Deterring Racial Bias in Criminal Justice Through Sentencing

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ABSTRACT: In 2013, the American Civil Liberties Union ("ACLU") published a report revealing stark racial disparities in the national enforcement of marijuana laws. The report suggested that police officers often use their law enforcement discretion to selectively patrol predominantly African American communities. This Note examines this and other methods by which police officers—and prosecutors—can, and frequently do, use their discretionary powers in a racially selective manner. Because the criminal justice system currently provides little institutional protection against discriminatory exercise of police and prosecutorial discretion, this Note proposes a two-step revision to federal sentencing practices to empower federal judges to combat racially biased law enforcement. By removing a provision from the Federal Sentencing Guidelines and adding a component to presentence reports, sentencing judges will gain the discretion necessary to issue lighter sentences to offenders subjected to racially biased law enforcement, which will effectively limit and deter racial bias in the future.

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I. INTRODUCTION

Criminal justice has a race problem. In June 2013, the American Civil Liberties Union ("ACLU") published a report revealing a gross racial disparity in marijuana arrests.[1] After analyzing data from the Federal Bureau of Investigation's Uniform Crime Reporting Program,[2] the ACLU discovered that African Americans are 3.73 times more likely than White Americans to be arrested for marijuana possession nationwide,[3] despite nearly equivalent marijuana usage between African and White Americans.[4] And the racial disparity appears to be growing: "[r]acial disparities in marijuana possession arrests have increased in 38 of the 50 states . . . over the past decade."[5] Like earlier phases of the War on Drugs, which also disproportionately affected African Americans,[6] the ACLU report suggests that the "War on Marijuana" has similarly become "a war on people of color."[7]

The ACLU report largely attributes the racial disparity in marijuana arrests to the discretion that police officers have to choose which communities

1. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013), *available at* https://www.aclu.org/sites/default/files/assets/100413-mj-report-rfs-rel1.pdf [hereinafter ACLU].

2. The FBI's Uniform Crime Reporting Program compiles crime data from "city, country, state, tribal, and federal law enforcement agencies to present a nationwide view of crime." FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 1 (2004), *available at* http://www2.fbi.gov/ucr/handbook/ucrhandbook04.pdf.

3. ACLU, *supra* note 1, at 17. In Iowa and the District of Columbia, the jurisdictions where the disparity is most severe, African Americans are over eight times more likely to be arrested. *Id.* at 18.

4. *Id.* at 21 ("In 2010, 14% of Blacks and 12% of whites reported using marijuana in the past year; in 2001, the figure was 10% of whites and 9% of Blacks. In every year from 2001 to 2010, more whites than Blacks between the ages of 18 and 25 reported using marijuana in the previous year.").

5. *Id.*

6. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 40–58 (2012) (discussing the political background of the War on Drugs and the racialization of crack cocaine); *see also* discussion *infra* Part II.A.

7. ACLU, *supra* note 1, at 9.

to patrol and which persons to arrest.[8] Police officers are not the only criminal justice entities with discretionary power, however. Prosecutors also possess the discretion to choose which arrestees to charge and which punishment to seek.[9] And, despite the lack of a definitive report detailing racial disparities in this area (like the ACLU's national arrest report), there are strong indications that prosecutorial discretion also results in disparate treatment of African Americans.[10]

In light of the empirical data establishing that African Americans are more likely to be arrested for certain crimes, and the corresponding likelihood that, once arrested, they are more likely to be prosecuted, this Note advocates for an institutional safeguard to confront this problematic issue that plagues the enforcement of *all* crimes.[11] This Note argues that sentencing judges should be empowered to assess certain contextual factors—for instance, whether prosecutors in a jurisdiction tend to charge African Americans with higher-level offenses than White Americans engaging in the same illegal conduct—when making sentencing decisions, with the goal of issuing more-lenient sentences to individuals who have been subjected to implicitly (or explicitly) biased law enforcement practices. Part II provides a brief background of the racial biases that have plagued the criminal justice system for generations[12] and two areas of law enforcement discretion that have arguably perpetuated those biases.[13] Part III examines the Federal Sentencing Guidelines and addresses the obstacles that the Guidelines pose to this Note's proposed sentencing model.[14] Part IV will dissect a thematically similar race-

8. *See id.* at 10 (describing the "War on Marijuana" as a "vehicle for police to target communities of color"); *see also* discussion *infra* Part II.B.

9. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 3-3.8; 3-3.9 (3rd ed. 1993) [hereinafter ABA STANDARDS], *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf; *see also* discussion *infra* Part II.C.

10. *See, e.g.*, ALEXANDER, *supra* note 6, at 117–19 (compiling anecdotes and empirical data suggesting racial inequality in the various stages of criminal prosecution); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012) (referring to empirical studies implicating race as a factor in discretionary prosecutorial decisions).

11. Although the ACLU data confronted racial disparities within the specific context of marijuana arrests, other comprehensive studies show that African Americans are treated more harshly by the criminal justice system in *all* crimes. *See* Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 20–21 (2008) (observing that racial targeting by law enforcement officers "worsen racial disparities for drug and firearms offenses"); *see also id.* at 17 (statistical comparison revealing that racial disparities in criminal justice span all categories of crime and cannot be fully explained by racial differences in criminal involvement). Accordingly, this Note characterizes the ACLU report as an identifiable symptom of broad racial biases throughout the enforcement of all crimes nationwide.

12. *See* discussion *infra* Part II.A.

13. *See* discussion *infra* Parts II.B–C.

14. *See* discussion *infra* Part III.

considerate sentencing statute implemented in Canada[15] and will address the successes and failures of the Canadian statute before advocating for the proposed shift in U.S. sentencing that this Note argues will ameliorate the tendency toward racial bias.[16]

II. RACE AND DISCRETION IN AMERICAN CRIMINAL JUSTICE

Studies have shown that people subconsciously hold embedded stereotypes about many groups of people: from age groups to racial groups.[17] One such embedded stereotype leads people to more quickly associate African Americans—and particularly African American men—with criminal activity, reflecting Americans' implicit and irrational fear of "black criminals."[18] Understanding that racial biases exist makes the documented racial disparities in marijuana arrests, and potentially in charging decisions, less surprising, but no less problematic. This Part briefly examines the historical underpinnings of embedded racial bias in America and provides examples of ways that racial bias manifests itself in police and prosecutorial decision making.

A. POST-SLAVERY RHETORIC ON RACE AND CRIME

Although the concept of race (and its byproducts: racism, bigotry, and racial discrimination) has existed for approximately half a millennium,[19] the American myth of the "black criminal" traces back only to the post-slavery era of the late 1800s, when an 1890 publication of prison data revealed a disproportionately high rate of imprisoned African Americans.[20] Just 25 years after the abolition of slavery, these statistics fueled beliefs "about the fundamental racial and cultural differences between African Americans and native-born whites," when, in fact, heightened surveillance of African Americans in predominantly White communities and racially discriminatory

15. *See* discussion *infra* Part IV.A.

16. *See* discussion *infra* Part IV.B.

17. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10–11 (Justin D. Levinson & Robert J. Smith eds., 2012).

18. *See id.* at 15–16 (describing "shooter bias" wherein White research participants, including police officers, are quicker to perceive African American images as threatening and, further, are quicker to "shoot" African Americans that they perceive as threatening).

19. ALEXANDER, *supra* note 6, at 23 (tracing the origins of "race" to European imperialism). European settlers sought to take for themselves land that belonged to native peoples and, to morally justify their violent seizure of that land, the settlers would think of the natives as inferior beings. *Id.* (citing KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 163 (2003)). Thus, race and its connection to power—or lack thereof—share the same origins.

20. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3–4 (2010).

punishment provided more plausible explanations for the difference in incarceration rates.[21]

Just as the 1890 incarceration statistics and the ensuing "black crime" rhetoric tempered the racial progress that the abolition of slavery promised, rising crime rates in the late 1960s had similar detrimental effects on the progress of the Civil Rights Movement.[22] FBI reports showed a dramatic rise in street crime and homicides during the 1960s, which Civil Rights opponents attributed to the movement's philosophy of civil disobedience.[23] Riots in Harlem and Rochester and uprisings after Martin Luther King Jr.'s assassination were strongly associated with race and further fueled the "black crime" dialogue,[24] despite the existence of a more rational explanation for the era's crime spike: the "baby boom" generation's influx of young men in their late teens and early 20s—an "age group [that] historically has been responsible for most crimes."[25]

In the ensuing decades, as the gains of the Civil Rights Movement made overtly racist rhetoric politically untenable, politicians instead began to "exploit[] racial hostility or resentment for political gain without making explicit reference to race."[26] It was during this era, in the early 1980s, that then-President Ronald Reagan diverted federal criminal resources away from the traditional realm of white-collar crime and into street crime, in what was dubbed the "War on Drugs."[27] Critics of the War on Drugs have argued that race—more so than drugs—motivated the federal government's sudden attention to street crime.[28]

Today, the race and crime issues that have plagued America's past—from the 1890s to the War on Drugs—continue to linger.[29] Recent developments, including the June 2013 ACLU report and United States Attorney General Eric Holder's August 2013 reform proposal for federal drug charging,[30]

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21. *Id.* at 4.

22. ALEXANDER, *supra* note 6, at 41.

23. *Id.* Further data showing generally lower crime rates in the South emboldened segregationists to argue that segregation was an effective crime-control technique. *Id.*

24. *Id.* at 41–42.

25. *Id.* at 41.

26. *Id.* at 48.

27. *Id.* at 49.

28. *See id.* (citing polls showing that the public did not consider drugs to be an "important issue facing the nation" as evidence of racial underpinnings for the War on Drugs, and emphasizing the subtly coded racial rhetoric Reagan used in his campaign). Later developments in the War on Drugs provided further ammunition for this view. For example, cocaine laws passed in 1986 punished possession of one gram of crack cocaine at the same severity as one hundred grams of powder cocaine. *See* Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 122–23 (1994). Data suggested that African Americans had a higher rate of crack cocaine use than White Americans. *Id.* at 123.

29. *See generally* ALEXANDER, *supra* note 6 (providing a comprehensive critique of the current status of African Americans disproportionately impacted by policies stemming from the War on Drugs).

30. *See infra* notes 32–34, 66–69 and accompanying text.

highlight how the American criminal justice system has thus far struggled to overcome these challenges. Subparts II.B and II.C describe a series of discretionary law enforcement practices that police and prosecutors routinely engage in—and that the United States Supreme Court has upheld as constitutional—which draw upon and reinforce the "black crime" myth.[31]

B. POLICE DISCRETION

The June 2013 ACLU report revealed that African Americans were nearly four times more likely to be arrested for marijuana possession than White Americans[32] despite virtually equal marijuana usage between the two races.[33] The ACLU attributed this disparity in marijuana arrests to heightened police activity in predominantly African American communities.[34] Through a series of Fourth Amendment decisions within the past 50 years,[35] the Supreme Court has constitutionally legitimized a number of discretionary police procedures that have in practice reinforced the kinds of racially selective law enforcement that underlie the ACLU report.

1. *Terry* Stops

One discretionary practice, upheld more than 45 years ago in *Terry v. Ohio*, is commonly referred to as a "*Terry* stop" or a "stop and frisk."[36] A *Terry* stop is a police "pat down" that the Court deems reasonable whenever "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot"[37] and where the officer "would be warranted in the belief that his safety or that of

31. Of course, law enforcement practices are not the only forces responsible for perpetuating the "black crime" myth. However, discussion of other forces, such as media representations of African Americans, is beyond the scope of this Note.

32. ACLU, *supra* note 1, at 17. The racial disparity persists regardless of income level, defusing the foreseeable counterargument that the issue is one of class instead of race. *Id.*

33. *Id.* at 21. In fact, historically White Americans have used marijuana at a *higher* rate than African Americans. *See* GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 16–17 (2008) ("[T]hroughout the period 1979–2000, white high school seniors reported using drugs at a significantly higher rate than black high school seniors.").

34. *See* ACLU, *supra* note 1, at 11.

35. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The Supreme Court's Fourth Amendment search and seizure jurisprudence has traditionally provided many of the constitutional limitations on police authority to intrude upon citizens, whether through physical searches and seizures or surreptitious surveillance. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949–53 (2012) (holding that the police cannot, without a warrant, trespass on a suspect's property for the purpose of gathering information to use against the suspect); Katz v. United States, 389 U.S. 347, 351–58 (1967) (concluding that the police cannot, without a warrant, conduct surveillance of a suspect in an activity where the suspect has a reasonable expectation of privacy).

36. BLACK'S LAW DICTIONARY 1555 (9th ed. 2009).

37. Terry v. Ohio, 392 U.S. 1, 30 (1968).

others was in danger."[38] In other words, police officers can stop—or seize—a person if they reasonably believe that the person is engaged in, or will soon engage in, criminal activity, and officers can pat down—or search—the person if they believe that the person threatens officer safety or the safety of others. And they can perform this search and seizure without securing a warrant beforehand, as the Constitution normally requires.[39]

Just as Justice Douglass feared in his dissent in *Terry*,[40] discretionary *Terry* stops have become commonplace and have disproportionately impacted urban and historically African American communities.[41] Recently the *Terry* doctrine has seen some judicial oversight limiting its abuses.[42] Nevertheless, *Terry*'s general rule remains good law: when an officer's experience suggests that "criminal activity may be afoot,"[43] he can conduct a warrantless search of a suspect's person, even if that underlying experience merely reflects a conscious or subconscious belief that African Americans are more likely to engage in criminal behavior.[44]

2. "Driving While Black"

A second discretionary police practice, upheld in *Whren v. United States*, more explicitly implicates race. In *Whren*, the Court held that where persons in a vehicle arouse an officer's suspicions—but to a level below that necessary to secure a search warrant or to justify a *Terry* stop[45]—the officer may follow

38. *Id.* at 27.

39. *Id.* at 20 ("[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.").

40. *See id.* at 39 (Douglas, J., dissenting) (fearing that the majority's holding represents a "new regime" allowing "the police [to] pick [someone] up whenever they do not like the cut of his jib" and subject him to a search).

41. *See* Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html (exposing the exceptionally high volume of *Terry* stops in one Brooklyn neighborhood). *Terry* stops were so prevalent in Brownsville, Brooklyn, from 2006 through 2010 that the total number of "encounters amounted to nearly one stop a year for every one of the 14,000 residents of these blocks." *Id.*

42. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (finding for plaintiffs in a section 1983 civil rights suit against New York City for widespread practice of unjustified *Terry* stops).

43. *Terry*, 392 U.S. at 30.

44. *Cf.* ALEXANDER, *supra* note 6, at 63–64 (discussing *Terry* in the context of racial bias). Of course, even the issuance of search warrants does not completely circumvent issues of racial bias: magistrate judges issuing search warrants may also hold suspect racial attitudes. However, requiring a judicial actor to assess an officer's probable cause for a search provides one more layer of protection against racially selective *Terry* stops. *Cf. infra* Part III (describing how sentencing judges possess untapped potential to provide a similar layer of protection against selective policing and conviction at the sentencing stage).

45. To secure a search warrant, the Government must show probable cause that the search subject has engaged in unlawful activity. U.S. CONST. amend. IV. To conduct a *Terry* stop, the Government must have reasonable suspicion—a lower standard than probable cause—that the

and observe those persons until the driver commits a traffic violation, at which point the officer may pull over the vehicle, arrest its occupants, and search it for evidence of illegal activity.[46] The Court recognized the probability that officers would use the *Whren* doctrine in a racially selective manner, but "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[47] Thus, even if an officer explicitly enforces traffic laws in a racially selective manner, so long as the ultimate cause for the vehicle stop is legitimate—for example, where a driver waits "unusually long" after a light turns green, turns right without signaling, or accelerates too quickly[48]—then the evidence discovered in the subsequent vehicle search is legitimate.[49] This discretionary standard has legitimized the phenomenon of "driving while black," where officers stop persons of color for nominal traffic violations to justify searches for evidence of non-traffic-related crimes.[50]

The practices evolving from *Terry* and *Whren* are only two of the numerous ways in which discretionary law enforcement methods have resulted in racial bias and criminal profiling.[51] This Note does not mean to

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search subject is, or will soon be, engaged in unlawful activity. *See supra* notes 36–39 and accompanying text. In *Whren*, the Court noted that the officers' "suspicions were aroused" by the defendants, but it did not find those suspicions to justify the search of the defendants' vehicle; instead, the Court found that it was the defendants' eventual traffic violations that provided justification for the search. Whren v. United States, 517 U.S. 806, 819 (1996).

46. *Whren*, 517 U.S. at 810, 819 (holding as reasonable any stops based on probable cause that the driver violated a traffic law, even where the stop is a pretext for a search on other grounds where "no probable cause or even articulable suspicion exists"). See United States v. Robinson, 414 U.S. 218, 235 (1973), for the origin of the doctrine permitting searches incident to a lawful arrest—even an arrest for a traffic violation.

47. *Whren*, 517 U.S. at 813.

48. *See id.* at 808 (noting the traffic code violations that the *Whren* defendants violated).

49. The Court adopted this standard over the *Whren* defendants' proposal for a standard that considers whether a reasonable officer would have made the traffic stop. *Id.* at 810–13.

50. David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, AM. CIVIL LIBERTIES UNION (June 7, 1999), https://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways ("No person of color is safe from this treatment anywhere, regardless of their obedience to the law, their age, the type of car they drive, or their station in life."). Indeed, even recognizable African American celebrities are not immune from being pulled over for "driving while black." *See* JAY-Z, *99 Problems*, *on* THE BLACK ALBUM (Roc-a-Fella Records 2004) ("So I pull over to the side of the road / I heard, 'Son do you know why I'm stopping you for?' / 'Cause I'm young and I'm black and my hat's real low / Do I look like a mind reader sir, I don't know."); *see also About 99 Problems*, RAP GENIUS, http://rapgenius.com/Jay-z-99-problems-lyrics (last visited Aug. 10, 2014) (stating that the "driving while black" verse is fictional in detail but based on a real run-in that Jay-Z had with police in 1994).

51. *See, e.g.*, CHI., ILL., MUN. CODE, ch. 8, art. 4, § 15 (Am. Legal Publ'g Corp. through Council J. of Mar. 5, 2014) (prohibiting "gang loitering," or "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable" gang control, intimidation, or illegal activities); AM. CIVIL LIBERTIES UNION & RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES 31–33 (2009), *available at* https://www.aclu.org/files/pdfs/humanrights/cerd_

suggest that officers engaging in these practices always do so with overtly discriminatory intentions, but instead argues that the rhetorical link between race and crime that has persisted for generations implicitly influences who officers suspect commit crimes.[52]

C. *PROSECUTORIAL DISCRETION*

"[Prosecutorial] discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors."[53] The primary benefit of prosecutorial discretion—which authorizes prosecutors to decide whether to pursue charges against arrested criminal suspects—is flexibility: the discretion "permits a prosecutor in dealing with individual cases to consider special facts and circumstances" that criminal statutes fail to take into account.[54] Unfortunately, like police discretion, this discretion creates the inevitability that some defendants will be treated differently than others.[55] Specifically, two methods through which prosecutors exercise their discretion have traditionally disparately affected African Americans.

1. To Charge or Not to Charge

A prosecutor's discretion over charging decisions "is among [her] most important duties."[56] A prosecutor can opt to charge nothing, even if probable cause exists,[57] or can charge every possible crime up to the number that "can reasonably be supported with evidence at trial or . . . fairly reflect[s] the gravity of the offense."[58] This broad authority allows prosecutors to charge a

finalreport.pdf (racially influenced FBI investigations following 9/11, and the use of "questionable and coercive tactics to recruit Muslim[] . . . informants").

52. *See* ALEXANDER, *supra* note 6, at 106 (sharing results of a 1995 study that revealed "[n]inety-five percent of respondents pictured a black drug user, while only 5 percent imagined other racial groups") (citing Betty Watson Burston et al., *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC., Winter 1995, at 19, 20); *see also* Charles Ogletree et al., *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 17, at 45, 48–49 (describing the psychological internalization of racial stereotypes).

53. United States v. LaBonte, 520 U.S. 751, 762 (1997).

54. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971).

55. *See* Tonry & Melewski, *supra* note 11, at 17 (showing that a lower percentage of White American arrestees are charged and convicted than are African American arrestees).

56. Memorandum from Attorney Gen. Eric J. Holder to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013) [hereinafter Attorney General Memo], *available at* http://www.justice.gov/oip/docs/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf.

57. ABA STANDARDS , *supra* note 9, at 3-3.8(a).

58. *Id.* at 3-3.9(f) (advising that prosecutors "should not . . . seek charges greater in number than can" be supported with evidence at trial, implying that any number of charges up to that amount is acceptable).

defendant with potentially dozens of crimes for which they have credible evidence, even if that evidence would fall far short of securing a conviction beyond a reasonable doubt at trial.[59] Although these extraneous charges are not likely provable at trial, the prosecutor may—and often does—choose to overcharge certain defendants at pre-trial to induce them into plea agreements. Such agreements are attractive options for defendants faced with a long list of charges that would yield harsher penalties if the prosecutor defies the odds by proving them at trial.[60]

2. Offense Levels and Mandatory Minimums

A prosecutor's charging discretion is not only implicated by the decision whether to charge or not to charge, but also by the choice of what offense to charge. Most federal drug offenses, for example, impose escalating mandatory minimum sentences based on the quantity of drugs involved in the conduct underlying the offense.[61] These mandatory minimum sentencing schemes often lead to unduly harsh punishment because they eliminate a defendant's ability to argue that mitigating circumstances warrant a lesser sentence than the statute prescribes.[62] When a defendant is charged with—and found guilty of—a mandatory minimum offense, the judge has no power to issue a sentence below the statutory minimum.[63] Thus, by electing to charge the highest degree of offense, prosecutors subject defendants to higher minimum sentences than they might otherwise receive.

In *Alleyne v. United States*, the Supreme Court altered the system through which courts impose mandatory minimums.[64] Whereas historically sentencing judges made the factual determinations to trigger mandatory minimum sentences, *Alleyne* held that any fact that "alters the legally prescribed punishment so as to aggravate it . . . necessarily forms a constituent part of a new offense and must be submitted to the jury."[65] Thus, post-*Alleyne*, because drug quantities "aggravate" a punishment by triggering mandatory minimum

59. ALEXANDER, *supra* note 6, at 87.

60. *Id.* ("When prosecutors offer 'only' three years in prison when the penalties defendants could receive if they took their case to trial would be five, ten, or twenty years—or life imprisonment—only extremely courageous (or foolish) defendants turn the offer down.").

61. *Compare* 21 U.S.C. § 841(b)(1)(A)(vii) (2012) (imposing a ten-year mandatory minimum for possession of 1000 kilograms or 1000 plants of marijuana), *with* 21 U.S.C. § 841(b)(1)(B)(vii) (2012) (imposing a five-year mandatory minimum for possession of 100 kilograms or 100 plants of marijuana). A mandatory minimum sentence is the lowest possible sentence that a convicted defendant can receive under the statute governing the offense. *See* BLACK'S LAW DICTIONARY 1485 (9th ed. 2009).

62. *See* Alleyne v. United States, 133 S. Ct. 2151, 2161 (2013).

63. *See id.* ("[T]he prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." (quoting Apprendi v. New Jersey, 530 U.S. 466, 522 (2000) (Thomas, J., concurring) (internal quotation marks omitted))).

64. *See id.* at 2162.

65. *Id.* Notably, an earlier case, *Apprendi v. New Jersey*, previously held that facts triggering a statutory *maximum* sentence must be submitted to the jury. *Apprendi*, 530 U.S. at 490.

sentences, prosecutors must include the alleged quantities in their charging documents and prove them to a jury beyond a reasonable doubt.[66]

By requiring a prosecutor to decide at the initial charging stage whether to seek a potentially harsh mandatory minimum sentence, "*Alleyne* heightens the role a prosecutor plays in determining" a defendant's sentence in most drug cases.[67] After the Court issued its *Alleyne* opinion, Attorney General Eric Holder released a memorandum providing federal prosecutors guidance on how to responsibly exercise this new discretionary power.[68] But the fact remains that *Alleyne* granted prosecutors yet another tool in their toolbox of discretion and, despite the Attorney General's desire to promote evenhanded charging decisions, "the power to be lenient [is also] the power to discriminate."[69]

Police officers and prosecutors share the ability to exercise their discretion in ways that profoundly impact defendants' lives. Police officers exercise their discretion in ways that result in higher arrest rates of African Americans, even in instances where African Americans and White Americans violate the law at equivalent rates.[70] Prosecutors exercise their discretion in ways that result in higher imprisonment rates of African Americans, even in instances where both African Americans and White Americans are arrested for similar offenses.[71] In contrast, the one prominent entity in a criminal proceeding generally *lacking* broad discretion to decide how the criminal justice system interacts with African American defendants is the sentencing judge, who is legislatively constrained in her ability to correct racial bias occurring in the arrest and charging phases.[72] The next Part addresses the limitations placed upon sentencing judges that inhibit their ability to alleviate racial bias in the criminal justice system.

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66. *See* Attorney General Memo, *supra* note 56.

67. *Id.*

68. *See id.* (urging prosecutors to "decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets" certain criteria mitigating his or her culpability).

69. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (alteration in original) (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 170 (1973)) (internal quotation marks omitted).

70. *See supra* notes 1–7 and accompanying text.

71. ILL. DISPROPORTIONATE IMPACT STUDY COMM'N, FINAL REPORT 4–5 (2010), *available at* http://www.centerforhealthandjustice.org/djis_fullreport_final.pdf (finding that, in Cook County, Illinois, White defendants are more likely to receive probation or court supervision, instead of imprisonment, for basic drug offenses); *see also, e.g.*, ALEXANDER, *supra* note 6, at 7 (noting that despite similar rates of drug use and sale, "[i]n some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men"); LOURY, *supra* note 33, at 23 (finding that "3 out of 200 young whites were incarcerated in 2000, [while] the rate for young blacks was 1 in 9").

72. *See* discussion *infra* Part III.

III. SENTENCING UNDER THE FEDERAL SENTENCING GUIDELINES

When a federal court imposes a sentence on a convicted defendant, it must consider the following sentencing goals: punishment for the unlawful conduct, crime deterrence (both on the individual and on a societal level), public protection, and educational or vocational training for the defendant.[73] Just as police officers and prosecutors have discretion within their duties,[74] judges traditionally also had great discretion to issue sentences that both achieved the sentencing goals and were uniquely tailored to each offender.[75] However, in the late 1970s and early 1980s, politicians grew critical of the discretionary sentencing model and the alleged "wanton" and "freakish" sentencing disparities that resulted.[76]

To combat the sentencing disparities arising under the discretionary model, Congress passed the Sentencing Reform Act of 1984.[77] The Act created the United States Sentencing Commission ("Sentencing Commission") and ushered in the era of the United States Sentencing Guidelines ("Guidelines").[78] The Guidelines excised judicial discretion from sentencing by imposing a complex calculus of factors that judges must apply when issuing a sentence,[79] with the goal that strict parameters would lead to

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73. *See* 18 U.S.C. § 3553(a)(2) (2012).

74. *See* discussion *supra* Parts II.B–C.

75. *See* William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85, 88 (describing the pre-Sentencing Guidelines system, where "federal judges imposed sentences within broad statutory ranges of imprisonment without any uniform standards and typically with little transparency" (citing MARRIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973))); *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–27 (1993) (tracing the history of discretionary sentencing to "the beginning of the Republic").

76. Sessions, *supra* note 75, at 88–89 (internal quotation marks omitted) (citing FRANKEL, *supra* note 75, at 104). Judicial discretion was not the only culprit responsible for sentencing disparities. The parole system shared the responsibility, due to its function of releasing prisoners early when they had successfully rehabilitated. *See* U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES app. B (2003), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/departures/200310-rtc-downward-departures/departrpto3.pdf ("The lack of uniformity in sentencing was exacerbated by the creation of a parole system that applied to only a portion of those sentenced and that focused the release of prisoners according to their potential for or actual rehabilitation.").

77. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (2012)).

78. *See* 28 U.S.C. § 991 (2012).

79. *See* Sessions, *supra* note 75, at 91 ("Superimposed on the existing, typically broad, statutory ranges of punishment [found in the statutes defining criminal offenses] were binding, narrower guidelines ranges that in many cases were driven by extremely detailed sentencing factors. Those ranges were modeled on a grid system, with axes for offense levels and criminal histories." (footnote omitted)).

"reasonable uniformity in sentencing."[80] Although the Guidelines are no longer mandatory, they remain influential in federal sentencing practice.[81]

A. *THE SENTENCING CALCULUS*

To achieve the desired "reasonable uniformity in sentencing," the Sentencing Commission crafted the Guidelines as a "pure real offense system" that calculates sentence lengths based on all identifiable conduct, from macro-level (the statutory offense) to micro-level (the events occurring during the commission of that offense).[82] First, the Guidelines require the sentencing judge to calculate the "offense level" of an offender's conduct—that is, the numerical value representing the full scope of the defendant's criminal offense, where higher numbers correspond with more severe conduct and longer sentences.[83] Second, the Guidelines apply adjustments to the offense level for aggravating[84] and mitigating factors.[85] Third, after arriving at the final offense level—the base offense plus or minus the adjustments—the sentencing judge must examine the offender's criminal history and assess it a point value.[86] Finally, once the court has compiled the necessary information, it plugs the data into the "Sentencing Table," placing the offense level on the y-axis and the criminal history points on the x-axis.[87] The coordinate where the two axes meet prescribes the sentencing range applicable to the offender, represented by months of imprisonment.[88]

To roughly illustrate how a court would calculate a Guidelines sentence, consider this hypothetical: Defendant robs a federally insured bank, stealing $60,000 from the bank's vault; it is her first offense and, during the offense, she ties up a bank employee before removing money from the vault. When Defendant is caught, she pleads guilty and tells law enforcement where she hid the stolen money. Defendant's overarching offense, robbery, has a base-level offense of 20,[89] which increases according to the following aggravating factors, called "Specific Offense Characteristics": the $60,000 amount that she stole (adding 2 levels)[90] and the federally insured financial institution from

80. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2013) [hereinafter GUIDELINES].

81. *See supra* Part II.C.

82. GUIDELINES, *supra* note 80, § 1A1.4(a).

83. *See id.* §§ 1B1.1(a)(1)–(5) (instructing how to calculate offense levels under the Guidelines); *see also id.* § 5A (plotting the sentencing ranges that correspond to the calculated offense levels).

84. *See, e.g.*, *id.* § 3A1.1 (assessing a multi-level increase for "Hate Crime Motivation or Vulnerable Victim").

85. *See, e.g.*, *id.* § 3E1.1 (assessing a 2-level decrease for "Acceptance of Responsibility").

86. *See id.* § 4A1.1.

87. *See id.* § 5A.

88. *See id.*

89. *Id.* § 2B3.1(a).

90. *Id.* § 2B3.1(b)(7)(C).

which she stole (adding 2 levels).[91] Defendant receives an upward adjustment for tying up a victim (adding 2 levels)[92] and a downward adjustment for pleading guilty and otherwise cooperating with authorities (subtracting 3 levels).[93] Because this is Defendant's first offense, she has zero criminal history points, placing her within "Criminal History Category I."[94] In light of the characteristics of her offense, Defendant's offense level is 23.[95] Matched with her Criminal History Category I on the Sentencing Table, the Guidelines prescribe a sentencing range from 46–57 months of imprisonment.[96]

To assist the sentencing judge in this complex sentence calculation process, the Guidelines also require probation officers to "conduct a presentence investigation" and compile a presentence report, which notifies the judge of the Guideline factors relevant to the defendant's case for use in calculating the sentence.[97] Presentence reports contain information beyond the Guidelines-oriented details of the offense, however. They also reveal "[a]dditional information" about the defendant's financial condition and social history, information regarding the "impact on any victim," and other contextual information that might inform the reasonableness of a sentence.[98]

B. SECTION 5H1.10'S FORBIDDEN FACTORS

With the probation officer's assistance, judges can appropriately consider all of the factors that the Guidelines strictly delineate. However, the Guidelines do not merely regulate factors that judges *must* consider; they also strictly regulate factors that judges *must not* consider. This Part discusses some of the forbidden factors that the Guidelines prohibit judges from considering when issuing a sentence. It is these factors that obstruct sentencing judges' ability to address racial bias occurring in the arrest and charging stages.

When passing legislation to strip judges of sentencing discretion, legislators undoubtedly had the best of intentions. In fact, liberal politicians supporting the Sentencing Reform Act sought to end sentencing discretion because they believed that it resulted in "unjust disparities and racial bias in the treatment of equally serious offenders."[99] Presumably in response to this concern, the Sentencing Commission drafted section 5H1.10 into the Guidelines, which expressly provides that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of

91. *Id.* § 2B3.1(b)(1).

92. *Id.* § 3A1.3.

93. *Id.* §§ 3E1.1(a)–(b).

94. *See id.* § 4A1.1.

95. 20 (base level) + 2 (specific offense characteristic) + 2 (specific offense characteristic) + 2 (restraining a victim) – 3 (cooperating with authorities) = 23.

96. GUIDELINES, *supra* note 80, § 5A.

97. *Id.* § 6A1.1.

98. FED. R. CRIM. P. 32(d)(2).

99. Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 8 (1993).

a sentence."[100] Despite the admirable goal of protecting African Americans and other classes of citizens from disproportionate sentences, by assuming that judges would only use identity-based factors to *extend* sentences, section 5H1.10 forecloses the possibility that judges might use those factors to *shorten* sentences. Thus, under section 5H1.10, judges must consider a discriminated-against offender's conduct in a vacuum, without the ability to reduce the sentence as a judicial deterrent to racially selective police or prosecutorial practices. This limitation is perhaps unsurprising, however, given the narrow aim of the Guidelines to secure "reasonable uniformity in *sentencing*," not necessarily reasonable uniformity in overall treatment in the criminal justice system.[101]

C. BOOKER *AND THE "ADVISORY" GUIDELINES*

In 2005, in *United States v. Booker*, the Supreme Court struck down the provisions of the Guidelines that made their application mandatory.[102] The Court held that, because juries generally determine a defendant's guilt regarding only the statutory base-level offense (for example, robbery, using the hypothetical in Part II.A), calculating mandatory sentences using additional factors *not* submitted to a jury violated the Sixth Amendment.[103] Although *Booker* made the Guidelines advisory rather than mandatory, the Court deliberately excised only two provisions—one expressly requiring courts to impose sentences within the Guidelines range and another granting appellate courts *de novo* review of any Guideline departures—while leaving the rest unchanged.[104]

Following *Booker*, the Court decided *Gall v. United States*, which established the procedure that a trial court must follow when sentencing offenders post-*Booker*.[105] First, "to secure nationwide consistency," the court must correctly calculate the applicable Guidelines range.[106] Second, it must consider arguments from the Government and the defense as to what sentence they deem appropriate.[107] Third, it must weigh the § 3553(a) sentencing factors[108] and decide whether they support the calculated

100. GUIDELINES, *supra* note 80, § 5H1.10.

101. *Id.* § 1A1.3 (emphasis added).

102. United States v. Booker, 543 U.S. 220, 245 (2005).

103. *Id.* at 232–33. The Sixth Amendment grants all citizens the right to a criminal trial conducted "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

104. *Booker*, 543 U.S. at 258–59 ("[W]e must 'refrain from invalidating more of the statute than is necessary.'" (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984))).

105. Gall v. United States, 552 U.S. 38, 49–50 (2007).

106. *Id.* at 49.

107. *Id.*

108. *See supra* note 73 and accompanying text.

Guidelines range.[109] Lastly, the court "must make an individualized assessment based on the facts presented" to decide whether "an outside-Guidelines sentence is warranted."[110] Where the trial court decides to sentence outside the Guidelines range, it must justify the deviation on the record—with a greater deviation warranting a more compelling justification.[111] Thus, as the post-*Booker* sentencing procedure demonstrates, while judges are capable of deviating, the Guidelines remain firmly entrenched in federal sentencing practice.[112]

Despite the ability to deviate, over 80% of sentences either conform to the Guidelines or deviate downward only after a request from the prosecution.[113] Correspondingly, in fewer than 20% of sentences did the sentencing judge unilaterally decide to deviate downward following consideration of the § 3553(a) factors and a *Booker*-style "individualized assessment based on the facts presented."[114] In drug offenses—i.e. those offenses in which the ACLU has specifically identified racial bias—"the influence of the guidelines has remained stable over time."[115] This data reveals that sentencing judges largely remain loyal to the Guidelines, even years after they became advisory. Due to this surviving allegiance and the continued presence of section 5H1.10, to have a sizable impact, any revision to federal sentencing that aims to secure more lenient sentences for defendants subjected to racially selective police or prosecutorial practices must operate through the Guidelines.

IV. ENLISTING JUDGES TO CORRECT AND DETER RACIALLY SELECTIVE PRACTICES

This Note has chronicled the ways that discretionary practices can—and often *do*—result in racial bias at the initial arrest[116] and at the subsequent

109. *Gall*, 552 U.S. at 49–50.

110. *Id.* at 50.

111. *Id.*

112. *See* GUIDELINES, *supra* note 80, § 1A2 (noting that even though *Booker* made the Guidelines non-mandatory, the now-advisory Guidelines remain instrumental to "further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted").

113. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 5 (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf ("During the *Gall* period, 80.7 percent of federal sentences were either within the guideline range (53.9% of sentences) or below the range pursuant to a government motion (26.8% of sentences).").

114. *Cf. id.* ("Less than one-quarter (17.4%) of sentences were non-government sponsored below range sentences.").

115. *Id.* at 5–6 (indicating that any decrease in drug sentences generally come only after government motion).

116. *See* discussion *supra* Part II.B.

charging and prosecution.[117] This Note has further examined the obstacles that the Guidelines pose for judges who wish to remedy that racial bias through discretionary sentencing decisions.[118] This Part advocates for a two-step measure to alter federal sentencing practices and to permit judges to issue bias-corrective sentences—i.e. lenient sentences to combat and deter racial bias in earlier arrest and trial phases. The first step requires the elimination of section 5H1.10 from the Guidelines.[119] The second step requires probation officers to investigate the factors surrounding an offender's arrest and prosecution to identify inferences of racial bias in their presentence reports.[120] First, however, this Part will examine and critique a sentencing principle that Canada adopted, which established a system similar to what this Note proposes, to mixed success.

A. A MODEL TO BUILD UPON: CANADA'S SECTION 718.2(e)

A sentencing principle permitting judges to account for racial bias when issuing a criminal sentence is not unprecedented. In 1996, the Canadian Parliament added a provision to Canada's Criminal Code, section 718.2(e), which provides in relevant part: "A court that imposes a sentence shall . . . take into consideration . . . (e) all available sanctions other than imprisonment that are reasonable in the circumstances . . . with particular attention to the circumstances of aboriginal offenders."[121] This provision reflects a clear parliamentary policy to avoid imprisoning aboriginal offenders where feasible, and Canada codified the provision in response to the "gross overrepresentation of Aboriginal people in prison."[122]

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117. *See* discussion *supra* Part II.C.

118. *See* discussion *supra* Part III.

119. *See* discussion *infra* Part IV.B.1.

120. *See* discussion *infra* Part IV.B.2.

121. Criminal Code, R.S.C. 1985, c. C-46, § 718.2(e) (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/C-46.pdf. "Aboriginals" refers to Canada's indigenous population. *See* Alexandra Olson, *Canada Faces 'Crisis' over Aboriginal Issues, Anaya Tells the UN*, CTV NEWS (Oct. 22, 2013, 4:18 PM), http://www.ctvnews.ca/canada/canada-faces-crisis-over-aboriginal-issues-anaya-tells-the-un-1.1507495 (describing contemporary issues facing Canada's indigenous aboriginal population).

122. KENT ROACH, ESSENTIALS OF CANADIAN LAW: CRIMINAL LAW 471 (5th ed. 2012) (citing data showing that at the time Parliament introduced the provision, "Aboriginal people constituted 12 percent of federal inmates but only 3 percent of the total population"). Whereas Canadian aboriginals are represented in the prison population at a four times higher rate than they are represented in the overall Canadian population, African Americans are similarly overrepresented at an approximately three times higher rate in America's federal prisons than in the overall American population. *Compare* U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (showing that African Americans made up 12.6% of the United States population in 2010), *with Inmate Race*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated June 28, 2014) (showing that African Americans make up 37.1% of the United States federal prison system).

In a landmark decision, *Regina v. Gladue*, the Supreme Court of Canada provided an expansive interpretation of section 718.2(e): not only must sentencing judges pay "particular attention to the circumstances" of individual aboriginals, but they must also take judicial notice of the "systemic" factors that affect *all* aboriginals and that may contribute to their overrepresentation in Canadian prisons.[123] Because *Gladue* held that section 718.2(e) requires judges to issue more lenient sentences to aboriginals due to the "systemic" factors contributing to their overincarceration—and because African Americans also experience "systemic" factors contributing to their overincarceration[124]—it is worthwhile to investigate how successful section 718.2(e)'s sentencing scheme has been in ameliorating the inequalities facing Canadian aboriginals.

Since the introduction of section 718.2(e), or more specifically since *Gladue* significantly broadened its scope, many Canadian judges have been reluctant to apply the standard to its fullest extent.[125] An extensive 2005 study analyzed all cases in which section 718.2(e) might feasibly have been applied.[126] The study concluded that judges cited 12 distinct reasons for *not* applying the standard, ranging from their preference for retributivism (instead of rehabilitation) and worries that their prison-alternative sentences will be overturned on appeal, to skepticism of "race-based justice" and the perceived irrelevance of aboriginal status to the offense at issue.[127] Additionally, many defense lawyers decline to request the inclusion of "*Gladue* factors" on presentence reports compiled by probation officers because they do not perceive *Gladue* to be a worthwhile defense strategy.[128] Notably, however, judges who *did* apply section 718.2(e) reportedly did so because they

123. R. v. Gladue, [1999] 1 S.C.R. 688, 690 (Can.), *available at* http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/1695/1/document.do ("In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.").

124. *See* discussion *supra* Part II (providing background of overarching attitudes toward African Americans and how those attitudes manifest in the criminal justice arena).

125. *See* Dawn Y. Anderson, After *Gladue*: Are Judges Sentencing Aboriginal Offenders Differently? 289 (Oct. 2003) (unpublished Ph.D. thesis, York University), *available at* http://www.collectionscanada.gc.ca/obj/thesescanada/vol2/001/nq86329.pdf (finding after extensive empirical study that judicial application of section 718.2(e) throughout Canada is fraught with "inconsistency and contradictions").

126. *See generally id.*

127. *Id.* at 85 (listing twelve rationales that judges cited for not applying section 718.2(e)); *see also id.* at 151–90 (discussing in detail the various cases wherein judges cited each of the twelve rationales for not applying section 718.2(e)).

128. *See* David Milward & Debra Parkes, Gladue*: Beyond Myth and Towards Implementation in Manitoba*, 35 MAN. L.J. 84, 91 (2011) (Can.) (stating how "*Gladue* myths" convince lawyers that raising *Gladue* at sentencing is not worthwhile); *see also id.* at 87–88 (describing the inclusion of "*Gladue* factors" in presentence reports).

considered the offender's aboriginal status to be relevant to the crime, they believed prison-alternative sentences provided a sufficient deterrent, or they favored rehabilitation over retribution as the primary goal of sentencing.[129]

B. THE TWO-STEP PROPOSAL

The previous section's brief survey of section 718.2(e) and *Gladue*'s impact in Canada revealed the following obstacles that a comparable system must overcome in order to succeed in the United States: (1) retributivist judicial philosophy; (2) concerns about reversal on appeal; (3) skepticism of "race-based justice"; (4) questions regarding the relevance of racial identity to criminal conduct; and (5) the lack of participation by defense counsel. With these concerns in mind, this Note describes how a two-step proposal—eliminating section 5H1.10 of the Guidelines and requiring the inclusion of the circumstances of a defendant's arrest and prosecution in presentence reports—creates a balanced approach to deterring racially biased criminal justice while avoiding the obstacles plaguing Canada's analogous measure.

1. Eliminate Section 5H1.10

As previously described, section 5H1.10 of the Guidelines prohibits judges from considering race, among other identity characteristics, when determining a sentence.[130] Although the Guidelines are now advisory, post-*Booker* cases continue to strictly preclude a sentencing judge from implying that race factored into a sentencing decision—even where race is mentioned only in the context of "balanc[ing] the unfairness" shown to a certain racial group.[131] Therefore, any system granting judges discretion to issue more lenient sentences to defendants subjected to racially selective treatment requires the elimination of section 5H1.10, as this will allow judges to fully and adequately explain the rationale for their sentencing deviation.[132]

Eliminating section 5H1.10 arguably triggers the first two obstacles that have plagued the Canadian sentencing scheme: criticism from retributivists and the judicial fear of being reversed on appeal. First, judges and critics who subscribe to a retributivist punishment philosophy[133] may object to section

129. *See* Anderson, *supra* note 125, at 85–86 (listing three rationales judges cited for applying section 718.2(e)); *see also id.* at 191–257 (discussing in detail the various cases wherein judges cited each of the three rationales for applying section 718.2(e)).

130. *See* discussion *supra* Part III.B.

131. *See* United States v. Mees, 640 F.3d 849, 856 (8th Cir. 2011) (implying that in certain contexts, referring to "the irony . . . that the Sentencing Guidelines were especially harsh toward Indian people" may be reversible error) (internal quotation marks omitted).

132. *See* Gall v. United States, 552 U.S. 38, 50 (2007) (requiring judges to "adequately explain the chosen sentence to allow for meaningful appellate review").

133. For the purposes of this Note, "retributivism" describes the punishment philosophy "that people who do bad things ought to suffer." *See* Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 262, 263 (1983). However, there are many nuances to the retributivism philosophy that go beyond the scope of this Note. *See generally id.*

5H1.10's elimination (and the entirety of this Note's sentencing proposal) on the grounds that it will lead to overall shorter sentences for offenders. However, this is not necessarily true. Like all sentencing decisions post-*Booker*, judges will still have the discretion to impose a broad range of sentences, both within the Guidelines calculation and outside of it.[134] And unlike Canada's section 718.2(e), this two-step proposal does not go so far as to contemplate non-prison sentences,[135] but simply advocates for *shorter* prison sentences to deter future race-based police and prosecutorial practices. Removing section 5H1.10 from the Guidelines serves only to give judges the ability to consider systemic racial factors—particularly racial bias within the criminal justice system—that the Guidelines have thus far artificially barred them from considering. Whether individual judges choose to exercise the additional degree of discretion is up to them.[136]

Second, as for those judges who fear reversal on appeal, eliminating section 5H1.10 does not dramatically alter the risk of reversal in either direction. First, appellate courts review deviations from the Guidelines under the deferential abuse of discretion standard.[137] As long as a judge considers the § 3553(a) sentencing factors and "adequately explain[s] the chosen sentence . . . . [t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate" is not enough to warrant reversal.[138] If anything, by providing judges with additional justifications for reducing a sentence, eliminating section 5H1.10 arguably shields a sentencing judge from reversal. And, to reiterate, a sentencing judge is not required to consider systemic racial factors, but is merely permitted to do so.

Eliminating section 5H1.10 is only the threshold step, however, which grants sentencing judges the *procedural* power to utilize sentence length as a deterrent measure against racial bias. The second step, in contrast, provides the *substantive* information that a judge will need to consider when participating in bias-deterrent sentencing.

2. Include Arrest and Prosecution Circumstances in Presentence Reports

Without information notifying sentencing judges that a defendant was racially targeted for arrest or prosecution, any power they gain to reduce sentences accordingly is useless. Thus, step two of this Note's sentencing proposal requires probation officers to investigate the relevant circumstances of a convicted defendant's arrest and prosecution and to include that information in their presentence report. Relevant information will include

134. *See supra* notes 105–12 and accompanying text.

135. *See* Criminal Code, R.S.C. 1985, c. C-46, § 718.2(e) (Can.) (requiring Canadian judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances").

136. Of course, this Note sincerely hopes that more judges than not will consider these factors.

137. *Gall*, 552 U.S. at 51.

138. *Id.*

the following: (1) how officers made the initial arrest (Was the defendant *Terry* stopped? Was the defendant pulled over for a nominal traffic violation, implying that she was pursued for "driving while black"? Were the officers patrolling predominantly African American communities?); (2) the nature of dialogue during the pre-trial phase (Did the prosecutor bring multiple charges prior to plea bargaining and then drop many before trial? Were the same techniques used on co-defendants with different racial makeup?); and (3) jurisdictional statistics (Are African Americans arrested at a higher rate in the district of arrest? Are they charged with more mandatory minimum offenses in the district of prosecution?).

These three strains of relevant information may come from interviewing the defendant, defense counsel, government prosecutors, and arresting officers, or from reviewing trial records and crime-reporting statistics. The additional information will require more time to compile, but because the scope of presentence investigations is already so broad—and already encompasses interviews with the defendant—the additional burden to probation officers is likely marginal.[139] With this information at their disposal, judges can gain a broader sense of both the defendant and her "complex web of circumstances, . . . which often, in their totality, justify mitigation of blame or punishment."[140] By examining the circumstances of arrest and prosecution and explaining why those circumstances warrant a downward sentencing variance, judges will bring instances of racial bias into the light, which is likely enough to deter unsavory race-based practices.[141] Canada imposed a thematically similar presentence-report system for its *Gladue* factors, but it placed the burden on defense counsel to affirmatively request the inclusion of the factors.[142] By requiring probation officers to include that information in every report, without first receiving a formal request, this Note's model will prevent the inactivity of defense counsel from obstructing bias-corrective policy goals.[143]

The remaining two obstacles—skepticism about "race-based justice" and the perceived irrelevance of race to sentencing—are significant, but likewise surmountable. The United States, as a collective, is generally skeptical of

139. *See* FED. R. CRIM. P. 32(c)(2), (d) (defining the current scope of the presentence report and allowing a probation officer to interview a defendant).

140. Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 LAW & PHIL. 339, 345 (2000) (quoting Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 110–11 (1993)).

141. *See* Devin G. Pope et al., *Awareness Reduces Racial Bias* 9–10 (Feb. 2014) (Econ. Studies at Brookings, ES Working Paper Series), *available at* http://www.brookings.edu/~/media/research/files/papers/2014/02/awareness%20reduces%20racial%20bias/awareness_reduces_racial_bias_wolfers.pdf (concluding that calling attention to racial bias can effectively reduce future racial bias).

142. *See* Milward & Parkes, *supra* note 128, at 87–88 (discussing the reasons why *Gladue* "has not been implemented in a systematic way").

143. *See id.* (discussing the various limitations of *Gladue*).

granting perceived benefits for race-based reasons.[144] However, this Note's proposed sentencing model is not "race-based justice." It will not apply race as a de facto mitigating factor, like *Gladue* held that section 718.2(e) must do,[145] but will instead apply racial *discrimination* as a mitigating factor. Race alone—or inferences of discrimination unsupported by the presentence report—will not provide adequate justification for a downward deviation from the Guidelines. But where the presentence report supports inferences of racial discrimination, judges must have the ability—even if they choose not to exercise it—to send a message that racial discrimination will not be tolerated. Congress has couched numerous other policies in race-based language to eliminate similar discriminatory practices.[146]

The primary distinction between this Note's race-considerate sentencing scheme and programs, like affirmative action, which have been the subject of judicial scorn[147] is that non-racial-minorities are not *dis*advantaged by the scheme.[148] Those defendants who were not arrested or prosecuted in a racially selective manner will not see their sentences affected, whether they are African American, White American, or any other race. To address the last remaining obstacle—the "irrelevance" of race to sentencing—this Note ultimately agrees that race *is* irrelevant to sentencing, but counters that it is also irrelevant to policing and charging. And whereas discretionary police and prosecutorial actions unquestionably make race relevant in ways that harm African American defendants, whether intentionally or not,[149] this Note's two-step scheme makes race relevant to remedy that harm, without harming other racial groups in the process.

V. CONCLUSION

This Note began by acknowledging the stark racial disparity in marijuana arrests nationwide, and the corresponding racial implications of nearly unbounded police and prosecutorial discretion, and identified sentencing as a potential arena through which to remedy and deter the racially selective application of United States criminal laws. After examining the difficulties that the current sentencing paradigm creates for judges wishing to engage in

144. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (applying strict scrutiny to affirmative action in college admissions).

145. *See supra* note 123 and accompanying text.

146. *See, e.g.*, 42 U.S.C. § 1981(a) (2012) (providing "[a]ll persons" with the "equal benefit of all laws . . . as is enjoyed by white citizens"); *id.* § 1982 (2012) (providing "[a]ll citizens" the same property rights "as is enjoyed by white citizens").

147. *See generally Fisher*, 133 S. Ct. at 2411 (addressing the University of Texas' use of race in its admissions decisions).

148. *See History and Debate of Affirmative Action*, DEBATE.ORG, http://www.debate.org/affirmative-action-debate/ (last visited Aug. 11, 2014) (describing criticisms of affirmative action, including the belief that "the privileged"—the non-racial-minorities—fear that affirmative action prevents them from "be[ing] hired no matter how well they perform").

149. *See* discussion *supra* Parts II.B–C.

that remedial and deterrent role, this Note advocated for a solution: a two-part revision to federal sentencing that (1) eliminates a Guidelines provision that prohibits any discussion of race during the sentencing process; and (2) requires the inclusion of details surrounding each offender's arrest and charging within every presentence report, so that judges may consider those contextual factors when arriving at an appropriate sentence. Under this slight change to the current sentencing model, this Note is confident that police and prosecutors will be forced to reflect on how race impacts their discretionary decisions and will alter their behaviors accordingly.