

BOTTOM-UP FEDERAL SENTENCING REFORM

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ABSTRACT

Today, about 160,000 people live behind the bars of a federal prison. That is roughly the population of Alexandria, Virginia. Starting from the premise that the federal system's contribution to mass incarceration should be curbed and recognizing that broad legislative reform seems unlikely, this Article considers the federal judiciary's potential role in sentencing reform.

Bottom-up sentencing reform consists of federal trial judges exercising their decisional authority in individual cases to engage with the fundamental premises and assumptions that underlie traditional sentencing decisions, categorically rejecting them when appropriate. This approach to reform is available under current law. In fact, a few prominent examples of this type of reform already exist. This Article proposes expanding those existing models and concludes that the benefits of more ambitious judge-led reform are not offset by potential critiques. In the absence of top-down reform, federal trial judges should use their discretion and fact-finding power to reform federal sentencing.

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INTRODUCTION

The most obvious way to curb the federal system's contribution to mass incarceration is top-down reform. Congressional action via legislation, the adoption of new charging policies by the United States Attorney General, or amendments to the Federal Sentencing Guidelines (Guidelines) by the United States Sentencing Commission would immediately transform federal sentences on a nationwide basis.¹ No doubt, comprehensive reform of that kind is needed. Yet sometimes lost in discussions about responses to mass incarceration is the system's built-in capacity for internally generated change via bottom-up reforms.² Bottom-up sentencing reform can be accomplished in the federal system by low-level actors making specific policy decisions through the legitimate exercise of existing discretion.³

This Article explores bottom-up federal sentencing reform, both as it exists today and how it could be expanded under current law. Part I defines the concept of bottom-up sentencing reform and distinguishes it from other phenomena. Part II explores three models of bottom-up reform. Part II.A discusses the version of bottom-up

1. See generally AMES C. GRAWERT, NATASHA CAMHI & INIMAI CHETTIAR, BRENNAN CTR. FOR JUST., A FEDERAL AGENDA TO REDUCE MASS INCARCERATION (2017), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-reduce-mass-incarceration> [<https://perma.cc/3G9D-7FFD>] (offering solutions to reduce mass incarceration, including through congressional legislation and Justice Department policy changes); Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration*, AM. CONST. SOC'Y BLOG (Jan. 23, 2018), <https://www.acslaw.org/expertforum/how-congress-the-u-s-sentencing-commission-and-federal-judges-contribute-to-mass-incarceration/> [<https://perma.cc/2PYC-SFWW>] (explaining how Congress and the U.S. Sentencing Commission have failed to act towards ending mass incarceration).

2. See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999).

3. See Vincent Schiraldi & Judith A. Greene, *Better by Half*, MARSHALL PROJECT (Oct. 28, 2016, 12:00 PM), <https://www.themarshallproject.org/2016/10/28/better-by-half> [<https://perma.cc/65GX-CEKS>] (attributing New York City's reversal of mass incarceration to "bottom-up" reform from grassroots advocacy organizations and responsive public officials); Andrea Kupfer Schneider & Cynthia Alkon, *Our Criminal Legal System: Plagued by Problems and Ripe for Reform*, AM. BAR ASS'N DISP. RESOL. MAG. (Jan. 28, 2020), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/our-criminal-legal-system/ [<https://perma.cc/TE6Q-MM3P>] (explaining how criminal legal system reform can occur "bottom up" when "driven by non-profit[s], litigants, court administrators, and community groups").

reform that is widespread today, under which district judges identify ways in which specific provisions of the Guidelines create injustice and impose sentences outside the range recommended by the Guidelines as a way of rejecting or correcting the flawed Guideline provision. Part II.B suggests a related but expanded model for bottom-up reform under which trial judges account for how the Guidelines affect not merely sentences but the federal criminal legal system writ large. This Part proposes addressing the problem of the vanishing criminal trial by encouraging trial judges, at sentencing, to explore the relationship between the federal system's guilty-plea rate of 98 percent and a Guideline provision that recommends imposing longer sentences on defendants who go to trial than on those who demonstrate "acceptance of responsibility" by pleading guilty.⁴ Part II.C previews a reform model that would lead sentencing judges to explore fundamental questions that lie at the heart of sentencing policy. For example, judges might use an evidence-based lens to determine whether and to what extent imprisonment advances the statutory goals of sentencing or consider evidence about neuroscience and the nature of human behavior to assess whether retribution is ever a defensible justification for increased imprisonment.⁵ Part III discusses potential benefits and criticisms of bottom-up sentencing reform.

In the end, sentencing reform led by federal district court judges has limitations.⁶ It will not immediately transform the system or end any problem quickly, including that of mass incarceration.⁷ Still, bottom-up reform would generate value today and holds

4. See U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2021).

5. See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 586-88 (2009); John S. Callender, *Neuroscience and Criminal Justice: Time for a "Copernican Revolution?"*, 63 WM. & MARY L. REV. 1119, 1155-56 (2022).

6. For examples of limitations of sentencing reform led by federal district judges, see Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 HASTINGS L.J. 771, 794 (2018) (discussing the increase in inter-judge disparity in the post-*Booker* world); D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 88 (2007) (noting that Congress could act to limit judicial discretion in sentencing if the judiciary takes its discretion "too far").

7. See Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283, 288-89 (2020) ("[J]udicial action is not a cure for Congress' inaction.").

promise for the future. It should at least be part of the broader discussion around federal sentencing reform.

I. BOTTOM-UP SENTENCING REFORM

A. *Defining the Concept of Bottom-Up Sentencing Reform*

Bottom-up sentencing reform occurs when, through the legitimate exercise of their decisional authority in a case, trial judges engage with and reject—often categorically—fundamental premises that underlie traditional sentencing decisions.⁸ In this sense, “bottom” refers to the reformer’s position in the structural scheme.⁹ In the federal system, district judges who preside over sentencing in the trial court form the judiciary’s sprawling base.¹⁰ Beneath the intermediate appeals courts, district courts are even further removed from the all-powerful Supreme Court.¹¹ Yet only district courts can engage in fact-finding.¹² And they are vested with enormous discretion in sentencing.¹³ Thus, while bottom-up reform is initiated

8. See *supra* note 3 and accompanying text.

9. See *supra* note 3 and accompanying text. See generally *Introduction to the Federal Court System*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/federal-courts> [<https://perma.cc/G67P-Z4WB>].

10. See generally U.S. DEP’T OF JUST., *supra* note 9; *About Federal Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [<https://perma.cc/7TVN-7KTZ>].

11. Similarly, a line Assistant United States Attorney has any number of decision makers above her, running from local supervisors, to the United States Attorney, and all the way up to the Attorney General. See Department of Justice Organizational Chart, U.S. DEP’T OF JUST. (Aug. 17, 2023), <https://www.justice.gov/d9/2023-09/DOJ%20-%20AG%20signed%20%20Approved%2008.17.2023.pdf> [<https://perma.cc/YY36-G64Y>]. Like district judges, line prosecutors act at the lowest level in their hierarchical structures and enjoy an enormous degree of discretion. *The Role of the Prosecutor*, VERA INST. JUST., <https://www.vera.org/unlocking-the-black-box-of-prosecution-for-communitymembers#:~:text=Line%20prosecutors%20are%20responsible%20for,key%20decisions%20of%20their%20cases> [<https://perma.cc/Q43X-MNF2>] (explaining the areas of decision-making in which line prosecutors exercise discretion). Decisions over the charges to be brought (including whether to bring charges with mandatory minimum sentences attached) and what plea offers to make are matters of prosecutorial discretion almost entirely insulated from judicial review. See *id.* This Article focuses on sentencing reform implemented by district judges, but similar concepts can apply to line prosecutors.

12. See *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/ER3F-HVAT>].

13. See Zunkel & Siegler, *supra* note 7, at 303-04.

from the lowest levels of the organizational chart, the power structure is such that district judges have more authority to shape sentencing policy than their colleagues reviewing cases on appeal.

1. Implemented (Not Advocated) Through Decision-Making

Bottom-up federal sentencing reform by district judges—at least as described here—is implemented through the judge’s legitimate decisional authority in a case.¹⁴ It is therefore different from the phenomenon of district judges advocating for reforms that are within the domain of Congress or the executive branch.¹⁵ Trial judges sometimes act as advocates for reform.¹⁶ They articulate reformist views in law review articles, op-eds, or even as dicta in decisions.¹⁷ *United States v. Young* is a good example of a sentencing judge advocating for reform.¹⁸ In that case, Judge Mark Bennett engaged in a thoughtful, lengthy, and well-researched examination of the Department of Justice’s use of recidivist enhancements under § 851 to increase mandatory minimum penalties in drug trafficking cases based on a defendant’s prior conviction for a qualifying drug offense.¹⁹ The opinion analyzed the history of the enhancement, discussed the absence of DOJ policy guidance about when prosecutors should apply it, and waded through data showing how the rates at which prosecutors filed § 851 enhancements varied widely based on the district in which a defendant happened to be charged.²⁰ The *Young* opinion highlighted a systemic problem and suggested specific reform proposals.²¹ Yet Judge Bennett ultimately acknowledged

14. *See id.*

15. *See, e.g.,* Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 190-91 (2018) (discussing nondecisional engagement by lower court judges).

16. *See* Jessica A. Roth, *Jack Weinstein: Reimagining the Role of the District Court Judge*, 33 FED. SENT’G REP. 163, 164 (2021) (collecting district court opinions expressing disagreement with applicable mandatory minimums or government charging decisions).

17. *See* Roth, *supra* note 15, at 191 (“Although some of it occurs in the context of judicial opinions, much of it is set forth in dicta. Some of it also occurs outside of judicial opinions entirely—e.g., in extrajudicial speeches and writings, through the issuance of individual court rules, or otherwise cajoling other local actors.”).

18. 960 F. Supp. 2d 881, 903-04 (N.D. Iowa 2013) (Bennett, J.).

19. *Id.* at 902-03.

20. *Id.* at 886-89, 891-92, 902-03.

21. *Id.* at 903-07.

that because “Congress has delegated § 851 enhancement decisions exclusively to federal prosecutors,” federal district judges “are powerless to do anything but complain about arbitrary application of § 851 enhancements.”²² The *Young* decision is an example of one institutional actor calling for reform by another institutional actor.

But advocating for sentencing reform is different from implementing it. To implement reform, the policy under review must be within the trial judge’s legitimate authority to apply or reject.²³ In *Kimbrough v. United States*, for example, District Judge Raymond A. Jackson analyzed the Guidelines’ 100-to-1 crack-to-powder ratio that irrationally punished crack offenses far more harshly than offenses involving powder cocaine.²⁴ Rather than writing an opinion that advocated for the Sentencing Commission or Congress to change that ratio, Judge Jackson rejected the ratio himself and imposed a sentence consistent with that policy judgment.²⁵ In *Young*, the district court was powerless to implement reform, left only to advocate for it. Yet in *Kimbrough*, the law enabled the district court to identify the need for reform and implement that policy through its legitimate decisional authority in the case before it.²⁶ This Article focuses on the implementation of reform by trial judges.

2. Based on Categorical Judgments Rather Than Individualized Circumstances

This Article’s use of the term “reform” is intended to invoke the policy-level nature of a trial judge’s reasoning.²⁷ Bottom-up sentencing

22. *Id.* at 903.

23. See Zunkel & Siegler, *supra* note 7, at 317 (describing district courts’ authority to vary from guidelines based on policy disagreements); Berman, *supra* note 2, at 111 (“[F]ederal judges have opportunities in every sentencing case to contribute their insights and wisdom concerning the development of the rules governing sentencing policy and practice.”).

24. 552 U.S. 85, 93, 110-11 (2007).

25. *Id.* at 111.

26. *Id.* at 110-11.

27. The concept of bottom-up reform discussed in this Article, by its terms, accepts and is intended to operate as part of the existing federal criminal legal system. Through the mechanisms described in this Article, courts can question fundamental premises of the system, or not. In any event, this Article’s use of the term “reform” is not meant to convey a position on the relative merits of traditional reforms and nonreformist reforms. See Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2502, 2507, 2511, 2527, 2562, 2575 (2023) (explaining that nonreformist reforms entail

reform occurs when low-level decision makers publicly announce policy judgments that predictably inform their use of discretion going forward.²⁸ This must be distinguished from sentencing judges who generally sympathize with the goal of sending fewer people to prison for less time, even if they tend to make decisions consistent with that worldview. Judges who routinely impose light sentences are not engaging in “reform” if they view the Federal Sentencing Guidelines as inherently valuable, uncritically accept the traditional premises of modern sentencing, seemingly walk through the same kind of analysis as their longer-sentencing colleagues, and merely arrive at different results because they weigh the equities differently. Reformist judges are doing something different, not merely getting different results using the same analysis.

In that way, the reform contemplated by this Article can be contrasted with what Judge Stefan Underhill calls “everyday sentencing reform.”²⁹ Judge Underhill argues for a category of reform that is achieved by on-the-ground participants in the system “simply ... doing their jobs differently.”³⁰ The premise underlying the kind of reform suggested by Judge Underhill “is that true justice requires that defendants be treated as individuals, that their conduct, background, and attitude be evaluated individually and in context, and that sentences be meted out one by one.”³¹ This Article concentrates on the inverse type of reform; that is, instances in which trial judges engage factually with the fundamental premises or assumptions underlying traditional sentencing decisions and address those issues on categorical bases.

This is not to say that individualized analysis at sentencing should be abandoned. A defendant’s individual characteristics and the context for the offense are indispensable factors at sentencing.³² However, the reform envisioned by this Article involves examination not of individualized facts or circumstances, but of the policies,

abolishing or undermining the legitimacy of an existing system, while traditional reforms embrace or acquiesce in an existing system’s normative premises).

28. See, e.g., Zunkel & Siegler, *supra* note 7, at 319-21, 328 (illustrating bottom-up sentencing reform in the context of drug guidelines).

29. Stefan R. Underhill, *Everyday Sentencing Reform*, 87 UMKC L. REV. 159, 159 (2018).

30. *Id.*

31. *Id.*

32. *Id.*

Guideline provisions, and dogma that underlie sentencing decisions in every case. In the context of federal sentencing—in which the district court is empowered to find facts and is vested with vast discretion—engagement with these ideas at a conceptual level through the exercise of decisional authority in individual cases can reform the system from the bottom up.³³

B. Distinguishing Reform From Activism

Bottom-up sentencing reform requires active engagement by the district judge, but it would be misleading to call this judicial activism, at least insofar as that term suggests that the court is acting outside the scope of its legitimate authority. Existing law vests trial judges with discretion at sentencing.³⁴ Bottom-up reform is implemented by judges exercising that discretion in specific ways when resolving actual cases and controversies before them.³⁵ The novelty here lies in how judges use their fact-finding power and discretion. But bottom-up reform does not involve judges assuming a power they lack.³⁶ That is one reason why bottom-up sentencing reform has such potential; it is a legitimate feature of the existing legal system.³⁷ The key to distinguishing bottom-up sentencing reform from more problematic forms of judicial activism is to understand how fact-finding and discretion play critical roles in a district judge carrying out her statutory directive at sentencing under today's law.

1. A Brief History of Sentencing Discretion

The amount of discretion afforded to district judges at sentencing has changed dramatically over time. In a series of events that feel more like whiplash than ebbs and flows, trial judges went from enjoying almost unfettered sentencing discretion for most of the 20th century, snapped to having very little discretion after passage of the

33. See *id.* at 167; MICHAEL A. FOSTER, CONG. RSCH. SERV., LSB10191 JUDICIAL FACT-FINDING AND CRIMINAL SENTENCING: CURRENT PRACTICE AND POTENTIAL CHANGE 2 (2018).

34. See FOSTER, *supra* note 33, at 3 (describing the Federal Sentencing Guidelines' allowance for judges to consider facts and circumstances not proven to a jury).

35. See *supra* Part I.A.

36. See FOSTER, *supra* note 33, at 2-3.

37. See *infra* Part I.B.2.

Sentencing Reform Act of 1984, and then regained most (but not all) of that discretion in a series of Supreme Court decisions starting with *Booker* in 2005.

Pre-Guidelines federal sentencing was defined by vast district court discretion, as described by Justice Blackmun in *Mistretta v. United States*.³⁸ “For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long.”³⁹ As Professor Berman describes it, “vast discretion was the hallmark of federal sentencing” in this era.⁴⁰ Under a regime focused on rehabilitation, district judges imposed sentences and parole boards released people back into the community after they had served as little as one-third of their sentence.⁴¹ During this era, “[t]here were few a priori rules or standards” and “to the extent there were standards, they evolved from the day-to-day experience of sentencing individuals.”⁴² Sentencing decisions were subject to virtually no appellate review.⁴³

Then came the Sentencing Reform Act of 1984 (SRA), which created the Federal Sentencing Guidelines and eliminated meaningful district court discretion at sentencing.⁴⁴ In response to a wave of criticism led by Judge Marvin E. Frankel,⁴⁵ and with momentum toward broader crime legislation gaining force within the Reagan administration,⁴⁶ the SRA drastically transformed

38. 488 U.S. 361, 363 (1989).

39. *Id.*

40. Berman, *supra* note 2, at 94.

41. *Id.* (citing KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 19-22 (1998)).

42. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010).

43. “In the federal system, a ‘doctrine of non-reviewability’ prevailed from 1891 until 1987, when the Federal Sentencing Guidelines became effective.” Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1444 (1997).

44. S. REP. NO. 98-225, at 38-39 (1983).

45. See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-11 (1973).

46. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 261-66 (1993) (discussing other aspects of the omnibus crime bill enacted as the 1984 Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837 (1984)).

federal sentencing law. A leading objective of the SRA was to eliminate what legislators and commentators perceived as grossly disparate sentences being imposed on defendants who seemed similarly situated.⁴⁷ If sentencing disparity was the problem, discretion was to blame. The relevant Senate report concluded that

[t]hese disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.⁴⁸

The SRA “aimed to replace the discretion of individual judges with centralized decision-making by a Sentencing Commission, which would settle questions of policy in a uniform way through research, deliberation, and rule-making.”⁴⁹

The SRA also changed the trial judge’s goal at sentencing. The system had been based on a rehabilitation model that the Senate committee report endorsing the SRA criticized as “outmoded.”⁵⁰ After the SRA, the theoretical goal of federal sentencing was to achieve adequate deterrence, incapacitation, just punishment, and rehabilitation.⁵¹ In two different provisions, the SRA rejected the use of imprisonment to achieve rehabilitation.⁵² Otherwise, these

47. Kenneth Feinberg, self-described as “a primary drafter of earlier versions of the Sentencing Reform Act of 1984” who served as Special Counsel to the United States Senate Judiciary Committee from 1975 through 1980, recounted a decade after the bill’s passage that “eliminating the disparity problem” was clearly the main objective of the SRA: “[q]uite frankly, all other considerations were secondary.” Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 291, 295-96 (1993).

48. S. REP. NO. 98-225, at 38 (1983).

49. Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 254 (1999).

50. S. REP. NO. 98-225, at 38 (1983). The report rejected the rehabilitation model in part because “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.” *Id.* A model, according to the Senate Report, led to defendants convicted of the same crime with similar criminal histories receiving widely differing prison terms. *Id.*

51. 18 U.S.C. § 3553(a)(2).

52. As the Supreme Court recognized in *Tapia v. United States*, the SRA set out its rejection of imprisonment as a tool for rehabilitation in two places. 564 U.S. 319, 328-30 (2011).

four policy objectives stood on equal footing. As the Senate report noted, the bill “contains a congressional statement of four purposes of sentencing, and the Committee has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment.”⁵³ The Senate Judiciary Committee rejected calls to focus the sentencing court’s inquiry by deleting some of the objectives, or at least prioritizing them, landing instead on a version of the bill that reflected the Committee’s belief “that each of the four stated purposes should be considered in imposing [a] sentence in a particular case.”⁵⁴

In reality, however, trial judges needed to balance competing penological theories only at the margins. The United States Sentencing Commission, established by the SRA as an independent commission in the judicial branch,⁵⁵ promulgated sentencing guidelines to be used by sentencing judges in determining the appropriate length of a term of imprisonment.⁵⁶ The district court could exercise discretion when imposing a sentencing within that range, but the range was quite narrow by design.⁵⁷ Moreover, a sentencing court’s ability to sentence outside that range was highly limited.⁵⁸ In 2003, for example, less than 7 percent of federal defendants received sentences below the guidelines range that were not sponsored by

First, 18 U.S.C. § 3582(a) instructs sentencing courts to consider a number of factors in determining whether to impose a prison term and the length of such a term, but cautions the sentencing court to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” *Id.* at 326-27 (quoting 18 U.S.C. § 3582(a)) (alteration in original). Then, in 28 U.S.C. § 994(k), Congress directed the newly created Sentencing Commission to ensure that the Guidelines “reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” *Id.* at 329-30 (quoting 28 U.S.C. § 994(k)).

53. S. REP. NO. 98-225, at 67 (1983).

54. *Id.*; see Feinberg, *supra* note 47, at 299-300 (“While endorsing all four philosophical underpinnings of criminal sentencing—rehabilitation (except in the context of imprisonment), deterrence, incapacitation, and retribution—the SRA conspicuously failed to prioritize any one of the four.”).

55. 28 U.S.C. § 991(a).

56. *Id.* § 994(a)(1)(B).

57. With limited exceptions, if the Guidelines recommended imprisonment, the high end of the range could not exceed the low end “by more than the greater of 25 percent or 6 months.” *Id.* § 994(b)(2).

58. *United States v. Booker*, 543 U.S. 220, 234 (2005) (noting that “departures are not available in every case, and in fact are unavailable in most”).

prosecutors as a reward for cooperation.⁵⁹ As Justice Scalia observed, the sentencing ranges promulgated by the Commission were “given the modest name ‘Guidelines,’ [but] they have the force and effect of laws, prescribing the sentences criminal defendants are to receive.”⁶⁰ Judges who disregarded the Guidelines were reversed.⁶¹

In 2005, however, the once-mandatory Guidelines suddenly became advisory. In *United States v. Booker*, the Supreme Court held that the mandatory federal Guidelines, which increased a defendant’s sentence based on judge-found facts, violated the Sixth Amendment.⁶² The Supreme Court cured the Sixth Amendment problem by excising those parts of the SRA that made the Guidelines mandatory.⁶³ With the stroke of a pen, the Supreme Court rendered the Guidelines “effectively advisory.”⁶⁴ According to *Booker*, the law “requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.”⁶⁵ Appellate courts would ask merely whether sentencing decisions were “unreasonable.”⁶⁶ District court sentencing discretion was back.

2. *Kimbrough and Policy-Based Disagreement with the Guidelines*

The extent of district court discretion in sentencing became broader and clearer in post-*Booker* decisions such as *Kimbrough* and *Spears*.⁶⁷ *Kimbrough* addressed the sentencing judge’s power to categorically reject provisions of the Guidelines based on policy

59. U.S. SENT’G COMM’N, TABLE 25A, REASONS GIVEN BY SENTENCING COURTS FOR OTHER DEPARTURES BELOW THE GUIDELINE RANGE n.2 (2003), in SOURCEBOOK OF FED. SENT’G STATS., https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/table25A_0.pdf [<https://perma.cc/T9PG-2BZZ>] (“Of the 70,258 cases, 4,896 had a non-government initiated departure below the guideline range.”).

60. *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (citation omitted).

61. *Id.*

62. 543 U.S. 220, 226-27 (2005).

63. *Id.* at 245.

64. *Id.*

65. *Id.* at 245-46 (internal citation omitted).

66. *Id.* at 261.

67. See *Spears v. United States*, 555 U.S. 261, 263-66 (2009); *Kimbrough v. United States*, 552 U.S. 85, 101, 108, 111 (2007).

disagreements.⁶⁸ Long before *Booker*, the Guidelines' disparate treatment of crack cocaine and powder cocaine was the subject of extensive criticism, perhaps most notably by the Commission itself.⁶⁹ At that time, the Guidelines treated one gram of crack cocaine as equal to one hundred grams of powder cocaine.⁷⁰ For years, the Commission and commentators argued that this ratio overestimated the relative harm of crack and brought down unusually harsh penalties mostly upon lower-level defendants and racial minorities,⁷¹ yet the Guidelines retained the 100-to-1 crack-to-powder ratio.⁷²

In *Kimbrough*, Judge Jackson rejected the 100-to-1 ratio and imposed a sentence significantly lower than that which the Guidelines based on that ratio had recommended.⁷³ The sentencing court commented that Derrick Kimbrough's case exemplified the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing."⁷⁴ In a per curiam opinion, the Fourth Circuit vacated Kimbrough's sentence, holding that the sentencing court's disagreement with the crack-powder disparity was not a valid basis for imposing a sentence below the range recommended by the Guidelines.⁷⁵ The Supreme Court took the case and endorsed a district court's authority to impose sentences based on a categorical disagreement with a provision of the Guidelines.⁷⁶

A sentencing court's legitimate power to reject a Guideline provision both *categorically* and based on a *policy* disagreement was key to *Kimbrough's* holding.⁷⁷ As the Supreme Court later put it, "[t]hat was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based

68. *Spears*, 555 U.S. at 264-65.

69. Steven L. Chanenson, *Booker on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 561-64 (2006).

70. *Id.* at 559-60.

71. *See id.* at 562-64 (recounting criticism); *see also Kimbrough*, 552 U.S. at 97-100 (same).

72. Chanenson, *supra* note 69, at 565.

73. *Kimbrough*, 552 U.S. at 92-93.

74. *Id.* (quoting Joint Appendix at 72, *Kimbrough*, 552 U.S. 85).

75. *United States v. Kimbrough*, 174 F. App'x 798, 799 (4th Cir. 2006) (recognizing prior circuit precedent holding that "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses").

76. *Kimbrough*, 552 U.S. at 91, 101.

77. *Spears v. United States*, 555 U.S. 261, 264-66 (2009).

on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”⁷⁸ Any question whether *Kimbrough* authorized *categorical* policy disagreement was clarified by the Court’s decision in *Spears*, which emphasized that “district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.”⁷⁹

After the *Booker* revolution was complete in about 2011, the Supreme Court had clarified that although sentencing courts must use the Guidelines as the starting point,⁸⁰ they have vast discretion to issue non-Guidelines sentences: “a sentencing judge’s overarching duty under § 3553(a) [is] to ‘impose a sentence sufficient, but not greater than necessary,’ to comply with the sentencing purposes set forth in § 3553(a)(2).”⁸¹ On that point, recall that Congress wrote into § 3553(a)(2) almost every conceivable penological interest—deterrence, incapacitation, retribution, and rehabilitation.⁸² Another provision of the SRA instructs sentencing judges to impose a sentence that achieves those purposes “to the extent that they are applicable in light of all the circumstances of the case.”⁸³

3. The District Court’s Obligation to Engage with Policy Arguments

After *Kimbrough*, the notion that a district judge possesses the authority to implement bottom-up sentencing reform through deciding a case should be rather uncontroversial. Existing law gives sentencing courts broad policy-level discretion on two key dimensions.⁸⁴ First, trial judges have the power to reject Guideline

78. *Id.* at 264.

79. *Id.* at 265-66; *accord* *Pepper v. United States*, 562 U.S. 476, 501 (2011) (“[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views.”).

80. *Gall v. United States*, 552 U.S. 38, 49 (2007).

81. *Pepper*, 562 U.S. at 491; *id.* at 490 (“Accordingly, although the ‘Guidelines should be the starting point and the initial benchmark,’ district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for ‘reasonableness.’” (quoting *Gall*, 552 U.S. at 49-51)).

82. 18 U.S.C. § 3553(a)(2).

83. *Id.* § 3551(a).

84. *See Spears v. United States*, 555 U.S. 261, 264-66 (2009); 18 U.S.C. § 3553(a)(2).

provisions categorically based purely on policy disagreement.⁸⁵ Second, trial judges have an overarching duty to decide upon a sentence based on how well the sentence will achieve an unprioritized list of policy objectives and to determine the extent to which those objectives are even applicable in a given case.⁸⁶

In fact, sentencing judges not only have the discretion to implement bottom-up reform, the law requires them to at least consider policy-based arguments. In its 2014 decision in *United States v. Kamper*, the Sixth Circuit held that a district court that failed to engage with a defendant's policy-based arguments about a drug guideline "misunderstood its authority to reject the Guidelines' MDMA-to-marijuana equivalency ratio and replace it with a more appropriate ratio."⁸⁷ The court stated that "district courts 'are not free to cede their discretion by concluding that their courtrooms are the wrong forum for setting a [new] [drug-quantity] ratio'" and cannot decline to engage with these questions by citing "institutional competence, deference to Congress, or the risk that other judges will set different ratio."⁸⁸

As this Part has shown, federal trial judges have existing authority and a legal obligation to engage at the policy level. This Article suggests only that judges use existing sentencing discretion more often, more broadly, and more explicitly to engage with sentencing law and theory at a policy level.

II. THREE MODELS FOR BOTTOM-UP SENTENCING REFORM

All bottom-up reform proposals will involve district judges exercising sentencing discretion in individual cases. However, the policy rationale supporting a given reform can be pitched at different levels of generality. The first—and least controversial—type of reform questions whether a particular provision of the Federal Sentencing Guidelines generates fair and just sentence recommendations.⁸⁹ A second type of reform examines the Guidelines as part

85. *Spears*, 555 U.S. at 264-66.

86. 18 U.S.C. § 3553(a)(2).

87. 748 F.3d 728, 742 (6th Cir. 2014).

88. *Id.* (first alteration in original) (quoting *United States v. Johnson*, 407 F. App'x 8, 10 (6th Cir. 2010)).

89. *See infra* Part II.A.

of the broader legal system, rejecting specific provisions based on their systemic effect.⁹⁰ A third type of reform operates outside the context of the Guidelines and requires district judges to explore the extent to which evidence supports imprisonment as an effective mechanism for accomplishing the congressionally established policy goals of federal sentencing under § 3553(a)(2), or whether a statutory policy goal is applicable at all.⁹¹

A. Questioning Whether Guidelines Promote Just Sentencing Outcomes

The *Kimbrough*-style policy variance is the most common and least controversial example of bottom-up reform. Here, district judges identify some aspect of a specific provision of the Federal Sentencing Guidelines and pick it apart to reveal a flaw in how the provision works.⁹² District court rejection of drug-quantity ratios established by the Guidelines is the paradigmatic example.⁹³

By way of background, in drug cases, the Federal Sentencing Guidelines generally treat the amount of drugs involved in the offense—the drug quantity—as the strongest proxy for culpability.⁹⁴ As the quantity of drugs attributable to a defendant increases, the recommended sentence does as well.⁹⁵ This creates a need for the Guidelines to compare quantities across different drug types.⁹⁶ One pound of heroin is not the same as one pound of marijuana in assessing the seriousness of the offense.⁹⁷ To make this cross-drug comparison, the Guidelines create drug-to-drug ratios.⁹⁸ The crack-to-powder ratio is one example, but these ratios exist for all drugs.⁹⁹

90. See *infra* Part II.B.

91. See *infra* Part II.C.

92. See, e.g., *Kimrough v. United States*, 552 U.S. 85, 91, 109 (2007).

93. *Id.*

94. See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 4 (2015); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANTITATIVE CRIMINOLOGY 155, 156 (2009) (noting that the Commission focused on quantity because “the amount of drugs was more easily quantifiable than role in the offense and, it was thought, quantity would serve as a good proxy for role”).

95. See Sevigny, *supra* note 94, at 169-70.

96. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT’G COMM’N 2021).

97. *Id.*

98. *Id.*

99. *Id.*

Similar to the crack-to-powder ratio criticized and rejected in *Kimbrough*, other drug ratios have been rejected by district judges around the country.¹⁰⁰ Some judges have criticized and rejected the guideline setting punishment ranges for offenses involving “ice” (methamphetamine testing at a certain purity).¹⁰¹ Others have likewise rejected the MDMA ratio.¹⁰²

Several judges have rejected other Guideline provisions based on analogous policy disagreements. For example, sentencing courts regularly reject a series of enhancements that increase the recommended sentence for nearly every non-production child pornography offender.¹⁰³ Similar to some widely panned drug ratios, the Sentencing Commission itself has criticized the non-production child pornography guideline,¹⁰⁴ and sentencing judges regularly cite that criticism in rejecting the enhancements on a policy basis.¹⁰⁵

100. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); *United States v. Ferguson*, No. 17-204, 2018 WL 3682509, at *3 (D. Minn. Aug. 2, 2018).

101. *See, e.g.*, *United States v. Nawanna*, 321 F. Supp. 3d 943, 952 (N.D. Iowa 2018) (explaining that “the Commission’s emphasis on an outdated assumption about methamphetamine purity as a proxy for culpability can lead to perverse sentencing outcomes” and rejecting the Guidelines ratio); *United States v. Pereda*, No. 18-cr-228, 2019 WL 463027, at *1, *5 (D. Colo. Feb. 6, 2019); *United States v. Bean*, 371 F. Supp. 3d 46, 50-51, 57 (D.N.H. 2019); *United States v. Rodriguez*, 382 F. Supp. 3d 892, 893, 895, 898 (D. Alaska 2019); *United States v. Jennings*, No. 4:16-cr-48, 2017 WL 2609038, at *3-4 (D. Idaho June 15, 2017); *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1256 (D.N.M. 2017); *Ferguson*, 2018 WL 3682509, at *3-4; *United States v. Ortega*, No. 09CR400, 2010 WL 1994870, at *7 (D. Neb. May 17, 2010).

102. *See, e.g.*, *United States v. McCarthy*, No. 09 cr. 1136, 2011 WL 1991146, at *1 (S.D.N.Y. May 19, 2011) (rejecting the Guidelines’ 500:1 MDMA-to-marijuana equivalency in favor of a 200:1 ratio); *United States v. Qayyem*, No. 10 cr. 19, 2012 WL 92287, at *5 (S.D.N.Y. Jan. 11, 2012) (same).

103. *See, e.g.*, *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *10 (D. Neb. Sept. 8, 2008). *Cf.* *United States v. Henderson*, 649 F.3d 955, 963 (9th Cir. 2011) (“[D]istrict courts may vary from the child pornography Guidelines, § 2G2.2, based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”).

104. In 2012, the Sentencing Commission released a report concluding that the “current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders’ collecting behavior.” U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at xxi (2012). Nine years later, the Commission released an updated report reiterating its prior conclusion that the guideline for non-production child pornography cases “is both overinclusive and underinclusive” and “no longer effectively differentiates among offenders in terms of either the seriousness of the offense or culpability of the offender.” U.S. SENT’G COMM’N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY: NON-PRODUCTION OFFENSES 69 (2021).

105. *See, e.g.*, *United States v. Jones*, No. 7:20-CR-2, 2021 WL 3609298, at *4 (E.D.N.C.

The career offender guideline is another example. Operating as a recidivist enhancement, the Guidelines' career offender provision can drastically increase the recommended sentence for defendants with certain qualifying convictions for past drug crimes or crimes of violence.¹⁰⁶ Several district judges have voiced policy disagreement with the career offender guideline and relied on the Sentencing Commission's own criticism of the provision in doing so.¹⁰⁷

Thematically, these policy disagreements are similar. They fit nicely into the *Kimbrough* framework.¹⁰⁸ In most of these examples, the Commission acted pursuant to congressional directives rather than its experience or unique expertise.¹⁰⁹ Sometimes, the Commission itself has criticized the guideline at issue, such as the aforementioned non-production and career offender guidelines. These are heartland *Kimbrough* cases.

District judges can engage more in bottom-up sentencing reforms of this kind.¹¹⁰ By digging into how Guideline provisions came to be and examining whether they effectively serve the objective they were designed to accomplish, judges can reject individual Guideline provisions because they categorically lead to unjust sentences.¹¹¹ In this sphere, the model for reform is clear and the legal authority undisputed.¹¹² The existing model need only be extended to different Guideline provisions.

Aug. 13, 2021) (relying on the Commission's 2021 report to reject enhancements); *United States v. Coffey*, No. 2:16CR54, 2016 WL 6780306, at *1 (E.D. Va. Nov. 15, 2016) (relying on the Commission's 2012 report to reject enhancements).

106. See U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021).

107. See, e.g., *United States v. Dixon*, No. 2:16cr16, 2016 WL 4492843, at *4 (M.D. Ala. Aug. 5, 2016) (rejecting career offender guideline, collecting cases doing the same, and noting that "[t]he Commission ... found that the guideline ... advances no sentencing purpose when applied on the basis of prior drug convictions") (quoting Amy Baron-Evans, Jennifer Coffin & Sara Noonan, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 53 (2010)).

108. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

109. See, e.g., U.S. SENT'G GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENT'G COMM'N 2021) (explaining how the career offender guideline follows congressional directives).

110. See Zunkel & Siegler, *supra* note 7, at 289 (calling on district judges to "issue categorical policy disagreements with the drug sentencing guidelines and the career offender sentencing guideline using the Supreme Court's blueprint in *Kimbrough v. United States*").

111. See *supra* Part I.B.2.

112. See *supra* Part I.B.2.

B. Examining the Influence of Guidelines on the Broader System

The next analytical step is to take bottom-up reform to a higher level of generality, from an examination of how a Guideline provision affects sentences in a category of cases to how a Guideline provision influences the broader system as a whole. This model of reform is not prevalent in district courts today, but it is equally defensible as traditional *Kimbrough*-style reform under current law. This Article proposes one such reform as an example of how judges might assess Guideline provisions for their broader effect on the system.

“Sentencing law becomes relevant at the end of a criminal case, after conviction, but the effects of sentencing radiate back much earlier in the case to influence both guilty plea decisions and acquittal outcomes.”¹¹³ Decisions about whether to plead guilty are driven by predictions that defendants and their lawyers make about sentencing under different scenarios.¹¹⁴ Thus, district judges who announce categorical disagreement with Guideline provisions that affect the difference between the sentence that a defendant expects to receive if convicted after a trial versus that he expects to receive if he pleads guilty will influence defendants’ decisions about whether to plead guilty.¹¹⁵ As a result, sentencing judges are well positioned to mitigate one of the most well-recognized problems of the federal criminal legal system, the vanishing criminal trial.

In 2021, over 98 percent of federal offenders pleaded guilty.¹¹⁶ At 84 percent in 1990, the guilty plea rate jumped to just over 95 percent by 2000 and has not fallen below that level since.¹¹⁷

113. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005).

114. *See id.* at 107-08.

115. *See id.* at 152.

116. U.S. SENT’G COMM’N, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2022).

117. *Id.* at 8, 24 n.8; Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012, 10:30 PM), <https://www.wsj.com/articles/SB10000872396390443589304577637610097206808> [<https://perma.cc/FKK3-SCKC>]; *see also* John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/8W84-V6MJ>]. (“Trials have been relatively rare in the federal criminal justice system for decades, but they have become even less common over time.

Mainstream academics, judges, and practitioners have largely agreed for some time that the virtual disappearance of the criminal jury trial undermines the health of the system.¹¹⁸ No top-down reform has meaningfully addressed the problem of the vanishing trial.¹¹⁹ Yet federal trial judges can examine the policy rationale for a key provision of the Guidelines that systematically increases the incentive for defendants to plead guilty. The “acceptance of responsibility” adjustment under § 3E1.1 of the Guidelines significantly increases the difference between the sentence a defendant can expect to receive after trial versus that which he would receive by pleading guilty.¹²⁰ District judges can reject this Guideline on a policy basis.¹²¹ The problem of the vanishing jury trial is well-established and will not be relitigated here.¹²² But because this Article proposes a bottom-up reform measure to address it, a brief overview of the problem is needed.

First, the demise of the trial undermines the broader criminal legal system because most of the system’s sacred rights are directly tied to trial.¹²³ Nearly every constitutional right enjoyed by a criminal defendant is either wholly abandoned or rendered meaningless by entry of a guilty plea.¹²⁴ Although waivers are not inherently problematic, when the trial rate is so low that core constitutional

The share of defendants who went to trial fell from 7% in fiscal 1998 to 2% two decades later.”).

118. See Walter I. Gonçalves, Jr., “How Much Time Am I Looking At?: Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts,” 59 AM. CRIM. L. REV. 293, 299 (2022) (reviewing scholarship); see also CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 5-7 (2021); SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 3 (2016); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/N48T-Z6X2>] (reporting views of several federal judges); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1416-17 (2003).

119. See Matthew Clair, *Disappearing Juries*, NATION (Sept. 20, 2023), <https://www.thenation.com/article/society/plea-bargains-class-war/> [<https://perma.cc/QG93-T6RJ>] (describing how top-down reforms to plea bargaining have been limited to the state level of government where such reforms succumb to political pushback).

120. See *infra* note 151 and accompanying text.

121. See *supra* Part I.B.2.

122. See, e.g., Weiser, *supra* note 118.

123. Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 753 (1981).

124. See *id.*

rights are virtually pleaded out of existence, the system as a whole suffers.

Second, the lack of criminal trials threatens the Constitution's structural protections. The criminal jury is a check on government power and a hallmark of popular sovereignty.¹²⁵ As the Supreme Court has written, "[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people."¹²⁶ As Judge William G. Young put it, "[t]he court system is where government policy is imposed on individual people, and juries historically are the last popular hurdle the government must clear before that imposition."¹²⁷ If not regularly exercised, this structural check on government power risks becoming a vestige of the constitutional system it was designed to protect.

Third, the expectation that there will be no trial creates problematic incentives for the system's repeat players and undermines the truth-finding function of a criminal trial. As one federal judge commented,

[W]hen only 3% of sentenced defendants have gone to trial, it is no longer an efficient use of a prosecutor's time to prepare her case for trial prior to indictment. If all you'll ever need is the probable cause necessary to indict, there's not much incentive to develop more than probable cause.¹²⁸

The same is true for defense attorneys. With guilty pleas as the default resolution, defense attorneys may give less attention to investigating and preparing trial defenses, instead allocating resources to plea negotiation and sentencing. Trials must be frequent enough that lawyers and judges expect trials regularly. Relatedly, when cases are resolved on a plea, the true facts rarely come to

125. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

126. *Id.* at 407.

127. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 311 (D. Mass. 2006).

128. *United States v. Kupa*, 976 F. Supp. 2d 417, 451 (E.D.N.Y. 2013), *aff'd*, 616 F. App'x 33 (2d Cir. 2015).

light.¹²⁹ An excessively high plea rate “reduces transparency and for that reason alone diminishes the quality of justice.”¹³⁰

Fourth, excessively high plea rates reflect a compelling incentive to plead guilty, which applies to both the innocent and guilty alike.¹³¹ Plea bargaining and systemic plea discounts pressure innocent defendants to plead guilty to avoid the risk of higher sentences after trial.¹³² As discussed below, the decision whether to plead guilty is governed by the difference between the expected trial sentence and the expected plea sentence.¹³³ A plea rate of 98 percent indicates that the system contains a *strong* incentive to plead that works equally against the guilty and innocent.

Accepting that the current guilty plea rate is problematic, it is important to understand what drives that rate. Why do defendants plead guilty? For any given defendant, the value of pleading guilty can be measured by comparing the “expected trial sentence” to the “expected plea sentence.”¹³⁴ The expected trial sentence is the prison term that will be imposed if the defendant is convicted at trial, multiplied by the percentage chance of being convicted.¹³⁵ The expected plea sentence is the prison term the defendant expects to receive if he pleads guilty.¹³⁶ As these expected sentences get closer, trials occur more frequently.¹³⁷

Guideline § 3E1.1 increases the difference between the expected plea and trial sentences in nearly every case.¹³⁸ Defendants who plead guilty and express remorse for their offense receive a significant reduction under § 3E1.1, which is labeled “Acceptance of Responsibility.”¹³⁹ As a practical matter, the only action a defendant

129. See HESSICK, *supra* note 118, at 6.

130. *Kupa*, 976 F. Supp. 2d at 451.

131. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006).

132. *Id.*

133. See Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 926 (2016).

134. *See id.*

135. *Id.*

136. *See id.*

137. *Id.* at 927.

138. See U.S. SENT’G GUIDELINES MANUAL § 3E1.1 (U.S. SENT’G COMM’N 2021).

139. On a mechanical level, “acceptance of responsibility” results in a two- or three-point reduction to a defendant’s offense level. Under § 3E1.1(a), the offense level is reduced by two levels if the defendant “clearly demonstrates acceptance of responsibility for his offense.”

can take to reduce the Guidelines' recommended sentence is to plead guilty and earn a reduction for acceptance of responsibility by doing so.¹⁴⁰ Section 3E1.1 thus creates a system-wide incentive to plead.

Even without § 3E1.1, the federal system contains strong incentives to plead.¹⁴¹ A 2013 report by Human Rights Watch discussed the coercive nature of federal plea-bargaining and criticized the power of federal prosecutors to extract guilty pleas through trial penalties.¹⁴² Mandatory minimum sentences can be used to induce pleas, and prosecutors can charge (or threaten to charge) mandatory minimums in many cases.¹⁴³ For example, prosecutors can trigger mandatory minimums by proving that drug offenses involved a certain minimum quantity.¹⁴⁴ Similarly, five-year mandatory minimum sentences are available in many gun cases.¹⁴⁵ Aggravated identity theft charges can tack two years onto the sentences of defendants who might otherwise be looking at minimal time in prison

Section 3E1.1(b) then provides an additional one-point reduction if before the operation of subsection (a) the offense level was 16 or greater, and the defendant "timely" notified the prosecution of his intent "to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." *Id.*

In theory, acceptance of responsibility adjustments do not strictly require a guilty plea. But the Guideline's commentary provides that the reduction "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." § 3E1.1 cmt. 2. In practice, these reductions track almost perfectly with guilty pleas. In fiscal year 2021, 98 percent of offenders pleaded guilty; 96.8 percent of defendants received a reduction under § 3E1.1. U.S. SENT'G COMM'N, *supra* note 116, at 8; see U.S. SENT'G COMM'N, CHAPTER THREE ADJUSTMENTS: OFFENDER BASED—FISCAL YEAR 2021 2 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch3_Offender_Based.pdf [<https://perma.cc/8CY5-B3D4>]. Pleading guilty is a necessary but insufficient condition for earning acceptance credit. See U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. 1(B) (U.S. SENT'G COMM'N 2021). For example, a defendant who pleads guilty but then tests positive for drugs while on bond can lose acceptance credit based on his failure to terminate criminal conduct. See *id.*

140. HUM. RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 4 (2013), https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf [<https://perma.cc/WA8L-WZ8W>].

141. See *id.*

142. *Id.* at 2, 4.

143. See *id.* at 3.

144. 21 U.S.C. § 841(b)(1)(A)-(B).

145. See 18 U.S.C. § 924(c).

or probation in fraud cases.¹⁴⁶ Furthermore, there are stepped-up mandatory minimums for defendants with a prior drug conviction, the so-called § 851 enhancement.¹⁴⁷ Perhaps more powerful than mandatory minimums are the huge benefits that come from cooperating with the government.¹⁴⁸ By substantially assisting the government's investigation or prosecution of another person, a defendant can see his sentence reduced by 50 percent or more.¹⁴⁹ If a defendant wants the chance to cooperate, however, he generally must plead guilty.¹⁵⁰

The degree to which § 3E1.1 reduces a sentence changes depending on the circumstances. Some defendants can see a plea discount of as much as 43 percent attributable solely to § 3E1.1.¹⁵¹ For others—mostly misdemeanor defendants with no criminal history—the recommended sentence is not affected at all by § 3E1.1.¹⁵² On average, however, the acceptance of responsibility reduction generates a plea discount of about 28 percent.¹⁵³

146. See *id.* § 1028A(a)(1). The Supreme Court acknowledged in *Dubin v. United States* that prosecutors have been “wield[ing] § 1028A(a)(1) well beyond ordinary understandings of identity theft” and rejected a maximalist reading of the statute’s scope under which a prosecutor in nearly every bank, mail, and wire fraud case could plausibly threaten a consecutive two-year sentence. 599 U.S. 110, 115 (2023). Whether the interpretation of § 1028A announced in *Dubin* will meaningfully narrow the set of fraud prosecutions in which the threat of a mandatory consecutive two-year sentence holds coercive power remains to be seen.

147. See 21 U.S.C. § 841(b) (setting penalties with and without prior drug convictions); *id.* § 851 (setting procedure for enhancing sentences based on prior drug convictions).

148. See HUM. RTS. WATCH, *supra* note 140, at 70.

149. U.S. SENT’G COMM’N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(b) 18 (2016) (finding that Rule 35(b) sentencing reductions for cooperation “resulted in an average decrease of 37.1 percent from the original sentence,” and that § 5K1.1 departures—another means of rewarding a cooperating defendant—resulted in an average decrease of 52.6 percent from the bottom of the original guideline range).

150. Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1514 (1997).

151. A defendant attributed at sentencing with having possessed six grams of crack with the intent to distribute (and receiving no other enhancements) would have an adjusted offense level of 16. U.S. SENT’G GUIDELINES MANUAL § 2D1.1 (U.S. SENT’G COMM’N 2021). Assuming no prior convictions, the bottom of his guidelines range on a guilty plea would be twelve months. *Id.* § 3E1.1. That is 43 percent lower than had he gone to trial (twenty-one months). *Id.*

152. *Id.* § 3E1.1.

153. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1242 (2015).

With all these moving parts, sentencing judges might struggle to isolate the acceptance of responsibility reduction's effect on the difference between expected plea and trial sentences. Professor Andrew Kim, however, answered that question by quantifying the portion of the federal trial penalty attributable to § 3E1.1.¹⁵⁴

Professor Kim used two different models to measure the federal trial penalty.¹⁵⁵ One model ignored the effect of acceptance of responsibility by using post-acceptance guideline ranges to compare the seriousness of offenses when calculating the trial penalty.¹⁵⁶ The other model accounted for acceptance credit by adjusting Sentencing Commission data so that guideline reductions directly tied to a defendant's plea are part of the trial penalty measurement.¹⁵⁷ Although Professor Kim's study was designed to provide a more accurate measurement of the federal trial penalty, as a byproduct, his data also roughly illustrated two alternative universes: the current system under which Guidelines acceptance credit is part of the true trial-penalty; and another that would exist if judges eliminated § 3E1.1's *additional* trial penalty by effectively awarding acceptance reductions to *all* defendants, including those who went to trial. Professor Kim's study showed that without adjusting the data to account for § 3E1.1, a defendant's sentence was 28 percent

154. *Id.* at 1245.

155. *Id.* at 1242.

156. *Id.*

157. *Id.* at 1242-43.

higher if he went to trial.¹⁵⁸ But accounting for the effects of § 3E1.1, the average trial penalty increased to 64 percent.¹⁵⁹

Although acceptance credit is not the only discount offered to defendants for pleading guilty, the effect of acceptance standing alone is significant. Describing acceptance of responsibility reductions as “perhaps the most powerful carrot for attracting guilty pleas,” Melissa Hamilton observed that the “assembly-line of justice strategically uses the acceptance of responsibility provision to expedite adjudication and to get to the end product—a certain punishment—in a punctual manner.”¹⁶⁰

The practical effect of § 3E1.1 is plain when assessing how a rational criminal defendant (regardless of guilt or innocence) will act in the face of these incentives. As noted above, a risk-neutral defendant will proceed to trial only if the percentage discount on his sentence is smaller than his chance of acquittal.¹⁶¹ Kim found that the average trial penalty is 64 percent, which translates to a plea discount of 39 percent.¹⁶² That means an average defendant should plead guilty unless his chance of winning at trial is 40 percent or better. The acquittal rate at trial for federal defendants from 2015

158. *Id.* at 1243 (measuring “the trial penalty at twenty-eight percent, ignoring the effects of acceptance of responsibility”). The differential between expected sentences after trial versus a plea can be framed either as a penalty or a discount depending on the normative baseline against which it’s measured. Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. U. L. REV. 261, 267 (2021). A plea discount framing uses trial sentences as the normative baseline: $PD = (TS - PS)/TS$. Using the plea sentence as the baseline expresses the same differential as a trial penalty: $TP = (TS - PS)/PS$. To give an example using round numbers, if the trial sentence is 100 months and the sentence after a guilty plea would be 78 months, that reflects a 22 percent plea discount: $(100-78)/100=0.22$. Using the same figures but with a different normative baseline reframes the 22 percent discount from a 100-month trial sentence as a 28.2 percent increase to the plea sentence of 78 months: $(100-78)/78=.282$. Because these are expressions of the same difference, the plea discount can be derived from the trial penalty (and vice versa): $PD = TP/(1+TP)$. Kim, *supra* note 153, at 1245 (equation 7). Thus, a 28 percent trial penalty is equal to a 21.9 percent plea discount. Because the Kim study discusses the plea differential as a penalty, this Article’s discussion of that study will use the same terminology.

159. *Id.* at 1243, 1245 (finding that, without ignoring the effects of acceptance of responsibility, “defendants convicted at trial receive sentences that are sixty-four percent longer, on average, than similar defendants who plead guilty to similar crimes”).

160. Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2218 (2014).

161. Kim, *supra* note 153, at 1245.

162. *Id.*

through 2019 was about 12 percent.¹⁶³ These numbers reveal why so many people plead guilty. The sentencing discount for pleading guilty is—on average—over three times more valuable than a jury trial.¹⁶⁴ Eliminating the portion of the trial penalty attributable to § 3E1.1 would encourage more trials. But independent of § 3E1.1, defendants receive a guilty-plea discount of about 22 percent.¹⁶⁵ Thus, even without § 3E1.1, a guilty plea would still be nearly twice as valuable as trial.¹⁶⁶

Importantly for judges assessing this Guideline provision from a policy perspective, § 3E1.1 was not the result of the Commission's unique expertise or its leveraging of national experience, but rather was a compromise between those who favored an automatic plea discount and those uncomfortable with such a practice.¹⁶⁷ Justice Stephen Breyer—a key architect of the Guidelines who served on the Sentencing Commission from 1985 to 1989¹⁶⁸—later recounted that § 3E1.1 reflected just such a compromise. Data on pre-Guidelines practice showed that defendants typically received a plea discount of thirty to forty percent.¹⁶⁹ As Justice Breyer noted, however, the Commission balked at “explicitly tell[ing] a defendant that a guilty plea means a lower sentence and that insistence upon a jury

163. In 10,601 criminal trials held in District Courts in Fiscal Years 2015 to 2019, 1,303 defendants were acquitted, including 33 found not guilty by reason of insanity. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2015 7 (2015), <https://www.justice.gov/media/823441/dl?inline> [<https://perma.cc/TLT7-2BCP>]; U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2016 7 (2016), <https://www.justice.gov/media/908156/dl?inline> [<https://perma.cc/9VT3-WHUE>]; U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2017 7 (2017), <https://www.justice.gov/media/962256/dl?inline> [<https://perma.cc/3FK9-WMY4>]; U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2018 7 (2018), <https://www.justice.gov/media/1023071/dl?inline> [<https://perma.cc/VM24-978N>]; U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2019 7 (2019), <https://www.justice.gov/media/1072721/dl?inline> [<https://perma.cc/P6VR-RU3H>]. Note that many trials are multi-defendant trials.

164. See *supra* note 163 and accompanying text; Kim, *supra* note 153, at 1245.

165. See *supra* note 158 and accompanying text (explaining how the 28 percent trial penalty Kim observed is equal to a 21.9 percent plea discount).

166. A 12 percent acquittal rate is about half of the 22 percent plea discount.

167. See *infra* notes 168-79 and accompanying text.

168. Stephen Breyer, Associate Justice, U.S. Sup. Ct., Address at the University of Nebraska College of Law: Federal Sentencing Guidelines Revisited (Nov. 18, 1998).

169. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1988) (footnotes omitted).

trial means a higher sentence.”¹⁷⁰ The Commission avoided making an unseemly and constitutionally problematic *explicit* connection between increased punishment and exercise of the trial right by creating a Guideline provision that did not facially turn on whether a defendant exercised his right to a trial. Instead, sentences would turn on the more amorphous question of whether the defendant demonstrated “acceptance of responsibility.”¹⁷¹ As Justice Breyer explained, the Guidelines were drafted to be “vague regarding the precise meaning of ‘acceptance of responsibility.’”¹⁷² Despite vague language that did not create an automatic plea discount, that policy rationale supported the acceptance Guideline.

As outlined by Michael O’Hear, the Commission sought to reward guilty pleas via § 3E1.1 for two reasons.¹⁷³ First, the Commission wanted to incentivize guilty pleas to conserve the system’s resources and spare witnesses (and victims) the stress of a trial.¹⁷⁴ Second, the Commission believed “that ‘the guilty plea “is the first step toward rehabilitation”’ and that other conduct demonstrating acceptance of responsibility, such as disassociation from criminal conduct and rectification of past harms, ‘is a sound indicator of rehabilitative potential.’”¹⁷⁵

In 1992, the Commission increased the acceptance of responsibility reduction for defendants facing higher sentences.¹⁷⁶ The rationale for this increase was not to acknowledge signs of rehabilitative potential but was explicitly focused on incentivizing guilty pleas and optimizing resource allocation. The additional reduction applied only when defendants timely notified prosecutors of their intention to plead guilty, “thereby permitting the government to avoid preparing for trial and permitting ... the court to allocate their resources efficiently.”¹⁷⁷ A working group at the Commission noted in 1991 that the proposed “change would be aimed at encouraging defendants facing significant prison terms to plead guilty more

170. *Id.*

171. *Id.* at 29.

172. *Id.*

173. O’Hear, *supra* note 150, at 1514.

174. *Id.*

175. *Id.* at 1514-15 (footnotes omitted).

176. U.S. SENT’G GUIDELINES MANUAL app. C, amend. 459 (U.S. SENT’G COMM’N 1992).

177. U.S. SENT’G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT’G COMM’N 2021).

often.”¹⁷⁸ This change was adopted on the working group’s explicit premise that guilty plea rates were relatively low—about 88 or 89 percent—and holding steady.¹⁷⁹

Given today’s 98 percent guilty plea rate—much higher than in the 1980s or early 1990s when § 3E1.1 was created and expanded—district judges could conclude that the first policy justification for § 3E1.1 is not warranted by current conditions.¹⁸⁰ Today’s numbers suggest no need for a mechanism designed to increase the pressure on defendants to plead guilty. Moreover, when § 3E1.1 was implemented, the Commission expected it to be “applied primarily, although not invariably or exclusively, in cases that involve guilty pleas without a charge reduction or sentencing agreement.”¹⁸¹ In other words, the Commission predicted that the acceptance reduction would be the main benefit a defendant would receive by pleading guilty. Yet the Kim study referenced above found that only about half of the federal trial penalty can be attributed to § 3E1.1,¹⁸² showing that § 3E1.1 generally supplements, rather replaces, other forms of plea bargaining. Agreements on sentencing recommendations and other plea-bargaining measures still exist, and may generate the other half of the current trial penalty.¹⁸³ These

178. SUSAN WINARSKY, DAVID DEBOLD & RICHARD MCNEIL, ACCEPTANCE OF RESPONSIBILITY WORKING GROUP REPORT 34 (Oct. 16, 1991), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/101991_Acceptance_of_Responsibility.pdf [<https://perma.cc/ZS9V-ZPS7>].

179. *Id.* at 4 (“[T]he plea rate for guideline cases in 1989 was 88.1 percent while the plea rate for pre-guideline cases was 89.7 percent in 1989,” and concluding that despite this “slight decrease in the plea rate for guideline cases, the overall rate for the last six years and eight months has remained about the same.”).

180. U.S. SENT’G COMM’N, *supra* note 116, at 8.

181. U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 50 (1987).

182. *See* Kim, *supra* note 153, at 1252 tbl. 3. Kim found a 28 percent trial penalty ignoring acceptance reductions, but a 64 percent trial penalty when controlling for acceptance reductions. *Id.* In a world where every defendant receives an acceptance of responsibility reduction (even those who lost at trial), the other factors driving the trial penalty will remain. Kim’s study suggests that roughly half of the 64 percent trial penalty that defendants face today would still exist if acceptance of responsibility reductions applied to everyone.

183. *See* U.S. SENT’G COMM’N, *supra* note 181, at 50-52 (considering various causes of the trial penalty). In fact, the Kim study *excludes* the effects of charge and fact bargaining. Kim, *supra* note 153, at 1202 n.22. As discussed above, charge bargaining (especially over charges that carry mandatory minimum sentences) is one of the most effective tools a prosecutor can use to induce a guilty plea. The trial penalty, as measured by Kim, does not capture all of the pressure points that can lead a defendant to plead guilty. This suggests that the pressure the

numbers could support a district court's factual finding that guilty pleas in the federal system are over-incentivized. Based on that finding, district judges could voice policy disagreement with a guideline that exists—at least in large part—for the purpose of generating a system-wide inducement toward guilty pleas.

If § 3E1.1 is not needed to encourage guilty pleas and thus save resources, sentencing judges may ask whether it is still justified by the Commission's second rationale.¹⁸⁴ Should the acceptance of responsibility guideline be retained because it rewards true contrition? On this score, district judges may sympathize with the intuition that heartfelt remorse is an indicator of rehabilitation. But § 3E1.1 is not an effective mechanism for rewarding true contrition.

Section 3E1.1 generally makes entry of a guilty plea a necessary precondition to earning the reduction.¹⁸⁵ As a result, defendants who are genuinely remorseful cannot obtain the reduction if they put the government to its burden of proof at trial.¹⁸⁶ Expression of remorse is a secondary consideration for receiving acceptance credit, relevant only after a defendant passes the threshold test by pleading guilty.¹⁸⁷ This generates two problems with retaining § 3E1.1 as a mechanism for acknowledging true contrition.

First, § 3E1.1 does not sort remorseful defendants from unre-morseful defendants on the front end because rational defendants make plea-versus-trial decisions based on the expected sentence framework rather than on their feelings being remorseful or otherwise.¹⁸⁸ To be sure, most people who plead guilty are likely sorry for

system exerts on a defendant to plead guilty outside of that attributable to the acceptance of responsibility reduction is greater than what Kim's numbers suggest.

184. See U.S. SENT'G COMM'N, *supra* note 181, at 50.

185. See U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. 3 (U.S. SENT'G COMM'N 2021).

186. See *id.* § 3E1.1 cmt. 2.

187. See *id.*

188. O'Hear, *supra* note 150, at 1553 (noting that 3E1.1 functions as an automatic "plea discount" that incentivizes defendants to plead guilty, even though "the very term 'acceptance of responsibility' seems more evocative of the remorse paradigm than of an automatic benefit for an action that might be undertaken in a cold, calculating manner"); *cf.* Kim, *supra* note 153, at 1231 (explaining that neither objective expressions of remorse, nor a subjectively remorseful mindset is required to receive acceptance credit, thus rational defendants choose to accept responsibility under circumstances in which doing so will likely reduce their sentence).

what they did.¹⁸⁹ But that is not *why* people plead guilty. Those who go to trial may be sorry but rationally conclude that admitting their guilt and professing their contrition is not worth losing their job, family, and freedom when there is a legitimate chance of avoiding such catastrophe. For trial-convicted defendants who feel remorse, § 3E1.1 provides no incentive to *express* that remorse because these defendants cannot earn a reduction after a trial loss (and they would risk having their statement used against them at a retrial if they were successful on appeal).¹⁹⁰ In sum, because a guilty plea is virtually required for a reduction, § 3E1.1 sorts defendants on the front end, not based on their remorse or unrepentance, but on their decisions about whether the chance of prevailing at trial justifies the risk of facing a higher sentence following a trial loss.

Second, once a defendant makes the decision to plead guilty (based on the framework discussed above), he knows that he must then express remorse to earn the acceptance of responsibility reduction.¹⁹¹ With knowledge that an apology will effectively reduce his sentence by 28 percent, a defendant has all the incentive in the world to express remorse.¹⁹² Very few defendants will fail to apologize, leaving judges to ferret out opportunistic expressions of remorse from those that are sincere.¹⁹³ More likely, judges faced with that impossible task will award the reduction to every defendant who, after pleading guilty, expresses remorse with any degree of

189. See Kim, *supra* note 153, at 1248 (explaining that some defendants may risk a significant trial penalty to avoid the consequences attendant to any length of incarceration). Note that there are significant epistemological problems that impede accurately assessing people's genuine remorse, regardless of whether they plead guilty. For a discussion of those issues, see O'Hear, *supra* note 150, at 1554-56.

190. See U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. 2 (U.S. SENT'G COMM'N 2021) ("This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial ... is convicted, and only then admits guilt and expresses remorse.... In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.... however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.").

191. See *id.* § 3E1.1 cmt. 3 (explaining that a guilty plea is necessary but not sufficient for acceptance credit, rather a defendant's conduct must also be consistent with accepting responsibility).

192. See Kim, *supra* note 153, at 1242.

193. See O'Hear, *supra* note 150, at 1555.

sincerity.¹⁹⁴ Perhaps recognizing this dynamic, Judge Andre M. Davis of the Fourth Circuit referred to “the fiction of ‘acceptance of responsibility’” as one of “the coins of the federal prosecutorial realm.”¹⁹⁵ The narrative that § 3E1.1 recognizes and rewards true contrition in the repentant offender does not reflect reality.

Finally, district judges may be inclined to reject the acceptance of responsibility framework due to concerns that § 3E1.1 effectively punishes the exercise of the right to trial.¹⁹⁶ To be sure, asking whether the Guideline provision punishes can mean different things. If the question is whether the Commission drafted § 3E1.1 for the purpose of punishing defendants for going to trial, then the answer is probably not.¹⁹⁷ At least, there is no evidence of a vindictive motivation.¹⁹⁸ The provision has survived many constitutional challenges premised on the theory that it punishes exercise of the right to trial.¹⁹⁹

Still, some judges have disagreed with the widely accepted constitutionality of § 3E1.1. And the rationale underlying these concerns need not be constitutionalized to support rejection of the provision through a *Kimbrough*-style policy disagreement.²⁰⁰ Judge Francis Murnaghan of the Fourth Circuit wrote that “[i]t approaches sophistry to say in one breath that one may not be punished for exercising one’s constitutional right to stand trial, and, then to say with the other, but, because he has demonstrated repentance by pleading guilty, he may have made out better.”²⁰¹ Judge Patricia Wald of the D.C. Circuit observed that whether a court “raise[s] [a man’s] sentence because he went to trial or denie[s] [him] a shorter

194. *See id.* (discussing the acute epistemological problems of an inquiry into remorse and the incentives for defendants who have pleaded guilty to make even dishonest statements of remorse).

195. *United States v. Said*, 798 F.3d 182, 200 (4th Cir. 2015) (Davis, J., concurring).

196. *See O’Hear*, *supra* note 150, at 1518.

197. *See* U.S. SENT’G GUIDELINES MANUAL § 3E1.1 cmt. background (U.S. SENT’G COMM’N 2021) (explaining the purposes of § 3E1.1, none of which relate to penalizing defendants for asserting their right to a trial).

198. *See id.*

199. *See, e.g.*, *United States v. Gonzalez*, 897 F.2d 1018, 1020 (9th Cir. 1990) (rejecting a facial challenge to § 3E1.1 under the Sixth Amendment); *see also* *United States v. Cordell*, 924 F.2d 614, 619 (6th Cir. 1991) (same).

200. *Kimbrough v. United States*, 552 U.S. 85, 110-11 (2007).

201. *United States v. Iager*, No. 87-5582, 1988 WL 60778, at *3 (4th Cir. June 9, 1988) (Murnaghan, J., dissenting).

sentence for the same reason is irrelevant because his constitutional right was burdened either way.”²⁰² Those views have not prevailed in the debate over § 3E1.1’s constitutionality.²⁰³ Yet, sentencing judges could reasonably conclude that there is something odd about discussing § 3E1.1 in terms suggesting that some 98 percent of the 160,000 people in federal prison were rewarded for pleading guilty, and thus received sentences less severe than they deserved or than was otherwise necessary to protect the public from their future crimes.²⁰⁴

To date, district judges have not widely voiced policy disagreement with § 3E1.1. Notably, however, one district judge has used § 3E1.1’s plea-inducing properties to justify a variance from the Guidelines in *Kimbrough*-style fashion. In 2020, during the height of the COVID-19 pandemic, U.S. District Judge David J. Novak announced in a series of orders that quick entry of a guilty plea during the pandemic “will result in [the defendant] receiving an additional point for acceptance of responsibility for conserving judicial resources during the outbreak of the Coronavirus.”²⁰⁵ Judge Novak appears to have recognized § 3E1.1’s power to induce guilty pleas, and—during a time when the perceived need to save judicial resources was particularly strong—prospectively announced his intention to vary downward by increasing the Guidelines’ plea

202. *United States v. Jones*, 997 F.2d 1475, 1487 (D.C. Cir. 1993) (Wald, J., dissenting).

203. *See, e.g., id.*

204. *See* Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 702 (2013); *see also* *Population Statistics*, FED. BUREAU OF PRISONS (Feb. 1, 2024), https://www.bop.gov/mobile/about/population_statistics.jsp#pop_totals [<https://perma.cc/6SGA-MTQM>] (listing the federal prison population at 156,417 as of July 20, 2023).

205. *See* Order, *United States v. Allen*, No. 4:20cr33 (E.D. Va. July 14, 2020), ECF No. 15 (advising that entry of a timely guilty plea during the pandemic “will result in [the defendant] receiving an additional point for acceptance of responsibility for conserving judicial resources during the outbreak of the Coronavirus”); *see also, e.g.*, Order, *United States v. Bowles*, No. 3:20cr77 (E.D. Va. Aug. 28, 2020), ECF No. 14 (same); Order, *United States v. Elleby*, No. 3:20cf76 (E.D. Va. July 31, 2020), ECF No. 11 (same); Order, *United States v. Butler*, No. 2:20cr44 (E.D. Va. July 20, 2020), ECF No. 15 (same). Judge Novak explained that “[a]s a policy,” for every case during the pandemic in which the defendant elects to plead guilty within 30 days, “I award a one-level variance due to the saving of resources to the Court beyond the third point for acceptance because of the very unusual circumstance.” Complete Transcript of Conference Call Before the Honorable David J. Novak, *United States District Judge*, at 3 in *United States v. Harris*, No. 3:20cr99 (E.D. Va. Oct. 7, 2020), ECF No. 41.

discount from 28 percent to 35 percent.²⁰⁶ The argument for reducing or eliminating the Guidelines' plea discount turns on judges reaching the opposite policy conclusion. Judge Novak's innovation *increased* the incentive to plead guilty quickly. But the legal rationale—rooted in the district court's sentencing discretion and ability to reach categorical policy conclusions—is the same in both contexts.²⁰⁷ Thus, there is some precedent for district judges using policy assessments to adjust the incentives created by § 3E1.1.²⁰⁸

Sentencing judges inclined to reject § 3E1.1 on policy grounds need to eliminate the inequality between defendants who plead guilty and those who do not. This requires either leveling up or leveling down. Through the use of downward variances under the Guidelines, judges could effectively apply two- or three-level reductions to the offense level in every case (for defendants who accept responsibility and those who do not).²⁰⁹ Alternatively, judges could effectively never reduce sentences based on § 3E1.1 by imposing two- or three-level upward variances on defendants who plead guilty and meet the Guidelines' criteria for the acceptance of responsibility reduction. Although either approach would solve the incentives problem, lowering sentences for those defendants who are not entitled to acceptance of responsibility reductions makes the most sense for several reasons.

First, effectively awarding acceptance credit in every case does the least damage to existing sentencing norms. Ninety-five percent of defendants receive acceptance credit now.²¹⁰ As a result, all but

206. A three-level decrease in a defendant's offense level generally reduces the recommended sentence by about 28 percent. *See* Kim, *supra* note 153, at 1242. For example, a Criminal History Category I defendant with offense level 23 faces a recommended range of 46-57 months' imprisonment. U.S. SENT'G GUIDELINES MANUAL, Ch. 5, pt. A, Sentencing Table (U.S. SENT'G COMM'N 2021). A three-level reduction to offense level 20 results in a range of 33-41 months' imprisonment, roughly a 28 percent reduction. This relative difference generally holds constant across different offense levels, such that a three-level reduction to the offense level generally corresponds to a 28 percent reduction in the recommended sentence. *See id.* Increasing that three-level reduction to a four-level reduction, as Judge Novak did, increases the plea discount from about 28 percent to about 35 percent. Taking the example above, a reduction from level 23 (with a recommended sentence of 46-57 months) to 19 (rather than 20), results in a recommended sentence of 30-37 months.

207. *See supra* Part I.B.2.

208. *See supra* Part I.B.2.

209. U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2021).

210. *See* Hamilton, *supra* note 160, at 2219.

a tiny fraction of sentences imposed today use an acceptance-adjusted Guidelines' range as the starting point and initial benchmark for sentencing. As Gerard Lynch explained, in a system where 98 percent of convictions result from a guilty plea, "it is unclear why the 'discounted' punishment imposed in that [98 percent] of cases should not [] be considered the norm."²¹¹

Second, ratcheting back post-trial sentences will affect fewer sentences. At the current plea rate, judges rejecting § 3E1.1 on policy grounds would either adjust down the 2 percent of sentences for defendants who lost at trial or increase the 98 percent of sentences for defendants who pleaded guilty. The former is far less disruptive.

Finally, federal sentences are—as a general matter—long enough from a normative perspective. The problem of mass incarceration will not be solved entirely by lowering sentences for defendants who are convicted after trial. Still, solving the § 3E1.1 problem through a solution that leads to a modest aggregate reduction in incarceration is preferable to one that would significantly increase sentence lengths for most defendants.

In keeping with the model of bottom-up sentencing reform, if district judges reject § 3E1.1 on policy grounds, then they should announce that view clearly and categorically. Each sentencing judge's analysis of this issue in a public decision will shape incentives going forward and contribute to discussions of top-down reform.²¹² Trial judges and litigants should also pay attention to ways in which other provisions of the Guidelines similarly affect the system as a whole and be prepared to address *Kimbrough*-style arguments about those provisions and their effects.

C. Investigating the Relationship Between Imprisonment and the Statutory Policy Objectives of Sentencing

The third and most controversial model for bottom-up sentencing reform requires district judges to engage critically not merely with the Guidelines, but with the federal sentencing statute itself, addressing at a foundational level how imprisonment advances the

211. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401 (2003).

212. See *infra* Part III.A.3.

policy objectives set by the statute. Congress directs sentencing judges to

impose a sentence sufficient, but not greater than necessary, to comply with the[se] purposes ... the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.²¹³

Congress also tells judges to impose a sentence that achieves these objectives “to the extent that they are applicable in light of all the circumstances of the case.”²¹⁴ Logically then, a district judge must answer two questions at sentencing. First, she must decide the extent to which each statutory purpose is applicable in the case before her.²¹⁵ Second, she must decide how imprisonment advances each applicable purpose, analyzing both the absolute effect of imprisonment and its marginal effect as the length of a prison term increases.²¹⁶

It may be tempting to accept traditional answers to these questions by starting from the premise that each statutory purpose of sentencing applies in every case and that roughly direct proportionality exists between the length of the sentence and the advancement of each policy objective. But reform-minded district judges will undertake fact-finding missions to answer these questions by engaging with experts, empirical studies, literature on penal philosophy, and

213. 18 U.S.C. § 3553(a).

214. *Id.* § 3551(a).

215. *Id.* § 3553(a)(2).

216. *See id.*

scientific understanding of human behavior to make intellectually rigorous sentencing decisions that are faithful to the statute.

One statutory objective of federal sentencing is “to afford adequate deterrence to criminal conduct.”²¹⁷ Deterrence comes in two forms. Specific deterrence refers to the sentence’s capacity to dissuade the defendant himself from committing future offenses.²¹⁸ General deterrence refers to the effect that the sentence imposed in one case will have in discouraging other would-be offenders from committing similar crimes.²¹⁹ Both forms of deterrence are well-suited to empirical analysis.²²⁰ Judges need not speculate about or use intuition to gauge the deterrent effect of a prospective sentence or the extent to which increases in a sentence’s length will increase its deterrent effect.²²¹ These are answerable questions that have largely been answered.²²²

As Professor Mirko Bagaric explains,

[t]he findings regarding general deterrence are relatively settled.... [G]eneral deterrence works in the absolute sense: there is a connection between criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate. It follows that marginal deterrence should be disregarded as a sentencing objective, at least unless and until there is proof that it works.²²³

Though this may be counter-intuitive, the evidence is clear. Based on these findings, the Department of Justice has acknowledged for nearly a decade that “[i]ncreasing the severity of punishment does little to deter crime,” and that “[l]aws and policies designed to deter crime by focusing mainly on increasing the severity of punishment

217. *Id.* § 3553(a)(2)(B).

218. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159, 159 (2012).

219. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1202 (2014).

220. *See id.* at 1199.

221. *See id.* at 1200, 1202.

222. *See id.*

223. *Id.* at 1202-03 (emphasis omitted).

are ineffective.”²²⁴ Similar studies exist examining the effect of sentence length on specific deterrence.²²⁵ As part of bottom-up sentencing reform, district judges can engage with this existing body of empirical research that is directly relevant to how long a sentence must be to achieve a statutory objective of sentencing. Some judges have done so.²²⁶

In 2017, Judge Clark Waddoups issued a decision engaging with this body of research and concluding that general deterrence interests did not require a sentence of imprisonment in a bank robbery case when the Guidelines recommended 151 to 188 months of imprisonment.²²⁷ Citing studies on the limits of marginal general deterrence, Judge Waddoups observed that “[t]hese conclusions acknowledge at least some delusion in the concept that severe punishment effects general deterrence.”²²⁸ The court considered general deterrence as an applicable objective of sentencing but found that “the evidence is, at best, inconclusive as to whether a lengthy term of imprisonment of Mr. Walker would provide any deterrent effect.”²²⁹ Similarly, in another 2017 decision, Judge Jack B. Weinstein concluded that “imposing a long incarcerative sentence ... in order to deter future gun violence by members of the community seems futile.”²³⁰ Although Judge Weinstein relied on expert testimony tailored to the facts of the case before him,²³¹ both district courts reached seemingly categorical conclusions about the relationship between general deterrence and lengthy terms of imprisonment.²³² Judge James O. Browning conducted a similar analysis of studies measuring the effect of increasing sentences on specific deterrence, ultimately concluding that “specific deterrence is a

224. U.S. DEPT OF JUST., FIVE THINGS ABOUT DETERRENCE (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/6HRD-N79J>].

225. See *United States v. Courtney*, 76 F. Supp. 3d 1267, 1304 n.13 (D.N.M. 2014) (collecting studies); see, e.g., Bagaric & Alexander, *supra* note 218, at 159.

226. *United States v. Walker*, 252 F. Supp. 3d 1269, 1294-97 (D. Utah 2017), *aff'd*, 918 F.3d 1134 (10th Cir. 2019); *United States v. Lawrence*, 254 F. Supp. 3d 441, 446 (E.D.N.Y. 2017).

227. *Walker*, 252 F. Supp. 3d at 1269, 1287.

228. *Id.* at 1297. The Tenth Circuit did not address the reasonableness of the sentence on appeal.

229. *Id.* at 1298-99.

230. *Lawrence*, 254 F. Supp. 3d at 446.

231. *Id.* at 443, 445-47.

232. See *id.* at 446; *Walker*, 252 F. Supp. 3d at 1298-99.

suspect ground for increasing incarceration.”²³³ Declining to rely on intuition or assumptions, these district judges examined *evidence* about the relationship between the length of a sentence and a statutory sentencing objective.²³⁴

To be sure, several appellate courts have reversed district judges who concluded, without evidentiary support, that deterrence did not warrant a lengthy sentence.²³⁵ The lesson may be that bottom-up reforms supported by logic or intuition will be less defensible than those based on evidence, even with non-case-specific evidence. In some circuits, however, evidence-based arguments about the relationship between imprisonment and § 3553(a)(2)’s objectives are seen as beyond the pale.²³⁶ At sentencing in *United States v. Patel*, the defense repeatedly “called the [sentencing] judge’s attention to the academic studies showing little connection between length of sentence and general deterrence.”²³⁷ The Seventh Circuit held that “the [sentencing] court was under no obligation to discuss the articles Patel presented questioning general deterrence” because they constituted “an invitation to the court to disregard not only the Sentencing Guidelines, but section 3553(a) itself, which expressly recognizes deterrence as a factor to be considered.”²³⁸ *Patel* cannot be squared with the federal sentencing statute. Sentencing judges operate under a statutory obligation to impose a sentence sufficient but not greater than necessary to accomplish specified goals.²³⁹ Determining the point at which a sentence achieves an objective necessarily entails an assessment of the relationship between

233. *United States v. Courtney*, 76 F. Supp. 3d 1267, 1304 n.13 (D.N.M. 2014).

234. *See supra* notes 227-33 and accompanying text.

235. *See, e.g.*, *United States v. Howard*, 28 F.4th 180, 209 (11th Cir. 2022), *cert. denied sub nom.* *Bramwell v. United States*, 143 S. Ct. 165 (2022) (“Leniency undermines general deterrence, and the extreme leniency of a probation sentence undermines it extremely.” (citing *United States v. Kuhlman*, 711 F.3d 1321, 1329 (11th Cir. 2013))); *United States v. Demma*, 948 F.3d 722, 731 (6th Cir. 2020) (“[T]he district court’s determination that general deterrence has no particular role in the child-pornography context is contrary to this circuit’s caselaw.”); *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007) (“Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.”).

236. *See United States v. Patel*, 746 F. App’x 569, 574 (7th Cir. 2018).

237. *Id.* at 572.

238. *Id.* at 574.

239. 18 U.S.C. § 3553(a).

means (imprisonment), and objective (general deterrence). A district judge's fact-finding power and sentencing discretion give her the opportunity (if not the obligation) to engage with these fundamental questions and generate evidence-based conclusions that can be relied upon to implement sentencing reform in individual cases.²⁴⁰

When sentencing courts assess the relationship between imprisonment and the § 3553(a)(2) purposes of sentencing, they may conclude that imprisonment is not an effective means of achieving these objectives.²⁴¹ From a descriptive standpoint, imprisonment has “become the clear default sentence in the federal criminal justice system.”²⁴² Yet one of the benefits of bottom-up reform may be the ability of trial court fact-finding to examine the evidence (or lack of evidence) supporting the assumption that imprisonment is a justifiable default sanction for most crime. Professor Peter Salib argues that imprisonment is (almost) never an efficient means of achieving optimal levels of deterrence while minimizing social costs.²⁴³ Professors Sandeep Gopalan and Mirko Bagaric propose twenty-four-hour technological monitoring as a form of punishment that is more cost efficient and achieves all the purported benefits of imprisonment.²⁴⁴ A significant body of research suggests that evidence-based sentencing would, as a general proposition, embrace far less imprisonment than tradition-based sentencing.²⁴⁵ Some district judges have explored these fundamental questions. For example, Judge John Gleeson captioned an order, “STATEMENT OF REASONS FOR ... MY POLICY DISAGREEMENT

240. See *supra* Parts I.B.2 & I.B.3.

241. See *United States v. Walker*, 252 F. Supp. 3d 1269, 1306 (D. Utah 2017), *aff'd*, 918 F.3d 1134 (10th Cir. 2019).

242. Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1275 (2014).

243. Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 170 (2017).

244. Sandeep Gopalan & Mirko Bagaric, *Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society*, 40 SEATTLE U. L. REV. 57, 58 (2016).

245. See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 596 (2009) (“Incarceration is today of limited and diminishing benefit in reducing crime and is one of the most expensive items in most state budgets. Most important, however, unlike in the 1970s, there exists today a large body of rigorous research proving that treatment programs operated in accord with rigorous research-based evidence can significantly change offender behavior and reduce recidivism.”).

WITH THE GUIDELINES' FAILURE TO ENCOURAGE ALTERNATIVES TO INCARCERATION.”²⁴⁶ In assessing what sentence is sufficient but not greater than necessary to accomplish the congressionally enacted objectives of sentencing, district judges logically must assess the comparative advantages of sanctions other than imprisonment.²⁴⁷

Finally, district judges can use their fact-finding power to assess, under § 3551(a), the extent to which each congressional purpose of sentencing is “applicable in light of all the circumstances of the case.”²⁴⁸ One of the purposes of sentencing under § 3553(a)(2)(A) is the need for retribution.²⁴⁹ Just as empirical evidence is relevant to assessing the effectiveness of imprisonment as a means of achieving deterrence, neuroscience may be relevant to assessing the extent to which a retributivist penological philosophy ever supports a punishment beyond that which can be justified on utilitarian grounds.²⁵⁰

Free will—which “proposes that there are actions that are free in the sense that they are not determined by prior causes”—“underpins retributive punishment, that is, the idea that the wrongdoer deserves to be punished in proportion to his crime, and that this punishment is morally required, regardless of any consequence that might flow from it.”²⁵¹ Yet leading experts on the science of human behavior assert with strong evidence that “free will is a fiction and that choice is an illusion.”²⁵² This notion of free will “is quite incommensurable with a scientific approach to human behavior.”²⁵³ “There is nothing in psychology, neuroscience, or elsewhere in science that allows for free (in the libertarian sense), uncaused actions. There has never been an observation that can only be

246. *United States v. Dokmeci*, No. 13-CR-455, 2016 WL 915185, at *0-1 (E.D.N.Y. Mar. 9, 2016).

247. *See* 18 U.S.C. § 3553(a)(3) (requiring judges to consider “the kinds of sentences available”).

248. *Id.* § 3551(a).

249. *See United States v. Irej*, 612 F.3d 1160, 1206 (11th Cir. 2010) (observing that “[t]he § 3553(a)(2)(A) consideration is the ‘just deserts’ concept, which carries the need for retribution”).

250. *See Callender*, *supra* note 5, at 1156.

251. *Id.*

252. Peter A. Alces & Robert M. Sapolsky, *Nohwere*, 63 WM. & MARY L. REV. 1079, 1084 (2022).

253. Callender, *supra* note 5, at 1156.

explained by free will.”²⁵⁴ If district judges find facts supporting a conclusion that choice is an illusion and free will does not exist, how can any sentence beyond that which is justified by utilitarian concerns like deterrence, incapacitation, and rehabilitation be justified? Is a just punishment purpose of sentencing ever applicable under such circumstances within the meaning of § 3551(a)?

Sentencing judges may be tempted to analyze thorny questions like this in granular terms that seemingly apply only to the specific facts and circumstances of the case before them. At capital sentencing, Avi Frey warns against defense lawyers pitching determinism arguments on a metaphysical level because people tend to implicitly embrace the notion of free will.²⁵⁵ Frey’s solution is to convince the sentencer of “the reality of determinism *only with regard to the defendant and [crime] at issue*. Put another way, mitigation should prove determinism only in the single, concrete example of the case at hand, and only through proof of the specific, causal factors at play.”²⁵⁶

Case-specific, individualized claims about causal factors in a specific case may, in fact, be more likely to persuade. But findings based on case-specific facts would not be reformatory. Reform would be accomplished by sentencing judges engaging at a universal level with the scientific questions on which moral culpability and retributive justice hinge.²⁵⁷ In these areas—assessing the applicability of the § 3553(a)(2) purposes of sentencing and the relationship between imprisonment and those purposes—district judges could legitimately use their fact-finding power and discretion to answer fundamental questions of sentencing in ways that break from traditional beliefs.²⁵⁸

254. *Id.* at 1156-57; *see also* Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON B: BIOLOGICAL SCI. 1775, 1783 (2004) (“We have argued that commonsense retributivism really does depend on a notion of free will that is scientifically suspect.”); *cf.* Tufik Y. Shayeb, *Behavioral Genetics & Criminal Culpability: Addressing the Problem of Free Will in the Context of the Modern American Justice System*, 19 U. D.C. L. REV. 1, 63-74 (2016) (exploring the problem of free will and the implications of using behavioral genetics in the criminal law, including the implications for retribution-based sentencing).

255. Avi Frey, *Determinist Mitigation in Capital Cases*, 40 HARBINGER 75, 83-84 (2015).

256. *Id.* at 84.

257. *See id.* at 82-83.

258. *See* Roth, *supra* note 15, at 270.

III. POTENTIAL BENEFITS AND CRITICISMS

The potential benefits and criticisms of judges engaging in bottom-up sentencing reform are multifaceted. On the whole, the potential benefits are significant and the potential criticisms—though helpful for recognizing the risks and limitations of bottom-up sentencing reform—fail to create a strong case against it.

A. *Benefits*

1. *Providing Direct Benefits to the Parties*

Most obviously, decisions made by sentencing judges affect the lives of real people who appear before them. Because bottom-up sentencing reform is implemented through decisions in individual cases, reformist judges provide immediate benefits to the defendant appearing before them regardless of how the policy-level decision in one case permeates out to affect other judges, other defendants, or the system more broadly.²⁵⁹

2. *Contributing to the Marketplace of Ideas*

Another benefit is the district court's contribution to the larger debate. Professor Roth describes district court opinions as contributions to "the marketplace of ideas."²⁶⁰ "When it comes to criminal justice issues, district court judges are, in many ways, better situated than any other type of federal judge to contribute new ideas and informed insights on how the system is working and could be improved."²⁶¹ For example, sentencing judges can speak with authority about how Guidelines provisions or policy statements by the Sentencing Commission work out on the ground.²⁶² District judges also enjoy the opportunity to engage with sentencing policy by developing a factual record.²⁶³ On appeal, a sentencing decision is

259. *See id.* at 253-55.

260. *Id.* at 252.

261. *Id.* at 253.

262. *Id.* at 194-95.

263. *See id.* at 253.

reviewed for substantive reasonableness under an abuse of discretion standard.²⁶⁴ Thus, district judges have more freedom than other judges to develop a record and engage with sentencing issues in the first instance.²⁶⁵

3. *Creating Models for Top-Down Reform*

Bottom-up reform can also provide a model for top-down reform that addresses the same policy failure. Take, for example, the crack-powder disparity under which people convicted of crimes involving crack were—and continue to be—treated substantially harsher than those whose crimes involve powder cocaine.²⁶⁶ After judges rejected that ratio in cases like *Kimbrough*, broader top-down reform followed in the form of Guideline’s Amendment 706,²⁶⁷ the Fair Sentencing Act of 2010,²⁶⁸ and the First Step Act of 2018,²⁶⁹ all of which address the crack-powder ratio.²⁷⁰

It is hard to draw a causal line between the implementation of reform by sentencing judges in individual cases and later top-down measures by Congress and the Sentencing Commission that implement similar policy judgments on a broader scale. This is in part because sentencing judges often rely on an existing body of research to implement reform, and in part because that research often leads to calls for top-down reform.²⁷¹ There was widespread criticism of the 100-to-1 crack-powder ratio and calls for top-down changes to the Guidelines—including by the Sentencing Commission—long before Judge Jackson categorically rejected the ratio at Derrick Kimbrough’s sentencing hearing.²⁷²

The causal connection between district court action and later top-down reform is probably weakest in cases such as the crack-powder

264. *Gall v. United States*, 552 U.S. 38, 51 (2007) (“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.”).

265. *See id.*

266. *See* Zunkel & Siegler, *supra* note 7, at 303-04.

267. U.S. SENT’G GUIDELINES MANUAL app. C, amend. 706 (U.S. SENT’G COMM’N 2007).

268. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

269. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

270. Zunkel & Siegler, *supra* note 7, at 302-03.

271. *See* Roth, *supra* note 15, at 253-54; *see also* Zunkel & Siegler, *supra* note 7, at 288-89.

272. *See supra* Part I.B.2.

disparity where—by the time *Kimbrough* was decided—agreement over the irrationality and injustice of the 100-to-1 ratio was broad and momentum toward adopting top-down solutions already strong.²⁷³ Still, Amy Baron-Evans and Kate Stith traced this history and concluded that “*Booker* and what followed in the courts ... contributed to the confluence of events that led Congress to take further action” in the Fair Sentencing Act.²⁷⁴ Regardless of whether a causal connection can be made persuasively in a given context, policy-based reforms implemented by district judges in individual cases could serve as models for later top-down reforms by Congress, the Sentencing Commission, or the Attorney General.²⁷⁵

4. *Aiding the Development of Sentencing Law*

Intellectually honest engagement by district courts with sentencing law and theory at a policy level will advance the quick and clean development of sentencing law. The Supreme Court’s endorsement of the district court’s categorical rejection of the crack-powder disparity in *Kimbrough* is a good example.²⁷⁶ The legal question over the district court’s authority presented itself cleanly and the rule coming out of *Kimbrough* was clear. Appellate courts are well-suited to review a decision that turns on a lower court’s explicit engagement with a single policy or premise of sentencing law—especially if the lower court rejected or adopted some rationale categorically.²⁷⁷ In contrast, when sentences turn on the nuanced interplay of deeply entangled and highly individualized factors, it can be harder for appellate courts to assess reasonableness.²⁷⁸ Likewise, it can be difficult for lower courts to discern the animating principle of appellate opinions that assess the reasonableness of deeply fact-bound and

273. By the time *Kimbrough* was decided in the Supreme Court in December 2007, the Sentencing Commission had adopted Amendment 706 to the Guidelines, which reduced the sentence recommended in crack cases by an average of about 15 months starting November 1, 2007. U.S. SENT’G GUIDELINES MANUAL app. C, amend. 706 (U.S. SENT’G COMM’N 2007); see also *supra* Part I.B.2.

274. Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1674 (2012).

275. *Id.* at 1675-76.

276. See Zunkel & Siegler, *supra* note 7, at 302-03.

277. See *id.*; see also Baron-Evans & Stith, *supra* note 274, at 1737-38.

278. See Baron-Evans & Stith, *supra* note 274, at 1738.

individualized sentencing decisions.²⁷⁹ Bottom-up reform will help the law in this area develop clearly and quickly, without necessarily favoring one worldview over another.

5. *Spurring More Judicial Engagement*

When judges use their discretion to implement bottom-up reform, it puts positive pressure on their peers to adopt the same policy or justify not doing so.²⁸⁰ Engagement at this level is certainly not the path for the indolent or risk-adverse trial judge. District judges implementing bottom-up reform will spend an enormous amount of time and resources digging into research, taking evidence, wading through briefing, and thinking hard. All of that to produce a decision that will inevitably generate a greater risk of reversal than a decision that focuses more on a multi-factored individualized analysis rooted in non-controversial findings of fact even if these divergent approaches ultimately lead to the same sentence. But if district judges see their peers engaging with these difficult questions that are squarely presented in every case, then they may feel some desire to jump into the debate.

Bottom-up sentencing reform's tendency to breed greater engagement by district courts will further advance the practice's other benefits.²⁸¹ Each reformist engagement and each response thereto will broaden further the marketplace of ideas, develop the law, and create other (different) models for top-down reform.²⁸² Broader engagement on various sides of these debates will also give district judges the sensation of having a greater degree of moral and intellectual responsibility for the decisions they make.²⁸³ Such responsibility can be mitigated by the sensation that low-level

279. See Zunkel & Siegler, *supra* note 7, at 303-04.

280. Melissa B. Jacoby, *Other Judges' Cases*, 78 N.Y.U. ANN. SURV. AM. L. 39, 81 (2022) ("Political scientists and ethicists agree: judges care what other people think of them, especially their peers.").

281. See Zunkel & Siegler, *supra* note 7, at 318-19 ("*Kimbrough* both advanced racial justice and is a prime example of how the federal judiciary can promote reform through the common law process ... *Kimbrough* thus provides the federal judiciary with a blueprint for continued reform.").

282. See Baron-Evans & Stith, *supra* note 274, at 1737-38.

283. See Zunkel & Siegler, *supra* note 7, at 318 (describing reasons that judges may feel disempowered to deviate from the Guidelines).

decision makers are powerless to act differently.²⁸⁴ In fact, they are not.

B. Criticisms

Perhaps the most obvious potential criticism of bottom-up sentencing reform is that it is simply a different form of judicial activism and that policy-level decisions should be made by Congress or the Sentencing Commission. Those concerns have already been addressed.²⁸⁵ But other potential problems do exist.

1. Limitations on the Ability to Extrapolate from Bottom-Up Reforms

Although specific bottom-up reform decisions may be somewhat helpful for Congress or the Commission to use as models for top-down policy change, the data individual cases create is limited. Even if a handful of judges consistently apply the same reform model in case after case, the effect of rolling out that reform uniformly across the country may be hard to predict. Bottom-up reforms will not themselves show Congress or the Sentencing Commission how a specific policy's national implementation will affect conduct, such as the policy's effect on general deterrence.²⁸⁶ That said, top-down policymakers could look to other sources for insight into how expansion of specific bottom-up reforms might look if implemented nationally. Taking the same example, researchers have pretty good data on general deterrence as a phenomenon,²⁸⁷ so policymakers could predict how national implementation of some reform model will affect general deterrence interests. Still, using bottom-up reform as a model for top-down reform has limitations.

2. Creating Legislative Backlash

Bottom-up reform could create legislative backlash. If district judges use their existing discretion to engage with sentencing law,

284. *See id.*

285. *See supra* Part I.B.

286. *See Fisher, supra* note 6, at 87.

287. *See Gopalan & Bagaric, supra* note 244, at 93-95.

theory, and policy when carrying out their duties under § 3553(a),²⁸⁸ they may draw the ire of Congress and see that discretion curtailed via new legislation. Since *Booker*, judges and commentators have flagged the risk of legislative backlash to sentencing discretion.²⁸⁹ Like the concern, the responses are rehearsed.²⁹⁰

Nearing 20 years after *Booker*, Congress seems unlikely to roll back district court discretion across the board. But the prospect of Congress reacting to a specific view espoused consistently by a critical number of judges seems plausible.²⁹¹ Then the question is whether a legislative response of that sort is really a problem.

Congress can legislate in response to how current law is being interpreted and implemented.²⁹² There is nothing inherently problematic about that phenomenon from a structural standpoint. It is only a problem if you have normative preferences about whether district courts should have more or less discretion; and perhaps whether you like the district court approach that Congress prohibits through responsive legislation.²⁹³ Indeed, bottom-up reform is needed in the first place, in part, because top-down policymakers are not inclined to act.²⁹⁴ If bottom-up reform catalyzes a legislative response—either backlash or endorsement—that will be more a feature than a bug.

288. See 18 U.S.C. § 3553(a).

289. See, e.g., Fisher, *supra* note 6, at 88 (warning, in the immediate aftermath of *Booker*, that “if the judiciary takes its newfound discretion too far, Congress will act to limit that discretion”); Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 34 (2012) (“If such categorical variances become the norm, not only with respect to the crack/powder disparity, but across the Guidelines writ large, Congress might impose new, detailed statutory penalties that will leave district judges with even less discretion than they possessed in the mandatory Guidelines era.”).

290. See 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 U. L. REV. 873, 909 (2014) (suggesting, among other things, that “it would be a serious separation of powers problem for Article III sentencing judges to let concerns of what Congress might do affect either directly or implicitly their judgment about how long a sentence should be”).

291. See Hardiman & Heppner, *supra* note 289, at 34.

292. Fisher, *supra* note 6, at 88.

293. See *id.* at 87.

294. See Berman, *supra* note 2, at 95.

3. *Entrusting Lower Courts with Too Much Power*

Even if sentencing law renders district court reform efforts legal, there is still the question whether it is problematic from a structural standpoint to have trial judges engage in policy-based decisions (at least outside the context of the Guidelines). Structural concerns, however, are superficial. Although bottom-up reform requires trial judges to engage at a policy level, they do so in the context of an individual case and without purporting to label the policy they reject as illegal or improper in all cases.²⁹⁵ This limits the broader fallout from a single instance of bottom-up reform. The sentencing judge rejects a premise, a Guideline provision, or a theory of punishment based on engaged analysis.²⁹⁶ But she does not purport to hold the Guideline provision unconstitutional and certainly does not purport to enjoin the use of that provision in other cases.²⁹⁷ Thus, this use of lower court power does not present the concerns that accompany more wide-reaching exercises of that authority, such as the issuance of universal injunctions.²⁹⁸

Moreover, a central premise of the reform suggested in this Article is that district judges will be clear about what they are doing and why. Thus, if the Department of Justice disagrees with a district judge's exercise of authority in a case, prosecutors can appeal and all interested parties will learn relatively quickly whether the district court's approach constitutes an abuse of discretion.²⁹⁹ If federal sentencing law develops to cabin this kind of judicial engagement, district judges will be bound to adhere to that law.³⁰⁰ So, the problem of too much power amassing in the hands of district judges is modest in the first instance. And, if abused, such power will be short-lived.³⁰¹

295. See Part II.A.

296. See Part II.A.

297. See Part II.A.

298. See Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 57 (2019).

299. See *supra* note 264 and accompanying text.

300. See Fisher, *supra* note 6, at 87-88.

301. See *id.*

4. *What's Good for the Goose*

Along the same lines, one potential criticism might be that because this type of bottom-up reform is justified by neutral legal principles, it could be used to implement reforms that today's anti-mass-incarceration reformers will find less normatively desirable. This argument is descriptively correct. Even if the Due Process Clause and the Eighth Amendment could constrain antidefendant uses of discretion, those protections will be relatively ineffective at protecting defendants' interests.³⁰² Again, however, the fact that this type of reform is not inherently slanted to favor one side enhances its legitimacy as a legal tool.

5. *Increasing Sentence Disparity*

A final criticism is that bottom-up reform will create more disparity in sentences.³⁰³ That is undoubtedly true in most instances. Some reforms may reduce sentence disparities.³⁰⁴ For example, *Kimbrough's* rejection of the crack-powder ratio reduced an unwarranted sentence disparity between defendants convicted of cocaine offenses.³⁰⁵ Because all judges must consider the need to avoid unwarranted disparities when imposing sentences, judges implementing bottom-up reform will have to grapple with any disparity created by their decision.³⁰⁶ But if individual district judges start to reject ideas that most of their colleagues accept, the resulting sentences will be different. That disparity cannot be defended as the inevitable result of highly individualized sentencing, in which seemingly similar cases can be distinguished by hundreds of granular facts that will always render each case and each defendant different.³⁰⁷ Here, the district court's decision is based on a policy

302. See Hessick, *supra* note 118, at 68-69, 108-10.

303. See *supra* notes 267-70 and accompanying text.

304. See Baron-Evans & Stith, *supra* note 274, at 1688-90.

305. See *id.* at 1709.

306. 18 U.S.C. § 3553(a)(6) (requiring courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when imposing sentences).

307. See generally Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 132-35 (2014) (noting how individualization at sentencing inherently creates disparate

level judgment.³⁰⁸ The difference between the sentence that the defendant in the reform case receives and that which a similarly situated defendant receives from another judge is traceable not to some individual difference between the cases but to differences in how two judges resolve a policy issue.³⁰⁹ Bottom-up sentencing reform will increase interjudge disparity.³¹⁰ In the end, increased disparity in sentencing outcomes is the inevitable result of *Kimbrough*.³¹¹ Uniformity is sacrificed for justice.³¹²

CONCLUSION

Federal district judges possess the power to develop factual records exploring important foundational questions that lie at the heart of federal sentencing.³¹³ Of course, the principle of party presentation will preclude district courts from reaching these questions unless criminal defense lawyers raise these arguments.³¹⁴ But when foundational questions are presented by the parties and subjected to rigorous examination, judges may reach novel conclusions about how the statutory objectives of sentencing are best accomplished.³¹⁵ They may reject Guideline provisions or depart from traditional assumptions about the relationship between imprisonment and the ultimate goals of sentencing.³¹⁶ Such assessments will be subject to review only for abuse of discretion.³¹⁷ These decisions may generate conflict in the lower courts, spur top-down reform proposals endorsing or rejecting those views, or merely contribute to the public

sentencing outcomes).

308. See *Spears v. United States*, 555 U.S. 261, 264 (2009).

309. See *Divine*, *supra* note 6, at 791-92 (summarizing multiple studies that found interjudge disparity increased post-*Booker*, with the most comprehensive study finding that disparity doubled).

310. *Id.* at 794 (discussing interjudge sentencing disparity, collecting studies, and concluding with high confidence that interjudge disparity has increased since *Booker*).

311. See *Baron-Evans & Stith*, *supra* note 274, at 1710-11.

312. *Id.* at 1709, 1712.

313. See *Spears*, 555 U.S. at 264.

314. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (discussing the principle of party presentation, under which courts generally rely on the parties to frame the issues for decision).

315. See *supra* Part II.C.

316. See *supra* Part II.C.

317. See *supra* note 264 and accompanying text.

debate over what the system is accomplishing by sending so many people to prison for so long. In some way, even small, these decisions have the capacity to reform federal sentencing from the bottom up.