

# Flawed Coalitions and the Politics of Crime

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*ABSTRACT: Bipartisanship can be dangerous. In the late 1970s, liberal and conservative forces united to discard two centuries of discretionary federal sentencing practice by passing the Sentencing Reform Act, which ushered in an era of fixed guidelines that would reshape the criminal justice landscape. In the decades that followed, liberals would come to bitterly regret their alliance with conservative sentencing reformers. The guideline regime established by the Act ultimately advanced hardline conservative criminal justice goals that were antithetical to the objectives of many of the Act's former liberal supporters.*

*Researchers have shown that a particular cognitive bias—cultural cognition—can explain why intense partisan conflicts persist even when different sides share the same long-term goals. But while scholars have documented ways that cultural cognition fosters disagreement where parties agree on desired outcomes, no commentator has explored the opposite phenomenon: whether cultural cognition may foster agreement where, in fact, citizens and policymakers sharply disagree.*

*This Article argues that the same cultural cognition biases that foment conflict among parties that share similar goals may also mask substantive differences among parties that should never have collaborated in the first place. Using the reform effort that led to the federal sentencing guidelines and the current movement to establish criminal “problem-solving courts,” this Article demonstrates how, in some cases, cultural cognition may dangerously frustrate the goals of elected officials who broadly delegate power to politically unaccountable actors.*

*Accordingly, this Article recommends the use of safeguards borrowed from administrative law that can minimize the dangers of flawed coalitions and promote deliberative democracy. By adopting sunset provisions and third-*

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*party monitors, policymakers can ensure that they do not overly commit to reform policies that will one day undermine their own interests.*

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## INTRODUCTION

*“The American people are crying out for bipartisanship and real solutions to the challenges we face . . . .”*

— Congressman Charles F. Bass<sup>1</sup>

*“Although there is no progress without change, not all change is progress.”*

— John Wooden, Former UCLA Basketball Coach<sup>2</sup>

Bipartisanship can be dangerous. In the late 1970s, liberals and conservatives had vastly different objectives for criminal justice reform.<sup>3</sup> Yet despite little agreement about the outcomes they hoped to achieve, the two sides united to discard two centuries of discretionary federal sentencing practice and ushered in an era of fixed guidelines that would reshape the criminal justice landscape.<sup>4</sup> Unfortunately for liberals, the guideline regime established by the Sentencing Reform Act<sup>5</sup> (“the Act”) ultimately advanced hardline conservative criminal justice goals that were antithetical to the objectives of many of the Act’s liberal supporters.<sup>6</sup> The fact that liberals undermined many of their long-term interests by cooperating with conservatives raises two foundational questions: why were liberals’ expectations for sentencing reform so misguided, and were the liberals irrational to ally themselves with parties that did not share their long-term goals? This Article examines whether cultural cognition theory can provide some clues as to why opposing parties might form ill-conceived coalitions when their interests diverge.

1. Representative Charles F. Bass, Statement on National Security and Job Protection Act (Sept. 13, 2012) (transcript available at Targeted News Service).

2. JOHN WOODEN & STEVE JAMISON, WOODEN: A LIFETIME OF OBSERVATIONS AND REFLECTIONS ON AND OFF THE COURT 199 (1997).

3. See *infra* introduction to Part III.

4. See Michael Vitiello, *Sentencing Guideline Law and Practice in a Post-Booker World: Introduction*, 37 MCGEORGE L. REV. 487, 490 (2006) (“Beginning in the 1970s, a coalition of liberal and conservative commentators mounted a challenge to the dominant indeterminate sentencing model in effect in the United States at that time.”). See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (describing the political history of the Sentencing Reform Act of 1984).

5. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

6. Stith & Koh, *supra* note 4, at 282 (“[M]uch of the criticism [of federal sentencing reform] is from the political left, including defense attorneys and scholars who had been early and enthusiastic proponents of binding sentencing guidelines.”); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 933–34 (1991) (describing how liberal supporters of sentencing reform “[sold] the farm”); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899, 899 (1992) (“The Federal Sentencing Commission, and the Congress which created it, simply are not getting the message, although the message could not be clearer: Your cure is worse than the disease.”).

Some of the most fiercely contested policy disputes can be reduced to basic empirical questions. Whether guns enhance or reduce public safety<sup>7</sup> or whether the death penalty deters or increases crime<sup>8</sup> can be measured objectively. But researchers have shown that, despite their factual nature, these disputes are not simply resolved by further empirical study.<sup>9</sup> Rather, scholars suggest that a particular cognitive bias—*cultural cognition*—explains why intensely partisan conflicts persist even when the sides share the same long-term goals.<sup>10</sup> Cultural cognition describes individuals' tendency "to conform their perceptions of risk and other [factual beliefs] to their cultural worldviews."<sup>11</sup> Cultural cognition scholars argue that it is differences in parties' cultural perspectives that drive political conflict over empirical policy questions.

But while a generation of scholarship has documented ways that cultural cognition fosters disagreement where parties agree on desired outcomes, no commentator has explored the opposite phenomenon: whether cultural cognition may foster agreement where, in fact, citizens and policymakers sharply disagree on the outcome. This Article argues that the same cultural biases that foment conflict among parties that share similar goals may also mask substantive disagreements among parties that should never have collaborated in the first place. In so doing, this Article identifies three conditions where "culturally motivated cognition"<sup>12</sup> may promote flawed coalitions: (1) when the parties possess incompatible long-term goals; (2) when powerful cultural cues are embedded in the proposed policy; and (3) when the parties delegate future resolution of contentious aspects of the

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7. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003) (describing the debate over whether guns make society more or less safe). Compare JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 20–21 (3d ed. 2010) (suggesting that gun control measures will lead to an increase in the crime rate), with Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1087–88 (2001) (providing empirical support for the proposition that increases in gun ownership are positively correlated to increases in the homicide rate).

8. See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 800–01 (2010) (suggesting that citizens' views on whether the death penalty deters murder are determined by their cultural worldview).

9. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 149–50 (2006) (describing individuals' tendency to reject empirical claims that conflict with their cultural perspective).

10. *Id.* at 163 ("[T]he phenomenon of cultural cognition explains how citizens whose *only* concern is their material well-being, narrowly understood, are still likely to array themselves into opposing cultural factions on political matters.").

11. Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 23 (2011).

12. Cultural cognition theorists refer interchangeably to "cultural cognition," "culturally motivated cognition," and "culturally motivated reasoning." See Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 859 n.39 (2012) (internal quotation marks omitted).

policy to third parties. The politics of crime are particularly likely to give rise to these three conditions, where legislatures frequently delegate contentious value-laden policies of rehabilitation and punishment to agencies and judges.

Using the reform effort that led to the federal sentencing guidelines and the contemporary movement to establish criminal “problem-solving courts,”<sup>13</sup> this Article demonstrates how, in some cases, cultural cognition may dangerously frustrate the goals of citizens, lawmakers, and judges. As set forth below, the guideline regime established by the Federal Sentencing Reform Act possessed all of the hallmarks of a false coalition: antithetical long-term criminal justice goals, powerful social cues embedded in the values of criminal sentencing, and broad delegations of power to an independent commission. More recently, liberals and conservatives have united in support of problem-solving courts—specialized courts that use intense rehabilitative programs as alternatives to incarceration.<sup>14</sup> The coalition that supports problem-solving courts is eerily reminiscent of the one that supported federal sentencing reform. Despite differences over whether the goal of problem-solving courts is to maintain order at low cost or provide comprehensive services to rehabilitate defendants, conservatives and liberals have united to delegate enormous discretion to judges to manage criminal defendants’ lives. Cultural cognition theory suggests that policymakers should be wary of such broad delegations of power to politically unaccountable actors.

Policymakers can adopt safeguards to minimize the dangers of flawed coalitions and better promote deliberative democracy. Administrative law solutions, such as sunset provisions and third-party monitoring, can help identify and manage situations where cognitive bias may mask incompatible policy objectives. These measures can help ensure that policymakers do not overly commit to a reform policy that will one day undermine their own interests.

This Article proceeds in five parts. Part I explores how cognitive bias generates political conflict—even where parties share the same long-term goals. Part II expands this model of cognitive bias and examines how the same biases that foster political conflict can facilitate the creation of political alliances between parties that do not share the same policy objectives. Part III examines the role that cultural cognition may have played in the federal sentencing reform process and identifies three warning signs that indicate

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13. Problem-solving courts are specialized courts that employ nontraditional approaches to criminal-case processing. See Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 59–62 (2009) (describing the modern problem-solving court movement).

14. See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 639–40 (2012) (describing growing bipartisan support for criminal justice reforms that utilize problem-solving court approaches).

when cognitive bias may be distorting a party's policy expectations. Part IV demonstrates how the same biases may be distorting the current debate over problem-solving courts. Finally, borrowing lessons from administrative law, Part V suggests practical solutions that will allow parties to pursue a bipartisan reform strategy without fear that cognitive bias will lead them to undermine the very goals they hope to achieve.

#### I. THE ROLE OF COGNITIVE BIAS IN THE PERSISTENCE OF CONFLICT

Do guns make communities safer or do they increase violent crime? Will a law requiring all school-age girls to be vaccinated for the human-papillomavirus ("HPV") make girls safer or endanger their health? Does climate change pose a significant risk to humanity's survival and prosperity or are global warming predictions based upon faulty research? These empirical questions are subject to fervent disagreement despite the fact that the population generally agrees that we would like our communities to be safer, our children to be healthy, and our environment to be capable of sustaining future generations.<sup>15</sup> Moreover, society's failure to come to an agreement on these "hot button" issues cannot be wholly explained by the fact that these issues are so complex and technical that the population cannot reasonably be expected to sift through the evidence and develop a shared consensus as to the answer. Researchers have identified strong correlations between unrelated policy disagreements.<sup>16</sup> Individuals who favor HPV vaccination are also likely to believe restrictions on handgun ownership will increase public safety.<sup>17</sup> Individuals who believe climate change is not a threat to global prosperity are more likely to believe that abortions endanger a woman's health.<sup>18</sup> The correlation between positions in seemingly unrelated factual disputes suggests that the persistence of

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15. See Kahan & Braman, *supra* note 7, at 1292 (describing the debate over whether guns make society more or less safe); Dan M. Kahan et al., *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. 501, 501-02 (2010) [hereinafter Kahan et al., *Who Fears the HPV Vaccine?*] (describing the debate over mandatory HPV vaccination); Dan M. Kahan et al., *The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change* 14-15 (Cultural Cognition Project, Working Paper No. 89, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871503) [hereinafter Kahan et al., *The Tragedy of the Risk-Perception Commons*] (attributing the polarized debate over climate change to cultural cognitive bias).

16. Kahan & Braman, *supra* note 9, at 150 ("If someone believes that gun control doesn't deter gun violence, he is very likely to believe that global warming poses no serious environmental risk, and that abortion clearly puts the health of women in danger; if she believes that gun control *does* deter crime, she's likely to think that global warming is a serious problem, and that abortion *isn't* dangerous to a woman's health." (citing Dan M. Kahan et al., *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety* 15-24 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 86, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=723762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=723762))).

17. See *id.*

18. *Id.*

conflict over such empirical questions cannot be attributed solely to the technical challenges of uncovering the correct answer.<sup>19</sup> A series of papers by scholars Dan Kahan and Donald Braman suggest that the endurance of many empirical policy disagreements is best explained by a particular type of cognitive bias that they term “cultural cognition.”

#### A. CULTURAL COGNITION DEFINED

Cultural cognition theory asserts that an individual’s evaluation of risk is shaped by his cultural worldview.<sup>20</sup> In effect, individuals do not base their conclusions on their assessment of the facts. Instead, they selectively choose to believe those facts that reinforce and complement their worldviews.<sup>21</sup> As a result, individuals who share a particular worldview are likely to reach similar empirical conclusions on such divergent issues as the amount of health risk associated with HPV vaccination and the likelihood that carbon emissions are contributing to a rise in the Earth’s temperature.<sup>22</sup>

Kahan and Braman’s cultural cognition hypothesis is based upon the work of sociologists Mary Douglas and Aaron Wildavsky.<sup>23</sup> Douglas and Wildavsky theorized that individuals estimate the danger or risk associated with particular activities or policies in ways that “reflect and reinforce” their cultural perspective.<sup>24</sup> They further explained that these cultural perspectives can be categorized according to a person’s view of the relationship between the individual and the group (“individualistic versus communitarian orientation”) and the person’s view of the appropriate

19. *Id.* at 149 (“If the source of public dispute about the empirical consequences of public policy were based on the indeterminacy or inaccessibility of scientific knowledge, then we would expect beliefs about these consequences either to be randomly distributed across the population or to be correlated with education. But this is not so . . .”).

20. Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511, 516 (2010) (“Cultural theorists believe that individual perceptions of risk are based largely on individual cultural worldviews.”).

21. Kahan & Braman, *supra* note 9, at 151–52 (“By [cultural cognition] we mean to refer to the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation.”); Kahan et al., *Who Fears the HPV Vaccine?*, *supra* note 15, at 502 (“The cultural theory of risk asserts that individuals selectively attend to risks and related facts in a way that reflects and reinforces their ‘cultural worldviews,’ or preferences about how society should be organized.”).

22. See Kahan et al., *Who Fears the HPV Vaccine?*, *supra* note 15, at 506–07 (explaining the spectrum of opinions about the HPV vaccine).

23. See MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* (1982); see also Greene, *supra* note 20, at 516–17.

24. DOUGLAS & WILDAVSKY, *supra* note 23, at 8–10; Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, in 2 HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS, AND SOCIAL IMPLICATIONS OF RISK 725, 727 (Sabine Roeser et al. eds., 2012).

organization of society (“hierarchical versus egalitarian” orientation).<sup>25</sup> Douglas posited that once an individual’s orientation with respect to these two cultural viewpoints was established, his or her worldview could literally be mapped along two dimensions, which she labeled “grid” and “group.”<sup>26</sup>

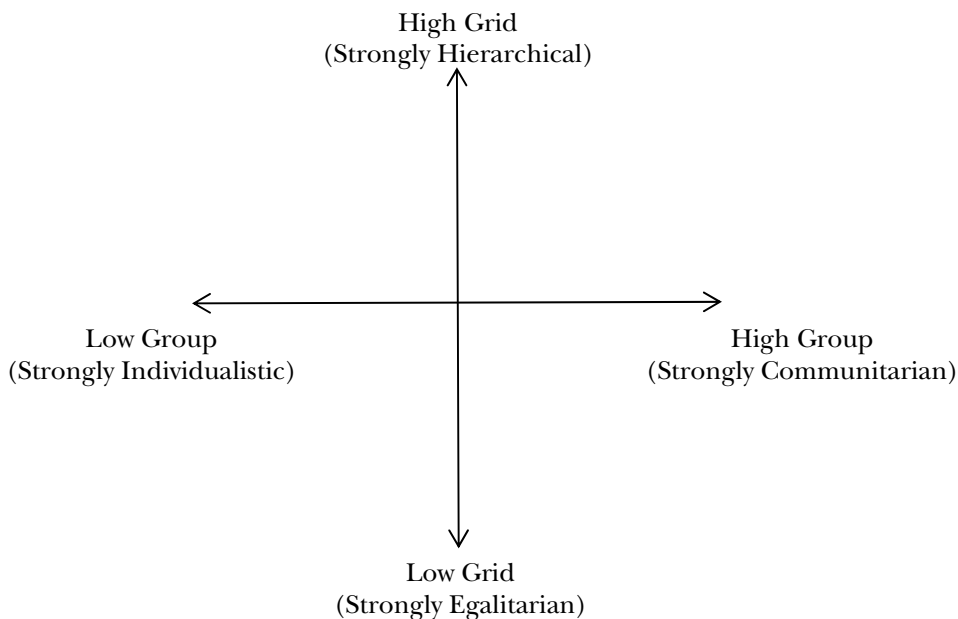


Figure 1. Cultural World Typology Based on Douglas’ Grid/Group Classifications

Persons exhibiting a “high grid” worldview believe in a highly stratified society in which roles, resources, opportunities, and the like are distributed based on clear and generally immutable characteristics like gender, class, and lineage.<sup>27</sup> Conversely, persons believing that such characteristics should have no bearing on the distribution of roles, resources, and opportunities have a “low grid,” or egalitarian, worldview.<sup>28</sup> A person with a “high group”

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25. Marjorie E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 *LOY. U. CHI. L.J.* 253, 258 (2009); *see also* DOUGLAS & WILDAVSKY, *supra* note 23, at 95; Steve Rayner, *Cultural Theory and Risk Analysis*, in *SOCIAL THEORIES OF RISK* 83, 87 (Sheldon Krimsky & Dominic Golding eds., 1992) (describing the characteristics of Douglas and Wildavsky’s four cultural variables).

26. *See* Mary Douglas, *Being Fair to Hierarchists*, 151 *U. PA. L. REV.* 1349, 1352 (2003) (“Grid-group is a method for identifying social pressures and plotting them on a map of social environments.”); Kahan, *supra* note 24, at 727.

27. *See* Rayner, *supra* note 25, at 87–88 & tbl.4.1; *see also* Kahan & Braman, *supra* note 9, at 153.

28. *See* Rayner, *supra* note 25, at 87–88 & tbl.4.1; *see also* Kahan & Braman, *supra* note 9, at 153–54.



worldview believes that society should be composed of interconnected, mutually supportive groups that share tasks and regularly interact with each other.<sup>29</sup> A person with a “low group” perspective is highly individualistic and views the world as being composed of competitive individuals who are primarily responsible for their own well-being.<sup>30</sup>

Building on Douglas and Wildavsky’s work, Kahan and Braman developed a survey designed to identify a respondent’s cultural worldview.<sup>31</sup> Questions revealing a respondent’s attitude towards race, sexual orientation, the military, and capital punishment were used to ascertain whether the respondent was inclined towards either a hierarchical or egalitarian worldview.<sup>32</sup> Questions exploring the respondent’s level of support for government spending on social and regulatory programs were designed to uncover whether a respondent nurtured an individualist or communitarian perspective.<sup>33</sup> After identifying each respondent’s cultural worldview, Kahan and Braman used multivariate regression analysis to identify the degree to which one’s worldview correlated with one’s position on a variety of policy questions.<sup>34</sup> Consistent with Douglas and Wildavsky’s theories, Kahan and Braman found that one’s cultural worldview is highly predictive of one’s position on a wide range of policy debates ranging from whether gun control policies increase public safety to the inherent dangers of nanotechnology.<sup>35</sup>

While Kahan and Braman have applied Douglas’ model to a host of policy issues, they have not stringently adhered to Douglas’ original conception of the four distinct worldviews.<sup>36</sup> Most notably, Douglas described low-group, high-grid individuals as “fatalists” who tend to accept the limitations of personal agency and who view efforts to abate risk as

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29. See Rayner, *supra* note 25, at 87–88 & tbl.4.1; see also Kahan & Braman, *supra* note 9, at 153.

30. See Rayner, *supra* note 25, at 87–88 & tbl.4.1; see also Kahan & Braman, *supra* note 9, at 153.

31. The questions that made up the survey were drawn from the 1988–2000 General Social Survey, which is conducted by the National Opinion Research Center at the University of Chicago. See Kahan & Braman, *supra* note 7, at 1302.

32. See, e.g., *id.* at 1303.

33. *Id.*

34. See, e.g., Kahan, *supra* note 8, at 731–33 (identifying a relationship between cultural worldview and issues surrounding consent in date-rape cases); Kahan & Braman, *supra* note 7, at 1306–08 (identifying a relationship between cultural perspective and views on gun control); Kahan et al., *Who Fears the HPV Vaccine?*, *supra* note 15, at 502–03 (identifying a relationship between worldview and perceptions of the dangers associated with the HPV vaccine).

35. See Kahan & Braman, *supra* note 7, at 1292–93 (discussing the impact of cultural perspectives on views about gun control); Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 758–59 (2008) (describing the relationship between cultural cognitive bias and perceptions of the dangers associated with nanotechnology).

36. See generally Kahan, *supra* note 24, at 729–31 (acknowledging the disconnect between the cultural cognition project’s conception of the low-group, high-grid worldview and conventional culture theory).

futile.<sup>37</sup> Instead, Kahan and Braman describe low-group, high-grid Americans as “individualists” who, like “the iconic American cowboy, the ‘Marlboro Man,’”<sup>38</sup> resist outside collectivist authorities like the federal government but still organize their local institutions and families in a “highly regimented, and highly stratified, way[.]”<sup>39</sup> According to Kahan and Braman, an American hierarchical individualist will oppose gun control because guns “are part of the symbolic equipment (particularly in the South) that enables men to occupy distinctively male roles (father, hunter, protector) and exhibit distinctively male virtues (courage, honor, responsibility, martial prowess).”<sup>40</sup> In her critique of Kahan and Braman’s gun control analysis, Douglas suggested that the authors’ survey questions revealed their own bias against hierarchists and accused the authors of failing to draw a clear distinction between the culture of individualism and the culture of hierarchy.<sup>41</sup> According to Douglas, in light of their “love of order,” a classic hierarchist would “line up in favor of [gun] control.”<sup>42</sup>

Ultimately, Kahan and Braman’s fidelity to Douglas’ traditional culture theory is less important than the strength of the relationships they uncovered.<sup>43</sup> Whether or not Kahan and Braman fairly characterized hierarchists, the correlation between seemingly unrelated policy positions and particular worldviews suggests that cultural orientation, whatever its proper designation, is shaping what people accept as “fact.”<sup>44</sup> So long as

37. The first authors to characterize low-group, high-grid individuals as “fatalists” were Michael Thompson, Richard Ellis, and Aaron Wildavsky. See MICHAEL THOMPSON ET AL., *CULTURAL THEORY* 7 (1990). Douglas accepted this characterization and referenced the low-group, high-grid outlook as “fatalist” in her later work. See Douglas, *supra* note 26, at 1359 (“It is true that they tend toward a fatalistic outlook, and not surprisingly, since there is little they can do about anything in their lives.”).

38. See Kahan, *supra* note 24, at 735.

39. *Id.*

40. Dan M. Kahan & Donald Braman, *Caught in the Crossfire: A Defense of the Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1395, 1412 (2003); Kahan & Braman, *supra* note 9, at 158 (“Persons of hierarchical and individualistic orientations, we surmised, would conclude that gun control has perverse consequences, a belief congenial to the association of guns with hierarchical social roles (hunter, protector, father) and with hierarchical and individualistic virtues (courage, honor, chivalry, self-reliance, prowess).”).

41. Douglas, *supra* note 26, at 1362.

42. *Id.* at 1361.

43. Kahan and Braman also do not subscribe to Douglas and Wildavsky’s view that the reason culture determines one’s policy views is because those views ultimately reinforce the culture itself. Instead of this “functionalist account,” proponents of cultural cognition theory suggest that psychological processes and heuristic reasoning create biases that tie worldviews to personal evaluations of risk and policy. See Kahan et al., *Who Fears the HPV Vaccine?*, *supra* note 15, at 502–03 (suggesting that the connection between culture and perceptions of risk is best explained by social psychology and conventional heuristic processes); see also Kahan, *supra* note 24, at 739 (“The *mechanisms* hypothesis is that worldviews yield risk perceptions through a set of social and psychological processes.”).

44. See Kahan & Braman, *supra* note 9, at 150.

people form their positions based upon their cultural viewpoint, policy disagreements would seem to be altogether intractable. Efforts to produce “objective data” cannot resolve intense policy disagreements if the data is interpreted and accepted or rejected according to the particular cultural orientation of the audience.<sup>45</sup>

As a result, cultural cognition theory would appear intensely pessimistic about the potential to resolve deeply polarized disputes. If, however, cultural differences are the root cause of society’s failure to bridge some entrenched disagreements, cultural cognition theorists have offered some potential solutions.<sup>46</sup> These solutions suggest the paralyzing conflicts that have led to political stalemate and societal discord ultimately may be surmountable.

B. *PROPOSED STRATEGIES FOR COMBATING CULTURAL COGNITION BIAS*

Scholars have suggested two alternative strategies for “managing” cultural cognitive bias.<sup>47</sup> Some have suggested that cultural bias can be avoided by draining policy proposals of their cultural import, thereby allowing for an unbiased examination of policy options.<sup>48</sup> Unfortunately, it is not easy to cleanse a policy proposal, or even the policy challenge that the proposal is intended to resolve, of cultural cues.<sup>49</sup> If Douglas and Wildavsky are right, “there is no culture-free perspective.”<sup>50</sup> However, by stifling the “cues” that signal to an audience that a policy proposal is linked to a particular cultural worldview, there may be a better chance that parties will

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45. *Id.* at 166 n.73 (“If our study demonstrates anything, it surely demonstrates that social scientists can not expect rationality, enlightenment, and consensus about policy to emerge from their attempts to furnish ‘objective’ data about burning social issues.” (quoting Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2108 (1979))).

46. *See id.* at 150–51.

47. *See, e.g.*, Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 111 (2010) (“[S]ocial science and legal research indicate that debiasing techniques do exist for judges to counteract their susceptibility to the more troubling and illiberal aspects of their biased decisionmaking.”); *see also* Kahan, *supra* note 24, at 753, 755 (“Cultural cognition suggests that the influence of worldviews on risk perceptions can be collectively managed in a manner that simultaneously advances the interests of persons of all cultural persuasions.”).

48. *See* Kahan, *supra* note 24, at 756 (“At least in theory, then, it should be possible to build into policymaking institutions and procedures devices that . . . stifle the sorts of cues that the mechanisms of cultural cognition depend on.”); Secunda, *supra* note 47, at 111 (suggesting “that debiasing techniques do exist for judges”).

49. Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 584–85 (2006) (describing the interdependence of factual beliefs and values and the difficulty in resolving policy debates by reference to empirical claims that are seemingly divorced from cultural commitments).

50. Kahan, *supra* note 24, at 755.

evaluate the proposal on its true merits.<sup>51</sup> While this may not inevitably lead to consensus, it would avoid the spontaneous conflict that emerges when groups with opposing worldviews recognize that a particular issue carries cultural significance.<sup>52</sup>

Alternatively, some have suggested that proposed solutions should be “infused” with multiple meanings that are attractive to different cultural groups.<sup>53</sup> This second approach, described as “expressive overdetermination,” on its face appears to offer a way for everyone to be happy. Each side believes that a particular policy supports its own worldview; as a result, conflict and stalemate can be avoided and progress can be made. United States welfare policy, for example, enjoyed broad support when aid to the poor appeared to mutually endorse hierarchist, individualist, and egalitarian values.<sup>54</sup> However, when the policy no longer appeared to reflect individualistic and hierarchical worldviews, the welfare discussion collapsed into political dissension and cultural conflict.<sup>55</sup>

Expressive overdetermination may well offer the best prospect of overcoming the political paralysis that results when groups with opposing cultural perspectives are unable to reach consensus because of perceived threats to their cultural worldview. Unfortunately, the strategy of appealing to multiple cultural worldviews poses an altogether different danger from the persistent social and political conflict that concerned Dan Kahan and his collaborators.<sup>56</sup> Just as culturally motivated reasoning can needlessly foment conflict, so too can it mask substantive differences and enable flawed alliances between parties that perhaps should never have collaborated in the first place.

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51. See *id.* at 756 (“When that happens, individuals will be forced to process information in a different way, maybe in a more considered way, or maybe in a way that reflects other cues that are reliable but not culturally valenced.”).

52. See *id.* (“In the resulting deliberative environment, individuals might not immediately converge on one set of factual beliefs about risks and risk mitigation. But they won’t spontaneously split into opposing cultural factions on those matters.”).

53. Kahan, *supra* note 11, at 68 (“Expressively overdetermined laws—ones that combine elements conveying a multiplicity of culturally valued meanings—have been instrumental in dissipating political conflict . . . .”); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145 (2007) (“I want to defend a new discourse norm, expressive overdetermination, that seeks to contain cognitive illiberalism not by stripping it of partisan social meanings but by infusing it with so many that every cultural group can find affirmation of its worldviews within it.”).

54. See STEVEN M. TELES, WHOSE WELFARE? AFDC AND ELITE POLITICS 12–14 (1996); see also Kahan, *supra* note 53, at 146–47 (concurring with Teles’ claim that the failure to appeal to a broad spectrum of cultural values contributed to the demise of U.S. welfare policy).

55. See Kahan, *supra* note 53, at 146–47.

56. See, e.g., *id.* at 146–48.

## II. THE ROLE OF COGNITIVE BIAS IN THE MANUFACTURE OF FALSE SOLIDARITY

### A. COALITIONS WITH SUBSTANTIVE DIFFERENCES

While theorists have focused intently on the potential for culturally motivated thinking to foment political conflict, the potential for cultural biases to manufacture flawed political alliances has been largely ignored. This is not altogether surprising. Few observers of the current political climate in Washington are likely to identify bipartisanship and compromise as a salient (much less troubling) feature of modern politics.<sup>57</sup> The same biases that contribute to cultural cognition<sup>58</sup> almost certainly shape where theorists are likely to see it at work.<sup>59</sup> Yet cultural cognition bias is relevant to a broader model of political activity. To fully appreciate cultural cognition's social impact one must recognize that, just as it perpetuates conflict and political inaction, it can also mask political differences and facilitate ill-conceived political action.

To date, scholars of cultural cognition bias have focused on issues in which individuals agree on their preferred outcomes. Both gun control advocates and gun enthusiasts want their communities to be safe—they just disagree on the best means to ensure that they are.<sup>60</sup> However, some disagreements are rooted in fundamental differences over the preferred outcome. Concededly, whether a particular disagreement is rooted in conflict over “ends” as opposed to “means” may be a matter of perspective. The debate over abortion laws can be explained as a fundamental disagreement about either cultural roles<sup>61</sup> or when life begins.<sup>62</sup> Indeed, it

57. See Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L. & POL'Y REV. 23, 44 (2008) (“The level of partisan bickering and animosity within Washington is at one of the worst points in history, and willingness to compromise between the parties and their members is an increasingly infrequent occurrence.”); Vincent L. Frakes, *Partisanship and (Un)compromise: A Study of the Patient Protection and Affordable Care Act*, 49 HARV. J. ON LEGIS. 135, 149 (2012) (“Partisan bickering is highlighted more today than it ever has been through traditional and non-traditional media outlets.”).

58. One of the heuristics that scholars propose explain cultural cognition is “availability bias,” which suggests that people are more likely: (1) to notice outcomes that are consistent with their cultural views; (2) to assign those outcomes significance consistent with their cultural views; and (3) to recall instances of the outcomes when doing so supports their views. See *supra* note 43.

59. A similar bias, “confirmation bias,” which describes the tendency to identify evidence that confirms pre-existing assumptions, may also explain scholars' focus on political conflict rather than ill-conceived political cooperation. See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

60. See Kahan & Braman, *supra* note 7, at 1292 (describing the debate over whether gun control laws will increase public safety).

61. See, e.g., Kahan, *supra* note 53, at 126 (“Laws relating to . . . [abortion] provoke bitter conflict not so much because of their impact on behavior but because of the messages their adoption (or rejection) sends about the relative status of persons who subscribe to competing cultural styles.”); see also Kahan et al., *supra* note 12, at 860 (“Citizens who combine hierarchical

seems likely that both means and ends are implicated in that particular debate.

The fact that cultural cognition may needlessly infuse policy questions with cultural significance does not suggest that there are not real differences among outcomes. On the contrary, it would be surprising if parties valued those different outcomes identically even if the policy were drained entirely of cultural meaning. A complete model of cultural cognition's impact on public policy must, therefore, account for the impact that culturally motivated thinking has on policy debates in which parties favor substantively different outcomes.

#### B. TOWARD A MORE COMPLETE MODEL OF CULTURAL COGNITION

Just as Douglas and Wildavsky's cultural theory can be illustrated along two intersecting dimensions,<sup>63</sup> the impact of cultural cognition on the political process can be depicted graphically using the X and Y axes to form four distinct quadrants.<sup>64</sup> (See Figure 2). The Y-axis indicates the degree to which parties agree upon a particular outcome (such as safer communities). The X-axis indicates the degree to which parties agree on a particular policy (such as gun control) as a means to achieve that outcome.<sup>65</sup>

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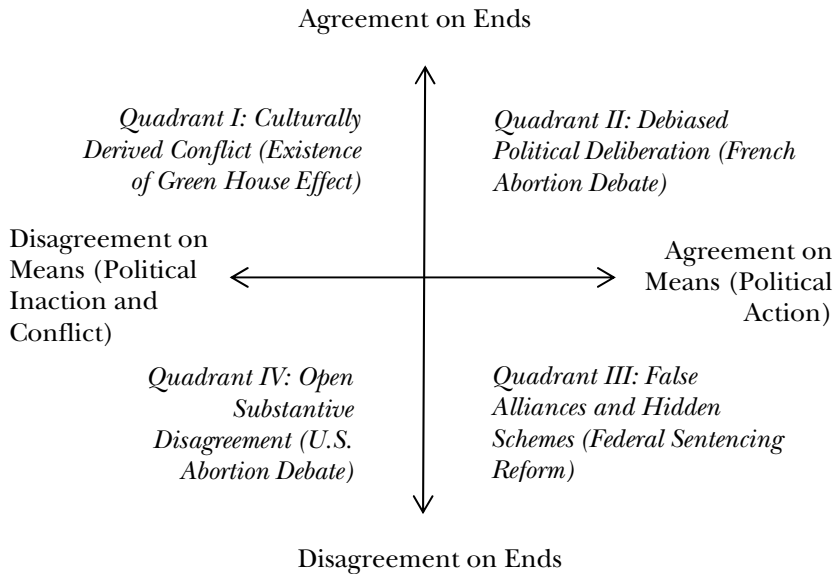
and communitarian values believe that the right to abortion demeans those women who eschew the workplace to be mothers; correspondingly, they worry that abortion poses a health risk to women.”).

62. Kevin J. Mitchell, *Guarding the Threshold of Birth*, 20 REGENT U. L. REV. 257, 299 (2008) (“Partial-birth abortion forces Americans to ask some of the most fundamental questions that one can ask about when life begins and when a fetus obtains intrinsic value in the eyes of the law.”).

63. Douglas, *supra* note 26, at 1355 (“The typology for cultural theory is based on two intersecting dimensions: regulation on the vertical axis and integration on the horizontal.”).

64. This two dimensional depiction describes the relationship between two political entities, but the model could be expanded to include more groups.

65. For the purposes of this Article, I use the term “policy” as “a means to achieve an outcome.” Despite the fact that policies can be value-laden and trigger the kind of political conflict described by cultural cognition theorists, they are not “ends” in and of themselves.



*Figure 2: Model of Cultural Cognition's Impact on Political Process*

The area to the right of the Y-axis thus encompasses debates in which political action is likely to occur because the parties agree upon the proposed policy even if they do not necessarily agree upon the desired outcome. Conversely, the area to the left of the Y-axis is marked by political conflict because the parties cannot agree upon a particular policy regardless of whether they share the same desired outcome.

The area above the X-axis delineates policy questions in which both sides agree upon the desired outcome. This area encompasses the policy debate described by cultural cognition theorists.<sup>66</sup> Cultural cognition theory helps to explain why so many policy debates fall into Quadrant I, where empirical policy issues are bitterly contested in situations in which the parties share the same ultimate goals.<sup>67</sup> Indeed, strategies such as expressive overdetermination, which infuse policy proposals with multiple meanings, or efforts to drain policy considerations of cultural cues are largely attempts to shift policy debates from Quadrant I to Quadrant II.<sup>68</sup>

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66. See Kahan & Braman, *supra* note 9, at 149–50 (describing the persistence of political conflict over empirical questions despite consensus as to desired outcomes).

67. See *id.*

68. Kahan, *supra* note 53, at 152 (describing strategies to help “individuals of diverse cultural orientations . . . converge on factual beliefs supportive of policies that *do in fact* promote their collective well-being”).

The area largely ignored by cultural cognition theorists lies below the X-axis. Quadrants III and IV describe policy debates in which the parties do not agree upon a particular outcome. Here, the parties have substantively different agendas or interests. Quadrant IV depicts situations in which the parties differ on both means and ends. This might describe the traditional/substantive characterization of the abortion debate, where the parties fundamentally disagree upon the outcome (e.g., the right to terminate a pregnancy) and similarly cannot agree upon a particular policy (e.g., the legality of a particular abortion procedure). Quadrant III describes situations that, at first blush, would seem highly unlikely—a scenario in which parties disagree on their preferred outcomes, but actually support the same policy proposals. Just as cultural cognition theory helps to explain why so many critical policy issues are mired in Quadrant I, it may also explain why parties who wish to achieve substantively opposing outcomes end up agreeing on a particular policy. For parties to cooperatively adopt a policy when they favor opposing outcomes, the two sides must have different expectations of the policy's consequences. The same cognitive biases that generate conflict over empirical questions when parties favor the same outcomes (Quadrant I) can produce agreements on policy when the parties anticipate different results (Quadrant III). This cooperative state, however, is likely to prove short-lived. Inevitably, some supporters of the policy will be disappointed by results that do not match their expectations. Thus, Quadrant III describes situations in which questionable political alliances are formed and parties should be particularly careful to ensure that their biases are not encouraging them to support policies that will eventually undermine their long-term objectives.

Many of the psychological mechanisms that cultural cognition scholars argue contribute to culturally based conflict can promote the false solidarity described by policy agreements falling within Quadrant III.<sup>69</sup> Cognitive bias

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69. Cultural cognition theorists have offered six distinct but interrelated psychological concepts that likely contribute to “culturally motivated cognition.” See Kahan, *supra* note 24, at 739. *Identity-protective cognition* suggests that individuals will conform their beliefs (including their evaluation of empirical data) to fit the views of the members of the group to which they self-identify. See *id.* at 740–42. *Cultural identity affirmation* suggests that individuals are more likely to accept information about risk when it is communicated in a way that affirms their cultural worldview. See *id.* at 752–53. *Culturally biased assimilation* suggests that individuals will give greater credence to evidence that supports their cultural viewpoint and will be dismissive of evidence that challenges those cultural views. See *id.* at 742–46. *Group polarization* suggests that members of a deliberating group will predictably move toward a stronger and more extreme position than the individual members' initial tendencies. See *id.* The *cultural credibility heuristic* explains the tendency to ascribe the characteristics of credibility (honesty, neutrality, expertise, etc.) to people who are perceived as sharing one's values. See *id.* at 749–52. Finally, *cultural availability bias* suggests that people are more likely to: (1) notice outcomes that are consistent with their cultural views; (2) assign those outcomes significance consistent with their cultural views; and (3) recall instances of the outcomes when doing so supports their views. See *id.* at 746–49; *supra* note 43.



not only distorts a person's evaluation of the impact of a particular policy, it also helps a person maintain his beliefs in the face of opposing viewpoints.<sup>70</sup> When, as in the gun control debate, parties favor the same outcome (public safety), differing expectations are likely to lead to political conflict. When parties favor different outcomes, however, these same psychological processes can contribute to each side believing that they realize the outcome they favor.

Perhaps the greatest hurdle to identifying faulty political alliances within Quadrant III lies in recognizing when parties actually favor incompatible outcomes. Cultural norms and political pragmatism may lead groups to mask their outcome preferences—or at least downplay the degree to which their interests conflict with others' goals.<sup>71</sup> Political realities necessitate that politicians at least appear to represent all of their constituents,<sup>72</sup> and there are sound reasons to avoid needlessly antagonizing one's opposition. Moreover, many policy debates are not zero-sum games.<sup>73</sup> Political compromise can, at times, involve each side getting something it wants. However, if one accepts that there will be times when political groups prefer fundamentally irreconcilable outcomes, then cultural cognition may help explain how faulty political alliances are initially formed, why they are so fragile, and how they can be substituted with genuine solidarity in the future.

### III. FALSE SOLIDARITY AND THE FEDERAL SENTENCING GUIDELINES

*“The movement for determinate sentencing reform created an unusually broad and influential alliance of forces. The campaign included not only radical supporters of the prisoners' movement, liberal lawyers and reforming judges, but also retributivist philosophers, disillusioned criminologists and hard-line conservatives.”*<sup>74</sup>

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70. See Kahan, *supra* note 24, at 739 (explaining how the six psychological concepts that contribute to “culturally motivated cognition” help individuals maintain their views in the face of opposing opinions and contradictory data).

71. Just as social norms and politics can make groups reluctant to reveal their outcome preferences, so too can they make individuals reluctant to reveal their cultural preferences. See Kahan & Braman, *supra* note 40, at 1411 (describing the reluctance of some groups (particularly hierarchists) to admit to their cultural preferences).

72. When the Republican nominee for President, Mitt Romney, infamously described the forty-seven percent of Americans on government assistance who would never support him, President Obama appealed to this norm when he argued that the president must “work for everyone, not just for some.” See Ken Thomas, *Obama Claims the 47% Romney Wrote Off*, STARLEDGER (Newark, N.J.), Sept. 19, 2012, available at 2012 WLNR 19962110 (internal quotation marks omitted).

73. See ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 25 (3d ed. 2001) (“In a zero-sum game, what one player gains, another player must lose.”).

74. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 60 (2001).

The Sentencing Reform Act of 1984<sup>75</sup> fundamentally altered the criminal justice landscape in federal courts. The Act, which established the United States Sentencing Commission and directed it to formulate binding guidelines to constrain federal judges' sentencing discretion, discarded two centuries of federal sentencing practice and expressly rejected the theory that punishments should be specifically designed to rehabilitate offenders.<sup>76</sup>

The abandonment of indeterminate sentencing<sup>77</sup> in favor of fixed sentencing guidelines dramatically shifted the balance of power between prosecutors and judges;<sup>78</sup> reduced (rather than increased) the use of alternative sanctions;<sup>79</sup> effectively eliminated federal probation;<sup>80</sup> contributed to "a dramatic increase in . . . the federal prison population";<sup>81</sup> and substantially increased the severity of the sentences that offenders served.<sup>82</sup> Yet while the guidelines ultimately favored hardline conservative

75. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

76. James R. Dillon, *Doubling Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker*, 110 W. VA. L. REV. 1033, 1040 (2008) (explaining that the Act "expressly abandoned the goal of prisoner rehabilitation as a primary purpose of incarceration" and describing how it established the Sentencing Commission); see also 28 U.S.C. § 994(k) (2012) ("The Commission shall insure 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.").

77. Under indeterminate sentencing, Congress specified a maximum possible sentence and sentencing judges maintained broad discretion to impose either probation or any prison sentence within the statutory range. Defendants' actual release dates were unspecified and determined by the parole board. See *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (describing indeterminate sentencing).

78. See Alschuler, *supra* note 6, at 926 ("The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors."); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336-40 (2005) (describing the role of the guidelines in the rise of prosecutorial sentencing power).

79. Richard J. Maher, *Community Service: A Good Idea that Works*, FED. PROBATION, June 1994, at 20, 23 ("Federal sentencing guidelines have severely limited judges' options to impose alternative sentences."); see also *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1983 (1998) ("The combination of the Guidelines and the statutorily mandated minimum sentences for many federal crimes does not regularly leave judges the option to experiment with various terms of probation.").

80. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1222 (2004) (explaining that "from the initial implementation of the federal guidelines, there has been a dramatic shift away from . . . the use of straight probation towards imprisonment").

81. *Id.* at 1212.

82. See Stith & Koh, *supra* note 4, at 268 ("By the time it was enacted in 1984, Senator Kennedy's sentencing reform proposal had a host of provisions mandating or encouraging imprisonment of federal offenders and longer prison terms."); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 63 & tbl.1 (1998) (calculating the average difference in time served for various crimes before and after the adoption of the guidelines); Bowman, *supra* note 78, at 1328 ("At or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that

criminal justice goals,<sup>83</sup> the Act was passed as part of a bipartisan effort<sup>84</sup> sponsored by two pillars of their respective liberal and conservative communities—Senators Edward Kennedy and Strom Thurmond.<sup>85</sup>

The liberal and conservative alliance to reform federal sentencing practices was not founded on a shared vision of criminal justice policy. On the contrary, liberals opposed indeterminate sentencing because they believed judicial discretion led to unjust sentencing disparities and racial bias, while conservatives argued that discretionary sentencing allowed lenient judges to give criminals inappropriately light sentences.<sup>86</sup> Moreover, while both sides were suspicious of a sentencing model premised on efforts to rehabilitate offenders, liberals and conservatives had very different aspirations for the criminal justice system. The two sides were united in their distaste for sentencing disparities, but liberals envisioned a system that

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federal law requires imposition of prison sentences too often and for terms that are too long.”); Miller, *supra* note 80, at 1222 (“All studies of sentencing severity in the federal system have shown dramatic increases over time.”).

83. See Stith & Koh, *supra* note 4, at 223 (describing the Sentencing Reform Act as a “conservative law-and-order crime control measure”); see also Dennis E. Curtis, Comment, *Mistretta and Metaphor*, 66 S. CAL. L. REV. 607, 618 (1992) (criticizing federal sentencing reform for redistributing power in ways that “increased the likelihood of unduly prolonged incarceration”).

84. In 1984, only three senators voted to oppose Kennedy’s reform bill. See Stith & Koh, *supra* note 4, at 261. Liberal support for the bill should not, however, be overstated. Despite garnering near universal support in the Senate, congressional representatives were far more skeptical of the bill and many opposed a fixed guideline system. See *id.* at 262–64. One notable critic, Representative John Conyers, opposed the Senate bill and accurately predicted “that limiting judicial discretion through sentencing guidelines would lead to ‘an escalation of sentences’ due to ‘political pressure.’” See *id.* at 264.

85. See Graham C. Mullen, Preface, 33 GEO. L.J. ANN. REV. CRIM. PROC. i, i (2004) (describing the Sentencing Reform Act as “the love child of polar-partisan Senators Strom Thurmond and Ted Kennedy”).

86. See STITH & CABRANES, *supra* note 82, at 104 (“Liberals believed that permitting the exercise of discretion compromised the ideal of equal treatment under the law, and conservatives were concerned as well that federal judges too often used their discretion to go easy on criminals.”); Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 8 (1993) (“Conservatives objected to lenient probation and parole release decisions which they believed resulted in less punishment than offenders deserved, failed to provide sufficiently certain and severe punishment to deter crime, and failed to incapacitate dangerous offenders. Liberals . . . argued that the exercise of discretion by judicial and parole authorities led to unjust disparities and racial bias in the treatment of equally serious offenders.” (footnote omitted)); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 8 (2010) (“Democrats expressed concern that indeterminate sentencing allowed race discrimination to flourish, while ‘tough on crime’ Republicans frequently worried that too many judges were unduly lenient.”). But see Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 494 (2006) (arguing that while sentencing reform was partly about “how liberals wanted rationalized moderate sentences while conservatives wanted rationalized harsh sentences,” it was also about punishing liberal judges for “transgressing racial guidelines”).

restrained the state's power to punish.<sup>87</sup> For liberals, the abolition of individualized sentencing was supposed to lead to uniform proportionate sentences of limited severity, an increased use of non-incarcerative penalties, and a reevaluation of the criminal code.<sup>88</sup> Conservatives, on the other hand, favored a system in which punishments were certain and where the law was "more overtly harsh in its sentencing directives."<sup>89</sup> Ultimately, the passage of the Sentencing Reform Act would accomplish many of the conservatives' objectives, while liberals would come to bitterly regret supporting the reforms.

How was it, then, that these two sides combined to promote a policy that ultimately favored one side far more than the other?<sup>90</sup> Why would liberals like Senator Kennedy, who championed the Sentencing Reform Act out of concern "that judicial discretion worked to the disadvantage of those already disadvantaged by birth and social condition,"<sup>91</sup> promote legislation that was so detrimental to the interests of poor and minority defendants?<sup>92</sup> While cognitive bias cannot wholly explain the complex political process that shaped the Sentencing Reform Act, cultural cognition theory may help explain how and why the two sides united to support the same policy despite their desire for largely incompatible outcomes.

There are many different explanations for liberal sentencing reform advocates' decision to ally themselves with their conservative counterparts.

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87. See GARLAND, *supra* note 74, at 55–56 (describing the American Friends Service Committee's effort to end indeterminate sentencing in favor of a regime that minimized punishments to the least costly and least harmful sanctions).

88. See *id.* at 55–58 (describing the American Friends Service Committee's proposed reforms); see also TAMASAK WICHARAYA, SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME 7 (1995) ("Liberals regard the determinate sentence as a fairer system, with equal punishment for similar crimes, proportionate to the gravity of crimes committed."); Stith & Koh, *supra* note 4, at 243 (describing Senator Kennedy's desire that sentencing reform "would, for the first time, integrate new sentencing alternatives into a new sentencing scheme" and "encourage the use of sentencing alternatives").

89. Stith & Koh, *supra* note 4, at 257 (describing how conservative amendments slowly reshaped the Sentencing Reform Act to become successively more punitive); see also STITH & CABRANES, *supra* note 82, at 104; WICHARAYA, *supra* note 88, at 7 ("From the conservative perspective, determinate sentences ensure certain and severe punishment.").

90. See Stith & Koh, *supra* note 4, at 285 ("Even had a different administration appointed the members of the Commission, the Commission's guidelines would probably be viewed as less than ideal by many liberal reform advocates."); see also Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 825 (2008) ("Would the left-liberal faction have agreed to the guidelines if it thought the guidelines might create greater racial and economic sentencing disparities . . . ? The answer . . . would seem to be no.").

91. Stith & Koh, *supra* note 4, at 287.

92. *Id.*; see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 86 (2005) ("As the Commission's studies show, geographic disparity, the unequal treatment of racial and ethnic groups, and disparities between the sentences of women and men have increased in the Guidelines era.").

First, the political environment regarding criminal justice reform changed dramatically from 1975, the year Senator Kennedy first introduced a sentencing reform proposal, to 1984, the year the Sentencing Reform Act was finally signed into law by President Reagan.<sup>93</sup> Commentators have offered multiple theories for the dramatic collapse of the rehabilitative ideal and the increasing political dominance of “tough-on-crime” ideology.<sup>94</sup> Whatever the explanation for the political shift to the right, it is possible that liberals simply bowed to the perception that it was political suicide to challenge what emerged in 1984 as a “conservative law-and-order crime control measure.”<sup>95</sup> Moreover, by attaching the bill to an urgent funding bill on the House floor, the bill’s supporters may have just outmaneuvered liberals who would have otherwise opposed the measure.<sup>96</sup>

Second, it is also possible that liberals wagered that the Sentencing Commission’s final product would be more consistent with their values.<sup>97</sup> Indeed, the primary drafter of the Sentencing Reform Act and Senator Kennedy’s former Chief of Staff, Kenneth Feinberg, acknowledged critics’ fears that “the code’s sentencing scheme constitutes a blind gamble since [no one knows] what the promulgated guidelines will actually look like.”<sup>98</sup> While in retrospect, the gamble clearly did not pay off,<sup>99</sup> it is possible that liberals took a calculated risk to support a policy that they knew might lead to undesirable results.

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93. See Stith & Koh, *supra* note 4, at 259 (describing the political history of the Sentencing Reform Act and “Congress’ increasing determination to demonstrate its anticrime sentiment”).

94. See Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997) (examining how “soft on crime” [became] the contemporary equivalent of ‘soft on Communism’”). See generally GARLAND, *supra* note 74 (explaining the shift in criminal justice policy as a societal response to social, economic, and cultural shifts and the political realignments that responded to these changes).

95. See Stith & Koh, *supra* note 4, at 223.

96. See *id.* at 264 (describing the attachment of the bill to the omnibus continuing appropriations bill as a “masterful parliamentary maneuver”). The claim that liberals were simply outmaneuvered, however, should not be overstated. As previously discussed, all but three senators voted to approve the reform bill in 1984. See *supra* note 84.

97. See Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 WAKE FOREST L. REV. 329, 342 (1993) (acknowledging that establishing a commission to develop sentencing guidelines “is somewhat of a gamble”).

98. Kenneth R. Feinberg, *Sentencing Reform and the Proposed Federal Criminal Code*, 5 HAMLINE L. REV. 217, 233 (1982); see also William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 309 n.26 (2011) (referring to Kenneth Feinberg as “the primary drafter of the Sentencing Reform Act”).

99. Alschuler, *supra* note 6, at 902 (“Some things are worse than sentencing disparity, and we have found them.”); Stith & Koh, *supra* note 4, at 287 (“Indeed, it appears that denying judges the opportunity to mitigate sentences on the basis of social disadvantage has worked *against* poor and minority defendants.”).

Finally, it may be that liberal reformers simply made a bad deal. Feinberg acknowledged there were “political and substantive compromises that were essential to secure the support of both liberals and conservatives in both the Senate and the House of Representatives.”<sup>100</sup> If politics is the “art of compromise,”<sup>101</sup> perhaps this particular compromise was simply too great. In their zeal to end racial disparity in federal sentencing it may be that liberals failed to recognize some of the long-term implications of their efforts.

Yet while a changing political landscape and the complexity of the legislative process can explain much of the background of the Sentencing Reform Act, some questions remain. Sentencing reform was scarcely inevitable. Despite the widespread criticism directed at indeterminate sentencing, reform was hardly the central cause of any powerful interest group.<sup>102</sup> Why then did liberals believe that this was a gamble worth taking or a compromise worth accepting? When critics of the Sentencing Reform Act argued that it was too risky to delegate so much substantive policy control to the Sentencing Commission, Kenneth Feinberg argued that the institutional protections built into the bill would assure that the guidelines fashioned by the Commission would reflect a sentencing policy that would be neither harsh nor arbitrary.<sup>103</sup> Why was his confidence misplaced? Could it be that the same cognitive bias that shapes expectations about the impact of gun control on public safety influenced policymakers’ assessments of the future of sentencing reform? More importantly, if theories of cognitive bias help to explain sentencing reform’s past, what does it suggest for current criminal justice proposals that are once again being advocated by strange political bedfellows?

#### A. CULTURAL COGNITION AND THE SENTENCING REFORM ACT

Cultural cognition theory operates on the premise that it is one’s cultural worldview, not one’s political affiliation or conventional political

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100. Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 293 (1993).

101. See Thomas P. Grumbly, *Comparative Risk Analysis in the Department of Energy*, 8 DUKE ENVTL. L. & POL’Y F. 23, 32 n.3 (1997) (attributing the phrase to a variation of Edmund Burke’s statement, “All government . . . is founded on compromise and barter” (alteration in original)).

102. Stith & Koh, *supra* note 4, at 287 (“It bears recalling also that Senator Kennedy shepherded sentencing reform through the Senate not because it was the favorite cause of powerful interest groups on either side of the ideological spectrum but because of a clear conviction that federal sentencing was at the time in ‘utter disarray’ . . .”).

103. Feinberg, *supra* note 98, at 233 (“It is true that critics raise a justifiable concern when they maintain that the code’s sentencing scheme constitutes a blind gamble . . . . But the institutional protections built into the bill are designed to assure that the guidelines fashioned by the Commission will reflect a sentencing policy that will not be harsh or arbitrary.”).

ideology that ultimately shapes one's evaluation of risk.<sup>104</sup> Support for a particular "liberal" policy does not necessarily indicate a particular cultural orientation. One might support abortion rights because such rights reinforce an individualist worldview by promoting a person's right to do what she chooses with her own body. Alternatively, egalitarians may identify as "pro-choice" because they link abortion rights to women's equality.

For the purposes of this Article, however, it is not necessary to map liberal and conservative positions entirely onto Douglas and Wildavsky's four cultural orientations. First, cultural cognition theorists have done much of the work already. While determining that one's party identification or political ideology is less predictive of policy preferences than cultural orientation,<sup>105</sup> Kahan and Braman have identified a strong correlation between cultural orientation, political ideology, and party affiliation.<sup>106</sup> This correlation is precisely why political ideology appears, on the surface, to dictate policy preferences. However, that relationship all but disappears when one takes into account characteristics like cultural worldview.<sup>107</sup>

Second, one need not identify the precise worldview supporting a particular sentencing philosophy to theorize that cultural perspectives facilitated the ill-fated alliance between groups on opposite ends of the political spectrum. This is because sentencing reform exemplified the kind of "expressively overdetermined" policy that cultural cognition scholars like Dan Kahan have advocated as a means to overcome culturally generated conflict.<sup>108</sup> The attacks on indeterminate sentencing and the arguments in

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104. Kahan & Braman, *supra* note 7, at 1307 ("Whether one is hierarchical or egalitarian, individualistic or solidaristic also matters more than whether one is conservative or liberal or identifies oneself as a Republican or Democrat.").

105. *See id.*

106. *See* Kahan, *supra* note 8, at 793 (explaining that political ideology is correlated with cultural worldview, but that one's worldview is ultimately the more predictive variable); *see also* Dan M. Kahan et al., *Cultural Cognition and Public Policy: The Case of Outpatient Commitment Laws*, 34 *LAW & HUM. BEHAV.* 118, 128 (2010) ("The political variables—ideology and party affiliation (Democrat versus Republican)—had no significant effect. This result suggests that the observed overall difference between Democrats and Republican[s] in the sample was an artifact of the correlation between party affiliation and other characteristics that explained variation in support for OCLs.").

107. Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 *AM. CRIM. L. REV.* 1, 38–39 (2008) (explaining that the impact of party affiliation and political ideology on one's attitudes about the propriety of using force in self-defense in certain scenarios disappears when one takes into account one's cultural viewpoint with regard to Hierarchy and Individualism); *see also* Kahan et al., *supra* note 106, at 128. Other correlated characteristics such as race and gender can help to explain the vanishing impact of political ideology on policy preferences as well. *See* Kahan & Braman, *supra*, at 31 ("Gender and race might themselves be groups of the sort or might correlate with others (e.g., political affiliations) that are [predictive of judgments or preferences].").

108. *See* Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 *HARV. L. REV.* 1071, 1096–1100 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)) (defending the use of expressive overdetermination as

favor of using sentencing guidelines to limit judicial discretion appealed to multiple cultural worldviews. Indeterminate sentencing was framed for liberals as a source of social inequality and its abolition as a critical piece in a wider struggle for social, economic, and racial justice.<sup>109</sup> These arguments likely appealed to individuals who were communitarian and egalitarian—that is, they supported worldviews that valued equal treatment and viewed the world as one in which individuals were socially responsible for each other's welfare. Conservative arguments that indeterminate sentencing lacked certainty and enabled judges to impose lenient sentences that undermined the deterrent impact of criminal law<sup>110</sup> likely appealed to hierarchists who favored harsh penalties for criminals who undermine social order.<sup>111</sup> Similarly, individualists might have been attracted to a conservative narrative that favored severe and certain punishment for those who would transgress on the liberties of others.<sup>112</sup> Strong and certain punishment might also have appealed to individualists' belief that one is personally responsible for one's actions.

This is not to suggest that liberals are uniformly egalitarian and communitarian or that conservatives are necessarily hierarchical individualists. Conceivably, an egalitarian communitarian might be attracted to conservative sentencing reform arguments, believing that harsh penalties, when administered equally, best serve the needs of an interconnected community and are, in fact, appropriate retribution for those who fail to fulfill their social obligations.<sup>113</sup> Ultimately, the multiple narratives associated with sentencing reform and their broad appeal to various cultural perspectives are precisely why cultural bias could have contributed to

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a means to counteract the political conflict generated by cultural cognition); *see also* Kahan, *supra* note 53, at 145 (advocating that political actors utilize a strategy of expressive overdetermination for reducing cultural conflict); Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2083 (2006) ("Laws that manage to affirm diverse cultural worldviews simultaneously, then, are the ones most likely to overcome political conflict and generate broad scale support.").

109. *See* GARLAND, *supra* note 74, at 55 (describing attacks on sentencing reform by the left).

110. STITH & CABRANES, *supra* note 82, at 31 ("[C]onservative political forces from outside the academic sentencing reform movement criticized judicial and parole discretion in sentencing on the ground that a focus on rehabilitation too often resulted in excessively lenient treatment of offenders who had significant criminal records or who had committed serious crimes.").

111. *See* Kahan, *supra* note 108, at 2089 ("[H]ierarchists can see [imprisonment] as supplying a delicious form of debasement for those who resist their proper place in the social order . . .").

112. *Id.* (explaining that individualists favor strict penalties "for those who fail to respect the liberty of others").

113. *See id.* at 2089–90 (explaining that communitarians may prefer harsh penalties for those who wrongfully renounce their social obligations).



bipartisan support for sentencing reform legislation, despite fundamental disagreements over substantive sentencing policy.<sup>114</sup>

Yet while sentencing reform might exemplify the potential for expressive overdetermination to overcome the cultural conflict that can paralyze the political process,<sup>115</sup> so too does it demonstrate the danger that cultural bias can distort evaluations of policy outcomes and contribute to imprudent and ultimately destructive political alliances.

*B. THE DANGERS OF EXPRESSIVE OVERDETERMINATION*

The decline of the rehabilitative ideal, the widespread rejection of judicial discretion, and the rise of a fixed sentencing regime that proved antithetical to many liberal interests cannot be blamed solely on cognitive bias. The influences that reshaped class and race relations and transformed the criminal justice system in the 1980s and 1990s were the product of complex historical forces that transformed social and economic life in the latter half of the twentieth century.<sup>116</sup> Yet the cultural changes that followed the Second World War only explain why some groups may have changed their position with regard to certain criminal justice issues. They do not, however, explain why liberals pushed for reforms that ultimately undermined the very values that they sought to promote. In this regard, federal sentencing reform is more than a marker that can delineate the shift in public sentiment regarding crime that occurred in post-World War II America. It also demonstrates the potential for expressive overdetermination and the mechanics of cultural cognition to promote ill-considered political action.

Culturally motivated cognition may well have contributed to liberals' decision to ally themselves with conservative sentencing reformers. The same biases that generate perpetual conflict over gun control<sup>117</sup> may have prompted liberals to disregard the policy arguments of conservatives, weakened internal criticism of "liberal proposals," and led liberal reformers to simultaneously overestimate the danger that judicial discretion posed to minority defendants and underestimate the risk of delegating sentencing policy to an administrative agency.

Two mechanisms of cultural bias can explain the failure of liberal reformers to recognize that they were advocating for reforms that would

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114. See Kahan, *supra* note 53, at 145 (suggesting that a policy proposal can be infused with multiple "partisan social meanings" so that "every cultural group can find affirmation of its worldviews within it").

115. See Kahan et al., *supra* note 108, at 1096–1100 (defending the use of expressive overdetermination as a means to counteract the political conflict generated by cultural cognition); see also Kahan, *supra* note 53, at 145 (advocating that political actors utilize a strategy of expressive overdetermination for reducing cultural conflict).

116. See GARLAND, *supra* note 74, at 75–77.

117. See generally Braman & Kahan, *supra* note 49.

result in a sentencing regime that was fundamentally at odds with the outcomes they had hoped to realize. *Identity-protective cognition* encourages individuals to reject information that undermines their cultural worldview, while *cultural identity affirmation* encourages individuals to accept information about risk when it is communicated in a way that affirms their cultural perspective.<sup>118</sup>

Consistent with identity-protective cognition bias, liberals with an egalitarian perspective may have discounted arguments that a sentencing regime created by a democratic political process might pose greater danger to minority defendants than a system granting judges the authority to decide what is best. Similarly, cultural identity affirmation suggests that arguments appealing to egalitarian sensibilities may have amplified some liberals' estimation of the dangers posed by unbounded judicial discretion. Framing rehabilitation, the primary justification for indeterminate sentencing,<sup>119</sup> as the paternalistic imposition of treatment forced upon unconsenting offenders,<sup>120</sup> may have led egalitarian liberals to overestimate the danger of allowing judges to craft individualized sentences.

Just as communitarians may have ignored conservative policy arguments that conflicted with their cultural perspectives, hierarchists could have been similarly biased in their estimation of the dangers of shifting to a determinate sentencing regime. Because indeterminate sentencing empowers judges and other specialized experts (such as parole board members) to craft individualized sentences for each offender,<sup>121</sup> one might expect a hierarchist to favor a sentencing regime that maximized the authority of those government officials.<sup>122</sup> However, the development of a complex centrally controlled regulatory regime may not have seemed particularly dangerous to liberals with a hierarchical worldview. Indeed, *identity-protective cognition*<sup>123</sup> suggests that a hierarchist would discount the

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118. See *supra* note 69.

119. See Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 927 (2002) (describing rehabilitation as "the theoretical justification for indeterminate sentencing").

120. See GARLAND, *supra* note 74, at 56 (describing the report of the American Friends Service Committee, which decried "[p]rogressive penology" . . . for its paternalism and hypocrisy, its naive faith that punishment can work useful results, and its willingness to impose 'treatment' in punitive settings, with or without the consent of offenders").

121. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 738-41 (2005) (describing the role of federal judges and other "experts" in determining the appropriate sentence for individual offenders in the pre-guideline era).

122. See Kahan & Braman, *supra* note 7, at 1297 ("The *hierarchical* orientation favors deference to traditional forms of social and political authority and is protective of the roles and status claims they entail.").

123. See *supra* note 69.

dangers posed by a regime that utilized a commission of experts to develop a “rational” and “technocratic” solution to the problem of sentencing.<sup>124</sup>

Liberals may well have recognized that conservatives desired a substantially different outcome for sentencing reform, but cognitive biases would have led liberals to believe that their preferred outcome was more likely to be realized. The fact that Senator Kennedy, a “liberal champion,”<sup>125</sup> led the fight for sentencing reform may help explain why liberals believed that the sentencing legislation would advance a liberal agenda despite evidence that conservatives with incompatible goals were pushing for the very same reforms. The *cultural credibility heuristic* encourages people to ascribe honesty, intuition, and expertise to the opinions of people who are perceived as sharing one’s values.<sup>126</sup> If the “Liberal Lion of the Senate”<sup>127</sup> declared that the sentencing reform bill would promote the interests of poor and minority defendants, cultural cognition theory suggests that liberals would likely accept this conclusion, even when faced with conservatives who seemed to believe the legislation would have very different implications.<sup>128</sup> Senator Kennedy may have exploited the cultural credibility heuristic himself. When support for sentencing reform waned in 1977, Senator Kennedy brought in “a man with undoubted liberal credentials,” Harvard University law professor Alan Dershowitz.<sup>129</sup> Dershowitz pronounced Kennedy’s sentencing bill “a net gain for civil liberties,” and thus substantially allayed liberal concerns that the bill might ultimately work against their interests.<sup>130</sup>

There is no question that the indeterminate sentencing era was rife with irrational and disparate sentences.<sup>131</sup> The question is why liberals believed that the evils of sentencing disparity outweighed the dangers of a fixed sentencing regime. Four types of cognitive bias that contribute to cultural cognition may help explain liberals’ determination to support the Sentencing Reform Act. *Culturally biased assimilation*, which describes

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124. See STITH & CABRANES, *supra* note 82, at 169 (describing the development of the federal sentencing guidelines as emerging, in part, from the desire to develop a “rational [and] technocratic solution[]” to the problems associated with indeterminate sentencing).

125. Nick Littlefield, *Inside Game: Getting Things Done in the Senate with Senator Kennedy*, 14 N.Y.U.J. LEGIS. & PUB. POL’Y 331, 336 (2011).

126. See Kahan, *supra* note 24, at 749–52 (describing the cultural credibility heuristic and the tendency of individuals to impute qualities that make an expert credible to individuals who share their cultural viewpoint).

127. See Robert D. Novak, *Ted Kennedy’s Senate*, WASH. POST, Aug. 28, 2003, available at 2003 WLNR 19308248 (describing Senator Kennedy “as the Senate’s liberal lion”).

128. See *supra* notes 69, 126.

129. See Stith & Koh, *supra* note 4, at 232–33 (quoting Anthony Lewis, *A Victory for Reform*, N.Y. TIMES, Mar. 14, 1977, at A30–31).

130. *Id.* (internal quotation marks omitted).

131. See STITH & CABRANES, *supra* note 82, at 31 (describing studies from the 1960s and 1970s that demonstrated “rampant, irrational variation in judicial sentencing and parole practices”).

individuals' tendency to heed evidence and arguments that reinforce their particular worldview while ignoring evidence that does not, could have affected liberals' estimation of the dangers posed by indeterminate sentencing.<sup>132</sup> Thus, arguments that condemned sentencing discretion for facilitating racially biased sentences would likely resonate with egalitarian liberals. At the same time, claims that might appeal to a hierarchical worldview—that judges used the discretionary power they enjoyed by virtue of their special position to temper the harshness of the criminal system—would likely be discounted by the same egalitarians.

Similarly, *cultural availability bias* suggests that people are more likely to notice and assign significance to outcomes consistent with their cultural views and later to remember instances of such outcomes when doing so supports their views.<sup>133</sup> Thus, egalitarians would readily recall examples of unjust sentences that offended their egalitarian sensibilities, while failing to recall instances in which judicial discretion actually promoted more just outcomes.<sup>134</sup>

Liberal estimations of the risks posed by judicial discretion may also have been magnified by *group polarization*.<sup>135</sup> Group polarization describes the process by which “members of a deliberating group . . . move toward a more extreme” position from a moderate position they shared prior to deliberation.<sup>136</sup> This dynamic might explain how a problematic symptom of discretionary sentencing (sentencing disparity) evolved into a central evil that became the primary focus of reform efforts to the detriment of other important policy considerations.<sup>137</sup> Perhaps more disturbingly, *identity-protective cognition* suggests that individuals are uncomfortable identifying beliefs that are at odds with members of the group with which they identify.<sup>138</sup> As a result, once liberals determined that indeterminate sentencing was a threat to liberal values, group members may have been reluctant to point out that alternative sentencing regimes might, in fact, be far worse.

### C. THE LESSONS OF FEDERAL SENTENCING REFORM

The fact that cognitive bias may have helped cement the alliance between liberals and conservatives despite the fact that the two sides desired

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132. Kahan, *supra* note 24, at 742–46 (describing culturally biased assimilation).

133. *See supra* note 69.

134. *See supra* note 69.

135. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) (“In brief, group polarization means that members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies.”).

136. *Id.*

137. *See id.* at 74–75 (describing group polarization).

138. *See supra* note 69.

fundamentally different criminal justice outcomes leads to an inevitable question: does it matter? It is not unusual for politicians to make ill-considered alliances, and some policy efforts inevitably have unintended consequences. But if cognitive bias is partly to blame for liberals' failure to recognize that federal sentencing reform would undermine their long-term criminal justice goals, there may be lessons for the future. While hindsight is 20/20,<sup>139</sup> a careful analysis of the federal sentencing reform process suggests that there may have been cues indicating that cognitive bias might have been promoting ill-considered bipartisanship. As a result, an evaluation of federal sentencing reform offers more than a cautionary tale of ill-considered political alliances—it can also identify concrete characteristics useful to avoid similar mistakes in the future.

In retrospect, there were several aspects of the federal sentencing reform process that might have signaled that cognitive bias was affecting liberals' evaluation of both the dangers indeterminate sentencing posed and the promise of a fixed guideline regime. First, strange political bedfellows united in support of a particular policy measure despite little agreement on the outcome they sought to achieve. Second, the issue that united the two sides was embedded with powerful cues capable of appealing to a number of different cultural perspectives. Finally, the parties delegated contentious aspects of the policy proposal to third parties for future resolution. Combined, these three characteristics may indicate situations where cognitive bias may be promoting ill-advised political cooperation that one party will regret in the future.

The mere fact that parties on opposite ends of the political spectrum agree on a particular course of conduct does not, on its own, suggest that cognitive bias has distorted someone's policy analysis. As discussed above, not every negotiation is a zero-sum game,<sup>140</sup> and some policy decisions legitimately appeal to all the parties involved. However, when the justification for each party's position appears to be in tension with (if not antithetical to) the other side's interests, it may signal that cognitive bias is affecting the parties' behavior. While liberals and conservatives were united in opposing indeterminate sentencing, the differences in their larger criminal justice goals were apparent relatively early in the process. The fact that both sides appeared to support the same reforms despite their conflicting objectives indicates that cognitive bias may have been affecting one or both side's estimation of the risks of reform.

The alliance of strange political bedfellows with seemingly incompatible policy goals might, itself, be sufficient to suggest that at least one party's judgment has been distorted by cognitive bias. However, if the policy issue in

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139. See *Cornman v. E. Cnty. Ry. Co.*, (1859) 157 Eng. Rep. 1050 (Exch.) 1052; 4 H. & N. 781, 786 (“Nothing is so easy as to be wise after the event.”).

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

question is infused with multiple, culture-specific meanings that could appeal to a number of different “world perspectives,”<sup>141</sup> then there is an even greater likelihood that cognitive bias could be shaping the policy debate. Not every issue is value-laden,<sup>142</sup> but criminal justice issues are especially likely to contain powerful normative signals that resonate strongly with particular cultural perspectives.<sup>143</sup> At times, these powerful signals can be polarizing—challenging one set of cultural values while complementing another. Such cases demonstrate the kind of culturally generated conflict that Kahan and Braman identify in the debates over gun control,<sup>144</sup> self-defense,<sup>145</sup> and the death penalty.<sup>146</sup> When the signals are mixed, however, as they were in the debate over federal sentencing reform, there is a greater chance that cognitive bias will distort the debate in another way—by promoting bipartisanship in a situation where the two sides do not actually share the same interests.

Last, policymakers delegated sentencing reform power to a third party. By 1984, the year Ronald Reagan signed the Sentencing Reform Act,<sup>147</sup> the tide had shifted quite strongly against the liberal agenda.<sup>148</sup> Yet even at this late date, the sentencing reform bill passed with overwhelming support in both houses.<sup>149</sup> One explanation for the continued liberal support of the bill is the fact that the substance of the guidelines, which would ultimately dictate the impact of the reform effort, was delegated to the Sentencing Commission to resolve at a later date.<sup>150</sup> As a result, liberals and conservatives were never forced to fully resolve the tensions between their largely incompatible objectives.

141. In other words, if the policy is “expressively overdetermined.” See *supra* note 53.

142. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1174 (2010) (distinguishing the treatment of “value-laden” issues from other more “legal” or “technical” issues).

143. See Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 112 (2006) (“Criminal punishment is necessarily a value-laden endeavor . . .”); Janine Young Kim, *Hate Crime Law and the Limits of Inculpation*, 84 NEB. L. REV. 846, 850 (2006) (“[T]he criminal law is and has long been value-laden.”).

144. See Braman & Kahan, *supra* note 49, at 571 (arguing that “competing cultural visions . . . drive the gun control debate”).

145. Kahan & Braman, *supra* note 107, at 3 (“The source of political contestation over self-defense, we will argue, [is] a set of related constraints on human cognition.”).

146. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 436–51 (1999) (describing how the charged debate over the death penalty is culturally generated).

147. Stith & Koh, *supra* note 4, at 223.

148. *Id.* at 223–24, 266–69 (describing the process of sentencing reform and the gradual elimination of liberal provisions that sought to encourage alternative sentences and limit the use of incarcerative sentences by requiring judges to make sure that prisons would not be overcrowded).

149. *Id.* at 223 (explaining that the sentencing reform bill “passed both Houses of Congress by overwhelming majorities”).

150. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

Politicians routinely delegate politically difficult decisions to expert agencies to avoid taking positions on politically contentious issues.<sup>151</sup> Indeed, a study of state legislatures that decided whether or not to delegate the responsibility for setting punishments to a sentencing commission found that states were more likely to establish an independent commission when there were particularly contentious fiscal concerns surrounding sentencing policy.<sup>152</sup> However, the delegation of such decisions may allow legislators to do more than just avoid taking political responsibility for unpopular policies.<sup>153</sup> Such delegation may also circumvent the kinds of political conflict that tend to reveal fundamental policy disagreements that are otherwise obscured by cognitive biases. By delegating key sentencing decisions to the Commission, liberals and conservatives could continue to believe that they would eventually get the policy outcome they sought to achieve.

#### IV. CULTURAL COGNITION AND PROBLEM-SOLVING COURTS

*“It’s a rare day when the Public Defender’s Office and the attorney general appear together to support a bill.”*

—John Suthers, Colorado Attorney General<sup>154</sup>

While the federal sentencing guidelines might have signaled a profound shift in American sentiment towards crime and the adoption of a more punitive vision of punishment,<sup>155</sup> some have argued that a “quiet revolution” has begun to take place that may signal that the pendulum is swinging back in favor of rehabilitation.<sup>156</sup> Since the first drug court was

151. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 513 (1988) (describing how legislators tend to delegate lawmaking or regulatory authority when issues involve “conflict among competing interest groups, [with] uncertain . . . political costs and benefits”).

152. Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 2017 (2006) (“[W]e find that fiscal concerns play a powerful role in legislative decisions to turn to commissions and guidelines.”).

153. See *supra* note 151.

154. Debi Brazzale, *HB10-1352: Lawmakers Unite Behind New Approach to Drug Offenders*, ST. BILL NEWS (Colo.) (Feb. 24, 2010), <http://statebillnews.com/2010/02/hb10-1352-lawmakers-unite-behind-new-approach-to-drug-offenders> (internal quotation marks omitted) (speaking in support of a Colorado bill that would substitute sentences involving drug treatment in place of incarceration).

155. See *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1175 (2008).

156. See GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 3 (2005) (describing the development of problem-solving courts as a “quiet revolution”); see also *Developments in the Law—The Law of Mental Illness*, *supra* note 155, at 1176 (identifying problem-solving courts as a part of a shift “toward rehabilitation and away from retribution”).

established in 1989, thousands of “problem-solving courts” have sprung up nationwide.<sup>157</sup> These courts appear to be the very embodiment of the rehabilitative ideal. Rather than seeking to punish and incapacitate criminals, problem-solving courts aim to address the deeper social issues that underlie many criminal cases by providing various services and incentives for defendants to improve their lives and avoid recidivating.<sup>158</sup> While problem-solving courts smack of the kind of penal welfarism that has traditionally been anathema to conservatives, a surprisingly bipartisan coalition has coalesced in support of such courts.<sup>159</sup> Liberal advocates have championed problem-solving courts as a less punitive alternative to incarceration and as a means to shift resources and services to underserved communities.<sup>160</sup> Conservatives, on the other hand, have advocated establishing more problem-solving courts as a way to control government spending without compromising public safety.<sup>161</sup> The question advocates must resolve is whether these two objectives are mutually compatible or whether the two

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157. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454-55 (1999) (describing the establishment of the first drug court); Tamar M. Meekins, *Are the New "Good Courts" Just Too Good to Be True?*, CRIM. JUST., Spring 2006, at 57, 57 (reviewing BERMAN & FEINBLATT, *supra* note 156) (describing the explosive growth of problem-solving courts); Quinn, *supra* note 13, at 60 (“Today, twenty years after the Miami Court opened its doors, over 2,300 drug treatment courts are operating across the country and more are on their way.”).

158. See Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 2 n.4 (2000) (“‘Problem solving justice’ is a term that describes judicial efforts to use the authority of courts not just to resolve the legal questions presented in a case, but also to address the deeper social issues that may underlie a significant portion of the caseload.”); see also Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 857 (1997) (describing problem-solving courts as engaging in “human problem solving” and the use of “legal leverage to direct offenders to services that can help deter future criminal activity”).

159. Brazzale, *supra* note 154 (“Drug addiction and crime are serving as catalysts to unite some Democrat[s] and Republican[s], as well as the attorney general and the state Public Defender’s Office, behind what they say is a common goal: reducing sentencing for drug offenders while carving out treatment opportunities from the cost savings.”).

160. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1482 (2004) (“These liberal justifications depend upon claiming that the drug court presents a social-welfare type of safety net for drug addicts.”); see also JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 53 (2001) (explaining that liberals support problem-solving drug courts because of their “humanitarian and rehabilitative qualities”).

161. Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> (urging states to consider alternative sentencing regimes that “can save on costs without compromising public safety”); see also NOLAN, *supra* note 160, at 53 (explaining that conservatives like drug court “because of its tough, intrusive nature” and its ability “to save the state money”); Brazzale, *supra* note 154 (describing a Republican state representative’s claim that his support for drug treatment is an effort to “get the best bang for our public-safety dollars” (internal quotation marks omitted)).



sides are seeking fundamentally different policy outcomes. If these liberal and conservative goals conflict, it may be that cognitive bias is, once again, facilitating a flawed alliance and one side is advocating for policies that will ultimately undermine the very criminal justice goals it is trying to realize.

#### A. THE PROBLEM-SOLVING COURT MOVEMENT

In the twenty years that followed the establishment of the first modern drug court,<sup>162</sup> a diverse array of problem-solving courts have been established to deal with a broad range of social issues and a wide variety of defendants.<sup>163</sup> Problem-solving courts may focus on a particular criminal activity,<sup>164</sup> a particular neighborhood,<sup>165</sup> or even a particular kind of defendant.<sup>166</sup> Notwithstanding their diversity, however, problem-solving courts have certain common qualities. Each court attempts to address the root causes of criminal or otherwise undesirable behavior by promoting a program of behavioral reform.<sup>167</sup> Such programs can involve in- and out-

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162. See Hora et al., *supra* note 157, at 454–55 (describing the establishment of the first drug treatment court in Miami in 1989).

163. See Quinn, *supra* note 13, at 60–61 (“It would appear that for nearly every problem in our society, there exists a specialty court within the criminal justice system that is trying to ‘solve’ it.”); see also BERMAN & FEINBLATT, *supra* note 156, at 31–32 (describing the diversity of problem-solving courts in the United States).

164. Courts specializing in a particular criminal activity include domestic violence courts, drug courts, and teen-prostitution courts. See, e.g., Hora et al., *supra* note 157, at 454–56 (describing the history of drug treatment courts); David Jaros, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995, 1001 (2005) (describing the development of specialized domestic violence courts); Interview by Sarah Schweig with Judge Fernando Camacho (Jan. 2012), available at <http://www.courtinnovation.org/research/changing-perceptions-conversation-prostitution-diversion-judge-fernando-camacho-0> (describing the development of “a specialized court dealing with teenagers charged with prostitution-related offenses” in Queens, New York).

165. See, e.g., Alex Calabrese, “*Team Red Hook*” Addresses Wide Range of Community Needs, N.Y. ST. B. ASS’N J., June 2000, at 14, 14 (describing the Red Hook Community Justice Center, a problem-solving court focusing on the neighborhood of Red Hook in Brooklyn, New York); see also Susan Saulny, *A Dignitary Examines Community Court*, N.Y. TIMES (Dec. 16, 2003), [www.nytimes.com/2003/12/16/nyregion/a-dignitary-examines-community-court.html](http://www.nytimes.com/2003/12/16/nyregion/a-dignitary-examines-community-court.html) (describing “neighborhood-based, problem-solving courts” located in New York).

166. See, e.g., Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009) (describing a court focused on the unique needs of veterans); see also Brent Moss et al., *Mental Health Courts in Idaho*, ADVOCATE, Sept. 2008, at 26, 26 (describing problem-solving courts “designed to address the needs of criminal offenders with severe and persistent mental illnesses”).

167. See BERMAN & FEINBLATT, *supra* note 156, at 35 (explaining that a goal of problem-solving courts is “changing the behavior of offenders”); see also John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 107 (2007) (“At the core of therapeutic jurisprudence and the problem-solving court model is the availability of ‘treatment’ to address the ‘biopsychosocial’ causes of the maladaptive behavior.”); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1462 (2004) (“Problem-solving courts address juvenile delinquency, drug abuse, domestic violence, and mental health

patient drug treatment, psychological counseling, parenting classes, domestic violence workshops, and even job training programs.<sup>168</sup> Problem-solving courts aim to address the host of challenges that contribute to a defendant's likelihood of recidivating, even those that are not directly implicated in the defendant's alleged crime.<sup>169</sup> Thus, a shoplifting defendant may be required to undergo drug treatment or a graffiti artist may be ordered to participate in job training.<sup>170</sup>

While the use of "treatment services" tends to be the most conspicuous characteristic of problem-solving courts, they have other important characteristics in common. Judges in problem-solving courts tend to have a significantly more expansive role than in traditional courts.<sup>171</sup> Judges actively supervise defendants, evaluate their compliance, and often craft and re-craft individualized sentences to promote the courts' rehabilitative goals.<sup>172</sup> The process of adjudicating cases in problem-solving courts also tends to be substantially less formal than a typical courtroom process.<sup>173</sup> Indeed, the weight of the criticism leveled against problem-solving courts focuses on the

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by promoting programs of treatment designed to address the root causes of criminal behavior."). Note that problem-solving courts are not limited solely to thinking about the rehabilitative prospects of defendants. Courts also tailor sanctions to fit the needs of the communities in which they operate. See BERMAN & FEINBLATT, *supra* note 156, at 62-63 (explaining that the Midtown Community Court, while providing "an array of professional helpers" to support defendants' rehabilitation, also adopted sanctions like graffiti removal and park restoration to better serve the neighborhood in which the defendants were arrested).

168. See Casey, *supra* note 167, at 1507 (describing the range of services offered through various problem-solving courts); Kathryn C. Sammon, Note, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 ST. JOHN'S J. LEGAL COMMENT. 923, 925-26 (2008) (describing problem-solving courts that offer "drug treatment, health care, job training, adult education, and anger management" services); Jennifer Thompson, Comment, *Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 444-45 (2004) (describing batterer education programs).

169. See BERMAN & FEINBLATT, *supra* note 156, at 31-35.

170. See *id.* at 33-34.

171. See *id.* at 35-36; see also Judith S. Kaye, Remarks, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 4 (1998) (describing a new activist role for judges in problem-solving courts, in which they no longer act as "remote umpires of legal disputes"); *Developments in the Law—Alternatives to Incarceration*, *supra* note 79, at 1918 ("One dramatic departure from the traditional model is the role of the drug court judge. These judges are not neutral factfinders; they actively direct the proceedings, track the progress of participants, and administer a system of rewards and sanctions *sua sponte*.").

172. See NOLAN, *supra* note 160, at 94-99 (describing the activist role played by judges in problem-solving drug courts); see also BERMAN & FEINBLATT, *supra* note 156, at 34-36 (describing the expansive use of judicial authority as a "hallmark" of problem-solving courts); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1593-94 (2012) (describing the intense involvement of judges in the individual cases that come before them).

173. See Quinn, *supra* note 13, at 60 (identifying informal and innovative courtroom processes as a characteristic of problem-solving courts).

lack of procedural protections such courts provide to the defendants they seek to rehabilitate.<sup>174</sup>

Yet despite criticism that these courts lack important safeguards for defendants, problem-solving courts have enjoyed broad support from across the political spectrum.<sup>175</sup> Forming a coalition that is eerily reminiscent of the adoption of the federal sentencing guidelines, conservatives and liberals have again rallied in support of the same criminal justice reform despite stark disagreements over their criminal justice goals. The question each side must resolve is whether their objectives are, in fact, incompatible, and whether cognitive bias may be distorting their expectations of what problem-solving courts will ultimately achieve.

#### B. COMPETING JUSTIFICATORY NARRATIVES FOR PROBLEM-SOLVING COURTS

Liberals and conservatives articulate very different justifications for supporting problem-solving courts. Liberal advocates favor problem-solving courts because they provide important treatment resources to underserved communities; take a therapeutic rather than punitive approach to criminal defendants; and purportedly lower high incarceration rates that liberals regard as socially harmful.<sup>176</sup> Conservatives, on the other hand, have embraced problem-solving courts for very different reasons. Conservatives

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174. See, e.g., Bozza, *supra* note 167, at 100 (“One common feature of the problem-solving court concept that has received a degree of critical scrutiny is the reliance on legal procedures that are at variance with the due process model and traditional principles of adversariness.”); see also Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1252 (1998) (“Almost without exception, these courts seek to accomplish their goals by muting the traditional adversarial positions of prosecutor and defendant, and by making the process judge-driven rather than lawyer-driven. This inversion of the traditional adversary system paradigm . . . tends to be coupled with a high degree of procedural informality.” (footnotes omitted)); Casey, *supra* note 167, at 1503 (arguing that the lack of procedural protections for defendants in problem-solving courts will ultimately undermine their legitimacy); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 13 (2006) (“Specialty court proponents replace common notions of procedural justice and fairness with a resolution to succeed in treatment or problem-solving goals mandated by judges or treatment professionals.”).

175. See NOLAN, *supra* note 160, at 53 (“Supporters of drug court span the political spectrum.”).

176. See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 369 (2005) (explaining that “many liberals” support problem-solving courts because of their “emphasis on treatment, the provision of social services, and offender reintegration in place of incarceration”).

praise problem-solving courts' ability to mete "tough" justice,<sup>177</sup> control difficult populations,<sup>178</sup> and save taxpayer money.<sup>179</sup>

While there is arguably some tension between the conservative goal of meting harsh justice and the liberal goal of taking a therapeutic rather than punitive approach to crime, these outcomes are not *necessarily* incompatible.<sup>180</sup> A therapeutic response to criminal behavior can include rigorous and even harsh penalties.<sup>181</sup> Problem-solving courts generally place greater demands on defendants,<sup>182</sup> keep them under supervision for longer periods of time,<sup>183</sup> and, for defendants who fail to successfully complete

177. See NOLAN, *supra* note 160, at 53 ("Conservatives like [drug court] because of its tough, intrusive nature . . ."); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009) ("Rehabilitation is, however, tempered by a form of 'tough love' that makes the court attractive to conservatives.").

178. See Carl Baar, Panel Speech at the Fordham Urban Law Journal Symposium: What the Data Shows (Feb. 28, 2002), in 29 FORDHAM URB. L.J. 1827, 1831 (2002) (explaining that it is not surprising that problem-solving courts have been adopted in many conservative states in light of their focus on preserving order as opposed to protecting defendants' rights); see also Miller, *supra* note 160, at 1574 (suggesting that the focus on therapy is blinding liberal critics to drug courts' use of incapacitory discipline).

179. See *Drug and Veteran's Treatment Courts: Seeking Cost-Effective Solutions for Protecting Public Safety and Reducing Recidivism: Hearing Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 112th Cong. 64 (2011) (statement of Douglas B. Marlowe, Chief of Science, Law & Policy, National Association of Drug Court Professionals) (explaining "that [d]rug [c]ourts have received highly vocal support from leading conservative think tanks and policy groups" and "prominent fiscal conservatives [like] Asa Hutchinson, former Speaker Newt Gingrich, . . . former White House 'Drug Czar' William Bennett, and former U.S. Attorney General Edwin Meese" because they can effectively manage defendants while "using fewer public tax dollars"); see also Fan, *supra* note 14, at 640 ("The powerful potential of rehabilitation pragmatism is demonstrated by the very recent call among conservatives for bipartisan examination of rehabilitative programs as an alternative to the crippling fiscal and human costs of maintaining high rates of incarceration."); Newt Gingrich & Pat Nolan, *Save Money, Save Lives Conservatives Should Support Commonsense Prison Reform*, PITTSBURGH POST-GAZETTE, Jan. 28, 2011, at B7, available at 2011 WLNR 1759279 (endorsing community treatment as a way of saving money).

180. Miller, *supra* note 160, at 1498 ("Under the therapeutic justice version of drug court procedure, rewards and sanctions are part and parcel of a training process in which the offender is to be weaned off his or her anti-social behavior.").

181. See NOLAN, *supra* note 160, at 53-55 (quoting Claire McCaskill, a Kansas City prosecutor who described drug court as "tougher than the alternatives," and Drug Court Judge William Schma's statement to defendants that drug court "is going to be a lot harder . . . than if you simply went through the system, took your licks, and went on" (internal quotation marks omitted for second quotation)); see also McLeod, *supra* note 172, at 1662 ("[S]ocial service intervention and punishment are not necessarily diametrically opposed. Such intervention may be experienced as punitive.").

182. See McLeod, *supra* note 172, at 1662.

183. Miller, *supra* note 160, at 1559-60 (explaining that defendants in drug courts tend to spend more time under court supervision than similar defendants in traditional court systems); see Nancy Wolff et al., *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35 LAW & HUM. BEHAV. 402, 408 (2011) (explaining that participants in mental health courts are generally "under court supervision longer than if they [had pled] guilty in criminal court").

their treatment plan, can involve periods of incarceration exceeding the typical sentences issued in conventional criminal courts.<sup>184</sup> Yet, these “tough” sentences can still be justified as part of a therapeutic effort to give defendants sufficient incentive to successfully complete their rehabilitative program.<sup>185</sup>

Not surprisingly, some scholars have argued that problem-solving courts offer an opportunity to “bridge the usually fiercely partisan worldviews on crime and punishment and clear the threshold hurdle in criminal justice reform of political inertia and deadlock.”<sup>186</sup> Indeed, problem-solving courts appear to embody the kind of expressive overdetermination that Dan Kahan championed as a means to overcome the cultural conflict that hampers the formation of sound public policy.<sup>187</sup> Whether one is a conservative or a liberal, an individualist or a communitarian, or a hierarchist or an egalitarian, problem-solving courts seem to offer something for everyone.<sup>188</sup> Yet, there are reasons to believe that the two sides’ objectives are less compatible than proponents suggest.<sup>189</sup> In fact, there is a real danger that cognitive bias is impeding one or both sides from recognizing that problem-solving courts will not satisfy their economic and political agendas.

The coalition between conservatives and liberals in support of problem-solving courts bears all the hallmarks of an alliance shaped by cognitive bias that masks conflicting expectations. Strange bedfellows have, once again, united to support a policy that is imbued with powerful cultural cues despite little agreement on the outcome they seek to achieve. Moreover, both sides are ultimately delegating the most contentious aspects of the policy to third parties—ironically, to the very judges that were once vilified by the two sides in the debates over federal sentencing reform.<sup>190</sup>

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184. Bowers, *supra* note 90, at 792 (“The studies found that the sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants.”); Quinn, *supra* note 13, at 65 (“[D]efendants often are sent to prison for faltering in their treatment efforts—sometimes for longer periods than they would have served had they forgone the problem-solving court option.”).

185. See Hora et al., *supra* note 157, at 526 (arguing that coerced treatment can be compatible with the therapeutic ideals of drug treatment courts particularly if there are graduated sanctions to incentivize participants to adhere to their treatment plan).

186. Fan, *supra* note 14, at 585.

187. Kahan, *supra* note 53, at 145.

188. See Bowers, *supra* note 90, at 795 (“On the surface of it, the drug-court model seemed to provide a third way—a politically-feasible middle ground that promised a little bit of something for everyone.”).

189. Fan, *supra* note 14, at 633–34 (suggesting that fiscal conservatives and liberal reformers can find common ground in supporting rehabilitative programs that satisfy both sides’ political and economic agendas).

190. See STITH & CABRANES, *supra* note 82, at 104 (describing the hostility directed towards judges by both conservatives and liberals during federal sentencing reform).

### 1. Strange Bedfellows and Problem-Solving Courts

While it is often obvious when strange bedfellows have united to support a particular policy, it is not always easy to discern when the two sides have incompatible long-term objectives. Yet, a close examination of problem-solving courts and the concerns expressed by both sides reveals that there might be deeper divisions than the political rhetoric suggests.

Both conservatives and liberals have praised problem-solving courts for their potential to reduce recidivism while saving tax dollars.<sup>191</sup> But many aspects of problem-solving courts are not so easily reconciled. Liberal support for problem-solving courts stems from two related assumptions; first, that such courts will act as a “social-welfare type of safety net” for the poor and addicted<sup>192</sup>; second, that problem-solving courts will help liberate criminal defendants who are enmeshed in the “revolving door” of the criminal justice system.<sup>193</sup> Conservatives, on the other hand, champion problem-solving courts as a cost-efficient way to preserve public order.<sup>194</sup> While successful rehabilitative programs run by problem-solving courts can, theoretically, accomplish both of these objectives, the reality is that there may be profound tensions between liberal goals to fund social service programs and to reduce the involvement of the criminal justice system in the lives of many defendants, and conservative goals to save money and maintain public order.

Conservatives who opposed indeterminate sentencing because they feared that judges were “too lenient” have not necessarily abandoned their belief that tough sentences are the best way to reduce crime and preserve public safety.<sup>195</sup> While everyone hopes that drug treatment programs will rehabilitate defendants by helping them to shed their addictions, the fact is that the programs serve goals of deterrence and incapacitation as well.<sup>196</sup>

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191. NOLAN, *supra* note 160, at 53 (arguing that both conservatives and liberals support drug courts because they save money and reduce crime).

192. Miller, *supra* note 160, at 1482 (“These liberal justifications depend upon claiming that the drug court presents a social-welfare type of safety net for drug addicts.”).

193. Greg Berman & John Feinblatt, *Beyond Process and Precedent: The Rise of Problem Solving Courts*, JUDGES’ J., Winter 2002, at 5, 6 (“Problem solving courts offer a ray of hope to those who want to put an end to ‘revolving door justice’—the perception that courts recycle the same defendants through the system again and again.”); Lanni, *supra* note 176, at 369 (describing the “empowerment” of defendants as an important part of the community justice movement that includes the adoption of criminal justice reforms such as problem-solving courts); Gregory L. Acquaviva, Note, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 982 (2006) (describing the adoption of mental health courts as arising out of dissatisfaction with the “revolving door” of the criminal justice system (internal quotation marks omitted)).

194. See Gingrich & Nolan, *supra* note 161 (describing conservative goals of protecting public safety and saving tax dollars); see also NOLAN, *supra* note 160, at 53, 59 (describing conservative republicans’ desire to save costs but remain tough on offenders).

195. See NOLAN, *supra* note 160, at 53–57.

196. See Miller, *supra* note 160, at 1479 (“[A]ny treatment is better understood as a form of incapacitation in which the length of the treatment is often much longer than the alternative

Despite the goal of liberals to diminish the involvement of the courts in the lives of people in poor communities, problem-solving courts may actually increase the number of individuals under the control of the criminal justice system.<sup>197</sup> First, defendants in problem-solving courts often spend greater time under the supervision of the criminal justice system than defendants who are prosecuted through conventional court systems.<sup>198</sup> This initial lengthy period of court supervision and control is also more likely to be extended as more intensive supervision is likely to bring minor infractions to the court's attention that justify subsequent supervisory sentences.<sup>199</sup> Second, the availability of "therapeutic" penalties may increase the likelihood that police and prosecutors will pursue defendants who commit low-level misdemeanor offenses and would otherwise have been ignored or given relatively minor, short-lived penalties.<sup>200</sup> This phenomenon has been described as "net widening," the process by which the availability of more lenient penalties draws greater numbers of defendants into the criminal justice system.<sup>201</sup> Finally, if drug courts carry substantial penalties for failing participants, then it is possible that problem-solving courts may ultimately

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prison sentence."); *see also* NOLAN, *supra* note 160, at 53–55 (describing the high level of supervision and the increased demands placed on defendants in treatment courts as opposed to what they received in conventional courts).

197. McLeod, *supra* note 172, at 1628 (explaining that the intermediate sanctions utilized by problem-solving courts can have a "net widening tendency" that "threatens to expand criminal supervision and increase short-term incarceration"); Miller, *supra* note 160, at 1479 ("This 'net widening' effect results in increased numbers of offenders in drug court, many of whom have no criminal record and no record of addiction."); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113, 118 (2010) ("[T]he creation of problem-solving courts may result in more families being drawn into the court system—often referred to as 'net widening' . . .").

198. Miller, *supra* note 160, at 1560 ("It is by no means obvious, then, that drug courts result in less time spent under court supervision than in a traditional court system.").

199. *See* Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 246 (2009) (describing studies demonstrating that defendants under the kind of intensive supervision experienced in problem-solving courts had "nearly doubled the number of technical violations compared to routine supervision, despite having recidivism rates for new crimes that were comparable to regular probationers"); *see also* McLeod, *supra* note 172, at 1629–30 (describing defendants "trapped in a never-ending series of criminal supervisory sentences").

200. *See* McLeod, *supra* note 172, at 1627 (describing how the availability of intermediate sanctions can "widen the net of infractions addressed by criminal courts"); Miller, *supra* note 160, at 1558 ("[T]here is a severe risk that drug courts operate to channel into the court those offenders who would otherwise escape the criminal justice system.").

201. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 225 (1990) (defining "net widening" and citing the Canadian Sentencing Commission's finding that "a widening of the net of penal control is liable to occur when a new sanction is introduced with the intention that it should be used in lieu of another sanction, which is more severe" (internal quotation marks omitted)).

incarcerate defendants for lengthier prison sentences than those defendants who pass through conventional courts.<sup>202</sup>

Problem-solving courts' level of involvement in the lives of defendants is very different from that experienced by defendants under the jurisdiction of conventional courts. While traditional probationers simply had to demonstrate that they were staying out of trouble, defendants in problem-solving courts are under orders to complete various programmatic activities. One problem-solving court judge explained,

We put a lot of demands on people. We make them spend at least three hours a week in our group [therapy sessions]. We make them spend at least two more hours a week in a 12-step meeting. We make them do their community service hours. We require them to report all the time to their probation officer. We require them to call TASC on a daily basis. And if they don't do what they are required to do, they suffer a consequence.<sup>203</sup>

While the demands placed on defendants may be therapeutic, it remains the case that problem-solving courts are more deeply involved in regulating the lives of defendants than traditional courts ever were. More troubling is the possibility that these services are not ultimately effective. In such a case, problem-solving courts may be serving an order maintenance function that is entirely compatible with conservative goals but antithetical to the liberal objective of liberating defendants from the control of the criminal justice system.<sup>204</sup>

Similarly, some liberal advocates hope that problem-solving courts will empower individuals and their communities.<sup>205</sup> Conservatives, on the other hand, may be attracted to problem-solving courts because they engage in

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202. See Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1511 (2000) ("The apparent paradox of more drug defendants going to prison out of courts designed specifically to send fewer drug defendants to prison is . . . a direct and predictable consequence of dismal recidivism results coupled with massive net-widening."); see also Bowers, *supra* note 90, at 792 ("The studies found that the sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants.").

203. NOLAN, *supra* note 160, at 55 (alteration in original) (internal quotation marks omitted) (quoting Judge Susan Bolton regarding the demands that drug courts place on defendants).

204. See Baar, *supra* note 178, at 1830 ("[N]o matter how innovative problem-solving courts are, they are reinforcing that order-preserving function and not that rights-protection function. That is what they are in business to do.").

205. See Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853, 855 (2008) ("[P]roblem-solving courts claim to be about empowering individuals and communities . . .").



“public shaming rituals” which, rather than empowering participants, result in the “degradation of these offenders in a public arena.”<sup>206</sup>

Problem-solving courts may also exacerbate the issues of racial disparity that led liberals to oppose indeterminate sentencing in the 1970s and 1980s.<sup>207</sup> First, there is the danger that strict-screening requirements will disproportionately prevent minority defendants from participating in problem-solving courts, leaving them subject to the incarcerative penalties that are issued in conventional courts.<sup>208</sup> Second, there is reason to believe the “net-widening” effect of problem-solving courts has a disproportionate impact on poor minority communities.<sup>209</sup> Third, for those minority defendants who are able to access problem-solving courts, there appears to be a higher likelihood they will fail out of their programs—ending up with more substantial jail sentences than their white counterparts.<sup>210</sup> To the extent that liberals have, traditionally, sought to reduce racial disparities in the criminal justice system, this outcome may well run counter to their long-term criminal justice objectives.

Conservatives, too, may find that their expectations for problem-solving courts will not be realized. Conservatives champion problem-solving courts as a cheap alternative to incarceration. However, the phenomenon of net

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206. See Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 486–87 (2009) (quoting Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 536–37 (2000)); *id.* at 487 (“Such Judge Judy moments doubtlessly contribute to the popularity of DTCs among many drug war conservatives, who rightly see in programs like the Las Vegas DTC less a repudiation of the basic drug war ideology (‘just say no’) than its apotheosis.”).

207. See *supra* introduction to Part III.

208. Joel Gross, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161, 169 (2010) (“[M]inority offenders are less likely to be given the opportunity to enter drug court programs compared with white offenders because of the strict screening requirements of many drug courts.”); see also Fan, *supra* note 14, at 642 (“Concerns have arisen, however, over the risk of racial disproportionality in who gets selected for the benefit and who succeeds in actually securing the benefit—and who does not and is subject to the hammer of harsher incarceration terms.”); McLeod, *supra* note 172, at 1670 (“A related risk is that in removing more purportedly sympathetic defendants from conventional criminal courts, racial and class disproportion will increase, with more defendants of color and materially poor defendants remaining in the conventional courts.”).

209. Gross, *supra* note 208, at 168–69 (“Specifically, net-widening has swept minority and indigent drug offenders from low-income communities into the criminal justice system, where many are either ineligible for or unable to complete drug treatment programs.”).

210. See *id.* at 172 (“High failure rates for minority and indigent offenders—which often result from the procedural requirements of drug court programs—consistently undermine the effectiveness of drug courts as a prison diversion program.”); O’Hear, *supra* note 206, at 480 (“Moreover, failure rates are higher for blacks than whites, by thirty or more percentage points in some DTCs. This should not be surprising, as DTC failure is correlated with a variety of socioeconomic disadvantages, and blacks are overrepresented among those who face these important barriers to successful treatment.” (footnotes omitted)).

widening, in which problem-solving courts pull members of the community into the criminal justice system who would otherwise have avoided it, may substantially undermine these therapeutic courts' fiscal benefits.<sup>211</sup> To the degree that the courts are extending rehabilitative services to populations that were unlikely to be incarcerated in the first place, such economic savings may not be realized. Moreover, if a significant percentage of the problem-solving court population fails to complete their programs, then conservatives may find that taxpayers are on the hook for both the court-funded programs and the cost of incarceration.

Problem-solving courts pose another potential threat to conservative interests. While the demands of problem-solving courts can be quite onerous, they pale in comparison to a long prison term.<sup>212</sup> To the degree that more serious offenders are able to access problem-solving courts, these courts may diminish conservatives' desire for "certain and severe punishment[s]" for criminal offenders.<sup>213</sup> One study suggested that drug dealers comprise as much as 95% of the participants in some drug courts.<sup>214</sup> Unaddicted dealers can "game" the system and avoid incarceration by agreeing to a treatment regime they can easily satisfy.<sup>215</sup> Conservative aims to severely punish law breakers may be frustrated if problem-solving courts enable defendants to avoid painful sanctions.

Every policy proposal carries potentially negative outcomes. However, in the case of problem-solving courts, each side may well favor the undesirable outcome feared by the other. Conservatives focused on order maintenance may actually prefer a criminal justice regime that is deeply involved in the lives of the population that passes through the court's doors. While liberals may be troubled by the onerous demands of problem-solving court treatment regimens and the harsh sentences imposed on those who fail to successfully complete their programs, conservatives traditionally favor severe punishments for law breakers. Conversely, liberals' desire to channel resources to poor communities through problem-solving courts may undermine conservative goals of preserving scarce tax dollars. Moreover, to

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211. See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 102 (1996) ("From the perspective of the designers of a program intended to save money and prison space by diverting offenders from prison, however, the judge's actions defy the program's rationale and obstruct achievement of its goals.").

212. See Hoffman, *supra* note 202, at 1493 (describing critics' concern that drug courts bestow more lenient sentences).

213. WICHARAYA, *supra* note 88, at 7; see also Lanni, *supra* note 176, at 368–69 (describing conservative concerns that problem-solving courts focus on "rehabilitation at the expense of accountability and individual responsibility").

214. See Bowers, *supra* note 90, at 794 ("In fact, in the relevant studies, drug dealers comprised the overwhelming majority of all participants—an astounding 95 percent in the Bronx drug court and 90 percent in the Brooklyn drug court.").

215. See generally *id.* (explaining how drug courts allow unaddicted dealers to "game" the system, but trap addicts who are unlikely to successfully complete program requirements).

the degree that serious offenders are able to avoid serious sanctions by participating in unnecessary therapeutic programs, problem-solving courts may undermine the deterrent effect of the criminal law that conservatives have traditionally championed.

While neither conservatives nor liberals openly favor disparate treatment for poor and minority defendants, it has traditionally been a more important concern for liberal advocates.<sup>216</sup> Conservatives may be willing to sacrifice egalitarian concerns surrounding racial and class disparity in order to achieve the cost-saving advantages they believe problem-solving courts can offer.

The coalition that favors problem-solving courts thus satisfies the first of the warning signs indicating that cognitive bias may be facilitating an ill-conceived political alliance—it is made up of strange bedfellows that have not necessarily come to agreement on the outcomes they hope to realize. Because the debate over problem-solving courts is infused with powerful cultural cues that can appeal to a variety of different cultural perspectives, there is even greater reason to suspect that cognitive bias is distorting the parties' expectations of what problem-solving courts will achieve.

## 2. Cultural Cues, the Politics of Crime, and Problem-Solving Courts

Criminal law is particularly infused with powerful cultural cues that are filled with social meaning.<sup>217</sup> As a result, while culturally motivated cognition can distort policy debates in a wide variety of areas, it is particularly likely to infect debates over criminal justice policy. Ironically, the breadth and strength of the cultural cues associated with criminal justice policy increase both the likelihood that culturally generated conflict will capsize the policy-making process as well as the risk that expressive overdetermination will facilitate an ill-considered alliance between parties that do not agree on their policy outcomes.

Problem-solving courts are likely to appeal to members from all four quadrants of Douglas and Wildavsky's grid and, thus, to conservatives and liberals alike. Problem-solving courts' emphasis on defendants taking personal responsibility for their actions, both before and after arrest, coupled with the tough challenges associated with the various alternative

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216. One prime example of this would be the crack-cocaine sentencing disparity that liberals complained disproportionately punished defendants of color, but which traditional "law and order" conservatives opposed eliminating. See Nkechi Taifa, Remarks at the International Community Corrections Association Conference and the National African American Drug Policy Coalition Summit (Mar. 2010), in Nkechi Taifa, *A Bittersweet Moment in History*, CHAMPION, May 2010, at 59, 63 (describing the twenty-four-year history of conflict over the disparity between crack and powder-cocaine federal sentences).

217. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997) ("Social meaning plays a critical role in criminal law."); see also Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 234 (2006) (describing how the criminal law is "infused with culture").

sentences the courts utilize are likely to appeal to individualists. Communitarians will be attracted to the therapeutic aspects of those same rehabilitative programs which affirm a shared responsibility to help individuals become successful members of the community. Egalitarians and hierarchists are also likely to regard problem-solving courts as affirming their cultural values.<sup>218</sup> Problem-solving courts are often trumpeted as a solution to the sentencing disparities that continue to plague the criminal justice system.<sup>219</sup> As a result, despite the real threat that the discretion enjoyed by problem-solving court judges will lead to additional issues of unequal treatment, egalitarians are likely to regard problem-solving courts as generally affirming their cultural values. The difficult demands placed on problem-solving court participants are likely to satisfy hierarchists' desire to punish social deviance that threatens order.<sup>220</sup> Moreover, the paternalistic nature of problem-solving courts<sup>221</sup> is likely to reaffirm hierarchical perspectives on the importance of acting according to one's proper social role and respecting authority.

The abundance of cultural signals problem-solving courts generate thus satisfies the second warning sign indicating that cognitive bias may be affecting the political process. Because problem-solving courts are "expressively overdetermined," there exists a strong possibility that culturally motivated cognition is shaping the parties' expectations for the courts' impact on defendants and the communities in which they operate.

### 3. Delegating Tough Questions

Ultimately, the outcomes generated by problem-solving courts will very much depend upon how judges exercise their discretion, treat defendants, and utilize the resources available to them.<sup>222</sup> This awesome power the judge wields is perhaps the most defining characteristic of problem-solving courts.<sup>223</sup> Just as the architects of the Sentencing Reform Act delegated

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218. See *supra* Part I.A.

219. See Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 722–25 (2008) (describing drug courts as a solution to the disparities in drug use and incarceration rates).

220. Kahan, *supra* note 24, at 735 (explaining that a hierarchist would be very "concerned that various forms of social deviance could threaten order").

221. See Cait Clarke & James Neuhard, "From Day One": *Who's in Control as Problem-Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 41 (2004) ("Problem-solving courts involve a level of paternalism, and the chance for disempowering a client's choice is staggeringly high." (internal quotation marks omitted)).

222. See Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 456 n.90 (2006) (describing "the central importance of individual judges' personalities and styles in determining drug court outcomes").

223. See Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 73, 86 (2010) ("The more 'therapeutic' and personalized crime control approach of problem-solving courts allows judges to reclaim much

critical policy decisions to the United States Sentencing Commission, so too have legislators delegated control over key problem-solving court outcomes to the judges who sit in those courts. If judges are quick to sentence defendants to long prison terms for stumbling during the completion of their therapeutic sentence, whether it is a positive drug test, a failure to attend a job counseling session, or a missed community service date, then problem-solving courts are unlikely to realize the financial savings or rehabilitative goals that some advocates favor. Conversely, if judges are overly lenient with offenders—allowing repeat violators to avoid punishment—then problem-solving courts may disappoint conservative supporters who expect the courts to ensure lawbreakers face stiff penalties.

Judges control the impact of problem-solving courts in other ways as well. If well-meaning judges become overly involved in the lives of the defendants who come before them, the courts may frustrate those liberal advocates who expect problem-solving courts to reduce the role of the criminal justice system in particular communities. Judges also decide how to treat the defendants who appear in their courts. If judges lambast and degrade defendants, then problem-solving courts will fulfill some conservatives' desire to stigmatize those who violate the law.<sup>224</sup> However, such practices will frustrate liberals who expect problem-solving courts to empower their participants.<sup>225</sup>

In his influential article, *The Pathological Politics of Criminal Law*, William Stuntz identified the powerful incentives that encourage lawmakers to expand criminal liability and rely upon prosecutorial discretion to ensure that sympathetic clients are treated leniently.<sup>226</sup> Legislators face similar incentives to delegate politically complex questions of punishment and control to problem-solving court judges. By delegating control over

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of the discretion they lost under mandatory sentencing requirements, and to have more flexibility in formulating and implementing therapeutic interventions and administering sanctions to defendants in the interest of rehabilitation.”).

224. See O'Hear, *supra* note 206, at 486–87 (describing conservative support for publicly shaming defendants in ways that are stigmatizing rather than reintegrative).

225. See Heather E. Williams, Note, *Social Justice and Comprehensive Law Practices: Three Washington State Examples*, 5 SEATTLE J. FOR SOC. JUST. 411, 431 (2006) (“When courts begin to recognize that the system can empower individuals, as creative beings, to solve their problems and heal with the support of others, the doors of judicial participation open and more satisfying outcomes are possible.”); see also Michael D. Clark, *Change-Focused Youth Work: The Critical Ingredients of Positive Behavior Change*, 3 J. CENTER FOR FAMILIES, CHILD. & CTS. 59, 59 (2001) (extolling juvenile delinquency and juvenile drug courts that “empower[]” young offenders); Linda Hughes, *Where Miracles Can Happen: The Promise of Drug Court Programs*, HUM. RTS., Winter 2004, at 5, 7 (describing how drug courts can “lead to the empowerment necessary for bigger changes and ultimately for successful completion of the program and a new way of life”).

226. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–47 (2001) (describing how legislators ratchet up criminal penalties and then rely on prosecutorial discretion to avoid the political repercussions of punishing trivial or sympathetic defendants).

outcomes to the judges themselves, legislators are free to pick and choose a political message that satisfies their political interests without estranging allies or segments of their constituencies who favor incompatible outcomes.

Problem-solving courts thus satisfy the third warning sign indicating that cognitive bias may be affecting the political process. Delegation of control to judges allows legislators to circumvent political conflicts that might reveal fundamental policy disagreements obscured by cognitive biases. As a result, liberals and conservatives continue to believe that they will eventually get the policy outcome they seek to achieve.

## V. RESPONDING TO THE CHALLENGES OF COGNITIVE BIAS

If cognitive bias is, in fact, masking deep divisions over problem-solving courts, what should advocates do? At first blush, the solution seems obvious—encourage efforts to monitor and study the courts. If conservative and liberal expectations are indeed incompatible, one might expect empirical research to reveal which side is right and which is mistaken. In fact, many scholars, including supporters of problem-solving courts, have called for research to provide evidence of the courts' rehabilitative efficacy and to evaluate the potentially disparate impact of their burdens and benefits.<sup>227</sup>

Unfortunately, increased research is unlikely to entirely resolve the ambiguity over whether problem-solving courts will frustrate or fulfill each side's criminal justice objectives. It is likely that the same cultural bias that may be distorting each side's expectations will similarly infect the parties' evaluation of empirical research produced to describe the courts' impact. Just as empirical studies have failed to resolve debates over the public safety impact of guns,<sup>228</sup> so too does cognitive bias limit the degree to which "further study" can fully resolve which of the seemingly incompatible outcomes problem-solving courts will likely achieve.

This is not to say that empirical research is without value. While cognitive bias may lead problem-solving court supporters to discount evidence that the courts are not achieving their objectives, it would presumably still have *some* persuasive power. Moreover, evidence suggests that once individuals are made aware that cognitive bias may be distorting their perspective, they are able to reduce some of its effects.<sup>229</sup>

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227. See Fan, *supra* note 14, at 586 ("This Article argues that as we demand more evidence of rehabilitative program efficacy, performance measures should also be sensitive to whether there are disparate distributions of benefits and burdens.").

228. Braman & Kahan, *supra* note 49, at 570 (explaining that cognitive bias helps to explain why multivariate regression models, contingent valuation studies, public-health risk factor analyses, and other forms of research have failed to resolve whether more guns make society more or less safe).

229. See Elizabeth J. Reese, Comment, *Techniques for Mitigating Cognitive Biases in Fingerprint Identification*, 59 UCLA L. REV. 1252, 1281 (2012) ("Creating general bias awareness is a

Unfortunately, studies have demonstrated that self-awareness alone is not enough to prevent cognitive bias from affecting one's expectations altogether.<sup>230</sup> Raising awareness about cognitive bias may engender some healthy skepticism concerning claims of what problem-solving courts can achieve, but it cannot wholly eliminate the concern that cognitive biases are masking important differences and fostering flawed coalitions.

There remains an additional problem—how can the parties identify their concerns in a timely manner? Liberal support for the federal sentencing guidelines did not persist indefinitely.<sup>231</sup> As powerful as cognitive bias may be, at some point, the outcomes achieved by a particular reform will so directly conflict with the goals of some of its supporters that they will eventually withdraw their support. In the case of the federal sentencing reform, however, liberals missed their opportunity to shape sentencing in the federal system. It was the Supreme Court that ended the era of the federal sentencing guidelines, not liberal legislators, scholars, and advocates who finally recognized that the guidelines conflicted with their larger criminal justice goals.<sup>232</sup>

At its core, the issue of problem-solving courts presents lawmakers with the dilemma that administrative law scholars wrestle with on a regular basis—how best to oversee a policy that is delegated to third parties for implementation. Fortunately, the same strategies that have helped legislators oversee the work of executive branch agencies can be applied to the challenge of problem-solving courts.

Scholars have identified two kinds of strategies to ensure sufficient oversight of administrative agencies: “police patrols” and “fire alarms.”<sup>233</sup> “Police patrols” describe Congress-initiated oversight with the aim of

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debiasing technique in which decisionmakers are informed about the existence of cognitive biases and how such biases can affect the decisionmaking process.”).

230. See Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 880 (1975) (finding that “once formed, impressions are remarkably perseverant and unresponsive to new input, even when such input logically negates the original basis for the impressions”); see also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 371 (“Unfortunately, research suggests that merely informing people about a cognitive bias, or urging a person to overcome the bias, is to some degree ineffective.”); Nathan A. Frazier, Note, *Amending for Justice’s Sake: Codified Disclosure Rule Needed to Provide Guidance to Prosecutor’s Duty to Disclose*, 63 FLA. L. REV. 771, 785 (2011) (“While simple awareness of cognitive bias may ease its effect, it is impossible to wholly eliminate cognitive bias from the decisionmaking process.”).

231. See *supra* note 6 and accompanying text.

232. See *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (O’Connor, J., dissenting) (“Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.”).

233. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (identifying two distinct techniques for providing adequate congressional oversight).

identifying and correcting policies that contradict lawmakers' goals.<sup>234</sup> By contrast, "fire-alarm" strategies rely on interested third parties identifying problems with a policy's implementation and bringing those issues to legislators' attention.<sup>235</sup> By utilizing a combination of police-patrol and fire-alarm strategies, policymakers can best ensure that they do not overly commit themselves to a reform policy that will ultimately undermine their long-term criminal justice objectives.

A. *SUNSET PROVISIONS AND PROBLEM-SOLVING COURTS*

Policymakers concerned that cognitive bias may have distorted their evaluation of problem-solving courts' eventual impact can utilize a sunset provision—a police-patrol strategy—to ensure they do not commit themselves to a policy that undermines their criminal justice goals. Sunset provisions automatically terminate a statute after a certain period of time absent affirmative legislative action to preserve it.<sup>236</sup> A sunset provision is ultimately a police-patrol strategy because it triggers a top down reevaluation of the policy by the legislative branch. Such provisions are not intended to abolish the legislated policy, but rather to provide an opportunity for the legislature to evaluate policy outcomes and make adjustments as they are needed.<sup>237</sup>

If the Sentencing Reform Act had included a sunset provision, disappointed liberals would have had an opportunity to revisit the policy and to advocate for reforms that better reflected their criminal justice objectives. Similarly, while a sunset provision would not eliminate the cognitive bias that may be distorting policymakers' expectations for problem-solving courts, it would enable them to reconsider the issue if it became clear that the reform was not achieving their goals.

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234. See *id.*; Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 203 (2009) ("Police patrols are routine examinations of agency activity, initiated and conducted by Congress itself.").

235. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 66 (2006) ("Under fire alarm supervision, the department sits back and waits for someone to pull the alarm indicating that there is a problem."); see McCubbins & Schwartz, *supra* note 233, at 166.

236. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 247 (2007) ("In form, temporary legislation merely sets a date on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of bicameralism and presentment is taken by the legislature."); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 350 (2006) ("Sunset legislation subjects government laws and bodies to periodic review under threat of automatic cessation at a predetermined date unless the activity is reauthorized.").

237. See Joy Sabino Mullane, *Perfect Storms: Congressional Regulation of Executive Compensation*, 57 VILL. L. REV. 589, 630 (2012) ("A sunset provision allows not only time for the political environment to settle, but also encourages reflection on, and an examination of, legislative results."); see also Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 562 (2007) ("Sunset clauses, providing for automatic repeal of the statute, sometimes indicate that Congress is uncertain whether a statute will be beneficial.").



A sunset provision would not be without costs. Adding a sunset provision to legislation enacting and funding problem-solving courts might create uncertainty about the stability of the courts and the programs they utilize, and create non-trivial administrative costs for courts forced to report their outcomes and justify their funding to the reviewing legislature.<sup>238</sup> These costs, however, might be justified if the danger of false coalitions can be ameliorated by giving the parties an opportunity to reassess their positions if their policy expectations have not been realized.

#### B. EMPOWERING THIRD-PARTY MONITORS

By relying on third parties to signal problems with problem-solving courts, policymakers may be better able to assess whether the courts are realizing their criminal justice objectives. Fire-alarm oversight involves establishing procedures and informal practices that enable individual citizens and interested groups to identify and challenge practices that conflict with legislative goals.<sup>239</sup> If legislators focus their efforts on creating opportunities for interested parties to identify problems with problem-solving courts, they may be better able to guard against their own biased expectations.

In the case of problem-solving courts, the chief challenge to ensuring adequate fire-alarm oversight is the difficulty of ensuring that all of the constituencies affected by the courts are heard. Some parties' interests will closely align with law enforcement and prosecutors, including groups well-equipped to signal concerns to the legislature.<sup>240</sup> Consequently, concerns that problem-solving courts are undermining crime-fighting efforts will likely be clearly communicated to policymakers. Similarly, one might expect that concerns about the fiscal impact of problem-solving courts will be communicated to legislative leaders through annual budgeting processes.

Other constituencies, however, may have a difficult time communicating to political leaders that problem-solving courts are failing to realize certain criminal justice goals. The effects of most criminal justice reforms are felt disproportionately in communities that are poor and disempowered.<sup>241</sup> If this population's experiences are not communicated to

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238. See Gersen, *supra* note 236, at 260 (describing the perception that sunset provisions "impose[d] significant administrative costs both on agencies that were forced to prepare for review and on reviewing committees").

239. See McCubbins & Schwartz, *supra* note 233, at 166 (describing fire-alarm oversight).

240. See Stuntz, *supra* note 226, at 542-46 (describing legislative responsiveness to prosecutors' concerns).

241. See David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 466 (2001) ("[W]e can afford to be so punitive only because the burdens of our tough-on-crime policies do not fall equally on the majority, but disproportionately on a disempowered minority group.").

policymakers, concerns about certain criminal justice outcomes may go unrecognized.

Finally, the need to hear from a broad spectrum of the community is not the only challenge to fire alarm oversight. The warnings of third parties are valuable only if advocates and policymakers are willing to heed them. Lawmakers and advocates concerned that motivated cognition is distorting their evaluations of problem-solving courts must do more than encourage third parties to “raise the alarm.” In the end, policymakers must embrace humility and skepticism for their own positions that runs counter to the natural inclination that cultural cognition bias typically engenders. Only by resisting the instinct to accept conclusions that affirm their cultural perspectives can lawmakers and advocates avoid forming faulty coalitions that may subsequently undermine the very criminal justice objectives they sought to achieve.