

# Learning from History in Changing Times: Taking Account of Evolving Marijuana Laws in Federal Sentencing

*Adam Davidson*†

## INTRODUCTION

The difference between becoming a successful entrepreneur in a fast-growing industry and becoming a federal prisoner may largely depend on which state you place your business in. This is the reality for those in the marijuana business. This predicament occurs because of two issues: the increasing spread of marijuana legalization for both medical and recreational use at the state level,<sup>1</sup> and the Department of Justice's decision not to enforce federal marijuana laws against those in compliance with their states' laws, while maintaining full enforcement against everyone else.<sup>2</sup>

While this seems unproblematic at first glance, 18 USC § 3553(a) provides that one of the factors judges must consider in imposing a criminal sentence is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>3</sup> The sentence should also “reflect the seriousness of the offense.”<sup>4</sup> Because the federal government is willing to accede to popular will and forego enforcement of marijuana laws in many states, the seriousness of the offense is lessening. This selective enforcement has created a regime in which some ostensible drug felons are allowed to become entrepreneurs and others who commit the same acts go to prison. As such, conforming to these two provisions suggests that a substantial downward variance from the sentence a court would ordinarily impose on a federal marijuana offender is appropriate.

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† BA 2011, The Ohio State University; JD Candidate 2017, The University of Chicago Law School.

<sup>1</sup> See Part II.A.

<sup>2</sup> See Part II.B.

<sup>3</sup> 18 USC § 3553(a)(6).

<sup>4</sup> 18 USC § 3553(a)(2)(A).

Indeed, in light of the nature of federal drug sentencing, it is imperative that the judiciary acts on this issue. Federal sentencing is based primarily on interaction between the Federal Sentencing Guidelines (the Guidelines), statutory mandatory minimum sentences, and judicial discretion.<sup>5</sup> While the Guidelines were once mandatory, it was clear from their inception that the United States Sentencing Commission (the Commission) both needed and expected judges on the ground to provide feedback in order to maximize the Guidelines' effectiveness. This feedback loop was built in to ensure that the Guidelines reflected a proper balance between the wide-scale policy analysis of the Commission and the actual experiences of federal judges.<sup>6</sup>

This Comment argues that because a majority of states,<sup>7</sup> both the executive and legislative branches of the federal government, and the American people have placed decreasing emphasis on the seriousness of marijuana crimes, judges should use their discretion to impose primarily noncustodial sentences for marijuana offenders. Furthermore, judges should use their discretion in this way because selective enforcement of federal marijuana laws as currently implemented creates a system that doubly advantages white citizens—both decriminalizing and allowing them to profit from marijuana activities, while simultaneously exacerbating existing racial disparities in marijuana sentencing.

Part I of this Comment examines the role of the Guidelines in federal criminal sentencing and their interaction with the

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<sup>5</sup> Statutory mandatory minimum sentences, and prosecutors' discretion in bringing charges that trigger them, are the subject of much debate. Compare, for example, Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion; The New Federal Sentencing Guidelines*, 80 J Crim L & Crimin 883, 895–99 (1990) (noting that Congress's decision to move away from indeterminate sentencing was largely a reaction to rampant and unjustified variations in sentences imposed for factually identical crimes), with David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion under Mandatory Minimum Sentencing*, 48 J L & Econ 591, 592 (2005) (“While mandatory minimum sentencing laws appear to significantly curtail the discretionary influence judges have over the minimum sentences they impose on convicted criminals, the point has been raised that these laws may simply shift the discretion to other actors in the judicial process, namely, prosecutors.”) (citation omitted). That debate, however, is largely outside the scope of this Comment.

<sup>6</sup> See Part I.A.

<sup>7</sup> At the time of writing, a majority of states, Guam, Puerto Rico, and the District of Columbia have either legalized or decriminalized marijuana in some way. See *State Medical Marijuana Laws* (National Conference of State Legislatures, Sept 29, 2016), archived at <http://perma.cc/VX5R-L7NF> (“A total of 25 states, the District of Columbia, Guam and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs.”); *Marijuana Overview* (National Conference of State Legislatures, Sept 2, 2016), archived at <http://perma.cc/HR4D-LNV3> (“Twenty-one states and the District of Columbia have decriminalized small amounts of marijuana.”).

§ 3553(a) sentencing factors. Part II examines the current public perception of marijuana and the status of marijuana laws on the state and federal levels. Part III focuses on several analogies to the current state of marijuana prosecution and sentencing. These analogies compare modern examples of judicial discretion in applying the Guidelines surrounding cocaine base and possession of child pornography, as well as the historical example of the Fugitive Slave Laws of 1793<sup>8</sup> and 1850,<sup>9</sup> to the current regime of federal marijuana nonenforcement.

Part IV argues that these analogies suggest that when the political branches use their power to corrupt the Commission's empirical methods, a pattern emerges: a relatively politically powerless or unpopular group is disproportionately burdened for political benefit. As the analysis of the Fugitive Slave Laws shows, this theme has roots in the earliest parts of American history. Part IV provides an analysis of the § 3553(a) factors based on the popular perceptions of marijuana and the state of marijuana laws described in Part II, as well as the lessons learned from the various analogies covered in Part III. Finally, Part IV presents a solution, ultimately arguing that, to the extent a defendant's actions violate only federal marijuana laws, the § 3553(a) factors suggest that a judge should impose a noncustodial sentence.

## I. DRUG LAWS: THEN AND NOW

The current state of drug sentencing in this country is based on the regime created by Congress in the Sentencing Reform Act of 1984.<sup>10</sup> This Part traces that history beginning with Congress's action in 1984 and concluding with the current state of drug laws.

### A. The Guidelines: An Evolving Sentencing Tool

The Sentencing Reform Act of 1984 created the United States Sentencing Commission to establish a uniform system of "sentencing policies and practices" by implementing "detailed" federal sentencing guidelines for judges to follow.<sup>11</sup> The pre-Guidelines

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<sup>8</sup> Act of Feb 12, 1793, 1 Stat 302.

<sup>9</sup> Act of Sept 18, 1850, 9 Stat 462.

<sup>10</sup> Pub L No 98-473, 98 Stat 1987.

<sup>11</sup> United States Sentencing Commission, *Guidelines Manual* § 1A1.1 (Nov 1, 2015) ("USSG") (describing the purpose of the Commission as "establish[ing] sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes").

sentencing regime afforded judges wide discretion. This discretion, in combination with the widespread use of parole, led to significant disparities in the harshness of sentences for similarly situated offenders, which was seen as “fundamentally at odds with ideals of equality and the rule of the law.”<sup>12</sup> At the same time, because of the perceived failure of utilizing sentencing and parole to further rehabilitative goals, there was a shift in the nation’s sentencing philosophy away from imposing sentences based primarily on those goals.<sup>13</sup>

These changes culminated in the passage of the Guidelines. The evolution of the Guidelines from a mandatory sentencing regime to their current advisory status has been covered extensively.<sup>14</sup> What is important for the purposes of this Comment is that the Guidelines were designed to evolve. Statutory mechanisms built into the Sentencing Reform Act ensured that “[t]he Commission’s work [would be] ongoing.”<sup>15</sup> The Commission must “publish[] guideline amendment proposals . . . and conduct[] hearings to solicit input on those proposals from experts and other members of the public,”<sup>16</sup> and must “review[] and revise[] the guidelines in consideration of comments it receives from members of the federal criminal justice system,” as well as “data it receives from sentencing courts.”<sup>17</sup>

Unfortunately, the Commission abandoned this traditional empirical approach in formulating the original Guidelines for marijuana and other drug-related offenses,<sup>18</sup> and so it is all the more important that sentencing judges use their discretion to provide the Commission with data points that accurately reflect the 18

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<sup>12</sup> Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 225–27 (1993). See also USSG § 1A1.3 (stating that giving judges broad sentencing ranges to select from “would have risked a return to the wide disparity that Congress established the Commission to reduce”).

<sup>13</sup> See Stith and Koh, 28 Wake Forest L Rev at 227–29, 239–42 (cited in note 12).

<sup>14</sup> See, for example, Ryan Scott Reynolds, Note, *Equal Justice under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity between Codefendants’ Sentences?*, 109 Colum L Rev 538, 540–49 (2009); Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity between State and Federal Sentences under Booker?*, 106 Colum L Rev 2095, 2098–2104 (2006); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Valp U L Rev 693, 696–734 (2005).

<sup>15</sup> *Rita v United States*, 551 US 338, 350 (2007).

<sup>16</sup> USSG § 1A2, citing 28 USC § 994(x).

<sup>17</sup> USSG § 1A2, citing 28 USC § 994(o).

<sup>18</sup> See Part IV.A.1.

USC § 3553(a) sentencing factors. These factors outline the considerations that a sentencing judge must consider and announce when determining a defendant's sentence.<sup>19</sup> It is a faithful application of these factors to the typical commission of a specific crime that a within-Guidelines sentence is meant to approximate.<sup>20</sup>

Although the Commission intends for the Guidelines to replicate applying the statutory sentencing factors, the Commission has not always succeeded in its pursuit of this goal. In several areas in which the Commission has abandoned its empirical ethos, such as in the cases of crack–powder cocaine ratio and child pornography possession, sentencing judges have varied from the Guidelines recommendations and caused both recommended and real reform.<sup>21</sup> The Commission itself has recognized that the Guidelines are only one part of a “deliberative and dynamic process that seeks to embody within federal sentencing policy the [statutory] purposes of sentencing.”<sup>22</sup> And at this moment, in the realm of drug sentencing, the Commission seems highly amenable to feedback.<sup>23</sup>

The Commission's current treatment of the drug Guidelines is an excellent example of an attempt to evolve the Guidelines through empirical analysis.<sup>24</sup> In 2014, the Commission promulgated a reduction in the Guidelines recommendation for drug sentences that would result in an estimated 17.7 percent reduction

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<sup>19</sup> See 18 USC § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”); 18 USC § 3553(c) (“The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.”).

<sup>20</sup> 18 USC § 3553(b)(1), which was ruled unconstitutional by *United States v Booker*, 543 US 220 (2005), required judges to impose a sentence within the established Guidelines range absent “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” See also USSG § 1A1.4(b) (“The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”).

<sup>21</sup> See Parts III.A–B. See also Brenda L. Tofte, *Booker at Seven: Looking behind Sentencing Decisions; What Is Motivating Judges?*, 65 Ark L Rev 529, 559 (2012) (noting that “history dictates that change often begins in the district courtroom, where sentencing practices alert Congress to the need for reform . . . or when, for the sake of consistency and constitutional finality, sentencing issues demand the Supreme Court's attention”).

<sup>22</sup> USSG § 1A2.

<sup>23</sup> See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am Crim L Rev 1, 7–14 (2015) (describing changes in the criminal justice system over the last decade and the Commission's research into the effects of sentencing reductions for drug crimes).

<sup>24</sup> See id at 17–24.

in effected sentences.<sup>25</sup> In evaluating whether to implement this change, the Commission considered past experience with reductions in crack cocaine offense recommendations,<sup>26</sup> assessed how past changes to the Guidelines reduced the need for high sentencing baselines,<sup>27</sup> and calculated the impact the change would have on reducing the prison population,<sup>28</sup> in addition to considering broader issues like the potential impact on recidivism, plea bargaining, and public safety.<sup>29</sup> Additionally, the Commission used a similarly measured and rigorous analysis in determining whether to make its 2014 amendments to the drug Guidelines retroactive, including “comment and testimony from federal judges, members of Congress, advocacy organizations, religious leaders, legal practitioners, and interested members of the public.”<sup>30</sup>

Looking at the Commission’s empirical work more generally displays just how far the Commission strayed when originally promulgating the Guidelines for drug offenses. Today, the Commission collects in-depth data on sentencing and compiles a yearly report known as the *Sourcebook of Federal Sentencing Statistics*.<sup>31</sup> This comprehensive report of “descriptive statistics on the application of the federal sentencing guidelines and [ ] selected district, circuit, and national sentencing data” has been created and made publicly available for the last twenty years.<sup>32</sup> These yearly sourcebooks contain a wealth of detailed information on virtually every aspect of federal sentencing. They include such detailed sentencing information as breakdowns of sentences by circuit,<sup>33</sup> by criminal offense,<sup>34</sup> and by amount of

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<sup>25</sup> Id at 17, 20, citing United States Sentencing Commission, Sentencing Guidelines for United States Courts, 79 Fed Reg 25996, 25997 (2014), amending USSG § 1B1.10.

<sup>26</sup> Saris, 52 Am Crim L Rev at 19 (cited in note 23).

<sup>27</sup> Id at 19–21.

<sup>28</sup> Id at 21 (calculating the number of prison beds saved per year by implementing the 2014 drug amendments).

<sup>29</sup> Id at 19–21.

<sup>30</sup> Saris, 52 Am Crim L Rev at 22–24 (cited in note 23).

<sup>31</sup> See, for example, *U.S. Sentencing Commission’s 2015 Sourcebook of Federal Sentencing Statistics* (United States Sentencing Commission), archived at <http://perma.cc/LGK5-LQZV>.

<sup>32</sup> Id. See also *Sourcebook Archives* (United States Sentencing Commission), archived at <http://perma.cc/ZZ7P-THN8> (compiling the last twenty years of sourcebooks).

<sup>33</sup> See, for example, *Table N-DC: Comparison of Sentence Imposed and Position Relative to the Guideline Range by Circuit; Fiscal Year 2015* (United States Sentencing Commission), archived at <http://perma.cc/X8TN-QVDW> (comparing national sentences to those imposed by the DC Circuit).

<sup>34</sup> See, for example, *Table 14: Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category; Fiscal Year 2015* (United States Sentencing Commission), archived at <http://perma.cc/LGT9-74VQ> (listing the length of imprisonment imposed sorted by the type of offense committed).

variation from the Guidelines range for the offense.<sup>35</sup> Beyond these yearly descriptive reports, the Commission actively studies, publishes on, and reports to Congress on a wide variety of sentencing-related topics,<sup>36</sup> and has done this as far back as 1988.<sup>37</sup> Perhaps in recognition of how much of a valuable resource the trove of sentencing-related data the Commission has collected is, the Commission makes its data files available for outside researchers who hope to perform their own quantitative studies.<sup>38</sup> The Commission goes so far as to provide researchers with “[g]uidance on how to avoid common pitfalls” of using the data it provides.<sup>39</sup> It is this level of depth and dedication to the empirical ethos that the Commission has shown in other areas of its work that makes its abandonment of that ethos in creating the drug sentences so striking.

B. *United States v Booker* and the Rise of § 3553(a)

Before *United States v Booker*,<sup>40</sup> the § 3553(a) factors were largely subsumed by the mandatory Guidelines, which dominated the sentencing inquiry.<sup>41</sup> *Booker* refocused the sentencing inquiry onto an analysis of the statutory factors.<sup>42</sup> Because the Court made the Guidelines advisory, they became one factor for the

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<sup>35</sup> See, for example, *Table 31C: Below Guideline Range with Booker/18 U.S.C. § 3553: Degree of Decrease for Offenders in Each Primary Offense Category; Fiscal Year 2015* (United States Sentencing Commission), archived at <http://perma.cc/AY5Z-BRAL> (giving the median decreases in both number of months and percentage of months of imprisonment imposed relative to the Guidelines minimum for various crimes).

<sup>36</sup> See generally, for example, *Recidivism among Federal Offenders: A Comprehensive Overview* (United States Sentencing Commission, Mar 2016), archived at <http://perma.cc/5WRG-J9FH>. See also generally *Report to the Congress: Impact of the Fair Sentencing Act of 2010* (United States Sentencing Commission, Aug 2015), archived at <http://perma.cc/F9R3-WY3S>.

<sup>37</sup> See generally, for example, Gary J. Peters, *Career Offender Guidelines* (United States Sentencing Commission, Mar 25, 1988), archived at <http://perma.cc/DNM8-ZU9E>.

<sup>38</sup> See *Commission Datafiles* (United States Sentencing Commission), archived at <http://perma.cc/2XB7-KRF8> (providing outside “users with access to the Commission’s annual and other special datafiles that support the Commission’s research agenda”).

<sup>39</sup> *Id.* See also generally Lou Reedt, Courtney Semisch, and Kevin Blackwell, *Effective Use of Federal Sentencing Data* (Office of Research and Data, United States Sentencing Commission, Nov 2013), archived at <http://perma.cc/79M5-YUQA>.

<sup>40</sup> 543 US 220 (2005).

<sup>41</sup> See Reynolds, Note, 109 Colum L Rev at 540–43 (cited in note 14); *Booker*, 543 US at 233–37.

<sup>42</sup> See *Booker*, 543 US at 258–65.

courts to consider when imposing a sentence within the wide latitude allowed by statute.<sup>43</sup> The post-*Booker* cases further shaped how the sentencing inquiry should be performed.

With the shift to an advisory Guidelines regime, analyzing the statutory sentencing factors in § 3553(a) became a much larger part of the sentencing inquiry. Section 3553(a) is a statutory mandate directing judges toward the relevant factors that they must consider in assigning a sentence to a defendant.<sup>44</sup> Passed as part of the Sentencing Reform Act of 1984, these factors guide judges as they impose a sentence while still allowing them the potential for broad discretion to adjust a sentence to the circumstances of each individual defendant.<sup>45</sup> Moreover, on appeal, a sentencing judge's failure to properly account for the § 3553(a) sentencing factors could lead to reversal either on procedural grounds,<sup>46</sup> or because the sentence was substantively unreasonable.<sup>47</sup> This appellate review is done under an abuse of discretion standard.<sup>48</sup> These factors require a court to consider the particular characteristics of the defendant and that individual defendant's crime. For example, § 3553(a)(1) requires the court to consider "the history and characteristics of the defendant" and "the nature and circumstances of the offense," while § 3553(a)(2)(D) says that the defendant's need for "educational or vocational training, medical care, or other correctional treatment" should also be a consideration.<sup>49</sup>

This Comment, however, focuses on two of the sentencing factors that open themselves to more general application: § 3553(a)(2)(A)'s requirement that a sentence "reflect the seriousness of the offense" and § 3553(a)(6)'s "need to avoid unwarranted sentence disparities."<sup>50</sup> In removing the mandatory nature of the Guidelines, and thus refocusing the sentencing inquiry on the

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<sup>43</sup> Id at 259–60.

<sup>44</sup> See 18 USC § 3553(a) (requiring that "[t]he court, in determining the particular sentence to be imposed, shall consider" the factors laid out in the statute).

<sup>45</sup> See, for example, 18 USC § 3553(a)(1).

<sup>46</sup> Such a reversal can happen if, for example, the sentencing judge "fail[s] to consider the § 3553(a) factors." *United States v Reyes-Hernandez*, 624 F3d 405, 409 (7th Cir 2010), quoting *Gall v United States*, 552 US 38, 51 (2007).

<sup>47</sup> See *Gall*, 552 US at 51 (stating that appellate courts should review the reasonableness of sentences by "tak[ing] into account the totality of the circumstances" below).

<sup>48</sup> Id ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.").

<sup>49</sup> 18 USC § 3553(a)(1), (2)(D).

<sup>50</sup> 18 USC § 3553(a)(2)(A), (6).

statutory sentencing factors, *Booker* failed to delineate exactly how the advisory Guidelines would interact with the statutory factors. Several subsequent Supreme Court cases clarified the gray areas left in sentencing procedure by *Booker*.

Although *Booker* held that the Guidelines were advisory,<sup>51</sup> the Supreme Court maintained that they should still play an important role in sentencing. The Court emphasized that § 3553(a)(4) still required sentencing courts to take account of the Guidelines in their decisions.<sup>52</sup> After *Booker*, appellate courts often did so by applying a presumption of reasonableness to a sentence imposed within the range of the Guidelines.<sup>53</sup> This presumption was upheld in *Rita v United States*.<sup>54</sup> *Rita* made clear that while a presumption of reasonableness might apply to a within-Guidelines sentence, a presumption of unreasonableness could not apply to an out-of-Guidelines sentence.<sup>55</sup> This presumption of reasonableness was appropriate in part because the Guidelines were not static, but were instead a constantly evolving balance of information from various actors within the criminal justice system. As the Court itself described:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations,

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<sup>51</sup> *Booker*, 543 US at 259–60.

<sup>52</sup> See *id.* at 261–63.

<sup>53</sup> See, for example, *United States v Green*, 436 F3d 449, 457 (4th Cir 2006), quoting *United States v Newsom*, 428 F3d 685, 687 (7th Cir 2005) (“[A] sentence imposed ‘within the properly calculated Guidelines range . . . is presumptively reasonable.’”) (ellipsis in original).

<sup>54</sup> 551 US 338, 341 (2007).

<sup>55</sup> See *id.* at 354–55. See also *United States v Howard*, 454 F3d 700, 703 (7th Cir 2006) (rejecting a presumption of unreasonableness for an out-of-Guidelines sentence prior to *Rita*); *United States v Matheny*, 450 F3d 633, 642 (6th Cir 2006) (same); *United States v Myers*, 439 F3d 415, 417 (8th Cir 2006) (same); *United States v Moreland*, 437 F3d 424, 433 (4th Cir 2006) (same).

experts in penology, and others. And it can revise the Guidelines accordingly.<sup>56</sup>

*Rita* makes clear that the Guidelines, both in their inception and in the Supreme Court's interpretation, are designed to be molded by an ongoing process of evaluation and feedback by the various members of the criminal justice system.

While *Rita* confirmed the continuing vitality of the Guidelines in the post-*Booker* era, the Supreme Court would go on to further assert the authority of a sentencing judge to deviate from the Guidelines when appropriate. In *Kimbrough v United States*,<sup>57</sup> the Supreme Court held that it was properly within a sentencing court's discretion to deviate from the 100-to-1 crack-powder cocaine drug-weight ratio prescribed by the Anti-Drug Abuse Act of 1986<sup>58</sup> ("1986 Act") and adopted by the Commission in the Guidelines.<sup>59</sup> This deviation could occur based on the sentencing court's own belief that application of the ratio was unreasonable, largely because the ratio illustrated an underlying issue with the Guidelines' drug-sentencing regime.<sup>60</sup> As the Court noted, "The Commission did not use [its] empirical approach [of evaluating past sentencing practices] in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme."<sup>61</sup> This led the sentencing judge at issue to believe that imposition of a within-Guidelines sentence would be overly punitive, and would violate § 3553(a)'s admonition to "impose a sentence sufficient, but not greater than necessary," to effectuate the purposes of punishment.<sup>62</sup>

The Court clarified *Kimbrough* in *Spears v United States*,<sup>63</sup> stating that a sentencing judge could completely reject the 100-to-1 crack ratio in favor of his own, and could use that judicially created ratio in every relevant case.<sup>64</sup> Some language in *Kimbrough* suggested that a district court might not be able to categorically

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<sup>56</sup> *Rita*, 551 US at 350.

<sup>57</sup> 552 US 85 (2007).

<sup>58</sup> Anti-Drug Abuse Act of 1986 § 1002, Pub L No 99-570, 100 Stat 3207, 3207-2, codified as amended at 21 USC § 841(b)(1)(A)-(B).

<sup>59</sup> *Kimbrough*, 552 US at 109-10.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 96.

<sup>62</sup> *Id.* at 111, quoting 18 USC § 3553(a).

<sup>63</sup> 555 US 261 (2009) (per curiam).

<sup>64</sup> *Id.* at 265-66.

reject the Guidelines' crack–powder cocaine ratio.<sup>65</sup> *Spears*, however, held “that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.”<sup>66</sup> This holding was premised on the idea that, because *Kimbrough* allowed a deviation from the ratio in even a mine-run case, if that holding was to be given any effect, a district court must be allowed to implement its own ratio in place of the one implemented by the Commission.<sup>67</sup> The alternative, that only a disagreement based on an individualized assessment of the defendant was allowed, would either have the effect of making district court judges believe that the ratio instituted by the Commission was mandatory or cause district court judges to commit “institutionalized subterfuge” by masking their categorical disagreements as individualized assessments.<sup>68</sup>

In an important display of the breadth of the discretion granted to judges in the post-*Booker* sentencing regime, *Gall v United States*<sup>69</sup> reaffirmed that the § 3553(a) factors are the guiding star for sentencing in the post-*Booker* world. *Gall* rejected the idea that variances from the Guidelines must be justified by “extraordinary circumstances.”<sup>70</sup> Some intermediate appellate courts used a “proportional” review for out-of-Guidelines sentences after *Booker*,<sup>71</sup> but this review was held inconsistent with the advisory Guidelines regime.<sup>72</sup> In its place, the Court established abuse of discretion review.<sup>73</sup>

At the heart of the case, however, was the notion that while the Guidelines were the beginning of the sentencing inquiry, the end must always be an assessment of the § 3553(a) factors as they applied to the individual defendant.<sup>74</sup> As Justice John Paul Stevens said, in the post-*Booker* world, “the range of choice [in imposing

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<sup>65</sup> Id at 265, quoting *Kimbrough*, 552 US at 111 (“The [district] court did not purport to establish a ratio of its own. Rather, it appropriately framed its final determination in line with § 3553(a)'s overarching instruction to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the sentencing goals advanced in § 3553(a)(2).”) (brackets in original).

<sup>66</sup> *Spears*, 555 US at 265–66.

<sup>67</sup> Id at 266–68.

<sup>68</sup> Id at 266.

<sup>69</sup> 552 US 38 (2007).

<sup>70</sup> Id at 47 (quotation marks omitted).

<sup>71</sup> See, for example, *United States v Claiborne*, 439 F3d 479, 481 (8th Cir 2006).

<sup>72</sup> *Gall*, 552 US at 45–48.

<sup>73</sup> See id at 51, 59.

<sup>74</sup> See id at 53–56.

a sentence] dictated by the facts of the case is significantly broadened.”<sup>75</sup>

As *Gall* itself showed, this could mean a noncustodial sentence for a defendant when the mandatory Guidelines would require incarceration for years.<sup>76</sup> Brian Gall was a college student when he used, and became involved in a conspiracy to distribute, ecstasy.<sup>77</sup> Within several months of joining the conspiracy, however, he voluntarily left it.<sup>78</sup> After that point, he neither sold nor used illicit drugs, graduated, began to build a career, and was an otherwise-upstanding member of society.<sup>79</sup> Years after his involvement in drug distribution, he was charged with his crimes.<sup>80</sup> Because of his voluntary withdrawal and generally productive life, the district court sentenced him to probation.<sup>81</sup> Upon imposing this sentence, the district court noted that “[a]ny term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life.”<sup>82</sup> In spite of this, had Gall had the misfortune to be sentenced during a regime of mandatory Guidelines, he would have been forced to spend between thirty and thirty-seven months imprisoned, unnecessarily disrupting his own career, as well as the lives of his friends and family members.<sup>83</sup>

## II. MARIJUANA

Much like the other drug Guidelines, the Guidelines for marijuana were not formulated by the Commission’s empirical approach. As such, they are susceptible to similar criticism as that levied against the crack–powder ratio by the cases leading to and following *Kimbrough*. Although the marijuana Guidelines may not be as inherently problematic as the crack–powder ratio, in recent years the steady stream of states decriminalizing or legalizing marijuana has created issues for their execution. Changes in

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<sup>75</sup> *Id.* at 59 (quotation marks omitted).

<sup>76</sup> *Gall*, 552 US at 45, 53–56.

<sup>77</sup> *Id.* at 41.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 41–45.

<sup>80</sup> *Gall*, 552 US at 42.

<sup>81</sup> *Id.* at 43–44.

<sup>82</sup> *Id.* at 44.

<sup>83</sup> See *id.* at 43, 45.

state criminal law would normally have little to no effect on federal sentencing. The federal government, however, has opted not to enforce federal marijuana laws against those in compliance with their states' laws. Because of this policy, there are potential implications for sentencing judges attempting to faithfully impose sentences that adequately consider the seriousness of the offense and the need to avoid unwarranted sentencing disparities, as required by the statutory sentencing factors.<sup>84</sup> Before delving into the potential implications for sentencing, it is worth surveying the current state of marijuana laws in the states, in the federal government, and in the perception of the American public.

#### A. Marijuana at the State Level

At the time of writing, “[a] total of 25 states, the District of Columbia, Guam and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs.”<sup>85</sup> Additionally, four states—Alaska, Colorado, Oregon, and Washington—and the District of Columbia have legalized marijuana for recreational use.<sup>86</sup> In 2015, the state of Ohio had a ballot initiative to legalize recreational and medical marijuana.<sup>87</sup> Although this provision failed, its failure does not necessarily reflect Ohio voters' preference to maintain the current regime of marijuana illegality; this failed state constitutional initiative also contained a provision that would have given a small group of businesses the exclusive right to provide marijuana to the state.<sup>88</sup> This constitutionally enforced oligopoly was opposed by a separate ballot initiative, which passed.<sup>89</sup> Therefore, it is unclear whether Ohio voters were antimarijuana and anti-oligopoly or promarijuana and anti-oligopoly. In light of the fact that polling prior to the election

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<sup>84</sup> See 18 USC § 3553(a)(2)(A), (6).

<sup>85</sup> *State Medical Marijuana Laws* (cited in note 7) (examining the various state medical and recreational marijuana laws).

<sup>86</sup> See *Marijuana Overview* (cited in note 7).

<sup>87</sup> *Ohio Marijuana Legalization Initiative, Issue 3 (2015)* (Ballotpedia), archived at <http://perma.cc/3YQS-TL5K> (providing an overview of and various sources for information on the recreational marijuana legalization initiative on the ballot in Ohio).

<sup>88</sup> See Mitch Smith and Sheryl Gay Stolberg, *On Ballot, Ohio Grapples with Specter of Marijuana Monopoly* (NY Times, Nov 1, 2015), online at <http://www.nytimes.com/2015/11/02/us/on-ballot-ohio-grapples-with-specter-of-marijuana-monopoly.html> (visited Apr 27, 2016) (Perma archive unavailable) (detailing the process by which ballot campaigners sought private investors to fund the campaign in exchange for licenses to commercially grow marijuana upon passage).

<sup>89</sup> See *Ohio Voters Reject Legal Pot, Pass Anti-monopoly, Redistricting Measures* (WLWT Cincinnati, Nov 3, 2015), archived at <http://perma.cc/P3MK-7A3C>.

suggested that the marijuana legalization initiative would pass,<sup>90</sup> as well as other polling that found 90 percent of voters supported medical marijuana,<sup>91</sup> the latter scenario seems just as, if not more, likely than the former.

Although Ohio chose not to legalize recreational marijuana, that state, as well as well as twenty others and the District of Columbia, has chosen to decriminalize possession of personal-use amounts of marijuana.<sup>92</sup> Ohio's willingness to consider moving from decriminalization to legalization is part of a wave of legislation across the country reconsidering how individual states treat marijuana. In fall 2016, three states had bills pending that would decriminalize marijuana.<sup>93</sup> Ten states, meanwhile, had pending measures, constitutional amendments, or initiatives that would have legalized marijuana in some form.<sup>94</sup> If history is any indication, many of these bills and measures will not pass in their current form; some, however, will.<sup>95</sup> This stream of experimentation and failure mixed with a steady trickle of success suggests that, although the states may not be in the midst of a marijuana revolution, they are undertaking a slow yet consistent evolution. Given the lack of a major backlash to this stream of marijuana law liberalization by states that have not legalized or decriminalized marijuana, it is likely that the evolution will continue steadily onward.<sup>96</sup>

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<sup>90</sup> See Jackie Borchardt, *Ohio Marijuana Legalization Ballot Issue Would Pass If Election Held Today, Kent State Poll Finds* (Plain Dealer, Oct 14, 2015), archived at <http://perma.cc/P5ZT-8MQZ>.

<sup>91</sup> See Todd Dykes, *Dissecting Marijuana's Election Day Defeat in Ohio* (WLWT Cincinnati, Dec 30, 2015), archived at <http://perma.cc/J57H-6W45>; *Florida, Ohio Back Personal Pot; Pennsylvania Split, Quinnipiac University Swing State Poll Finds; Keystone State Voters Say Attorney General Must Go* (Quinnipiac, Oct 8, 2015), archived at <http://perma.cc/QGZ4-C66L>.

<sup>92</sup> See *Marijuana Overview* (cited in note 7).

<sup>93</sup> See *id.* ("Decriminalization bills currently are pending in legislatures in Illinois, Michigan and New Jersey.").

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* (recapping a number of failed legalization and decriminalization bills from the years 2013, 2014, and 2015, as well as a number of successful decriminalization measures from the same time period).

<sup>96</sup> While numerous states have voted down or otherwise chosen not to pass legalization initiatives in the last few years, and the legislature of Idaho reaffirmed their commitment to marijuana prohibition, no state has recently taken steps to counteract the tide of legalization by, for example, strengthening its own marijuana laws. At most, like Idaho, states have chosen to maintain the status quo. See *Marijuana Overview* (cited in note 7).

## B. Marijuana in the Executive Branch and Congress

All three branches of the federal government have signaled approval of the states' experimentation with marijuana legalization. In 2014, Congress passed an amendment to the yearly omnibus spending bill forbidding the use of appropriated funds to prevent the implementation of state medical marijuana laws.<sup>97</sup> This amendment was approved again in 2015, and it was included in that year's spending bill as well.<sup>98</sup> Known as the Rohrabacher-Farr Amendment, this provision passed the House of Representatives in 2015 by a vote of 242–186, and was sponsored or cosponsored by an equal number of Democratic and Republican representatives.<sup>99</sup> The strong bipartisan support behind this amendment suggests that Congress views marijuana with notably less seriousness than it did earlier in the war on drugs, given how large of a marked shift from previous congressional actions during the war on drugs this appropriation measure represents. Previously, Congress had been content to allow state marijuana businesses to be raided by federal law enforcement<sup>100</sup> and repeatedly refused to lessen the penalties for drug offenses.<sup>101</sup> Even in the Fair Sentencing Act of 2010,<sup>102</sup> which lowered the crack–powder ratio to 18-to-1, Congress “also directed the Sentencing Commission to ensure that the Guidelines provide penalty increases for a variety of aggravating factors for *all* drug offenses,”<sup>103</sup> and “actually created 12 new enhancements that potentially increase the Guideline range

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<sup>97</sup> See Consolidated and Further Continuing Appropriations Act, 2015 § 538, Pub L No 113-235, 128 Stat 2130, 2217 (2014). See also Russell Berman, *Why Congress Gave In to Medical Marijuana* (The Atlantic, Dec 17, 2014), archived at <http://perma.cc/YFR4-CP8Q>.

<sup>98</sup> See *Rohrabacher Hails Passage of Medical Marijuana Amendment* (Rohrabacher, June 4, 2015), archived at <http://perma.cc/P73A-UCC7>.

<sup>99</sup> See *id.*

<sup>100</sup> See, for example, Valerie Richardson, *Feds Raid Colorado Medical Marijuana Operations* (Wash Times, Nov 21, 2013), archived at <http://perma.cc/49QX-FL3W> (noting federal raids in California, Colorado, Montana, and Washington); Eric Gorski, John Ingold, and Kieran Nicholson, *DEA Raids Four Denver Marijuana Sites Related to VIP Cannabis* (Denver Post, Apr 30, 2014), archived at <http://perma.cc/X4UT-SG97>. The Rohrabacher-Farr Amendment has not completely stopped the Department of Justice from raiding state-legal marijuana businesses, much to the chagrin of the congresspersons who included the ban within the bill. See Evan Halper, *A Year after Congress Voted to End War on Medical Pot, Raids Continue in California* (LA Times, Dec 29, 2015), archived at <http://perma.cc/ETY3-EB8P>.

<sup>101</sup> See, for example, *Kimrough*, 552 US at 105–06 (noting Congress's decision not to adopt the Commission's lowered crack–powder cocaine ratio).

<sup>102</sup> Pub L No 111-220, 124 Stat 2372.

<sup>103</sup> Mark Osler and Mark W. Bennett, *A “Holocaust in Slow Motion?” America's Mass Incarceration and the Role of Discretion*, 7 DePaul J Soc Just 117, 157–58 (2014). See also Fair Sentencing Act of 2010 §§ 2, 5–6, 124 Stat at 2372–74.

across all drug types.”<sup>104</sup> These enhancements have the same force in marijuana prosecutions as they do in prosecutions of “harder” drugs. As such, in the last four years, Congress has shifted from ratcheting up the potential criminal liability of all marijuana defendants to prohibiting the prosecution of a significant portion of them.

Indeed, the namesake representatives of the Rohrabacher-Farr Amendment made the gravity of this shift clear when they were faced with potential pushback from some actors in the Department of Justice. In a letter to Attorney General Eric Holder addressing a potential interpretation of their amendment that would allow some medical marijuana prosecutions to continue, Representatives Dana Rohrabacher and Sam Farr wrote, “[T]his interpretation of our amendment is emphatically wrong.”<sup>105</sup> The letter went on to tell Holder, “Rest assured, the purpose of [the] amendment was to prevent the Department from wasting its limited . . . resources on prosecutions . . . against medical marijuana patients and providers, including businesses that operate legally under state law.”<sup>106</sup> Lest the Department of Justice was still unsure of where the letter’s authors stood, the letter offered additional guidance, suggesting that if there happened to be any questions about compliance with state law, “state law enforcement agencies are best-suited to investigate and determine [if there was a state law violation] free from federal interference.”<sup>107</sup> In sum, the representatives essentially told the Department of Justice that its interpretation of the amendment had no leg to stand on, as the congressional intent was so clear that “[e]ven those who argued against the amendment agreed with the proponents’ interpretation.”<sup>108</sup>

The executive branch, for its part, has been extremely active in the area of marijuana law liberalization. Over the past six years, the Department of Justice has issued numerous memos and directives to the US attorneys detailing a policy of selective enforcement regarding federal marijuana laws. In 2009, Deputy Attorney General David W. Ogden issued a memorandum calling for federal prosecution of marijuana laws when the offender is not “in clear and unambiguous compliance with existing state laws

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<sup>104</sup> Osler and Bennett, 7 DePaul J Soc Just at 158 (cited in note 103). See also Fair Sentencing Act of 2010 §§ 5–6, 124 Stat at 2373–74.

<sup>105</sup> Representatives Dana Rohrabacher and Sam Farr, Letter to Attorney General Eric Holder \*1 (Apr 8, 2015), archived at <http://perma.cc/P6GE-JPNW>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*2.

<sup>108</sup> *Id.* at \*1.

providing for the medical use of marijuana” and providing a number of characteristics that would suggest that an offender is not in compliance with state law, such as the presence of unlawful firearms or sales to minors.<sup>109</sup> The memo says that “the Department’s investigative and prosecutorial resources should be directed towards” the “prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks,” and that when a potential offender is in compliance with state laws, she is unlikely to fall into these prioritized categories.<sup>110</sup>

Four years later, then–Deputy Attorney General James M. Cole issued another memo clarifying that if an offender’s conduct did not fall into one of a list of “enforcement priorities,” prosecutors should use their discretion to avoid utilizing federal resources to prosecute these marijuana offenders.<sup>111</sup> This “2013 Cole Memo” was clarified in a statement that Cole made to the Senate Committee on the Judiciary, in which he stated that the Department of Justice was “emphasizing comprehensive regulation and well-funded state enforcement because such a system will complement the continued enforcement of state drug laws by state and local enforcement officials, in a manner that should allay the threat that a state-sanctioned marijuana operation might otherwise pose to federal enforcement interests.”<sup>112</sup> Additionally, “the Department notified the Governors of Colorado and Washington that we were not at this time seeking to preempt their states’ ballot initiatives.”<sup>113</sup>

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<sup>109</sup> David W. Ogden, *Memorandum to Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Department of Justice, Oct 19, 2009), archived at <http://perma.cc/HGH2-WPSN> (“Ogden Memo”).

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

<sup>111</sup> See James M. Cole, *Memorandum for All United States Attorneys: Guidance regarding Marijuana Enforcement* \*1–3 (Department of Justice, Aug 29, 2013), archived at <http://perma.cc/4LLA-G98Q> (“2013 Cole Memo”). These enforcement priorities are primarily concerned with preventing state marijuana decriminalization from increasing risks to public health or serving as a conduit for other crimes. See *id.* at \*1–2. Before the 2013 memo, Cole issued another memo to the US attorneys clarifying that the 2009 Ogden Memo referred only to medical marijuana, and states authorizing the large-scale manufacturing and sale of marijuana for commercial use were still ripe for prosecution. See generally James M. Cole, *Memorandum for United States Attorneys: Guidance regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (Department of Justice, June 29, 2011), archived at <http://perma.cc/K26K-NSMT>.

<sup>112</sup> *Statement of James M. Cole, Deputy Attorney General, before the Committee on the Judiciary, United States Senate, for a Hearing Entitled “Conflicts between State and Federal Marijuana Laws”* \*3 (Department of Justice, Sept 10, 2013), archived at <http://perma.cc/XRX5-Z9L6> (“Cole Statement”).

<sup>113</sup> *Id.* at \*2.

The Department of the Treasury also allayed fears of marijuana business owners in a 2014 memo from the Financial Crimes Enforcement Network (FinCEN).<sup>114</sup> Prior to the issuance of the memo, one of the major hindrances to marijuana-related businesses was their inability to use traditional banking services, but FinCEN provided guidance to banks on how to provide services to these businesses.<sup>115</sup> Primarily, this guidance focused on the type of due diligence a financial institution should conduct on any marijuana-related business it provides services to, as well as how to report a marijuana-related business's suspicious activity.<sup>116</sup> This memo reiterated the 2013 Cole Memo's enforcement priorities and used them as a basis of the guidance to financial institutions on identifying and reporting businesses that appeared to run afoul of state law.<sup>117</sup> This identification and reporting was to be done through the filing of "suspicious activity reports," which would identify the parties involved in the marijuana business, as well as the level of concern the financial institution had about that business's compliance with state and federal law.<sup>118</sup>

As the head of the executive branch, President Barack Obama has also played a role in ensuring that the enforcement of federal drug laws represents a just result. To that end, he has used his power of commutation to commute the sentences of numerous nonviolent drug offenders, including marijuana offenders.<sup>119</sup> While executive action in this area by the Obama administration is susceptible to being undone by a future administration, that seems unlikely in the marijuana context for two reasons. First, the leading candidates remaining in the presidential election as of May 2016 were, at the least, willing to allow the states to continue to experiment with marijuana legalization.<sup>120</sup> As was the case with the Rohrabacher-Farr Amendment,<sup>121</sup> this is a noticeably bipartisan issue. Both the Democratic and Republican nominees supported continued state medical and recreational legalization measures.<sup>122</sup> The bipartisan support among

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<sup>114</sup> See generally *BSA Expectations regarding Marijuana-Related Businesses* (FinCEN, Feb 14, 2014), archived at <http://perma.cc/TLX7-FGY4>.

<sup>115</sup> See id at \*2-3.

<sup>116</sup> See id at \*3-7.

<sup>117</sup> See id at \*1-3.

<sup>118</sup> *BSA Expectations* at \*3-7 (cited in note 114).

<sup>119</sup> See Sari Horwitz and Juliet Eilperin, *Obama Commutes Sentences of 46 Nonviolent Drug Offenders* (Wash Post, July 13, 2015), archived at <http://perma.cc/6PG6-WANL>.

<sup>120</sup> See notes 144-47 and accompanying text.

<sup>121</sup> See text accompanying notes 97-99, 105-08.

<sup>122</sup> See notes 144-47 and accompanying text.

presidential candidates is matched among politicians more broadly, as support for state legalization is part of both parties' efforts toward comprehensive sentencing reform.<sup>123</sup> Second, the amount of support that marijuana legalization and decriminalization has received from Congress, the judiciary, and the states could potentially lessen the impact of a sea change in marijuana policy from the executive branch.

### C. The Federal Judiciary and *United States v Dayi*

The judiciary has also been active in this area. By providing a categorical downward variance from the Guidelines in a large, interstate marijuana conspiracy, *United States v Dayi*<sup>124</sup> has served as a touchstone for other actors within the realm of criminal sentencing to begin pushing for further exercises of discretion that ensure marijuana crime sentencing reflects a proper analysis of the § 3553(a) sentencing factors.

A foreseeable extension of *Booker*, *Kimbrough*, and their progeny would be to apply the judicial discretion permitted by *Booker* and the allowance for rational, policy-based disagreements from *Kimbrough* to other areas of the Guidelines. This is exactly what happened in *Dayi*. *Dayi* involved a large-scale, interstate conspiracy to distribute marijuana featuring twenty-two defendants.<sup>125</sup> Judge James K. Bredar expressed two concerns: that the Guidelines did not appropriately account for the decreasing seriousness of marijuana in the eyes of both the public and the federal government, and that the federal government's selective enforcement of marijuana laws could lead to unwarranted sentencing disparities. These concerns were rooted in the sentencing factors that Bredar was required to consider by statute—namely, § 3553(a)(2)(A), which calls for a sentence to reflect the seriousness of the offense, and § 3553(a)(6), which calls for a sentence to

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<sup>123</sup> See, for example, Bill Piper, *The Growing Bipartisan Consensus for Rolling Back the Failed War on Drugs* (Huffington Post, Oct 16, 2015), archived at <http://perma.cc/C27Y-S62R> (discussing Republican-led marijuana-related spending provisions in the House of Representatives and bipartisan sentencing reform bills in the Senate); Burgess Everett, *Bipartisan Marijuana Banking Bill Introduced in the Senate* (Politico, July 9, 2015), archived at <http://perma.cc/CC8M-SRK6> (discussing a bipartisan bill introduced in the Senate that would allow marijuana businesses to utilize traditional banking services).

<sup>124</sup> 980 F Supp 2d 682 (D Md 2013).

<sup>125</sup> *Id.* at 683.

avoid imposing unwarranted sentencing disparities.<sup>126</sup> Ultimately, Bredar determined that a two-level reduction in the offense level provided for by the Guidelines was appropriate for every defendant involved in the conspiracy.<sup>127</sup> This led to a 20 percent to 25 percent reduction in the length of each defendant's sentence.<sup>128</sup>

Bredar rested his reasoning on several ideas. First, as with the crack Guidelines at issue in *Kimbrough*, the Commission abandoned its usual empirical approach when it first formulated the marijuana Guidelines.<sup>129</sup> At the time of *Dayi*, the Commission was in the process of using this empirical approach to review the accuracy of all of the drug weight-based Guidelines, including those for marijuana.<sup>130</sup> Second, due to the increasing number of states that have legalized or decriminalized marijuana for medicinal or recreational purposes, the general seriousness of marijuana-based crimes has significantly decreased.<sup>131</sup> Moreover, the federal nonenforcement of marijuana laws for those in compliance with state law leads to potentially long custodial sentences for actions in some states, with no prosecution for the same actions in others.<sup>132</sup> Further, the choice to selectively enforce marijuana laws suggests that the executive branch does not view marijuana with the seriousness that the Guidelines grant it.<sup>133</sup> As Bredar noted, “[I]f a state were to legalize and regulate heroin—another Schedule I controlled substance—the Justice Department almost certainly would not respond with a policy of non-enforcement.”<sup>134</sup> As such, Bredar concluded that, even in the eyes of the people tasked with enforcing the federal marijuana laws, the seriousness of the offense, a factor that the sentencing judge must account for,<sup>135</sup> was lessened.<sup>136</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 683–84.

<sup>128</sup> *Dayi*, 980 F Supp 2d at 689.

<sup>129</sup> *Id.* at 684.

<sup>130</sup> See *id.* at 685 (“[T]he Court takes notice of a recent news release in which the Commission announced that it has ‘set out as an important new priority reviewing the sentencing guidelines applicable to drug offenses, including consideration of changing the guideline levels based on drug quantities.’”).

<sup>131</sup> *Id.* at 688–89.

<sup>132</sup> *Dayi*, 980 F Supp 2d at 689.

<sup>133</sup> *Id.* at 688–89.

<sup>134</sup> *Id.* at 688.

<sup>135</sup> 18 USC § 3553(a)(2)(A).

<sup>136</sup> *Dayi*, 980 F Supp 2d at 688 (“The result [of the Justice Department’s nonenforcement policy] is an undeniable signal that violating federal marijuana laws is not as serious an offense as it once was.”).

The sentencing of Bounlith Bouasykeo provides another example of the judiciary's concern regarding this potential issue.<sup>137</sup> In that case, the district court called for argument on whether the defendant's sentencing should be delayed in light of Oregon's then-impending vote on whether to legalize recreational marijuana, as well as how the impact of that vote should affect the defendant's sentence.<sup>138</sup> That argument featured extensive analysis of *Dayi*.<sup>139</sup> Similarly, multiple defense attorneys have invoked *Dayi* in an attempt to bring this issue to the fore in other district courts.<sup>140</sup> Additionally, in 2014, the Commission, acting in its role as an evaluator of empirical data and national experience, issued a call for congressional action to correct the past generation's overly harsh drug sentencing.<sup>141</sup> Recognizing that those proposals must work their way through the political process, the Commission also unilaterally modestly reduced the Guidelines-recommended sentence for drug trafficking offenses, and made these reductions retroactive.<sup>142</sup> This change was estimated to reduce the average drug trafficking sentence by approximately 17.7 percent.<sup>143</sup>

#### D. Marijuana in Popular Sentiment

It has become increasingly clear that to many Americans, including politicians, marijuana is not as dangerous as it was once thought to be. Many of the presidential candidates, of both the Republican and Democratic parties, in the 2016 election espoused a willingness to, at the least, allow the states to continue to experiment with marijuana legalization.<sup>144</sup> Former Secretary of State

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<sup>137</sup> See Sentencing Hearing: Transcript of Proceedings before the Honorable Michael W. Mosman, United States District Court Judge, *United States v Bouasykeo*, Criminal Action No 13-00186, \*1 (D Or filed Nov 6, 2014).

<sup>138</sup> *Id* at \*3–5.

<sup>139</sup> *Id* at \*6–12.

<sup>140</sup> See, for example, Defendant John Paul McMillan's Sentencing Memorandum, *United States v McMillan*, Criminal Action Case No 12-20083, \*17–18 (D Kan filed Dec 31, 2014) (available on Westlaw at 2014 WL 7685931) (citing *Dayi* as support for a downward departure from the Guidelines' recommendation); Supplemental Sentencing Memorandum, *United States v McIntosh*, Case No 10-cr-00777, \*9–13 (D Md filed Mar 19, 2014) (available on Westlaw at 2014 WL 7740236) (same).

<sup>141</sup> See Saris, 52 Am Crim L Rev at 16–17 (cited in note 23).

<sup>142</sup> *Id* at 17–24.

<sup>143</sup> *Id* at 20.

<sup>144</sup> See *Where Do They Stand on Marijuana Policy?* (Marijuana Policy Project), archived at <http://perma.cc/CG5N-TYJD> (noting that Donald Trump, Senator Bernie Sanders, and former Secretary of State Hillary Clinton stated that marijuana legalization should be a state issue, and that both Sanders and Clinton proposed removing marijuana from Schedule I).

Hillary Clinton stated that she was in favor of continuing to allow state experimentation, as well as removing marijuana from Schedule I in order to facilitate further research.<sup>145</sup> Senator Bernie Sanders, runner-up in the Democratic primary, echoed Clinton's statements, while adding that owners of marijuana stores should have access to traditional banking services like any other business and placing his beliefs about marijuana within the broader war on drugs.<sup>146</sup> Donald Trump, for his part, expressed support for medical marijuana and also supported continuing to allow state experimentation with marijuana legalization.<sup>147</sup> Candidates in the 2016 election spoke openly about marijuana reform, and reform even began to serve as a differentiator between potentially similar candidates.<sup>148</sup>

What is even more striking is the level of acceptance that marijuana legalization has gained among the American populace. According to a recent Gallup poll, over half (58 percent) of Americans support legalization of marijuana,<sup>149</sup> including 71 percent of adults between the ages of eighteen and thirty-four and 35 percent of adults over the age of sixty-five.<sup>150</sup> While seemingly low, this latter percentage represents a higher amount of support for legalization among seniors than at any previous point that Gallup has observed.<sup>151</sup> In fact, support for legalization continues to increase. In an AP-NORC Center for Public Affairs Research poll using the same question to measure support for legalization as the Gallup poll, 61 percent of respondents answered in the affirmative.<sup>152</sup> Interestingly, this popular support is notably bipartisan, especially among younger generations. The Pew Research Center

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<sup>145</sup> Id.

<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> See John Hudak, *2016 Will Be the Marijuana Election* (Newsweek, Mar 22, 2015), archived at <http://perma.cc/422N-SUFA> (noting that marijuana policy became an increasingly mainstream issue and a potential differentiator for otherwise-similar candidates).

<sup>149</sup> See Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use* (Gallup, Oct 21, 2015), online at <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx> (visited Nov 2, 2015) (Perma archive unavailable).

<sup>150</sup> See id.

<sup>151</sup> See id.

<sup>152</sup> Christopher Ingraham, *Support for Marijuana Legalization Has Hit an All-Time High* (Wash Post, Mar 25, 2016), archived at <http://perma.cc/DYK4-FKD5> (explaining that the question "Do you think the use of marijuana should be made legal, or not?" was used in both the Gallup and AP-NORC Center for Public Affairs Research polls).

found that fully 63 percent of Republican millennials and 77 percent of Democratic millennials favored marijuana legalization.<sup>153</sup> Additionally, polling from the Harvard Institute of Politics suggests that, at least among individuals under age thirty, the percentages of people strongly supporting and strongly opposing legalization are relatively equal, but almost double the amount of people “somewhat support” legalization than “somewhat oppose” it.<sup>154</sup> Indeed, even staunch conservatives, who at one point might have been expected to place themselves firmly in the camp for prohibition, have begun to embrace “marijuana federalism,” the belief that a state should have the right to decide how it will govern itself on the issue of marijuana.<sup>155</sup>

This high level of support for marijuana legalization might be a reflection of the large number of people who admit to trying or using marijuana. According to a Gallup poll, 11 percent of respondents reported that they currently smoke marijuana and 44 percent reported that they had tried marijuana at least once.<sup>156</sup> These numbers are the highest reported since Gallup began polling on the question in 1969, when only 4 percent of respondents admitted to trying marijuana.<sup>157</sup> Alternately, support for marijuana legalization could be a reflection of popular reevaluation of the drug’s potential for personal harm when compared to other legal

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<sup>153</sup> George Gao, *63% of Republican Millennials Favor Marijuana Legalization* (Pew Research Center, Feb 27, 2015), archived at <http://perma.cc/RRM7-LYNP>.

<sup>154</sup> See *Political Issue: Marijuana* (Harvard IOP, 2016), archived at <http://perma.cc/JFE9-UWK3> (noting that Institute of Politics polling found 23 percent of respondents strongly in favor of and 23 percent of respondents strongly opposed to marijuana legalization, with 21 percent somewhat in favor and 11 percent somewhat opposed).

<sup>155</sup> See Jacob Sullum, *Ted Cruz’s Cannabis Conversion Reflects the Political Prudence of Marijuana Federalism* (Forbes, Mar 5, 2015), online at <http://www.forbes.com/sites/jacobsullum/2015/03/05/by-supporting-marijuana-federalism-republican-candidates-can-be-principled-and-popular/#5355c45c373e> (visited May 19, 2016) (Perma archive unavailable) (discussing Senator Ted Cruz, Senator Rand Paul, Governor Jeb Bush, and Governor Rick Perry’s embrace of “marijuana federalism”).

<sup>156</sup> Justin McCarthy, *More Than Four in 10 Americans Say They Have Tried Marijuana* (Gallup, July 22, 2015), online at <http://www.gallup.com/poll/184298/four-americans-say-tried-marijuana.aspx> (visited Apr 23, 2016) (Perma archive unavailable). See also Seth Motel, *6 Facts about Marijuana* (Pew Research Center, Apr 14, 2015), available at <http://perma.cc/2XKH-NWUY> (noting that the 2012 National Survey on Drug Use and Health reported that 12 percent of respondents had used marijuana in the last year and 49 percent admitted to having tried marijuana).

<sup>157</sup> McCarthy, *More Than Four in 10 Americans Say They Have Tried Marijuana* (cited in note 156).

substances, or of more widespread realization of the societal harms caused by prohibition.<sup>158</sup>

### III. LEARNING FROM HISTORY: HISTORICAL AND MODERN ANALOGIES

This Part explores three analogues to the current regime of selective federal enforcement of marijuana laws. Examining the history of the crack and powder cocaine Guidelines and the Guidelines surrounding possession of child pornography provides further examples of instances when Congress and the Commission abandoned the Guidelines' self-proclaimed empirical methodology in favor of political expediency. The Fugitive Slave Laws, meanwhile, provide a point of comparison to a time when the moral and political will of the states was out of sync with that of federal politicians. Examining this point in American history illuminates both the potential benefits and pitfalls of federal nonenforcement.

Part III.A discusses the history of crack and powder cocaine and the sentencing Guidelines surrounding those drugs. Part III.B discusses the Guidelines for child pornography possession and the judicial response to the perceived harshness of those Guidelines. Part III.C discusses the Fugitive Slave Laws of 1793 and 1850.

#### A. Crack and Powder Cocaine

The history of the crack cocaine Guidelines begins with the spark set off by a single high-profile drug overdose in 1986. The effects of that single event continue on to the present day. Underlying all of this history is the steady current of racial disparity. This Section discusses the crack cocaine Guidelines, beginning with the Supreme Court jurisprudence surrounding them and the events that led to their creation, then discussing the aftermath of *Kimbrough*, and finally concluding with a discussion of race's role in the implementation and execution of these Guidelines.

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<sup>158</sup> See, for example, German Lopez, *A New Report Evaluates Marijuana Legalization in Colorado So Far. It's Mixed News.* (Vox, Apr 19, 2016), archived at <http://perma.cc/L72E-R9DA> (exploring the balancing act of marijuana legalization, including the potential benefits of additional tax revenue, the reduction of disproportionate harm caused to African Americans by marijuana-related contact with the criminal justice system, and the negative effect on criminal cartels).

1. The use and abuse of the sentencing Guidelines through *Kimbrough*.

Because of the Guidelines' mandatory nature in the pre-*Booker* regime,<sup>159</sup> judges were forced to impose sentences that were, in their view, wildly disproportionate to the seriousness of the offense in cocaine-base<sup>160</sup> cases.<sup>161</sup> Indeed, courts regularly noted that if the defendant before them had the good fortune to traffic in powder cocaine instead of crack, her sentence would be materially lessened.<sup>162</sup> Part of the reason for these exceptionally harsh sentences was the relatively small amount of crack needed to invoke a mandatory minimum sentence.<sup>163</sup> In *United States v Maske*,<sup>164</sup> for example, the defendant possessed more than five grams of cocaine base, and the district court was therefore unable to impose a sentence less than the five-year mandatory minimum. If, however, the defendant had been convicted of possessing a similar amount of powder cocaine, the *maximum* sentence would have been one year of imprisonment.<sup>165</sup> The prevalence of mandatory minimum sentences was not the only reason for this harshness, as the Guidelines' 100-to-1 ratio, which treated every gram of crack as equivalent to one hundred grams of powder cocaine for

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<sup>159</sup> See Klein, 39 Valp U L Rev at 699–720 (cited in note 14).

<sup>160</sup> The Guidelines and statutes that impose mandatory minimum sentences refer to cocaine base in their references to crack cocaine. The possible distinctions between cocaine base and crack cocaine are immaterial to the purposes of this Comment. The terms cocaine base, crack, and crack cocaine are used interchangeably throughout this Comment.

<sup>161</sup> See Frank O. Bowman III and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L Rev 1043, 1131 n 376 (2001) (noting that one district judge “was withdrawing his ‘name . . . [from] the wheel for drug cases . . . [because] I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade’”) (brackets and ellipses in original). See also Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 Rutgers L Rev 873, 904–13 (2014); Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 Am Crim L Rev 11, 16–18 (2003) (illustrating Judge Louis F. Oberdorfer's view that “the Guidelines provided that offenses involving crack cocaine were to be treated much more severely than offenses involving powder cocaine”); *United States v Clary*, 846 F Supp 768, 797 (ED Mo 1994) (finding “that the disproportionate penalties for crack cocaine as specified in all of the pertinent sections of 21 U.S.C. § 841 violate the Equal Protection Clause of the U.S. Constitution generally and as applied in this case”).

<sup>162</sup> See, for example, *United States v Shaw*, 936 F2d 412, 414 (9th Cir 1991) (noting that the defendants faced a ten-year mandatory minimum if the substance they trafficked was cocaine base, but no statutory minimum if the substance was powder cocaine); *United States v Maske*, 840 F Supp 151, 152 n 3 (DDC 1993).

<sup>163</sup> This issue continued even after *Kimbrough*. See, for example, *United States v Dossie*, 851 F Supp 2d 478, 481–83 (EDNY 2012).

<sup>164</sup> 840 F Supp 151 (DDC 1993).

<sup>165</sup> *Id* at 152 n 3.

sentencing purposes, meant that the Guidelines had the potential to impose sentences far above those mandatory minimums. For example, in *United States v Barbosa*,<sup>166</sup> while the statutory mandatory minimum sentence set the floor for the defendant at 240 months, the Guidelines recommended a sentence of up to 293 months.<sup>167</sup> For Luis Barbosa, this meant that the Guidelines could cause him to spend an extra four years and five months in prison, on top of his statutorily mandated twenty-year sentence.<sup>168</sup>

The relevant question then becomes: Where did this ratio come from? The answer is that the Commission simply adopted the congressionally created drug-weight ratio from the 1986 Anti-Drug Abuse Act.<sup>169</sup> Because crack cocaine was relatively new at the time of the Act's creation, and its dangers were perceived to be exceptionally potent, Congress chose to adopt a 100-to-1 ratio that caused every gram of crack to be treated the same as one hundred grams of powder cocaine for the purposes of mandatory minimum sentences.<sup>170</sup> The Guidelines then adopted this ratio wholesale for the full range of sentencing.<sup>171</sup>

This ratio was more the result of political posturing than the reflection of a reasoned analysis by Congress. Although Congress intended for this ratio to punish "major" or "serious" drug dealers,<sup>172</sup> the amount of crack needed to trigger lengthy prison sentences was almost comically small. As one report from the ACLU

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<sup>166</sup> 51 F Supp 2d 597 (ED Pa 1999).

<sup>167</sup> *Id.* at 599–600 (noting that the defendant faced either the 240-month statutory minimum or a sentence of 240 to 293 months under the Guidelines). Interestingly, *Barbosa* could have been convicted of trafficking an equal amount of either powder cocaine or crack cocaine (depending on how the court decided to classify the substance he possessed). While the Guidelines recommended up to 293 months for the crack conviction, the maximum recommended length of imprisonment for the powder cocaine conviction was only 97 months. Stated differently, the Guidelines recommended more than 16 years of additional imprisonment for a conviction for trafficking crack instead of powder cocaine. *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *Kimbrough*, 552 US at 96.

<sup>170</sup> *Id.* at 95–96.

<sup>171</sup> *Id.* at 96–97 (explaining how the Guidelines tied the potential range of sentences to drug weights, which ranged from "less than 250 milligrams of crack (or 25 grams of powder)" at a minimum to "more than 1.5 kilograms of crack (or 150 kilograms of powder)" at a maximum). See also USSG § 2D1.1(c).

<sup>172</sup> Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* \*2 (ACLU, Oct 2006), archived at <http://perma.cc/6T2Z-WP9S>. See also *Report to the Congress: Cocaine and Federal Sentencing Policy* \*6–7 (United States Sentencing Commission, May 2002), archived at <http://perma.cc/6QXZ-ZBMJ> ("2002 USSC Cocaine Sentencing Report") (noting that Senator Robert Byrd stated that the ten-year mandatory minimum sentence was intended for "kingpins" and the five-year mandatory minimum was intended for "middle-level dealers"); *id.* at \*6 n 20 (noting that a number of congresspersons expressed concern that the

noted, someone with an amount of crack equal to “the weight of two pennies” (five grams) would be “sentenced to at least five years imprisonment,” and someone with a candy bar’s weight in crack (fifty grams) would be sentenced to at least ten years.<sup>173</sup> As the Court noted in *Kimbrough*:

Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.<sup>174</sup>

These were perfectly rational reasons to believe that crack needed to be punished more harshly than powder cocaine, but by the mid-1990s, it was clear that they were almost all definitively incorrect.<sup>175</sup> The relative harmfulness of crack (including to the infamous prenatal “crack babies”<sup>176</sup>), the potential spread of its popularity, and the violence associated with its sale and use were all previously overstated.<sup>177</sup> In spite of the Commission’s recognition of its original fault and recommendation for change,<sup>178</sup> Congress did not adopt a lower ratio until 2010.<sup>179</sup>

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bill was being passed in haste or without adequate consideration because of an upcoming election).

<sup>173</sup> See Vagins and McCurdy, *Cracks in the System* at \*2 (cited in note 172).

<sup>174</sup> *Kimbrough*, 552 US at 95–96, citing *2002 USSC Cocaine Sentencing Report* at \*90 (cited in note 172).

<sup>175</sup> *Kimbrough*, 552 US at 97–98 (noting that the Commission later realized that the relative harmfulness of the two drugs was not supported by experience, that the crack–powder disparity was inconsistent with the 1986 Act’s goal of punishing major traffickers, who mostly deal with powder cocaine, and that the discrepancy “fosters disrespect for and lack of confidence in the criminal justice system”).

<sup>176</sup> See *id.* at 98 (“[The Commission] also observed that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure.”) (quotation marks omitted).

<sup>177</sup> *Id.* at 97–98. See also generally *2002 USSC Cocaine Sentencing Report* (cited in note 172); *Report to the Congress: Cocaine and Federal Sentencing Policy* (United States Sentencing Commission, May 2007), archived at <http://perma.cc/CX2D-BPAP> (“2007 USSC Cocaine Sentencing Report”).

<sup>178</sup> See *Kimbrough*, 552 US at 97, quoting *2002 USSC Cocaine Sentencing Report* at \*91 (cited in note 172) (“Based on additional research and experience with the 100-to-1 ratio, the Commission concluded that the disparity ‘fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.’”).

<sup>179</sup> See Fair Sentencing Act of 2010 § 2, 124 Stat at 2372, codified at 21 USC § 841.

Although *Kimbrough* discussed *how* Congress failed in creating the 100-to-1 ratio, that case did not afford adequate attention to *why* those failures occurred. Namely, *Kimbrough* did not afford adequate attention to the role that popular fear played in the depiction of crack's seriousness. Failing to discuss this part of the origins of the 1986 Act, and the drug Guidelines that it spawned, leads to an incomplete picture of the problems it created and increases the probability that future solutions will not grapple with all of the problem's underlying causes.

Most notably, House Speaker Thomas "Tip" O'Neill, whose district included the city of Boston, heavily pushed for the 1986 Act.<sup>180</sup> That O'Neill represented Boston is significant because, in the summer of 1986, Len Bias, a black man who had recently been drafted by the NBA's Boston Celtics, died of what was assumed to be a crack overdose.<sup>181</sup> His actual cause of death, however, was an overdose on *powder* cocaine.<sup>182</sup> This death caused O'Neill to "ma[ke] passing a new drug statute a priority."<sup>183</sup> Invigorated by Congress's desire to appear tough on crime in an election year, the "law was pushed through just a few weeks before the 1986 Congressional elections."<sup>184</sup> As one *New York Times* piece noted, the effort to pass the bill was bipartisan, and "[t]he spectacle of the month in Washington [was] the Gadarene rush of politicians to the drug issue. Democrats in the House of Representatives vied with President Reagan and his followers for the most ferocious posture in the crusade against drugs."<sup>185</sup> This confluence of factors can be seen in the 1986 Act's rushed passage:

The Controlled Substances Act sentencing provisions were initiated in the House Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been

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<sup>180</sup> Osler and Bennett, 7 DePaul J Soc Just at 131–33 (cited in note 103). See also generally Adam M. Acosta, Comment, *Len Bias' Death Still Haunts Crack-Cocaine Offenders after Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences under 18 U.S.C. § 3582*, 53 Howard L J 825 (2010).

<sup>181</sup> Osler and Bennett, 7 DePaul J Soc Just at 131–32 (cited in note 103).

<sup>182</sup> *Id.* at 132.

<sup>183</sup> LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J Gender, Race & Just 375, 381–82 (2011).

<sup>184</sup> Osler and Bennett, 7 DePaul J Soc Just at 131 (cited in note 103).

<sup>185</sup> Anthony Lewis, *The Political Narcotic* (NY Times, Sept 29, 1986), online at <http://www.nytimes.com/1986/09/29/opinion/abroad-at-home-the-political-narcotic.html> (visited Nov 22, 2015) (Perma archive unavailable).

bombarded with constituent horror and outrage about the cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. . . . For this omnibus bill much of [the typical congressional] procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.<sup>186</sup>

The rushed timeline for this bill suggests not only that the likelihood for unforeseen effects was increased, but also that the motivations of the members pushing it through were not merely solving a problem, but also achieving a political “win” in time for an election.

## 2. *Kimbrough*'s aftermath.

*Kimbrough* and its progeny stand for the idea that a sentencing judge's differing policy belief from the Commission can allow that judge to deviate from the Guidelines even in a seemingly mine-run case.<sup>187</sup> *Kimbrough* is particularly notable here because the Court differentiated the crack cocaine recommendations as they were not a reflection of the Commission's characteristic approach of basing recommendations on empirical data and national experience.<sup>188</sup> Instead, the Commission simply adopted the 1986 Act's mandatory minimum sentences as its guidepost.<sup>189</sup> Because the Commission twice used its empirical methodology to propose substantial changes to the ratio, and Congress acquiesced to one set of these changes, the Court argued that it would be eminently reasonable for a district court to further deviate from this portion of the Guidelines.<sup>190</sup> Indeed, the crack ratio cases might best be understood to stand for the principle that the sentencing factors

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<sup>186</sup> William Spade Jr, *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz L Rev 1233, 1250 (1996) (brackets omitted) (quoting the testimony of Eric E. Sterling, president of the Criminal Justice Policy Foundation, at a 1993 hearing before the Commission).

<sup>187</sup> See *Kimbrough*, 552 US at 109–10.

<sup>188</sup> *Id.* at 109.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 105–06.

enunciated by § 3553(a) should be the ultimate touchstone for district courts. Because those factors are statutory, judges are bound to apply them faithfully. When the Guidelines conflict with a faithful application of § 3553(a) to a particular defendant, variance from the Guidelines is not only warranted, it is necessary.<sup>191</sup>

In 2010, Congress and the Commission implemented an 18-to-1 crack–powder cocaine ratio.<sup>192</sup> Judge Mark W. Bennett of the Northern District of Iowa, however, has posited that this updated ratio does not go far enough and, like the original 100-to-1 ratio, is more the result of political compromise than the reasoned empirical analysis reflecting the § 3553(a) sentencing factors that the Commission purports to undertake.<sup>193</sup> For these reasons, in *United States v Williams*,<sup>194</sup> Bennett continued to utilize a 1-to-1 ratio.<sup>195</sup> After he originally adopted this ratio in *United States v Gully*,<sup>196</sup> a number of other judges followed suit.<sup>197</sup>

### 3. Race.

As the Court noted in *Kimbrough*, the brunt of the 100-to-1 crack ratio Guidelines fell on the shoulders of African Americans, as “[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black.”<sup>198</sup> In its reasoning for why a district court might deviate from the ratio in a mine-run case, the Court approvingly quoted a Commission report that “stated that the crack/powder sentencing differential ‘fosters disrespect for and lack of confidence in the criminal justice system’ because of a ‘widely-held perception’ that it ‘promotes unwarranted disparity based on race.’”<sup>199</sup> Similarly, Congress’s belief that “crack users and dealers were more likely to be violent than users and dealers

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<sup>191</sup> See 18 USC § 3553(a) (mandating that “[t]he court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection”) (emphasis added).

<sup>192</sup> Fair Sentencing Act of 2010 § 2, 124 Stat at 2372, codified at 21 USC § 841.

<sup>193</sup> See *United States v Williams*, 788 F Supp 2d 847, 855–56 (ND Iowa 2011).

<sup>194</sup> 788 F Supp 2d 847 (ND Iowa 2011).

<sup>195</sup> *Id.* at 891–92.

<sup>196</sup> 619 F Supp 2d 633, 644 (ND Iowa 2009).

<sup>197</sup> See *United States v Whigham*, 754 F Supp 2d 239, 245–47 (D Mass 2010) (Gertner) (applying a 1-to-1 ratio); *United States v Lewis*, 623 F Supp 2d 42, 45–47 (DDC 2009) (Friedman) (same). See also *United States v Shull*, 793 F Supp 2d 1048, 1064 (SD Ohio 2011) (Marbley) (opining that the mandatory minimum sentence forbade the sentencing judge from applying the sentence that a 1-to-1 ratio would call for); *United States v Parker*, 2015 WL 10527259, \*15 n 13 (D Vt) (noting that the chief judge of the district recently announced that the court would not abide by the 18-to-1 ratio).

<sup>198</sup> *Kimrough*, 552 US at 98.

<sup>199</sup> *Id.*, quoting 2002 USSC Cocaine Sentencing Report at \*103 (cited in note 172).

of other drugs” and that “crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy”<sup>200</sup> comports with long-standing negative stereotypes of African Americans as violent and as irresponsible parents.<sup>201</sup> That Congress fell prey to these stereotypes is less surprising when considering the rush to pass the 1986 Act to appear tough on crime in an election year.<sup>202</sup> These fears, predictably, proved to be largely unfounded.<sup>203</sup>

The role that race played in the implementation and reformation of the crack cocaine Guidelines cannot be overstated. As Michael Gelacak, vice chairman of the Commission, stated in a report to Congress, “The perception of unfairness [caused by the 100-to-1 ratio] is a very real problem. Black Americans know that the penalties for crack cocaine fall primarily upon the youth of their communities and they do *not* countenance the present penalty structure.”<sup>204</sup> Gelacak analogized the ratio to “punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch whiskey,” noting how “[t]hat suggestion is absurd on its face and ought be no less so when the abused substance is cocaine rather than alcohol.”<sup>205</sup> Importantly, Gelacak recognized the political realities of this issue. Engaging with the racial realities of the ratio’s impact would “elevate[ ] . . . the political consequences” of the issue, and shifting the ratio, and thus lowering sentences for some offenders, might cause politicians to be “labeled soft on crime.”<sup>206</sup> In spite of these risks, Gelacak believed that justice required the change. Not only did “the public and various law enforcement officials and personnel acknowledge there is a problem,” but the potential ramifications of the problem

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<sup>200</sup> *Kimrough*, 552 US at 95–96.

<sup>201</sup> For a particularly virulent example of these and many other negative stereotypes of African Americans, see *The Birth of a Nation* (David W. Griffith Corp 1915) (opining, by quoting President Woodrow Wilson, that “the negroes were the office holders, men who knew none of the uses of authority, except its insolences”).

<sup>202</sup> See Vagins and McCurdy, *Cracks in the System* at \*1 (cited in note 172) (describing the rushed passage of the 1986 Act and the “extremely arbitrary” racialized sentencing disparities it created).

<sup>203</sup> See generally *id.* See also *Kimrough*, 552 US at 97–98.

<sup>204</sup> *Concurring Opinion of Vice Chairman Michael S. Gelacak* \*3, in *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (United States Sentencing Commission, Apr 1997), archived at <http://perma.cc/NH5W-SR27> (“Gelacak Opinion”).

<sup>205</sup> *Id.* at \*2.

<sup>206</sup> *Id.* at \*3–4 (quotation marks omitted).

extended beyond the traditional court of public opinion.<sup>207</sup> Gelacak noted bluntly:

Bad laws weaken respect of good laws. Consequences follow. Sooner or later all those people who feel alienated as a result of receiving what they believe to be unfair treatment and unjust sentences will be released from jail. Does this country really expect them to become productive members of society or might we anticipate some retributive behavior?<sup>208</sup>

In conclusion, Gelacak wrote that because of the vast and unwarranted racial disparities, “I believe strongly that the disparity between penalties for the same quantities of crack and powder cocaine is wrong.”<sup>209</sup> Although the Commission found “no evidence of racial bias behind the promulgation of this federal sentencing law,” the fact remained that “nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is white.”<sup>210</sup> This disturbing fact raises an even more disturbing question: Had this massive, disparate, and severe impact not fallen on African Americans, a historically politically disenfranchised group, but on the majority white population, would it ever have happened? While there may never be a definitive answer to this question, the response to the recent outbreak of heroin use suggests that the answer is no.<sup>211</sup>

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<sup>207</sup> Id at \*4.

<sup>208</sup> *Gelacak Opinion* at \*4–5 (cited in note 204).

<sup>209</sup> Id at \*5.

<sup>210</sup> *Special Report to the Congress: Cocaine and Federal Sentencing Policy* \*8 (United States Sentencing Commission, Apr 1997), archived at <http://perma.cc/M97B-F75Q> (“1997 USSC Cocaine Sentencing Report”).

<sup>211</sup> See Clyde Haberman, *Heroin, Survivor of War on Drugs, Returns with New Face* (NY Times, Nov 22, 2015), online at <http://www.nytimes.com/2015/11/23/us/heroin-survivor-of-war-on-drugs-returns-with-new-face.html> (visited June 6, 2016) (Perma archive unavailable) (discussing the recent heroin epidemic and its primarily white user base, and noting how “compassion is the ascendant spirit” in the response to heroin’s rise); Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs* (NY Times, Oct 30, 2015), online at <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> (visited June 6, 2016) (Perma archive unavailable) (“Because the demographic of people affected [by the heroin epidemic] are more white, more middle class, these are parents who are empowered,” said Michael Botticelli, . . . the nation’s drug czar. “They know how to call a legislator, they know how to get angry with their insurance company, they know how to advocate.”).

## B. Deviating from the Child Pornography Possession Guidelines

As in the war on drugs, the Guidelines addressing the possession of child pornography do not appear to reflect the Commission's empirically calculated proxy for a reasoned application of the § 3553(a) factors.<sup>212</sup> It is thus unsurprising that a number of judges have begun varying from the Guidelines' recommendations for child pornography possession, just as they previously did with the crack cocaine Guidelines.<sup>213</sup>

As explained in *United States v Hanson*,<sup>214</sup> the Guidelines for some child pornography offenses do not reflect the Commission's typical role of performing empirical studies.<sup>215</sup> Instead, Congress has directly increased the harshness of the child pornography possession Guidelines, even as the Commission has suggested that the length of these sentences should be decreased.<sup>216</sup> Because of this, the Guidelines might suggest a sentence near the statutory maximum, or even an impossible sentence above that maximum, for a typical possessor of child pornography.<sup>217</sup>

*Hanson's* facts demonstrate this phenomenon. Jon Hanson had no prior criminal record.<sup>218</sup> Outwardly, he appeared to be an upstanding business owner and family man, but secretly he possessed a large collection of child pornography and participated in online chat rooms about child pornography.<sup>219</sup> Through numerous enhancements to his Guidelines range, Hanson's recommended sentence called for between 210 months and 262 months imprisonment.<sup>220</sup> These enhancements were required because Hanson used a computer to access child pornography; possessed images of a child under the age of twelve; compiled a collection of hundreds

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<sup>212</sup> See *United States v Hanson*, 561 F Supp 2d 1004, 1008–12 (ED Wis 2008) (discussing the history of child pornography in the Guidelines).

<sup>213</sup> See, for example, *United States v Grober*, 624 F3d 592, 608–09 (3d Cir 2010); *United States v Dorvee*, 616 F3d 174, 182–88 (2d Cir 2010); *Hanson*, 561 F Supp 2d at 1011–12; *United States v Johnson*, 588 F Supp 2d 997, 1002–07 (SD Iowa 2008). See also Arlen Specter and Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion against Harsh Sentences for Child Pornography Offenses—Should the Laws Be Changed?*, *The Champion* 12, 13 (Oct 2011).

<sup>214</sup> 561 F Supp 2d 1004 (ED Wis 2008).

<sup>215</sup> See *id.* at 1009 (discussing USSG § 2G2.2).

<sup>216</sup> See *id.* at 1009–10 (noting that, in spite of the Commission's recommendations, “Congress has repeatedly amended [this portion of the Guidelines] directly”).

<sup>217</sup> See *id.* at 1010–11.

<sup>218</sup> *Hanson*, 561 F Supp 2d at 1011.

<sup>219</sup> See *id.* at 1007–09.

<sup>220</sup> See *id.* at 1006.

of images; traded images for a “thing of value,” which is defined to include trading for other images of child pornography (Hanson did not attempt to sell any child pornography); and possessed a portrayal of sadistic conduct, an enhancement that applied whether Hanson intended to possess those particularly sadistic images or not.<sup>221</sup>

While child pornography is clearly heinous and causes great harm,<sup>222</sup> it is important to note that, for the crime Hanson was charged with, Congress mandated a sentence of between five and twenty years imprisonment,<sup>223</sup> but these enhancements resulted in a Guidelines-recommended sentence potentially longer than that maximum. This is especially problematic because many of Hanson’s enhancements either had nothing to do with his own culpability, such as the enhancement for sadistic imagery,<sup>224</sup> or are typical of any modern child pornography offense.<sup>225</sup> In the Internet age, amassing a collection of hundreds of images could be as simple as spending a few hours on a file transfer site like that used by Hanson. It is similarly unsurprising that chat room participants would engage in trades, and Hanson’s use of a computer to access the images is unexceptional in light of the fact that computers are now the primary tool for accessing any type of information.<sup>226</sup> Indeed, in light of Hanson’s own history of being sexually abused, and his subsequent alcohol abuse and addiction,<sup>227</sup> a theory of justice focused around rehabilitation, as opposed to retribution, might argue that, instead of significant jail time, Hanson should have received substantial counseling. In fact, Hanson did undergo significant sex-offender counseling and began participating in Alcoholics Anonymous.<sup>228</sup> These factors convinced the district court to give him a sentence near the statutory minimum.<sup>229</sup> *Hanson* is an excellent example of § 3553(a) in action. By recognizing Hanson’s mitigating characteristics, as called

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<sup>221</sup> *Id.* at 1006, 1009.

<sup>222</sup> See Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 Pace L Rev 847, 852–59 (2008) (discussing the harms caused by child pornography).

<sup>223</sup> *Hanson*, 561 F Supp 2d at 1005.

<sup>224</sup> This enhancement is based on strict liability, and applies whether or not a defendant intended to possess these especially sadistic images. See *id.* at 1009.

<sup>225</sup> See *id.* at 1010.

<sup>226</sup> Over 95 percent of federal child pornography defendants are subject to this enhancement. See Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash U L Rev 853, 897 n 188 (2011).

<sup>227</sup> *Hanson*, 561 F Supp 2d at 1011–12.

<sup>228</sup> *Id.* at 1012.

<sup>229</sup> *Id.*

for by § 3553(a)(1) and § 3553(a)(2), the court ensured that the statutory requirement that a sentence be “sufficient, but not greater than necessary,”<sup>230</sup> was fulfilled.

*Hanson* is not a case of one rogue judge taking pity on a sympathetic defendant. According to one survey of the case law, at least fifteen separate cases have taken a downward departure from the child pornography possession sentences recommended by the Guidelines.<sup>231</sup> The Commission’s own data is even more telling. In the period between 2007 and 2011, 44 percent of child pornography nonproduction offenses resulted in a sentence below the Guidelines range, with an average reduction of 40.4 percent.<sup>232</sup> Commentators, too, have noted that there is a widespread judicial rebellion against this portion of the Guidelines.<sup>233</sup>

While lengthy child pornography possession sentences can be justified by societal opprobrium for those offenders, it is more difficult to argue that the recently *increased* child pornography sentences reflect *increasing* societal disapproval. Without this increasing level of disapproval, or some other new information suggesting that child pornography possession is causing previously unforeseen harm, the increases that have occurred in Guidelines sentences appear to reflect not the empirical ethos of the Commission, but the political will of Congress. Furthermore, other justifications for increased punishment are unconvincing. For example, increased punishment’s ability to either deter future child sexual abuse or punish undetected past abuse is unsupported by empirical research.<sup>234</sup>

These increased sentences have reached the point of absurdity, resulting in cases in which possessors of child pornography are punished more harshly than someone who physically sexually assaulted a child.<sup>235</sup> Even if the belief that all possessors of child pornography wish to sexually assault children is accepted as true, this convergence in the length of sentences between possession and assault is illogical. If this possession-assault reasoning was actually motivating the increase in child pornography possession

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<sup>230</sup> 18 USC § 3553(a).

<sup>231</sup> See *United States v Diaz*, 720 F Supp 2d 1039, 1041–42 (ED Wis 2010).

<sup>232</sup> *Analysis of Child Pornography Offenses* \*114, archived at <http://perma.cc/H7GE-CPX8>.

<sup>233</sup> See generally Specter and Hoffa, *The Champion* 12 (cited in note 213); Marcia G. Shein, *The Changing Landscape of Sentencing Mitigation in Possession of Child Pornography Cases*, *The Champion* 32 (May 2011); Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 *Ga St U L Rev* 375 (2014).

<sup>234</sup> See Hessick, 88 *Wash U L Rev* at 864–86 (cited in note 226).

<sup>235</sup> *Id* at 861.

sentences, Congress should also have sought to increase the length of child sexual assault sentences to maintain marginal deterrence on assault crimes. Without that level of marginal deterrence, a potential perpetrator of assault choosing between possessing or watching child pornography and physically assaulting a child does not have a reason not to make the latter, potentially more devastating choice.<sup>236</sup> In light of all this, it seems that a likely explanation for these harsh and seemingly inexplicable sentences is the same as that in the crack ratio context. Congress, in attempting to respond to the real problem of increased access to child pornography on the Internet, abandoned a reasoned application of the available empirical data in an effort to be tough on a morally repugnant crime.<sup>237</sup> In doing so, they unnecessarily harmed a politically despised class (pedophiles) without reflecting on whether their methods would actually solve the relevant problem.<sup>238</sup> The crack, marijuana, and child pornography Guidelines suggest that Congress sees these criminal problems as nails, and so they use the politically popular hammer of harsh sentences.<sup>239</sup>

Because Congress has, at times, indiscriminately and improperly addressed problems by increasing the harshness of sentences, the judiciary has used its discretion to correct the ensuing injustice. It is perhaps unsurprising that sentencing judges have decided that possessors of child pornography are notably less deserving of lengthy prison sentences than perpetrators of child sexual assault. This is so because sentencing judges must interact

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<sup>236</sup> See *id.* at 865–80 (presenting and rebutting the arguments that child pornography either is or leads to child sexual abuse). It is possible that Congress believed that increasing the Guidelines for child pornography possession would increase deterrence of the crime, as the Internet has greatly increased the proliferation of child pornography while making possessors potentially more difficult to catch. While this possibility is logically defensible, it is telling that the increase was *not* based on a recommendation by the Commission in its empirical role, and that it has been rebuked by sentencing judges.

<sup>237</sup> See *id.* at 866 (noting a statement cited in congressional hearings that child pornography was “worse than murder”); *id.* at 882 & n 120 (citing congressional statements that equate possessors of child pornography with child predators who commit contact offenses).

<sup>238</sup> See Amir Efrati, *Making Punishments Fit the Most Offensive Crimes* (Wall St J, Oct 23, 2008), online at <http://www.wsj.com/articles/SB122471925786760689> (visited Mar 28, 2016) (Perma archive unavailable) (noting a similar argument that the increased sentences often defy explanation).

<sup>239</sup> See Cheyenne Morales Harty, *The Causes and Effects of Get Tough: A Look at How Tough-on-Crime Policies Rose to the Agenda and an Examination of Their Effects on Prison Populations and Crime* \*4–57 (unpublished graduate thesis, University of South Florida, Jan 2012), archived at <http://perma.cc/997X-9M7H> (discussing several theoretical explanations for why politicians might be tough on crime before utilizing those theories to describe how tough-on-crime policies drove sentencing reform efforts in the last decades of the twentieth century).

with various criminal defendants on an individual level and must evaluate the totality of the circumstances of these defendants' lives.<sup>240</sup> The feedback from this on the ground perspective was anticipated and expected in the Commission's formulation of the Guidelines,<sup>241</sup> and is necessary to ensure that the Guidelines continue to reflect the § 3553 sentencing factors.

### C. Conflicts of State and Federal Law: The Fugitive Slave Laws

The Fugitive Slave Laws of 1793 and 1850 serve as helpful examples of another time in American history when federal law was powerfully at odds with both state laws and the personal beliefs of much of the populace. The moral starkness of the issue of slavery, as well as our temporal distance from that experience, might help to elucidate principles that also are relevant to child pornography and drug sentencing, but are obscured by the immediacy and political realities of those issues.

The Fugitive Slave Laws served one primary purpose: to return escaped enslaved persons living in states that disallowed slavery back to their "owners" in states that allowed slavery.<sup>242</sup> These laws aided the continued survival of the institution of slavery in those states where it was legal. Naturally, the populations of states where slavery was illegal often wanted no part in returning those fortunate enough to escape slavery's clutches to their former masters.<sup>243</sup> One way that states chose to counter these federal laws was with the passage of so-called personal liberty

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<sup>240</sup> It is this logic—that personal interaction leads to better understanding of people representing different groups—that underlies the push for school integration. See, for example, Alana Semuels, *The City That Believed in Desegregation* (The Atlantic, Mar 27, 2015), archived at <http://perma.cc/UTX5-G786> (discussing Louisville, Kentucky's reasons for continuing down the difficult path of integrating its public schools).

<sup>241</sup> See USSG § 1A1.2.

<sup>242</sup> See Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 Yale L J 161, 164 (1921) (discussing the purpose of the Fugitive Slave Law of 1793); Emmett D. Preston, *The Fugitive Slave Acts in Ohio*, 28 J Negro Hist 422, 429–32 (1943) (discussing the purpose, effect, and passage of the Fugitive Slave Law of 1850).

<sup>243</sup> See Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 Cardozo L Rev 1793, 1798–99 (1996) (noting Northerners' willingness to resort to extralegal means to prevent the recapture of enslaved persons, including the history of the attempt to prevent the return of formerly enslaved person Anthony Burns to slavery). Of course, not every resident of the Northern states was a staunch abolitionist willing to raise arms to prevent the return of an escaped enslaved person, but there were enough such people to cause major obstruction to the Fugitive Slave Laws. See generally *id.*

laws.<sup>244</sup> These laws were enabled by *Prigg v Pennsylvania*,<sup>245</sup> which noted that states could prohibit their magistrates from exercising authority under the Fugitive Slave Law of 1793 by statute, thus providing the states with a guideline for how to blunt the effectiveness of the law.<sup>246</sup> Through a variety of tactics, these personal liberty laws effectively “closed [Northern states’] jails and courtrooms to slave catchers.”<sup>247</sup> For example, after a prominent, and ultimately failed, attempt by one slave owner to retrieve an escaped enslaved person,<sup>248</sup> Massachusetts passed an act that “prohibited state judges from hearing fugitive slave cases and barred state officers from arresting or incarcerating fugitive slaves.”<sup>249</sup> These laws, in coordination with resistance by the populace, effectively ensured that the Fugitive Slave Law of 1793 went unenforced in many states.<sup>250</sup>

These personal liberty laws are analogous to the states’ passage of laws legalizing marijuana in the medical and recreational contexts. The Supremacy Clause of the Constitution clearly allows federal slave (or drug) laws to trump whatever the states

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<sup>244</sup> See, for example, Act of March 25, 1826, 1825 Pa Laws 150; *Of the Writ of Habeas Corpus, to Bring Up a Person to Testify, or to Answer in Certain Cases*, 2 NY Rev Stat 559 (1829); *An Act to Restore the Trial by Jury, on Questions of Personal Freedom*, 1837 Mass Laws 240 (requiring a jury trial in order for slave owners, or their agents, to reclaim the persons they claimed were escaped slaves). See also Finkelman, 17 *Cardozo L Rev* at 1797–99, 1801–02 (cited in note 243) (discussing the passage of “personal liberty laws” ostensibly designed to protect free blacks from kidnapping, which had the additional purpose of circumventing federal fugitive slave laws and preventing the return of escaped enslaved persons to the South, and also examining the Fugitive Slave Laws’ implications for competing notions of law and justice); James A. Kraehenbuehl, Comment, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 *U Chi L Rev* 1465, 1474 n 46 (2011). See also generally Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780-1861* (Johns Hopkins 1974). Citizens of states that disallowed slavery would also use extralegal means to prevent the return of formerly enslaved persons to slavery or would pressure Southerners pressing a claim to sell at a below-market price. See Finkelman, 17 *Cardozo L Rev* at 1798–99 (cited in note 243).

<sup>245</sup> 41 US (16 Pet) 539 (1842).

<sup>246</sup> See *id* at 625–26 (holding the Pennsylvania act intended to protect free blacks from kidnapping, as well as effectively preventing slave catchers from operating within the state, to be unconstitutional, while maintaining that states may prohibit magistrates from exercising authority under the Fugitive Slave Law of 1793 by statute).

<sup>247</sup> Finkelman, 17 *Cardozo L Rev* at 1799 (cited in note 243).

<sup>248</sup> See generally *Commonwealth v Tracy*, 46 Mass 536 (1843).

<sup>249</sup> Finkelman, 17 *Cardozo L Rev* at 1799 (cited in note 243).

<sup>250</sup> See *id* at 1797–99. It should be noted that these personal liberty laws also served the important purpose of attempting to ensure that free African Americans were not kidnapped and taken into slavery by slave catchers. *Id* at 1797. See also Morris, *Free Men All* at xi (cited in note 244) (noting that “[n]early all the states above the Mason-Dixon line experimented at one time or another with such laws (the only exceptions are Illinois and the far western states that came into the Union in the 1850s)”).

may do,<sup>251</sup> but states often take advantage of whatever leeway the federal government allows them in an effort to enact laws that match the will of their constituencies. While this tension ultimately led to the clash between North and South in the slavery context, there is much more unity of purpose in the context of drug reforms, and especially marijuana reforms. State passage of medical and recreational marijuana laws may be in direct conflict with federal law, but all three branches of the federal government have shown a willingness to allow the states to pursue their own aims, as well as a willingness to lend support to the states to ensure the success of their experiments.<sup>252</sup>

The Fugitive Slave Law of 1850 provides an example of how strict federal enforcement in opposition to the will of the states and their citizenry might end poorly. That law came about as part of the Compromise of 1850,<sup>253</sup> an attempt to appease the South and keep the Union together.<sup>254</sup> To ensure enforcement, the Fugitive Slave Law of 1850 provided harsh penalties for anyone attempting to interfere with the recapture of an enslaved person and prohibited trials on the right of the alleged enslaved person to her freedom; “the whole tenor of the law was corrupt.”<sup>255</sup> Further, the law “penalized opponents of slavery, mocked due process, undermined the independence of those authorized to enforce the law, and, worst of all, made Northerners into slave catchers.”<sup>256</sup>

In light of the fierce opposition to slavery in parts of the North,<sup>257</sup> it is perhaps unsurprising that this law helped to increase the rift between North and South in the years immediately preceding the Civil War. While it is obvious that the Fugitive Slave Laws had a destructive impact on African Americans, the full extent of the political branches’ willingness to forego the safety and liberty of both free and enslaved African Americans is

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<sup>251</sup> See US Const Art VI, cl 2.

<sup>252</sup> See Part II.

<sup>253</sup> See Paul Finkelman, *States’ Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 Akron L Rev 449, 456–61 (2012).

<sup>254</sup> See Finkelman, 17 Cardozo L Rev at 1800–02 (cited in note 243).

<sup>255</sup> Id.

<sup>256</sup> Id.

<sup>257</sup> See, for example, *Commonwealth v Aves*, 35 Mass 193, 202 (1836) (holding that although federal law recognized slavery, as did the laws of the master’s home state, a slave brought into the state of Massachusetts could not then be forced to return to slavery, in part because slavery “offends [the people of Massachusetts’s] morals, [ ] contravenes their policy, . . . [and] offers a pernicious example”). See also Finkelman, 17 Cardozo L Rev at 1832–34 (cited in note 243) (discussing the ostracization of Edward Greely Loring, a Northern judge who chose to enforce the Fugitive Slave Law of 1850).

not as immediately apparent. During the regime of the Fugitive Slave Law of 1793, personal liberty laws not only served the purpose of circumventing the Fugitive Slave Law, but also attempted to protect free African Americans from kidnapping by slave catchers acting under the guise of the law.<sup>258</sup> The Fugitive Slave Law of 1850's draconian policies, by contrast, sacrificed the security and rights of free African Americans, as well as any potential that an enslaved person might reclaim her freedom by escaping to the nonslave states, in favor of the white political establishment's interest in appeasing the Southern states.<sup>259</sup>

These laws suggest that the political willingness to disproportionately burden either racial minorities or other politically unpopular or powerless groups is long-standing, and that the crack, marijuana, and child pornography sentencing Guidelines are only the most recent incarnations of an unsavory reoccurrence in American history. In all of these areas, the legislature is faced with the question of how to allocate, and hopefully to minimize, harm. The shift from the Fugitive Slave Law of 1793 to the Law of 1850 moved the economic and enforcement burdens of the law from Southern constituents to the Northern populace and especially to the African American population of those Northern states. This shift was intended to prevent the breakup of the Union, a harm that the legislature viewed as greater than any caused by the burden placed on Northern states.<sup>260</sup> In the context of the drug and child pornography possession Guidelines, the legislature responded to the harms caused by drugs and child pornography by attempting to shift those harms to the people committing those crimes. In this attempt, however, Congress was overzealous and did not properly account for all of the relevant circumstances. Ultimately, this overzealousness resulted in select groups becoming overburdened, creating excess harm in the exact area that Congress was attempting to fix.

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<sup>258</sup> See James Oliver Horton and Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 *Chi Kent L Rev* 1179, 1183–85 (1993) (discussing the experience of Henry Highland Garnet and other antebellum black leaders with the Fugitive Slave Law of 1793 and the potential danger the law posed to both free and formerly enslaved African Americans).

<sup>259</sup> See generally *id.* (discussing the dire impact of the Fugitive Slave Law of 1850 on African Americans).

<sup>260</sup> See Jeffrey Rogers Hummel and Barry R. Weingast, *The Fugitive Slave Act of 1850: Symbolic Gesture or Rational Guarantee?* \*2 (Jan 2006), archived at <http://perma.cc/GA9X-R359> (discussing the Compromise of 1850, including the reasons for the South's push for the Fugitive Slave Law of 1850, and noting that one scholar stated that the South's push for that act "risk[ed] [ ] getting enmeshed in a destructive Civil War").

One additional lesson relevant for the current state of federal marijuana crimes appears in evaluating the history of the Fugitive Slave Laws. These acts show that if there is a way for the federal government to allow the states to implement the will of their citizens, the states should be allowed to experiment unless that experimentation would cause disproportionate harm to a historically unrepresented or underrepresented group.<sup>261</sup>

#### IV. EVALUATING THE 18 USC § 3553(A) FACTORS IN LIGHT OF INCREASINGLY LAX MARIJUANA LAWS

The three analogues to the marijuana Guidelines all share a common feature: they allow the political branches to pursue a popular goal—appearing tough on crime or desperately attempting to keep the Union together—at the expense of a politically unpopular or relatively powerless group. In the drug-sentencing realm, that politically unpopular group remains the same as it was in the Fugitive Slave Law of 1850: African Americans.

History seems to be repeating itself in the current regime of federal marijuana laws. Just as with crack, a disproportionate number of those arrested for marijuana-based crimes are African American.<sup>262</sup> This is in spite of the fact that African Americans report similar rates of marijuana use as other races.<sup>263</sup> This disproportionate arrest rate is exacerbated by the fact that, according to an analysis of ACLU data by Stanford psychiatry Professor Keith Humphreys, those states that have legalized or decriminalized marijuana have tended to have a below average population of African Americans.<sup>264</sup> Ultimately, this means that while it primarily is white entrepreneurs in states like Colorado and Washington who build businesses and profit from the federal government's choice not to enforce marijuana laws, African Americans in the rest of the country continue to bear the brunt of criminal marijuana

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<sup>261</sup> This idea is discussed further in Part IV.B.2. For an alternate, yet similar, theory of how federalism issues might play out in the marijuana context, see J. Mitchell Pickerill and Paul Chen, *Medical Marijuana Policy and the Virtues of Federalism*, 38 *Publius* 22, 23 (2008) (putting forth a three-part test for determining when state policies should be allowed to operate based on whether experimentation is adding to the substantive debate, whether there is an issue of “regional diversity,” and “whether state [experimentation] would protect and/or enhance individual rights and liberties”).

<sup>262</sup> Dylan Matthews, *The Black/White Marijuana Arrest Gap, in Nine Charts* (Wash Post, June 4, 2013), archived at <http://perma.cc/X98J-WTDS>.

<sup>263</sup> *Id.*

<sup>264</sup> See Keith Humphreys, *Persistent Racial Differences under Softening Marijuana Enforcement* (The Reality-Based Community, June 4, 2013), archived at <http://perma.cc/QA8R-4XJT>.

prosecutions.<sup>265</sup> While this increasing geography-based disparity might be a function of nonracial factors like religion, that does not change the fact that the disparate racial impact is being exacerbated by the federal government's actions. Therefore, it is appropriate to consider it as a factor in determining the merits of those federal actions. As Vice Chairman Gelacak once noted in another area of sentencing law, "If the impact of the law is discriminatory, the problem is no less real regardless of the intent."<sup>266</sup>

As both the Supreme Court and other members of the judiciary have noted throughout history, when a political minority, especially one that has been as historically discriminated against as African Americans, bears the burden of a politically motivated activity like the promulgation of the marijuana Guidelines, it is not only the role but the duty of the judiciary to intervene and to provide an especially searching analysis of the issue.<sup>267</sup> While the judiciary may not feel the pull of this duty in other areas of the law in which there is a disparate impact without a clear discriminatory intent, this is not the case in the jurisprudence surrounding sentencing. In this realm, *Kimbrough* and its history show that federal judges and justices, perhaps in recognition that sentencing is traditionally their area of expertise, are willing and able to mitigate an outsized load placed on the shoulders of minorities.<sup>268</sup> Moreover, this is not an area of the law that relies purely on the internal ethos of the judiciary for action. Because of the 18 USC § 3553(a) sentencing factors, judges have a statutory mandate to account for unwarranted sentencing disparities.<sup>269</sup>

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<sup>265</sup> See April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison* (AlterNet, Mar 16, 2014), archived at <http://perma.cc/3DTY-6UTH> (covering an interview with Professor Michelle Alexander, in which she detailed how it primarily was white businessmen who were profiting from the distribution of marijuana, a more wide-scale version of the same activity that has disproportionately criminalized African Americans); Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry* (AlterNet, Mar 31, 2015), archived at <http://perma.cc/8SGR-4HAE> (noting that there is only one African American-owned marijuana dispensary in the state of Colorado).

<sup>266</sup> *Gelacak Opinion* at \*2 (cited in note 204).

<sup>267</sup> For examples and analysis of the judiciary's intervention in the Fugitive Slave Laws, see Part III.C. The proposition that it is the role of the judiciary to intervene when particular categories of minorities are burdened by the political process was most famously enunciated in *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry.").

<sup>268</sup> See Parts III.A.2–3.

<sup>269</sup> See 18 USC § 3553(a)(6).

This Part proceeds as follows: Part IV.A discusses an application of the § 3553(a) sentencing factors to marijuana crimes, focusing primarily on the requirements to adequately account for the seriousness of the offense and the need to avoid unwarranted sentencing disparities. Part IV.B then presents possible solutions based on this analysis.

A. Application of the § 3553(a) Sentencing Factors to Marijuana

State legalization of marijuana for medical and recreational use has created a direct conflict with federal drug laws. Recognizing legalization as a potential national wave, the various actors within the federal government have adopted a policy of toleration of this conflict through selective enforcement of the federal drug laws surrounding marijuana. This selective enforcement policy, however, has created a problem for the federal judiciary. The statutorily mandated sentencing factors require district courts to avoid unwarranted sentencing disparities and to ensure that sentences reflect the seriousness of the offense. Because individuals possessing and distributing marijuana are now treated like legal business owners by the federal government in some states, and felons in others, the judiciary is placed at a crossroads when sentencing defendants for marijuana-based crimes.

1. The seriousness of the offense.

The increasing proliferation of both medical and recreational marijuana legalization, as well as the revelation that a majority of the country's population seems to support legalization in some form, has greatly decreased the relative seriousness of marijuana offenses in the eyes of American society. While the federal government categorizes marijuana as a Schedule I substance under § 202 of the Controlled Substances Act,<sup>270</sup> this categorization is at odds with an increasingly large body of medical research that suggests that marijuana could have a medically beneficial effect.<sup>271</sup> Also, the federal statute establishing the punishment level for

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<sup>270</sup> Pub L No 91-513, 84 Stat 1242, 1247–49 (1970), codified as amended at 21 USC § 812 (listing marijuana as a Schedule I drug).

<sup>271</sup> See *Report to the Legislature and Governor of the State of California Presenting Findings pursuant to SB847 Which Created the CMCR and Provided State Funding* \*10–15 (Center for Medicinal Cannabis Research, University of California, Feb 11, 2010), archived at <http://perma.cc/3NCA-STLG> (examining ten years of research on the possible medical effects of marijuana).

possessing different types of contraband in prison seems to recognize marijuana's seriousness as not being in the same category as other Schedule I substances.<sup>272</sup> That statute calls for marijuana to be punished in a like manner to Schedule III substances.<sup>273</sup> There is additionally at least one study that suggests that the Guidelines that apply to drug-related crimes are wildly out of step with regular citizens' perceptions of the sentences needed to appropriately punish criminals.<sup>274</sup>

The Fugitive Slave Laws and the cases surrounding them suggest that there is a history of state opposition to what citizens consider morally repugnant federal laws, and of the federal government, including the judicial branch, allowing the states leeway to operate around those laws.<sup>275</sup> This indicates that, because there are not countervailing disproportionate harms to underrepresented groups or infringements on individuals' rights caused by state experimentation,<sup>276</sup> all branches of the federal government, including the judiciary, should utilize their discretion to allow state experimentation.

Similarly, both the history of the crack–powder cocaine ratio and the current implementation of the child pornography Guidelines provide clear analogies to the Guidelines for marijuana-related crimes. Both of these portions of the Guidelines represent deviations from the Commission's typical empirical approach to the creation of sentences in favor of Guidelines created by politically motivated actors. Much like the crack–powder cocaine ratio, the Guidelines for marijuana were based on the 1986 Anti-Drug Abuse Act drug weights and have only recently begun to be revised.<sup>277</sup> It also bears repeating that *Kimbrough* and its progeny ensure that judges are free to vary from the Guidelines if they reasonably believe the recommended sentence does not properly

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<sup>272</sup> See 18 USC § 1791(d)(1)(B) (categorizing marijuana along with Schedule III drugs for the purposes of punishment for possessing contraband in prison).

<sup>273</sup> 18 USC § 1791(d)(1)(B).

<sup>274</sup> See James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv L & Pol Rev 173, 186–92 (2010) (observing that, when given the chance, jurors would recommend sentences vastly below the Guidelines ranges in almost all cases, and especially in drug-related cases).

<sup>275</sup> See generally, for example, *Prigg*, 41 US (16 Pet) 539 (holding one Pennsylvania antislavery law unconstitutional, while maintaining another avenue for the states to resist the Fugitive Slave Laws).

<sup>276</sup> See note 261 and accompanying text.

<sup>277</sup> See Saris, 52 Am Crim L Rev at 16–17 (cited in note 23).

reflect the seriousness of the offense and the other § 3553(a) factors.<sup>278</sup>

The question remains whether this analysis properly accounts for the personal and societal harms that originally led to marijuana's prohibition. The answer to that question is: maybe, or maybe not.<sup>279</sup> As this Comment shows, however, the American people are increasingly coming to the conclusion that the perceived harms of marijuana have been overstated, and are pushing all levels of state and federal government to correct course.

Section 3553(a)(2)(A) calls not only for the sentence imposed to account for the seriousness of the offense, but also for the sentence to “promote respect for the law.”<sup>280</sup> It is difficult to imagine that ignoring the fact that citizens in over half of the states have decided to allow either medical or recreational marijuana use could “promote respect” for the federal law.<sup>281</sup> Likewise, that the liberalization of state marijuana laws has happened with what can only be described as the blessing of both politically accountable branches of the federal government<sup>282</sup> suggests that failure to modify sentences to account for the current state of affairs could lead to the belief that the judiciary is out of touch with current societal mores, and thus lessen faith in the federal judiciary, and the sentences it imposes, more generally.<sup>283</sup> Although the judiciary is often viewed as an antimajoritarian bulwark, operating too far outside the bounds of contemporary society risks irrelevancy or revolt. Indeed, given the prevalence of state referenda that flout federal drug laws, citizens might be primed to subvert the rulings of the judiciary on marijuana-related issues. Given this, at least

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<sup>278</sup> See Part I.B.

<sup>279</sup> This question is ultimately a balancing test that must be answered both empirically (on a societal level) and personally (on an individual level). Realistically, it can be answered with any certainty only by a retrospective study of solutions based on this analysis.

<sup>280</sup> 18 USC § 3553(a)(2)(A).

<sup>281</sup> Indeed, the theme of popular revolt against an out of touch political class that ignores the will of the people has reached new levels of salience in the 2016 presidential election. See Derek Thompson, *Who Are Donald Trump's Supporters, Really?* (The Atlantic, Mar 1, 2016), archived at <http://perma.cc/B92R-DGUL> (noting that the single best predictor of someone supporting Trump for president was agreement with the statement “people like me don't have any say about what the government does”).

<sup>282</sup> See Part II.B.

<sup>283</sup> See *Gelacak Opinion* at \*4–5 (cited in note 204) (noting that “[b]ad laws weaken respect of good laws” and that sentences based on unwarranted disparities could lead to “retributive behavior”).

in the drug law context, the seriousness of the offense must be tied to popular will.<sup>284</sup>

## 2. Avoiding unwarranted sentencing disparities.

Ensuring similar treatment of similarly situated offenders was a driving force behind the creation of the Commission and the Guidelines. The Supreme Court has upheld this mission in its repeated emphasis of the importance of the § 3553(a) sentencing factors.<sup>285</sup> Although state laws may differ, federal law should attempt to treat similarly situated actors similarly. Congress and the executive branch may have chosen to ignore this tenet by advocating for selective enforcement, but the judiciary has not been afforded that luxury. Judges are bound to implement § 3553(a)(6), which calls for the avoidance of “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>286</sup>

Like Judge Bredar, this Comment construes this language broadly, as a mandate to ensure equal treatment of similarly situated defendants.<sup>287</sup> In the context of nonenforcement of federal

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<sup>284</sup> An alternate conception of the “seriousness of the offense” that is removed from the will of the populace might be an evaluation of the harm caused by an offender in the commission of his crime. This harm measurement seems to be implied when courts use § 3553(a)(2)(A) in other criminal contexts. See, for example, *United States v Stanley*, 644 Fed Appx 935, 941 (11th Cir 2016) (per curiam) (noting that upward variance from the Guidelines was reasonable because the defendant was convicted of “shooting at a police officer in Florida, robbing a bank with pistols and an AK–47 type rifle, firing shots inside of an occupied bank, fleeing across state lines, and shooting at police during a high-speed chase”); *United States v Webster*, 820 F3d 944, 945 (8th Cir 2016) (per curiam) (noting that a district court justified a 120-month sentence because “the Guidelines did not adequately take into account the seriousness of the offense: Webster had discharged the subject firearm into a fleeing vehicle, narrowly missing the driver”). Within the marijuana context, the emerging medical research on marijuana, as well as the number of states willing to decriminalize or legalize the substance, suggest that the harm caused by marijuana, whether physical or societal, is less than the Guidelines make it out to be.

<sup>285</sup> See Part I.B.

<sup>286</sup> 18 USC § 3553(a)(6).

<sup>287</sup> See *Dayi*, 980 F Supp 2d at 689. A similarly broad interpretation of 18 USC § 3553(a)(6) has occurred in the fast-track context, in which defendants in some districts were able to take advantage of a downward departure from the Guidelines by entering a guilty plea and waiving certain rights, but others were not. This discrepancy occurred entirely because the fast-track programs were not implemented uniformly across federal districts. District courts used this lack of federal uniformity to allow defendants in non-fast-track districts to take advantage of the downward departure they would have been allowed if they were in a fast-track district. See Tom McKay, Note, *Judicial Discretion to Consider Sentencing Disparities Created by Fast-Track Programs: Resolving the Post-Kimbrough Circuit Split*, 48 Am Crim L Rev 1423, 1433–35, 1441–44 (2011) (discussing circuits that allowed district courts to impose fast-track-equivalent sentences).

marijuana laws, this broad interpretation seems to be the most sensible one. It would be counterintuitive to allow this provision designed to reduce sentencing disparities to magnify them instead because of the deliberate and widespread selective enforcement of federal laws. Additionally, the departure granted by Bredar in *Dayi* should be seen as the beginning of a snowball rolling downhill. Even if § 3553(a)(6) were read to require a formal adjudication of guilt to invoke its equality principle, the defendants in *Dayi* should be considered “similar” for the purposes of the statute, and future defendants should gain the benefit of a comparable downward variance.

Notably, although it is possible that *Dayi* is extraordinary, in that it is the first case to utilize this specific reasoning, it is absolutely pedestrian in its result. After *Booker* and its progeny granted judges increased discretion in sentencing, the percentage of non-government-sponsored below-Guidelines sentences granted for marijuana offenses steadily rose from approximately 9 percent in the portion of 2005 immediately following *Booker*<sup>288</sup> to a high of over 21 percent in 2014,<sup>289</sup> before falling to approximately 17 percent in 2015.<sup>290</sup> When government-sponsored below-Guidelines sentences are included in this figure, the extent of the number of judges regularly departing from the Guidelines becomes even more dramatic. In 2015, over half of all defendants sentenced for federal marijuana crimes received below-Guidelines sentences,<sup>291</sup> and in 2014, fully 67 percent of marijuana defendants received below-Guidelines sentences.<sup>292</sup>

In spite of this, opponents of more lax marijuana sentencing might argue that § 3553(a)(6) calls for the avoidance of *unwarranted* sentencing disparities between like defendants and that in states where marijuana has been legalized in some form, a disparity in sentencing compared to those states where marijuana has not been legalized is warranted because of the regulatory

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<sup>288</sup> See *Sentences Relative to the Guideline Range for Drug Offenders by Each Drug Type: Fiscal Year 2005, Post-Booker (January 12, 2005, through September 30, 2005)* \*2, archived at <http://perma.cc/3XB3-X2CA>.

<sup>289</sup> See *Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type: Fiscal Year 2014* \*2, archived at <http://perma.cc/NW4J-ZBXH> (“2014 Drug Sentences Relative to the Guidelines Range”).

<sup>290</sup> See *Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type: Fiscal Year 2015* \*2, archived at <http://perma.cc/G9RE-Z8YG>.

<sup>291</sup> See *id.*

<sup>292</sup> See *2014 Drug Sentences Relative to the Guidelines Range* at \*2 (cited in note 289).

regimes created by the states. This argument has some force. Indeed, at its logical extreme this argument would suggest that the status quo of selective federal enforcement is exactly what should be happening. There are several issues with this interpretation, however. First, this could lead to the creation of fifty wildly different sentencing regimes, based purely on the intricacies of state law and policy. This issue is already arising in the current system, because current federal nonenforcement requires “unambiguous compliance” with state law.<sup>293</sup> This means not only that growers and distributors face harsh sentences<sup>294</sup> if they are found to have sold marijuana for recreational use in a state where only medical use is permitted, but that those same sentences could be imposed if they are out of line with any of the specific nuances of state law, which otherwise have little to do with traditional notions of marijuana’s harmfulness.<sup>295</sup>

Proponents of this selective nonenforcement might also argue that this is no different from prosecutors exercising their discretion differently in various jurisdictions. Smaller crimes in busier districts might not be prosecuted as vigorously as they are in other districts. The difference here is the institutionalized and disparate nature of the nonenforcement. This is not a local office deciding to focus on some crimes deemed of more local import; it is a centrally made decision to disparately enforce the law on a national level, to the disproportionate benefit of white citizens and the disproportionate detriment of black ones.

#### B. Three Possible Solutions: Full Enforcement, No Enforcement, and the Middle Ground

While there are an infinite number of possible solutions to the problem created by the interaction of federal nonenforcement of marijuana laws and the § 3553(a) sentencing factors, all of

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<sup>293</sup> See *Ogden Memo* (cited in note 109).

<sup>294</sup> Commercial-level growers and distributors of marijuana could face potentially mammoth amounts of jail time because the Guidelines suggest offense level by drug weight. See, for example, John Ingold, *A Colorado Marijuana Guide: 64 Answers to Commonly Asked Questions* (Denver Post, Dec 31, 2013), archived at <http://perma.cc/YEE8-QR38> (noting that some recreational stores can have up to 10,000 marijuana plants, equivalent to 1,250 pounds of marijuana, enough to invoke a mandatory minimum ten-year sentence and a \$10 million fine).

<sup>295</sup> For example, marijuana dispensaries in Colorado are allowed to operate only between the hours of 8 a.m. and midnight. See *id.* While making a sale at 7 a.m. might seem like a small slight of state law, it opens up the dispensary to the full brunt of federal prosecution, including possible mandatory minimum sentences.

these solutions lay between two extremes: total enforcement of the law and total abdication of enforcing the law. Both of these extremes are problematic, and so a middle ground solution is the most likely to satisfy the various competing interests at stake.

1. Both full enforcement and total nonenforcement of marijuana laws are possible, albeit problematic, solutions.

The preceding analysis proposes a solution with two logical extremes. One extreme would suggest that the federal government should fully enforce the marijuana laws in every state regardless of state laws, and the federal judiciary should strictly abide by the Guidelines in order to minimize sentencing disparities. At this extreme, no downward variance should be given for the seriousness of the offense without a more explicit federal directive that marijuana-based offenses should be deemed less serious crimes. This directive might come in the form of removal of marijuana from Schedule I of the Controlled Substances Act. This solution, however, is essentially a return to the mandatory regime invalidated by *Booker*, and under that regime the issue of disparate enforcement against African Americans was in full force.<sup>296</sup> With respect to marijuana, this racially disparate enforcement might seem especially problematic. Given the demographics of the states that have passed some form of legalization,<sup>297</sup> the suggestion might be that the political will to continue marijuana enforcement is not based in the majority's disapproval of marijuana, but in the desire to criminalize racial minorities.<sup>298</sup>

The other extreme solution says that if the Department of Justice is willing to forego prosecution of marijuana laws in some

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<sup>296</sup> See Part I.B.

<sup>297</sup> See Humphreys, *Persistent Racial Differences under Softening Marijuana Enforcement* (cited in note 264).

<sup>298</sup> This is in no way meant to posit that this is actually what is happening. There are, of course, alternate, nonracial, possible explanations for the geographic regions that have legalized marijuana. More religious citizens, for instance, tend to be less likely to use or have experimented with marijuana, and so states with an outsized proportion of religious citizens may be more likely to continue prohibition. See McCarthy, *More Than Four in 10 Americans Say They Have Tried Marijuana* (cited in note 156). For the purposes of this Comment, whether or not race-based reasoning is actually underlying this trend is less important than the optics and potential interpretation. Given the country's past treatment of African Americans in the area of drug criminalization, see Part III.A, a perceived racial intent could lead to a diminution of respect for the law of federal sentences, a factor courts are statutorily required to consider. See 18 USC § 3553(a)(6).

states, it should, absent exceptional circumstances, forego prosecution in all states and leave the prosecution of marijuana-based crimes to state and local prosecutors. Under this solution, any federal marijuana-based crimes that were prosecuted (for example, interstate trafficking offenses or marijuana charges brought as part of charging a conspiracy to commit other federal crimes) would receive sentences that attempted to treat those crimes as if the marijuana-based component did not occur. This solution is problematic in several ways. First, unless “exceptional circumstances” was interpreted incredibly broadly, crimes that need to be deterred at the federal level would be left undeterred. Depending on the definition of “exceptional circumstances” under this hypothetical test, a large number of crimes that cannot be fully or properly prosecuted on the state level could go unprosecuted, and therefore undeterred. Second, complete federal nonenforcement could promote an equal or greater disrespect for the rule of law than either selective enforcement or full enforcement. In a similar vein, nonenforcement also suggests a wild abuse of discretion by federal officials, and could lead to a standard of selective nonenforcement for any number of laws, depending on which way the political winds might blow. This differs from the discretion afforded the federal judiciary. Unlike federal judges, federal prosecutors are not hired with lifetime tenure and have their discretion curtailed and guided by the attorney general, who is a political appointee.

2. Large downward variances from the Guidelines, resulting primarily in noncustodial sentences, are the optimal solution to selective federal enforcement.

As is often the case, the best solution is probably somewhere in the middle. The lessons of the Fugitive Slave Laws suggest that the Department of Justice should continue to allow states to experiment with various forms of legalization, as those states’ citizens would prefer. In the case of both the Fugitive Slave Laws and marijuana legalization, the federal government could either preempt state will through strict enforcement or allow the states to experiment as they please. The history of the Fugitive Slave Laws suggests that to the extent that the will of the states can be implemented while minimizing external harm, the federal government should allow that experimentation to occur. In the Fugitive Slave Laws context, that meant allowing Northern states to circumvent the Fugitive Slave Laws while still formally keeping a

procedure for returning escaped enslaved persons in place as an appeasement for the Southern states. Additionally, this early regime afforded greater protection of the rights of free African Americans.

The current status of federal nonenforcement of marijuana laws is akin to the first Fugitive Slave Law. The draconian nature of the Fugitive Slave Law of 1850, however, increased the likelihood of conflict. Although it seems unlikely that full enforcement of federal marijuana laws would lead to another Civil War, given that states began passing marijuana legislation before any indication of federal permissiveness, continued experimentation with legalization seems possible even in the face of extreme federal enforcement. Because extreme federal enforcement would, by definition, mean utilizing federal law enforcement officials to shut down state-legal businesses, the reality of police raids on people once considered entrepreneurs could seem draconian in a similar way as the Fugitive Slave Law of 1850 did in its time. This could foment resentment and resistance toward the federal government.

Moreover, both drug crimes and the Fugitive Slave Laws are examples of federal law providing an overlay on subjects largely considered the province of the states.<sup>299</sup> This connection suggests that the lessons from the Fugitive Slave Laws may be especially relevant to the marijuana realm. Indeed, this connection illuminates an important difference between marijuana enforcement and the Fugitive Slave Laws. While both situations provide examples of the federal government imposing on a particular subject matter otherwise dominated by the states, interstate conflict is relatively absent in the context of marijuana legalization. As such, when the Fugitive Slave Laws failed at assuaging the conflict between states, the backlash caused the states to turn on each other. Federal marijuana enforcement, however, sets up a conflict primarily between the state and the federal government. Any potential backlash by the states would, therefore, likely take aim at federal policy. Indeed, the roots of this revolt can be seen in Washington, DC. After the city legalized recreational marijuana in 2014 by popular initiative, Congress used its power over the city's budget to block the implementation of a regulatory regime

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<sup>299</sup> The vast majority of people who interact with the criminal justice system come into contact with it on the state level. See Lauren E. Glaze and Danielle Kaebler, *Correctional Populations in the United States, 2013* \*12 (Bureau of Justice Statistics, Dec 2014), archived at <http://perma.cc/7CUX-UUMP> (noting that of over 2 million inmates incarcerated in 2013, only approximately 215,000 were in federal prisons).

for marijuana sales.<sup>300</sup> In response to this obstruction, the city developed a “gift economy” in marijuana,<sup>301</sup> and, in 2016, it mounted a successful legal challenge that would effectively overturn the congressional-funding blockade.<sup>302</sup>

In states that have not passed laws legalizing marijuana in any form, the 2013 Cole Memo provides a structure for curtailing prosecutorial discretion that could lead to either unwarranted sentencing disparities or overly harsh prosecutions in the regime of selective enforcement. Additionally, applying the general structure of the 2013 Cole Memo in those states that have not legalized marijuana ensures that any harm caused by the lack of a state regulatory regime is minimized.

For those cases that are prosecuted under this regime, this Comment’s analysis suggests that to the extent the defendant’s crime is the possession or distribution of marijuana, judges should impose a noncustodial sentence. This noncustodial solution takes as its inspiration the outcome of *Gall*.<sup>303</sup> In that case, a defendant for whom the Guidelines recommended years of imprisonment instead received a noncustodial sentence because the district court recognized that a faithful application of the § 3553(a) factors did not require imposing a term of imprisonment.<sup>304</sup> As a statement of law, this case can simply be said to stand for the proposition that although the Guidelines may be a touchstone, they cannot restrain the court from instituting a sentence based on a full application of § 3553.<sup>305</sup> More fundamentally, this noncustodial baseline attempts to prevent the extreme outcome that a deprivation of liberty through incarceration represents for defendants convicted of actions that both the American populace and the Department of Justice have deemed not to warrant prosecution in many circumstances. From this baseline, custodial

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<sup>300</sup> See Aaron C. Davis, *Budget Bill Outlaws Pot Sales in D.C. for 2 Years* (Wash Post, June 11, 2015), archived at <http://perma.cc/GW7H-A8SR>.

<sup>301</sup> Josh Barro, *Can Washington’s Gift Economy in Marijuana Work?* (NY Times, Mar 20, 2015), online at <http://www.nytimes.com/2015/03/21/upshot/can-washington-dcs-gift-economy-in-marijuana-work.html> (visited May 20, 2016) (Perma archive unavailable).

<sup>302</sup> See Chloe Sommers, *D.C. Superior Court Clears Hurdle for Legal Marijuana Sales* (Marijuana Times, Mar 30, 2016), archived at <http://perma.cc/864E-LN4R> (discussing the history of marijuana legalization in Washington, DC, and the court decision that returned budget autonomy to the city from Congress). See also generally *Council of the District of Columbia v Dewitt*, 2016 WL 1109117 (DC Super).

<sup>303</sup> See *Gall*, 552 US at 53–56.

<sup>304</sup> *Id.* (discussing Gall’s reformation from his criminal past and withdrawal from the drug conspiracy at issue).

<sup>305</sup> See *id.* at 46–50, 53–56.

sentences may be appropriate for acts such as targeting sales to children or using weapons or violence while pursuing the goal of distribution.<sup>306</sup>

These primarily noncustodial sentences still ensure a level of deterrence against crimes that are best prosecuted at the federal level and recognize the importance of punishment in the face of a violation of the rule of law. These offenders will still suffer the harms that occur from a federal criminal (and likely felony) conviction,<sup>307</sup> as well as the numerous noncustodial restrictions that a district court is able to impose on a defendant. These restrictions might include a lengthy term of probation, with any number of defendant-specific conditions such as mandatory drug testing, drug treatment, and limitations on contact with certain individuals.<sup>308</sup> This also properly accounts for the seriousness of the offense by recognizing that although a majority of the adult population favors legalization of marijuana, that desire may not yet be recognized in an enactment of Congress due to anomalies in the political process that lead political actors to pursue tough-on-crime policies that the national majority does not prefer.

Additionally, if large variances from the Guidelines in these cases become the norm, they could, as they did in the crack ratio cases, fulfill the ideal of the feedback loop between the district courts and the Commission that the Guidelines originally envisioned. When functioning properly, this feedback loop has the opportunity to cause both the Commission and Congress to reevaluate the state of marijuana sentencing using the empirical methods that the Commission was designed to implement. Indeed, for the first time since the passage of the Anti-Drug Abuse Act of 1986, it appears that both of these bodies may be amenable to a serious departure from the current state of the Guidelines.

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<sup>306</sup> See, for example, USSG § 2D1.1(b)(1) (increasing the potential sentence of a drug trafficking defendant for possessing a dangerous weapon in the commission of the offense); USSG § 2D1.1(b)(2) (increasing the potential sentence for a drug trafficking defendant if she “used violence, made a credible threat to use violence, or directed the use of violence”).

<sup>307</sup> For a thorough examination of the negative impact that a criminal conviction can have on a defendant, including the vast array of collateral consequences felons face, see generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2010); David J. Norman, Note, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 Quinnipiac L Rev 985 (2013).

<sup>308</sup> See, for example, *Hanson*, 561 F Supp 2d at 1012 (explaining the additional strictures imposed upon the defendant during his noncustodial supervised release term following his term of imprisonment).

Although this Comment has focused primarily on § 3553(a)(2)(A) and § 3553(a)(6), this solution establishes a baseline that comports with the other sentencing factors in a typical case of marijuana distribution. By utilizing the full range of non-custodial options available, the requirement to avoid a sentence greater than necessary is fulfilled,<sup>309</sup> as is the required consideration of the “kinds of sentences available.”<sup>310</sup> Additionally, the strictures of probation can ensure a proper level of deterrence, can be tailored to ensure that society is “protect[ed] . . . from further crimes of the defendant,” and can require the defendant to undergo necessary self-improvements.<sup>311</sup> Finally, by accounting for the disparities created by federal nonenforcement and evolving sentiment surrounding marijuana, this solution ensures that imposed sentences promote respect for the law by comporting with the majority of the populace’s sense of justice.<sup>312</sup> Perhaps most importantly, by focusing primarily on what should occur based on only two of the § 3553 factors in a mine-run case, this solution leaves substantial leeway for sentencing judges to exercise their discretion in ensuring that a defendant is treated with the individualized assessment required by Congress and the Supreme Court’s sentencing jurisprudence.

Critics of this solution might come from both ends of the legalization spectrum. An advocate for legalization might argue that this solution still creates sentencing disparities between like actors. While this is true, the only way to totally avoid sentencing disparities in this realm is to create either a prosecution regime that operates without regard to state law or a sentencing regime in which guilty defendants receive no judicially imposed punishment. A prosecution regime that operates without regard to state law falls within the realm of prosecutorial discretion, and is akin to the extreme no-punishment solution described above. The second possibility, of no judicially imposed punishment whatsoever, is likely to be viewed as an abuse of discretion by appellate courts, and could lead to the perception that the judiciary does not respect the rule of law it is meant to uphold. A tangible, yet noncustodial, sentence avoids these issues.

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<sup>309</sup> 18 USC § 3553(a).

<sup>310</sup> 18 USC § 3553(a)(3).

<sup>311</sup> 18 USC § 3553(a)(2)(B)–(D).

<sup>312</sup> See 18 USC § 3553(a)(2)(A) (requiring judges to take into account the need for the sentence “to promote respect for the law, and to provide just punishment for the offense”).

Legalization opponents might argue that this solution does not do enough to either deter or punish marijuana offenders, especially those operating large-scale growth and distribution rings. This argument is problematic because it underestimates the grievous negative impact and long-lasting effects that noncustodial punishments can have, including collateral consequences like the denial of political participation,<sup>313</sup> as well as the potential for incarceration if the defendant violates the terms of her parole. Therefore, even if an opponent of legalization believed that nothing short of a lengthy term of incarceration was appropriate to protect society from marijuana offenders, this solution should assuage her concern because those offenders who violate the terms of their probation will face prison time, and those offenders who do not violate the terms of their probation will be acting well within society's expectations of its citizens. Additionally, this argument ignores that the only difference between a marijuana distribution ring that commits no other crimes and any other business is the product being sold. This middle ground solution thus treats marijuana-based and non-marijuana-based businesses substantially similarly, while still allowing for enhanced punishment if a marijuana-based business engages in especially harmful activities, like sales to children, or if participants commit other crimes in their attempt to distribute marijuana.

#### CONCLUSION

State marijuana legalization has created a direct conflict with federal drug laws. In response, various actors within the federal government have adopted a policy of toleration of this conflict through selective enforcement of the federal drug laws involving marijuana. This policy, however, has created a problem for the federal judiciary. The statutory sentencing factors require district courts to avoid unwarranted sentencing disparities and to ensure that sentences reflect the seriousness of the offense. Because individuals possessing and distributing marijuana are now considered legal business owners by the federal government in some states, and felons in others, the judiciary is placed at a crossroads when sentencing a defendant for a marijuana-based crime.

This Comment provides a potential solution to this issue. By taking lessons from history—including the treatment of the Fugitive

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<sup>313</sup> See Nora V. Demleitner, "Collateral Damage": *No Re-entry for Drug Offenders*, 47 *Vill L Rev* 1027, 1040–41 (2002).

Slave Laws by the federal and state governments, the federal judiciary's rebellion against the infamous 100-to-1 crack-powder cocaine ratio implemented by Congress and adopted by the Guidelines, and the judiciary's current treatment of the Guidelines' child pornography possession recommendations—it is possible to fashion a solution to this issue that respects state autonomy, while still accounting for the need to deter and punish violators of federal drug laws.

Ultimately, this Comment provides only a framework and baseline, as the need to sentence a defendant based on her specific, individual actions and characteristics has long been enshrined in this country's jurisprudence. Any potential solution, however, should involve consistent—and often large—downward variances from the current Guidelines range for marijuana sentences. In light of the Department of Justice's willingness to almost completely forego enforcement of these laws in some states, and the rapidly decreasing seriousness of marijuana possession and distribution in the eyes of the American public, this Comment ultimately concludes that in the core marijuana distribution prosecution, a noncustodial sentence is appropriate regardless of the drug weight at issue.

This solution focuses on the judiciary for three distinct and important reasons. First, when creating the Guidelines, the Commission envisioned the federal district courts playing an important role in the Guidelines' evolution. By providing feedback through careful analysis in its sentencing decisions, and by varying from the Guidelines when appropriate, the judiciary gives the Commission the data necessary to increase the accuracy of the Guidelines' sentencing recommendations. Second, as members of the federal judiciary, sentencing judges are free from the pressures that cause political actors to distort the will of the populace, and can therefore exercise their discretion to ensure a just result. Finally, and perhaps most importantly, the judiciary has long recognized its role in ensuring that this country's minorities are not subject to the tyranny of the majority. For much, if not all, of their duration, the overwhelming weight of the federal drug laws and the accompanying Guidelines has fallen on the shoulders of African Americans and other minorities. This was true in the realm of crack cocaine sentencing, and it is true of marijuana sentencing. Left unchecked, selective enforcement of marijuana laws could create a world in which it primarily is white citizens who reap the

economic benefits of legalization, while it disproportionately is African American defendants who continue to be imprisoned for the same activities. It is therefore incumbent on the federal judiciary to do what it can to ensure that any disparate enforcement of the federal criminal laws is minimized to the extent possible. Through § 3553(a), it has the tools to do so.