistance from the Commission. In a comprehensive 2010 survey of federal trial court judges conducted by the Sentencing Commission, the Guidelines for child pornography were designated as inappropriately high by 70% of the judges for possession offenses and 69% of the judges for receipt offenses.<sup>65</sup> The only other sentences in the same ballpark of judicial disapproval for harshness were the crack cocaine penalties.<sup>66</sup> In the past few years, a growing number of appellate courts have joined individual sentencing judges in taking measures to ameliorate the harshness of child pornography sentencing, especially for less-culpable and less-dangerous offenders. It remains to be seen whether these growing judicial defections—and the potential for increased sentencing disparities that they portend—will lead Congress to reconsider the structure and magnitude of federal child pornography penalties.

When the Guidelines were first promulgated, simple possession of child pornography was not a federal crime. The single relevant Guideline addressed

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63. See U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 54 (2009) [hereinafter 2009 CHILD PORNOGRAPHY HISTORY], available at [http://www.ussc.gov/Research/Research\\_Projects/Sex\\_Offenses/20091030\\_History\\_Child\\_Pornography\\_Guidelines.pdf](http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf).

64. See Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines 2 (Jan. 1, 2009) (citing federal statistics), available at <http://www.fd.org/docs/select-topics---sentencing/child-porn-july-revision.pdf?sfvrsn=4>.

65. See U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, question 8: Appropriateness of Guideline Ranges (2010), available at [http://www.ussc.gov/Research/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf). The judges gave similar answers regarding the appropriateness of the applicable mandatory minimum penalties. See *id.* at question 1: Mandatory Minimums.

66. See *id.* at questions 1 & 8.

“transporting, receiving, or trafficking” offenses, for which the base offense level was thirteen.<sup>67</sup> Congress criminalized possession and possession with intent to sell child pornography in 1990<sup>68</sup> and directed the Commission to “amend existing guidelines for sentences involving sexual crimes against children . . . so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate.”<sup>69</sup> The Commission responded to this statute and directive by formulating a new Guideline setting the base offense level for the new offense of possession of child pornography at ten and treating the pre-existing offenses of transporting and receiving child pornography as analogous to possession rather than to trafficking (thus lowering their base offense level from thirteen to ten). The Commission described its process of collection and analysis of quantitative and qualitative data, including interviews with judges, prosecutors, and probation officers.<sup>70</sup> The Commission explained that its decision to set a lower base level offense for the least serious offenses rested on a pattern of judicial downward departures, coupled with the absence of government appeals, under the pre-existing Guidelines. This pattern suggested that both judges and prosecutors thought that the least serious forms of child pornography offenses were being too harshly punished.<sup>71</sup> The Commission further explained that its decision relied on the fact that “receipt is a logical predicate to possession” and the conclusion that “the guideline sentence in such cases should not turn on the timing or nature of law enforcement intervention, but rather on the gravity of the underlying conduct.”<sup>72</sup> The Commission also added an enhancement applicable to both possession and trafficking offenses for material involving a prepubescent minor or a minor under the age of twelve years,<sup>73</sup> as well as enhancements applicable only to trafficking offenses for distribution of child pornography and for material portraying sadistic, masochistic, or violent conduct.<sup>74</sup>

Congress was displeased with the Commission’s approach to possession of child pornography, especially the decision to treat receipt and transportation as analogous to possession, and thus as less serious than trafficking. A letter responding to the Commission produced in the House of Representatives noted that most child pornography offenders, including trafficking offenders, were caught in the act of receiving the material through sting operations, and therefore argued that the Commission’s downgrading of receipt was misguided.<sup>75</sup> In 1991, Congress passed new legislation directing the Commission

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67. See 2009 CHILD PORNOGRAPHY HISTORY, *supra* note 63, at 11.

68. See Crime Control Act of 1990, Pub. L. No. 101-647 § 323, 104 Stat. 4789, 4818–19 (1990).

69. *Id.* § 321.

70. See 2009 CHILD PORNOGRAPHY HISTORY, *supra* note 63, at 8.

71. See *id.* at 21.

72. See *id.* at 19.

73. See *id.* at 12.

74. See *id.* at 16.

75. *Id.* at 22 (citing 137 CONG. REC. 6740 (1991) (memorandum by House staff in response to Sentencing Commission letter inserted into record by Rep. Wolf)).

to treat receipt the same as trafficking, and to increase the base offense level for trafficking offenses from 13 to 15, and for possession offenses from 10 to 13. The Commission, despite its noted objections,<sup>76</sup> implemented Congress's directives (as it was required by law to do).

In 1995, Congress again directed the Commission to raise the base offense levels for child pornography offenses across the board by at least two offense levels (from 15 to at least 17 for trafficking and from 13 to at least 15 for possession) and to add an at least two-level enhancement for the use of a computer.<sup>77</sup> Congress further directed the Commission to study child pornography and child sex offenses and to submit a report to Congress with the Commission's recommendations.<sup>78</sup> The Commission complied with Congress's directives but made only the minimum required increases. In its report, the Commission explained that its analysis supported an enhancement for the use of a computer to solicit participation in the production of child pornography, but worried that the general two-level enhancement for any computer use was not "finely-tuned" enough to distinguish among quite different levels of distribution and culpability.<sup>79</sup>

In 1998, Congress again passed legislation directing the Commission to increase the severity of the child pornography penalties.<sup>80</sup> Congress generally directed the Commission to ensure that the guidelines were "appropriately severe" as well as "reasonably consistent" with other Sentencing Guidelines.<sup>81</sup> Congress also specifically directed the Commission to promulgate several new enhancements and to clarify that "distribution" of child pornography included both distribution for monetary remuneration and for a non-pecuniary interest.<sup>82</sup> The clarification directive was significant because it ensured enhancement not only for those who sold child pornography, but also for those who traded it for other images.<sup>83</sup> The Commission complied with Congress's directives,

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76. See 2009 CHILD PORNOGRAPHY HISTORY, *supra* note 63, at 20–21. Congress also directed two new enhancements, one for possession of more than ten items of child pornography, and one for trafficking if the defendant engaged in a pattern of sexual abuse of a minor. The Commission noted that it did not object to either the pattern-of-abuse enhancement or the base-offense-level increase for trafficking from 13 to 15, as these two aspects of Congress's directives were consistent with the Commission's own recommendations. *Id.* at 24–25.

77. See Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71 §§ 2–3, 109 Stat. 774 (1995).

78. See *id.* § 6.

79. See U.S. SENTENCING COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 30 (1996), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Sex\\_Offense\\_Topics/199606\\_RtC\\_Sex\\_Crimes\\_Against\\_Children/199606\\_RtC\\_SCAC.PDF](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/199606_RtC_SCAC.PDF).

80. See Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998).

81. *Id.* at § 502(b), 112 Stat. 2980.

82. See *id.* § 506.

83. The development of peer-to-peer file-sharing technology (P2P technology) has engendered a split in the federal circuits on the question whether the five-level enhancement for non-pecuniary distribution (bartering) of child pornography is supported merely by proof that a defendant had installed a file-sharing program on his computer that gave others free access to pornographic images.

promulgating a set of graduated enhancements for distribution, including a five-level enhancement for distribution for non-pecuniary gain.<sup>84</sup>

In 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”),<sup>85</sup> the piece of legislation that most displayed Congress’s growing impatience with both the Commission and the federal courts.<sup>86</sup> Congress directed the Commission to substantially reduce the frequency of downward departures from the Sentencing Guidelines in general, regardless of the Commission’s view of the necessity of such a measure, and prohibited the Commission from promulgating any new downward departure Guidelines of any kind for the next two years. Moreover, Congress required that sentencing data be reported directly to Congress rather than to the Commission. With regard to child pornography offenses, Congress passed a five-year mandatory minimum sentence for trafficking and receipt offenses, and increased the statutory maximum sentence for trafficking and receipt offenses from fifteen to twenty years, and for possession offenses from five to ten years.<sup>87</sup> In addition, for the first time in the history of the Guidelines, Congress bypassed the Commission completely and made direct amendments to the Guidelines. Congress added a four-level enhancement for possession of sadistic, masochistic, or violent images, and enhancements varying between two and five levels based on the number of images trafficked or possessed.<sup>88</sup> Congress also added a statutory provision that required that the Guidelines be “consistent with all pertinent provisions of any Federal statute.”<sup>89</sup>

In order to conform to the new mandatory minimum sentence and higher statutory maxima introduced by the PROTECT Act, the Commission raised the base offense levels for trafficking and receipt offenses from 18 to 22, and the base offense levels for possession from 15 to 18.<sup>90</sup> The Commission conducted a prison-impact analysis that revealed that the 2003 amendments required by the PROTECT Act would cause average sentences for both trafficking and possession to approximately double.<sup>91</sup> The Commission attempted to ameliorate the impact of the amendments by adding a two-level decrease for offenders whose offenses were limited to receipt or solicitation of child pornography and

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*Compare, e.g.,* United States v. Stults, 575 F.3d 834 (8th Cir. 2009) (yes, enhancement supported by installation of P2P technology), *with* United States v. Spriggs, 666 F.3d 1284 (11th Cir. 2012) (no, enhancement not supported by installation of P2P technology).

84. See 2009 CHILD PORNOGRAPHY HISTORY, *supra* note 63, at 33–34.

85. Pub. L. No. 108-21, 117 Stat. 650 (2003).

86. Alan Vinegrad, the former United States Attorney for the Eastern District of New York, described the PROTECT Act as “the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress.” Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. RPTR. 310, 415 (June 2003).

87. PROTECT Act § 103.

88. *Id.* § 401(i).

89. *Id.* § 401(k).

90. See 2009 CHILD PORNOGRAPHY HISTORY, *supra* note 63, at 46.

91. *Id.* at 42.

who did not intend to distribute or traffic in such material.<sup>92</sup> But the Commission also decided to count a video as seventy-five images for the purposes of Congress's mandated table of enhancements based on the number of images involved. The highest degree of enhancement (five levels) would thus be triggered by eight videos.<sup>93</sup>

At the conclusion of its 2009 *History of the Child Pornography Guidelines*, the Commission noted that “[s]entencing courts have . . . expressed comment on the perceived severity of the child pornography guidelines through increased below-guidelines variance and downward departure rates.”<sup>94</sup> The pattern of judicial defection noted by the Commission has recently accelerated and moved beyond the sentencing courts to the federal courts of appeals. In the past two years, four federal appellate courts have applied the Supreme Court's decision in *Kimbrough*<sup>95</sup> to hold that, as with the crack cocaine Guidelines, a sentencing court may vary from the child pornography Guidelines not only because of an individualized determination that they yield an excessive sentence in a particular case, but also because of the court's policy disagreement with them.<sup>96</sup> These courts have reasoned that the extent of Congressional involvement in structuring the child pornography Guidelines by legislative fiat may lead sentencing courts to reasonably conclude that the Guidelines lack the infusion of expertise that warrants judicial deference. Quoting the *Kimbrough* Court, the courts of appeals have argued that the child pornography Guidelines do not reflect the Commission's “exercise of its characteristic institutional role,” which requires that it base its determinations on “empirical data and national experience.”<sup>97</sup>

In addition to criticizing the process by which the child pornography Guidelines developed over the years, some of the courts of appeals also presented substantive grounds for questioning the Guidelines. First, some courts noted the sheer severity of sentencing under the Guidelines. For

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92. *Id.* at 48.

93. *Id.* at 43. In 2008, Congress created a new child pornography offense making it unlawful to knowingly produce with intent to distribute or to distribute “child pornography that is an adapted or modified depiction of an identifiable minor” (“morphed image”). PROTECT Our Children Act of 2008, Pub L. No. 110-401, § 304, 122 Stat 4229, 4242–43 (codified at 18 U.S.C. § 2252A(a)(7) (2006)). The Commission responded with amendments incorporating the new offense into the existing child pornography Guidelines. *See* 2009 CHILD PORNOGRAPHY HISTORY at 50–52.

94. *See id.* at 54.

95. *See supra* notes 40–42 and accompanying text.

96. *See* *United States v. Henderson*, 649 F.3d 955, 963 (9th Cir. 2011); *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010); *United States v. Grober*, 624 F.3d 592, 608–09 (3d Cir. 2010); *United States v. Stone*, 575 F.3d 83, 89 (1st Cir. 2009).

97. *Henderson*, 649 F.3d at 963 (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)); *see also id.* at 963 n.4 (referencing similar conclusions in the other three circuit courts). Congress's efforts are not required to have the same empirical grounding as the decisions of the Commission, and critics have noted how little deliberation attended Congress's interventions regarding the child pornography Guidelines. *See, e.g.*, Stabenow, *supra* note 64, at 6–7 (discussing lack of debate about 1991 legislation); *id.* at 10–12 (discussing the lack of debate about the 1995 legislation); *id.* at 20–21 (discussing the lack of debate about the 2003 legislation).

example, in upholding a below-Guidelines sentence of five years plus three years of supervised release for a defendant who had a large collection of child pornography on his computer and who had traded such images several times by e-mail, the Third Circuit explained that the Guidelines would have yielded an “outrageously high” sentencing range of 235 to 293 months.<sup>98</sup> The severity of the Guidelines is a product of the wide applicability of enhancements that treat run-of-the-mill cases as highly aggravated. In the current world of nearly universal computer access, which allows easy downloading and sharing of images, enhancements for “computer use,” “non-pecuniary distribution” (that is, trading of images), and offenses involving “more than 600 images” (when one video counts as seventy-five images) are examples of enhancements “that are all but inherent to the crime of conviction” and ensure sentences near the statutory maximum for “ordinary first-time offender[s].”<sup>99</sup> As a consequence, the Guidelines fail to distinguish between commercial distributors of child pornography and defendants whose “core conduct [is] consumption” and who present “a very low risk of harm to society.”<sup>100</sup> Moreover, the child pornography Guidelines are out of sync with the rest of federal sentencing law. As the Second Circuit noted, the Guidelines for child pornography are so high that they treat an offender who never had any contact with a child more severely than the Guideline sentences for repeated sex with a child or for aggravated assault with a firearm that results in bodily injury.<sup>101</sup> As in the context of crack cocaine sentencing, the apparent disproportionality of many child pornography sentences has not led to successful *constitutional* proportionality challenges, both because intra- and inter-jurisdiction sentencing comparisons may not be considered unless a facial determination of *gross* disproportionality between offense and sentence is first sustained,<sup>102</sup> and because the sentences upheld by the Supreme Court against Eighth Amendment proportionality challenges have themselves been so extreme.<sup>103</sup> But some of the courts of appeals have used the same sort of proportionality arguments that are unavailing in the constitutional context to explain why the child pornography Guidelines do not deserve judicial deference under *Kimbrough*.

The four circuits that have accepted the *Kimbrough* argument (that the child pornography Guidelines may be rejected by sentencing courts on policy grounds) have deployed the argument with varying degrees of aggressiveness. The First Circuit did not itself endorse the *Kimbrough* critique of Congress’s intervention in the creation of the child pornography Guidelines. Rather, it held

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98. *Grober*, 624 F.3d at 595.

99. *Dorvee*, 616 F.3d at 186 (reporting Commission statistics showing that, in 2009, 94.8% of child pornography sentences involved an image of a prepubescent minor, 97.2% involved a computer, 73.4% involved a sadistic, masochistic or violent image, and 63.1% involved 600 or more images).

100. *Grober*, 624 F.3d at 598 (describing the district court’s findings).

101. *See Dorvee*, 616 F.3d at 187.

102. *See supra* notes 46–49 and accompanying text.

103. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003) (upholding a twenty-five-years-to-life sentence for offense of stealing three golf clubs under California’s “three strikes and you’re out” law).



only that a sentencing court must be *permitted* to vary from the Guidelines on such a ground and must be aware that it has such permission. But the First Circuit maintained that a sentencing court must also be free to reject a defendant's *Kimbrough* critique, and indeed, to embrace its opposite: "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."<sup>104</sup> The Ninth Circuit did not go as far as the First Circuit did in saying that courts were free to treat the defects identified in *Kimbrough* as assets, but the Ninth Circuit emphasized that "district courts are *not obligated* to vary from the child pornography Guidelines on policy grounds if they do not have, in fact, a policy disagreement with them."<sup>105</sup> The Third Circuit also endorsed the view that district courts are "not obligated" to vary from the child pornography Guidelines, but only after a lengthy and very critical review of the development of the Guidelines. The Third Circuit drew both on the Commission's 2009 report and the Second Circuit's opinion in *Dorvee*, and it described these materials as "a wealth of resources that have become available since the sentencing in this case" that put the sentencing court's below-Guidelines decision "on even stronger ground."<sup>106</sup>

The Second Circuit in *Dorvee* went by far the farthest of the four circuits when it rejected a within-Guidelines sentence as substantively unreasonable. Part of the grounds for the Second Circuit's reversal of the district court were specific rejections of the district court's views regarding the defendant's future dangerousness, the need for deterrence, and the reasonableness of a statutory maximum sentence simply because it fell below the Guidelines range.<sup>107</sup> However, the Second Circuit went on to present a lengthy and scathing critique of the child pornography Guideline, describing it as "fundamentally different from most."<sup>108</sup> After canvassing both the procedural and substantive flaws of the Guideline and deriding its "irrationality,"<sup>109</sup> the *Dorvee* court concluded by encouraging district courts "to take seriously the broad discretion they possess[,] . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."<sup>110</sup>

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104. *United States v. Stone*, 575 F.3d 83, 93 (1st Cir. 2009). The First Circuit added a "coda" to its decision upholding the sentencing court's rejection of the defendant's *Kimbrough* argument: "[W]e wish to express our view that the sentencing guidelines at issue are in our judgment harsher than necessary. . . . Were we collectively sitting as the district court, we would have used our *Kimbrough* power to impose a somewhat lower sentence." *Id.* at 97.

105. *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011) (emphasis added).

106. *United States v. Grober*, 624 F.3d 592, 609 (3d Cir. 2010).

107. *See United States v. Dorvee*, 616 F.3d 174, 183–84 (2d Cir. 2010).

108. *Id.* at 184.

109. *Id.* at 187.

110. *Id.* at 188.

Recently, two circuits have pushed back against this wave of appellate criticism of the child pornography Guidelines. In late 2011, the Fifth Circuit held that a sentence within the Guidelines range for child pornography offenses is entitled to a presumption of reasonableness on appeal.<sup>111</sup> Directly responding to the Second Circuit's *Dorvee* opinion, the Fifth Circuit wrote, "Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them. . . . [W]e will not reject a Guidelines provision as 'unreasonable' or 'irrational' simply because it is not based on empirical data and even if it leads to some disparities in sentencing."<sup>112</sup> Less than a month later, in early 2012, the Sixth Circuit followed suit, holding that a deep downward variance from the Guidelines range for possession of child pornography was substantively unreasonable.<sup>113</sup> The trial court had imposed one night in jail and ten years of supervised release for the sixty-seven-year-old defendant, rather than a sentence in the Guidelines range of 63- to 78-months imprisonment. The Sixth Circuit reversed and joined the Fifth in directly repudiating the reasoning of *Dorvee* and other appellate decisions relying on *Kimbrough* to authorize rejection of the child pornography Guidelines. But the Sixth Circuit went even further, affirmatively defending the Guidelines as reasonable *because of* (rather than *in spite of*) Congress's direct, non-expert, and non-empirical intervention: "Congress can marginalize the Commission all it wants: Congress created it. Indeed it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission. The Constitution is fundamentally a democratic document, not a technocratic one."<sup>114</sup>

This profound disagreement among the federal appellate courts guarantees that there will be an increase—probably a substantial one—in sentencing disparities among child pornography offenders, depending on whether they are sentenced in circuits that strongly advise, permit, or forbid sentencing judges to reject the applicable Guidelines. The increasing sentencing disparities in the child pornography context (and the substantial judicial criticisms of the Guidelines that generated such disparities) have evoked concern from individual federal judges,<sup>115</sup> the ABA,<sup>116</sup> and the Sentencing Commission itself,

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111. See *United States v. Miller*, 665 F.3d 114 (5th Cir. 2011).

112. *Id.* at 121.

113. See *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012).

114. *Id.* at 762.

115. See, e.g., *United States v. Stern*, 590 F. Supp. 2d 945 (N.D. Ohio 2008) ("[O]ne would be hard pressed to find a consistent set of principles to explain exactly why some federal child porn defendants face decades in federal prison, some face many years in federal prison, while others only end up facing months.") (quoting Douglas A. Berman, *Is There an Ivy-League Exception to Federal Child Porn Charges?*, SENTENCING LAW AND POLICY (Oct. 22, 2008, 7:33 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/10/is-there-an-ivy.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/10/is-there-an-ivy.html)).

116. See ABA Criminal Justice Section, Resolution 105A (April 2011) (urging the Sentencing Commission to review the child pornography Guidelines, passed by the ABA House of Delegates at its 2011 annual meeting), available at [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/2011a\\_resolution\\_105a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105a.authcheckdam.pdf).

which held a public hearing on the child pornography Guidelines in February 2012.<sup>117</sup> Whether this concern will prompt reform by the Commission or Congress (akin to the Fair Sentencing Act in the crack cocaine context) remains to be seen.

### III

#### LESSONS

What lessons can other countries draw from these dual stories of stasis and change in the Federal Sentencing Guidelines of the United States? If the stories are driven by the distinctive politics, law, and institutional structures of contemporary America, then perhaps nothing. If, however, the stories reflect some more universal challenges of guiding sentencing discretion, then perhaps they can be useful. Because both conditions are true to some extent, I will try to tease apart the distinctive from the more universal and to reflect upon both negative and positive lessons.

#### A. Distinctive Politics, Law, and Institutions

The first obvious caveat in drawing lessons from the Federal Sentencing Guidelines is that they are, well, *federal*, and thus they reflect the distinctive role that the federal government plays in American law enforcement. Unlike most other countries (even ones with federal systems), the United States allocates the lion's share of criminal law enforcement authority to its federal units, the individual states. Thus, the institutions of federal criminal law enforcement have sole or primary authority only in the relatively small arena of distinctively federal concerns; the federal government shares authority for everything else with state and local law enforcement. Drug and child pornography offenses fall squarely within this area of shared authority. One consequence of this distinctive institutional arrangement is that both federal criminal lawmakers (Congress) and federal prosecutors operate under a somewhat different set of incentives than state and local lawmakers and prosecutors, or than their national counterparts in other countries. Congress and federal prosecutors do not have primary responsibility for responding to the bulk of ordinary crime, and thus criminal law enforcement and corrections form a much smaller part of the federal budget than of state budgets, or the budgets of other countries. As a result, both Congress and federal prosecutors are less constrained by the regulating effects of scarcity. If they misallocate resources—spending too much to prosecute relatively low-level offenders—there will be fewer budgetary repercussions and less public outcry than in a state system, or any other system that is the “front line” of criminal law enforcement. Similarly, the federal government's limited role in criminal justice leads it to legislate in particular areas in something of a vacuum, without the

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117. The Sentencing Commission's agenda for its public hearing on the child pornography Guidelines is available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20120215-16/Notice\\_15.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Notice_15.pdf).

context and trade-offs with which state legislatures (and other national legislatures) are familiar. Consequently, American-style criminal justice federalism often leads Congress “to support legislation of the ‘feel-good, do-something’ variety rather than to seek out the most cost-effective way to address a particular problem.”<sup>118</sup>

In addition to the distinctive politics of American federalism, there is the distinctive politics of American *politics*. American political institutions are structured in a way that tends to highlight the salience of criminal justice issues. The two-party, winner-takes-all American electoral system, in contrast to the multi-party parliamentary system in place in the United Kingdom and elsewhere, promotes single-issue campaigns when there is a single issue (like crime) that has wide appeal to “floating, median voters.”<sup>119</sup> American institutions are also distinctively populist—not only in their disaggregation of power to state and local units, but also in the multitude of institutional channels for popular political influence (such as the “primary” system for selecting party candidates, and state referenda and initiatives such as the Washington state ballot initiative system described by Kate Stith in her contribution to this symposium).<sup>120</sup> Moreover, criminal justice is special even within American political populism, as there are a number of special institutional measures to ensure popular participation in criminal justice administration (such as the election of most prosecutors and judges, and lay participation in grand and petit juries).<sup>121</sup> This distinctive sensitivity to populist influence renders the American political and criminal justice systems especially prone to over-reaction to discrete events and to the influence of “moral panics”—such as those that surrounded both crack cocaine and child pornography in the past few decades.<sup>122</sup>

These distinctive features of American politics and institutions proved hospitable to the potent influence of three different, though overlapping, political movements in the United States. The first, which started in the 1960s, was the Republican party’s so-called “Southern strategy”—its conscious attempt to use crime as a coded racial appeal to Southern democrats angered by the civil rights movement of the 1950s and ‘60s.<sup>123</sup> The second, which began the following decade, was the victims’ rights movement, an organized and powerful

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118. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1303 (2005); see also *id.* at 1299–1312 (surveying the various ways in which American federalism shapes Congressional law-making in the sentencing context).

119. NICOLA LACEY, *THE PRISONER’S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 69 (2008).

120. See Kate Stith, *Sentencing Guidelines in Washington State*, 76 LAW & CONTEMP. PROBS., no. 1, 2013 at 105, 122–24.

121. See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 114–20 (2002) (exploring features of American political populism and criminal justice populism).

122. See generally MICHAEL H. TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004) (describing how moral panics have led to unprecedented and unnecessary harshness in American criminal justice over the past several decades).

123. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 43–44 (2010).

movement to promote the interests and influence of crime victims in the criminal process.<sup>124</sup> The third, which began in the 1980s, was the rise to power of the religious right, which has led to the formidable political influence of first Jerry Falwell's "Moral Majority" and then Pat Robertson's "Christian Coalition," from the Reagan years onward.<sup>125</sup> These three political developments helped to promote both the political candidates and the political agenda that undergirded the War on Drugs (and the war on crack cocaine in particular), as well as the almost equivalent "war" on child sex offenders (which includes child pornography offenders).<sup>126</sup>

Finally, the distinctive mode of constitutional regulation of criminal justice in the United States has prevented the courts from serving as a counter-majoritarian check on the political excesses of American penal populism. Since the "criminal procedure revolution" of the 1960s, when the Warren Court incorporated most of the provisions of the federal constitutional Bill of Rights to apply to the states through the Fourteenth Amendment's Due Process Clause, American constitutional regulation of criminal justice has been almost entirely procedural rather than substantive.<sup>127</sup> The granting of increased constitutional procedural rights to criminal defendants created incentives for legislatures to empower prosecutors at the plea-bargaining negotiating table with more-expansive criminal prohibitions and more-severe sentences.<sup>128</sup> At the same time, the Supreme Court's abdication of constitutional authority to review the substantive proportionality or distributional equity of punishment removed any judicial check on this "pathological politics"<sup>129</sup> of crime on the legislative side.

To the extent that these distinctive features of American politics, institutions, and law drove the two Guidelines failures that are my topic, these stories are useful to other countries only to the extent that they have some parallel features in their own systems. Perhaps in Israel, the influence of the "religious right" (albeit of a different religion) or the linking of the crime issue with disadvantaged racial, ethnic, or religious groups (albeit of different groups)

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124. See generally MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* (2002) (chronicling and critiquing the victims' rights movement in the United States); see also *History of Victims' Rights*, NATIONAL CRIME VICTIM LAW INSTITUTE, [http://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/about\\_ncvli/history\\_of\\_victims\\_rights/](http://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/) (last visited November 26, 2012) (dating the movement's origins to 1973).

125. See generally WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* (1996) (chronicling the twentieth century's rise of the religious right, with an emphasis on the rise of the Moral Majority and the Christian Coalition).

126. See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARVARD C.R.-C.L. L. REV. 435 (2010) (elaborating on the parallels between the War on Drugs and the new "war" on sex offenders).

127. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 209–10 (2011) (calling for greater constitutional regulation of substantive criminal law).

128. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537 (2001) (describing legislative incentives to expand the criminal law to empower prosecutors and reduce the costs of criminal prosecution).

129. *Id.*

may offer some loose resonances. However, although the distinctive features canvassed above are clearly operative in the two Guidelines stories I recount, they do not exhaust the factors contributing to these failures. I thus turn now to some more generalizable aspects of the Guidelines stories.

## B. General Challenges of Guiding Sentencing Discretion

The distinctive politics of the United States described above played a larger role than it might otherwise have done in the overarching Guidelines story because of contestable institutional choices in the shaping of the Federal Sentencing Commission and its relationship to Congress. This is the first generalizable challenge for any system that seeks to constrain judicial discretion based on some form of expert set-points or guidelines—the challenge of insulating expertise from the political sphere. In the federal Guidelines story, Congress kept tight control over the Sentencing Commission, giving itself both the power to issue specific directives to the Commission and the power to directly legislate changes in the Guidelines. As time went on, Congress further arrogated power to itself, not only proliferating mandatory minimum sentences but also temporarily stripping the Commission of the power to create new downward departure Guidelines, demanding the reporting of sentencing data directly to itself rather than to the Commission, and specifically requiring that the Guidelines be consistent with all Congressional legislation as part of the PROTECT Act of 2003.<sup>130</sup> One can imagine alternative choices that would have promoted greater deference to the expertise of the Commission (more on this below). The basic point is that a central element in stories of failure recounted above is the erosion of deference to expertise and reliance instead on ever-more-polarized politics. Creating and maintaining a healthy balance between expertise and political accountability is a key challenge for any guided sentencing regime.

A second general challenge that controlling judicial discretion through guidelines inevitably confronts is the temptation to count most what can easily be counted. In the cocaine context (indeed, in the entire drug context), the temptation was to count the weight of the drug at issue, because it was infinitely divisible on a calibrated scale and allowed for easily calculated triggers for differentiated penalties. It was this focus on weight that gave birth to the troubling 100-to-1 crack-to-powder ratio. Similarly, the number of images possessed or transmitted exerted the same siren pull and played a similarly problematic role in the context of child pornography offenses. The central problem is that the most easily calculable metrics often place too much emphasis on the wrong things—the weight of drugs and the number of pornographic images are very weak proxies for the culpability and dangerousness of offenders. But accounting for all of the myriad contributors to culpability and dangerousness is difficult, if not impossible—and much harder

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130. See *supra* notes 84–89 and accompanying text.

to monitor for disparities. Hence the attraction of the easy metric, and once such a metric is in place, it tends to dominate a judge's decisionmaking process, even if that process ostensibly includes the myriad other "softer" factors. Dan Richman, in his contribution to this conference, explains that financial loss plays the role of attractive-but-problematic metric in the white collar context; he sums up this problem beautifully, noting that "there is a substantial likelihood that a preliminary quantifiable task will distort the larger qualitative project in which it is embedded."<sup>131</sup>

A related temptation in formulating sentencing guidelines is to count most what can easily be *caught*. We see this clearly in the child pornography context, where one big issue of contention between the Commission and Congress was the proper treatment of the crime of "receiving" child pornography. The Commission reasoned that "receiving" pornography (through the mail or electronically) is tantamount to "possessing" it in terms of culpability and dangerousness and thus should be treated similarly in terms of punishment. But Congress insisted that receipt be punished more than possession (on a par with "trafficking") because it learned from federal law enforcement that many defendants were arrested in sting operations at the moment of receipt, so that maintaining high penalties for receipt would make prosecution easier.<sup>132</sup> This dispute illustrates the more general problem of identifying—and adhering to—a set of coherent and defensible principles in formulating the ordinal ranking of penalties in a guidelines scheme.

The lack of a coherent and defensible rationale for the structure of the cocaine and child pornography Guidelines illuminates a deeper problem endemic to guidelines sentencing in general. The birth of guided discretion (in sentencing or elsewhere) is always attended by hopes that the troubling disparities permitted by unbridled discretion will be reduced. What is not always fully realized is that the unjustified disparities (as well as unjustified uniformities) that arise from rule-based sentencing can be just as pernicious as those that are produced by discretion, but they can also be both less visible and (even when visible) more difficult to change. The stories of the cocaine and child pornography Guidelines are, if nothing else, testaments to the "stickiness" of bad ideas in guiding sentencing discretion. In both contexts, despite ample evidence casting doubt on the wisdom of the Guidelines at issue—including criticism from a substantial majority of the none-too-liberal federal bench—

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131. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS., no. 1, 2013 at 53, 70. The fact that "softer" sentencing factors are often not amenable to easy calibration also leads to a tendency to simply exclude them from any Guidelines calculus. As federal judge Marvin Frankel noted, "Part of the pattern of excessive severity is the Commission's relatively cursory and meachanical handling of mitigating factors [in the federal Guidelines]." Marvin E. Frankel, Keynote Address, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992).

132. See *supra* notes 69–71 and accompanying text. The fact that the vast majority of federal criminal cases are disposed of by plea bargaining rather than by trial increases legislative willingness to enhance the prosecutor's bargaining position by raising penalties for easily provable offenses even when they are not the most serious ones.

change has been either very slow or non-existent. As one commentator has quipped, “[S]orry’ seems to be the hardest word for legislators to say when it comes to the recalibration of criminal penalties.”<sup>133</sup> Moreover, in a guidelines system, legislative impulses to demonstrate “toughness” on a particular kind of offense generally lead to across-the-board increases in the sentences of all offenders in that general category, as the whole scale of such offenses is recalibrated. In a non-guidelines system, it is easier for legislatures to merely raise the statutory maximum in a symbolic gesture that sends a public message, while still allowing for prosecutorial and judicial discretion to keep sentences at reasonable levels. This difference means increased harshness in a guidelines regime generally will be not only “stickier” but also more pervasive in effect.<sup>134</sup>

Thus, we can glean from the two stories of failure three general types of challenges that any guidelines scheme must face—challenges that can be grouped under the headings of “lack of insulation from politics,” “unprincipled metrics,” and “resistance of rules to change.” The harder question, to which I now turn, is whether there are any positive strategies available to meet these challenges.

### C. Positive Prescriptions

With regard to the problem of inadequate insulation of expertise from politics, one can take the American experience and start to imagine different institutional arrangements. It is not difficult to think of choices that Congress might have made to render deviations from the Sentencing Commission’s decisions more costly, without abdicating its power to overrule the Commission through legislation. For example, as a substantive matter, Congress could have kept the power to veto the Commission’s proposed amendments to the Guidelines without giving itself the power to issue specific directives or to directly legislate changes in the Guidelines. Or, Congress could have imposed greater procedural requirements on itself as a precondition to issuing directives or directly legislating Guidelines changes (requirements of greater study and more thorough hearings, for example), or it could have invited the Commission to revisit Congressionally mandated changes after a certain period of data collection and study. Or, Congress could have formalized a rule similar to what the federal courts have begun to generate on their own—that in an advisory Guidelines system, specific Guidelines are worthy of judicial deference only when they reflect expert judgment and empirical support. Such rules limiting its own power, of course, are always revocable by Congress, but the “ground rules” that Congress sets for itself *ab initio* are important not only as rules, but also as crucial aspects of a culture of deference to expertise—a culture that grew progressively weaker in the criminal justice sphere over the lifetime of the federal Guidelines.

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133. Graham, *Sorry Seems to Be the Hardest Word*, *supra* note 14, at 769.

134. I am indebted to Yoav Sapir for this point.



Alternatively, one could approach the problem of lack of political deference to expert choices from a different angle and attempt to promote the credibility of expert choices by involving the legislative branch in their formulation. If there were mandated legislative representation on the Sentencing Commission, it might “politicize” the Commission’s work even further. But, conversely, it might have the effect of creating greater legislative “buy-in” and thus deference to the work of the Commission when that work was reviewed on Capitol Hill. This latter choice is not necessarily incompatible with the proposals above to promote greater political deference to expertise. The point is to generate institutional arrangements—and, beyond the formal arrangements, an expectation and a culture—that promote deference to expertise in the political sphere.

On the issue of problematic metrics, one could address it directly by requiring penalty metrics to conform to some general sentencing principles in a coherent and defensible way. But this simple and sensible idea, experience shows, may lie beyond the realm of the possible. The original Federal Sentencing Commission was simply unable to agree on more than the most general principles and thus settled for metrics that, for most offenses, were designed to reproduce aggregate past sentencing practices.<sup>135</sup> Moreover, the ritualistic intonation of the purposes of Guidelines sentencing that now precedes every advisory application of the Guidelines (even those that are diametrically opposed to one another) suggests that there is too much room to roam in application at the higher levels of purposive generality (while there is not enough agreement on purposes at lower levels of generality). A better response to the tendency of guidelines systems to count (or overly emphasize) the wrong things in formulating its metrics is to develop a robust set of mitigating factors that can negate “false positive” readings produced by rigid or inaccurate metrics. For example, in the child pornography context, a mitigating factor that allowed a substantial downward departure for clinical evidence supporting a low likelihood of sexual contact with a child in the future would go a long way toward surmounting the unwarranted assumptions built into the significant enhancements for possessing a large number of images, and for the violence of the images, and for using a computer.

As for the way in which disparities can be generated by rules as much as by discretion, the best response here may be prevention—in the form of required predictive analysis of the racial (or ethnic or religious) impact of a proposed guideline scheme, or a later amendment to such a scheme. This kind of prevention can be coupled with the *post hoc* commitment to “sunshine”—continued required data collection on racial (or ethnic or religious) disparities. In both the preventive and *post hoc* stages, data production must be tied to a commitment to respond and to modify guidelines that produce unwarranted disparities along these dimensions. Of course, controversy will always attend

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135. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988).

the question whether disparities are “unwarranted” (as it did in the crack-powder disparity context). But starting and maintaining such a conversation, however controversial, is the first necessary step in addressing the disparities that may be introduced by a more rule-based sentencing system.

Finally, the “stickiness” and resistance to change that have accompanied the two American stories of Guidelines failures may be a product primarily of dysfunctional American politics. But to the extent that the failures of a guided sentencing system can become entrenched even absent such politics, the best remedy may be to keep open and to take seriously channels of feedback, especially from sentencing judges. It is American federal sentencing judges, more than any other institutional actors, who questioned both the cocaine and the child pornography Guidelines. Had they been heard and heeded sooner, legislative change on the cocaine front may have come much more quickly (and more extensively), and *ad hoc* defection on the child pornography front would not be the order of the day.<sup>136</sup> In a different vein, explicitly connecting guidelines formation to budgetary constraints or prison capacity can also be a way to prevent excessively harsh guidelines from continuing in perpetuity, as some state guidelines schemes have done within the United States.<sup>137</sup>

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Guided discretion of judicial sentencing is not bound to fail—or at least not bound to fail as disastrously as it did in the American cocaine and child pornography contexts. Close attention to these two stories of failure offers some answers to the questions of what contributed to these particular failures and how generally such types of failures might be averted in the future. In law, as in life, role models are always helpful, but perhaps even more helpful are *negative* role models who demonstrate what not to do. I hope that the two examples canvassed here start a helpful conversation in this latter vein.

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136. American trial juries, even when they do not have sentencing power, can also be a source of such feedback through their nullification power, though federal sentencing judges have been unsuccessful in attempting to harness this power. *See, e.g.,* *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009) (overruling the district court’s holding that it should have informed the trial jury of the sentencing consequences in a child pornography case); *United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004) (holding that the defendant had no legal entitlement to a jury instruction the regarding sentencing consequences in child pornography case).

137. For example, Minnesota pioneered the routine and rigorous use of resource-impact assessments to guide the formulation of sentencing guidelines, a practice followed to varying degrees by many other states. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1216 (2005) (“Arguably the most important innovation of state guidelines systems, and the key to their survival and effectiveness, is their use of prison and other resource impact assessments.”).