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Article

***1427** GUNS, CRIME CONTROL, AND A SYSTEMIC APPROACH TO FEDERAL SENTENCING

David E. Patton [FNa1]

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Abstract

Recent scholarship about the role of sentencing reform in reducing high levels of incarceration has focused on evidence-based, offender-specific solutions, such as how to better assess offenders' risk of recidivism and their amenability to diversionary programs. This Article proposes a new, systemic approach. In particular, it suggests that in cases where the primary rationale for steep sentences is crime reduction, as opposed to retributive notions of harm and blameworthiness, judges ought to engage in an evidence-based examination of how the government is making "use" of the sentences it seeks in its law enforcement efforts. And where the government's efforts fall short, so too should the sentences. The proposal would not only result in more rational and just sentences, it also has the potential to enhance public safety.

Although law enforcement and prosecutorial strategy have conventionally been viewed as the exclusive territory of the Executive Branch, this Article contends that judges are in fact appropriate and competent institutional actors to examine them. This Article explores these issues in the context of the federal government's most formal and direct intervention into the prosecution of street crime, Projects "Triggerlock" and "Safe Neighborhoods," which, in the name of crime control, have resulted in a ten-fold increase in the number of federal "felon-in-possession" prisoners over the past twenty years.

> ***1428** The various crime reduction initiatives in the past decade have taught us that to have a truly significant impact, the federal government must do more than just increase its arrest and prosecution numbers. Our efforts must be comprehensive. We must build effective partnerships with our state and local counterparts. We must enhance our capacity to obtain and analyze crime and other data that should guide our strategies and afford us the opportunity to measure the impact of our efforts. . . . And we must build a powerful and lasting coalition with our citizens--one that empowers them to be agents of change in their own communities.
>
> -- United States Department of Justice [FN1]

Introduction

Consider the following scenario. Walter Jones has been convicted in federal court of being a felon in possession of a firearm. [FN2] He was arrested when his car was stopped and searched by local police and a gun was found in the trunk. He landed in federal court because local and federal authorities coordinate to refer any

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"felon-in-possession" case to federal court for the purpose of seeking stiffer sentences than those in state court. If Mr. Jones's case had proceeded in state court, he likely would have received a sentence of two years imprisonment. Under the Federal Sentencing Guidelines, he faces an advisory sentence of roughly six years. The stated purpose of the federal prosecutions is to reduce violent crime.

Further assume that in the federal district in which Mr. Jones is being prosecuted, the government runs a comprehensive community outreach and media campaign with the goals of informing potential offenders of the enforcement program, directly offering them social and vocational services, and garnering "buy-in" among community residents. Surveys demonstrate that the message is getting out and that the affected communities consider the programs legitimate and useful. Data are gathered suggesting that the programs are in fact working to reduce violent crime in the community.

Now consider a different scenario. Mr. Jones's offense and personal characteristics are the same, but assume that the federal government runs none or very few of the community outreach and communication programs in the district, and there are no data to suggest ***1429** whether the federal prosecutions and steep sentences are affecting crime rates. Should the difference in the two scenarios affect Mr. Jones's sentence?

In this Article, I suggest it should. In particular, I suggest that when the primary rationale for steep sentences is crime control, as opposed to retributive notions of harm and blameworthiness, judges ought to engage in an evidence-based examination of the government's crime control efforts. And where those efforts fall short, so too should the sentences.

In one respect, the proposition is simple: To the extent that sentences are driven primarily by a given rationale, judges ought to thoroughly examine that rationale. In another respect, the idea may be more controversial: In order to fully examine the utility of sentences, judges must question prosecutors about how the government is in fact making "use" of the sentences it seeks. For instance, what is the government doing to communicate its enforcement programs and sentences? Are the programs being conducted in ways that are viewed as legitimate, thereby helping to shape norms and foster compliance in affected communities? Is the government using research and data to guide its programs and assess results?

Although these questions tread on what has traditionally been viewed as exclusive executive territory, this Article contends that judges are in fact appropriate and competent institutional actors to examine them. Despite recent incursions into the judiciary's sentencing authority via mandatory sentencing laws, judges are still charged with exercising wide discretion in assigning punishment. And just as they are increasingly employing evidence-based practices to assess offender characteristics, there is also good reason for them to use those practices to assess more systemic factors. This "systemic sentencing" would not only result in more just and rational sentences, but it also has the potential to improve public safety.

The Article explores this issue in the context of the federal government's most formal and direct intervention into the prosecution of street crime, Projects Triggerlock and Safe Neighborhoods. Over the past twenty years, the prosecutions have resulted in a ten-fold increase in the number of federal felon-in-possession prisoners [FN3] at a cost of several billion dollars. [FN4] The Article focuses on these programs because they offer a prime example of crime control rationales trumping a ***1430** variety of other concerns, including disparate treatment of like offenders and stark racial disparities. [FN5]

In order to even begin discussing the wisdom of trading off equity and fairness for the benefits of reduced crime, courts must first assess whether those benefits actually exist. By simply deferring to prosecutors on the

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specifics of crime control, federal judges conflate a proper respect for prosecutorial discretion and separation of powers with their legitimate and necessary role as principled sentencing actors.

This Article proceeds in three parts. Part I explores the latest evidence and theory regarding severity of punishment and crime control, and the challenges that severity faces in effectively reducing crime. Part II examines the steep rise throughout the 1990s and 2000s of federal felon-in-possession prosecutions, the sort of prosecutions formerly left to state and local courts. It reveals that the stated reason for the federalization of gun cases was, and remains, stiff federal sentences in the name of reducing violent crime. Part II further explains why those crime reduction goals are particularly difficult for the federal government to achieve in the absence of additional non-prosecutorial programming--programming which is only sporadically implemented. Thus, in many districts, severe sentences are imposed in the name of crime control without the accompanying programming that is likely necessary to achieve worthwhile results.

Drawing upon felon-in-possession prosecutions, Part III proposes a robust role for federal judges in questioning the government about its crime control strategies at sentencing. The Part discusses why examination of programming is not only good policy, but is also firmly grounded in the Sentencing Reform Act [FN6] and the jurisprudence of United States v. Booker. [FN7] Part III also addresses anticipated objections, including concerns about the proper scope of judicial authority, the potential for increased sentencing disparity, and the complexity of the endeavor.

I. Crime Control and Sentence Severity

Utilitarian theories of punishment include deterrence (general and specific), incapacitation, rehabilitation, and a norm-shaping function ***1431** that seeks to foster compliance and change behavior. [FN8] As a general matter, utilitarians favor sentences that produce benefits to society (typically in the form of reduced crime and social happiness) that outweigh the costs of imposing the sentence (typically in the form of incarceration expenses, individual pain and social disruption). [FN9] Properly understood, a sentence grounded in utilitarian theory ought to be "the minimum amount of punishment necessary to achieve any given level of crime control." [FN10]

Of course, actually determining that precise amount of punishment is a difficult task. In this Part, I briefly review some of the latest evidence and theories regarding levels of punishment and crime control, and the challenges that punishment severity faces in effectively reducing crime at acceptable costs. [FN11]

A. Deterrence

The theory of deterrence is premised on the notion that potential offenders engage in some form of cost-benefit analysis when deciding whether to commit a crime. [FN12] Deterrence is not dependent on perfect knowledge or precise analysis; it only requires that potential offenders respond to general incentives. [FN13] In its most simplified form, the theory holds that society ought to set punishments for crimes at the level at which potential offenders who, taking into account their probability of detection and conviction (and the swiftness of both), will forego committing the crime. [FN14] Thus, the basic equation is: the perceived probability of detection and conviction multiplied by the perceived severity of punishment must be greater than the perceived benefit of the crime. [FN15] The theory suggests that increasing either the probability of detection and conviction or the severity of punishment should have an increasing deterrent effect. [FN16] But even the earliest proponents

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of ***1432** deterrence theory recognized that not all cost-adjustments worked the same.

While no one seriously doubts that a general system of criminal justice deters crime, [FN17] there is considerable skepticism about the effectiveness of punishment severity in doing so. The eighteenth century utilitarian philosopher and earliest proponent of deterrence theory, Cesare Beccaria, theorized that certainty and swiftness of punishment are far more effective than severity at deterring crime. [FN18] As the argument goes, criminal offenders, almost by definition, are not very good at taking future consequences into account and are much more focused on immediate rewards. [FN19]

Recent behavioral science has supported these theories. Those most likely to offend typically have greater risk preferences and higher discount rates than the general population and are less swayed by the possibility of an uncertain future harm. [FN20] Certainty of detection and swiftness of punishment are likely to act as deterrents on that same population group because those factors address the immediate concerns at the forefront of most potential offenders' minds. [FN21]

But even assuming that increasing severity has some deterrent value, there are still other significant hurdles in assuring its effectiveness. First and foremost, potential offenders must know about the penalties. [FN22] While perfect knowledge is not necessary, there must be at least some general awareness of the relative severity of punishment. [FN23] Not only have numerous studies shown how poor the public's knowledge of criminal laws and penalties is, [FN24] but also how ***1433** poor prior offenders' knowledge is--even for crimes for which they have personally been convicted and sentenced. [FN25] These are highly problematic findings for the prospect of using severe sanctions to deter crime. When it comes to deterrence, the perception of sanctions, rather than the sanctions themselves, determines whether the sanctions will have an impact. As David Kennedy has noted, “changing perception, and thus behavior, through information can have the same, or even greater, impact than changing it through more concrete actions.” [FN26]

Even with respect to specific deterrence, there are reasons to be highly skeptical of sentence severity (at least in the form of increased incarceration) as a means for deterring crime. First, once sentence severity exceeds some minimal amount, the marginal increase in deterrent value is greatly diminished. [FN27] For instance, Professors Kent McClelland and Geoffrey Alpert discovered that recent arrestees viewed a five-year sentence as only 1.6 times more severe than a one-year sentence. [FN28] A later study resulted in a similar conclusion, with recent arrestees' viewing a twenty-year sentence as only 1.4 times as severe as a ten-year sentence. [FN29]

In addition, many recidivist offenders actually find prison preferable to other forms of sanction, such as probation. A study of Texas inmates revealed that two-thirds of the prisoners would prefer a year in prison to ten years of probation. [FN30] One third preferred a year in prison to just three years of probation. [FN31] In other words, prison may sometimes be viewed as a less serious penalty, and therefore less likely to dissuade, than other forms of punishment. A host of other studies demonstrate just how varied, and perhaps counterintuitive, individual perceptions of punishment severity are. [FN32] Findings such as these, in combination with other insights discussed above, suggest that recidivist ***1434** offenders seem especially difficult to deter by means of sentence severity in the form of increased incarceration.

Professor John Darley summarizes the challenges of the usefulness of severity as a deterrent as follows:

> [T]he monetary and social costs of long duration prison sentences are high. Examining the deterrence effectiveness of those sentences causes skepticism about their utility: many who commit crimes show no evidence of thinking at all about the future punishments that might await them. . . . Recent research on

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the punitive weight of long duration sentences suggests that these sentences are less punitive than advocates of long duration sentences consider them to be. These are likely to be among the reasons that sentencing duration increases generally show no reduction in crime rates when aggregated effect studies are done. [FN33]

A recent program from Hawaii illustrates both the limits of severity and the effectiveness of employing tools other than severity of punishment to accomplish compliance with criminal justice rules. In 2004, a Hawaii state court trial judge, Steven Alm, exasperated by the high level of probation violations and the steep sentences that accompanied them, designed a new system of deterrence. [FN34] The long-time practice among Hawaii's probation officers had been to refrain from writing up probationers for violations such as drug use and failure to report until multiple violations had occurred. [FN35] Violations were so frequent that probation officers did not believe they had the time or resources to impose stricter standards. And even after a violation was initiated, weeks or months would often pass before a hearing was held and a determination made. [FN36] Upon a finding that a violation occurred, probationers received lengthy prison sentences. [FN37] But despite the threat of heavy sanctions, probationers consistently violated. [FN38]

Judge Alm flipped the equation. He established a program, Hawaii's Opportunity Probation with Enforcement (H.O.P.E.), whereby all violations were consistently and immediately punished, but punished lightly. [FN39] Selected "high risk" probationers, namely those who had consistently violated in the past, were given what he called a "warning ***1435** hearing," in which they were told that the next time they missed a meeting or tested positive for drug use, police would immediately arrest them and that they would "spend some time in jail." [FN40] Because these were the high-rate violators and the previous practice had let them slide for minor infractions, the judge and probation office braced for a flood of violations. [FN41] Instead, however, the opposite occurred. Violations dropped dramatically. In the six months after it was initiated, H.O.P.E. probationers' positive drug tests dropped by ninety-three percent as compared to a fourteen percent drop in a comparison group. [FN42] Despite reducing the severity of punishment, deterrence was achieved through the credible threat of certainty and swiftness.

To be sure, there is still considerable debate about the ability of punishment severity to deter criminal conduct, a debate most often held in the context of the death penalty. [FN43] But there is increasing acknowledgment of severity's limitations. As Kleiman recently noted, "[t]he criminal-justice system as it now operates provides a level of expected punishment ample to deter any potential burglar, robber, or retail drug dealer who carefully calculates risk and reward in the manner of an economically rational actor." [FN44] Because it does so, we can now expect "to find offending concentrated among those who heavily discount the future compared to the present, undervalue tiny risks of large disasters compared to high probabilities of small gains, and overestimate luck and skill." [FN45] In other words, society should be increasingly wary of the ability of severe sentences to do much to deter crime. Instead, efforts to deter crime will almost surely have to come from different, or at the very least additional, methods.

B. Incapacitation

The sentencing theory behind incapacitation is straightforward: By incarcerating offenders, we directly prevent them from committing crimes during the period of incarceration. [FN46] The logic is virtually unassailable as it relates to the period of time that offenders are incarcerated: Inmates cannot commit crimes outside of prison while ***1436** inside prison. [FN47] But the harder question is whether incapacitation actually works to reduce crime over time and whether the costs--financial, social and moral--are worth the crime control benefits. [FN48]

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Once again, there is good reason to be skeptical.

First, by any measure, incapacitation is one of the least efficient ways to use punishment to control crime. By definition, it relies on the crime reduction benefits of removing one person at a time from the community as opposed to sending a broader message to the community as a whole, and it only attends to that period of time that an offender is incarcerated, as opposed to the time after which the person is released.

Second, depending on the offense, the person removed may simply be replaced by someone else willing to fill the role of the incarcerated offender. These substitution effects are especially prevalent in group-related crime and crimes such as drug dealing, where the absence of one offender creates an opportunity for others to satisfy the market demand. [FN49]

Third, imprisonment itself has criminogenic effects. Recent longitudinal studies demonstrate that imprisonment results in poorer post-incarceration health, employment status, and social ties, even controlling for typically low pre-incarceration levels among the population of criminal defendants. [FN50] All three categories are significant contributors to recidivism. [FN51] Loss of employment and family ties are particularly troublesome, as they greatly reduce the opportunity costs of committing crime. Thus, while incapacitating offenders may prevent ***1437** crime during the period of incarceration, it may actually increase criminal activity over the long term. [FN52]

Fourth, we are not very accurate in our specific predictions of recidivism. Incapacitation is a form of preventive detention; we keep offenders in prison for a given period of time because we have deemed them a risk to commit more crime. [FN53] But as Michael Tonry has noted, although we know that, generally speaking, criminal history is a predictor for higher rates of recidivism, "[f]or crimes of any significant seriousness, we are not very good at predicting which offenders will commit them in the future." [FN54] Thus, "[f]or every 'true-positive' who will [commit a future crime], three or four others predicted to do so will not." [FN55] This carries with it not only the moral concerns about unjustified incarceration, but also the utilitarian costs of expending significant resources unnecessarily on those who would not otherwise commit additional crimes and who, because of their incarceration, may actually become more likely to commit future crimes. As Zimring and Hawkins stated in summarizing the issue of incapacitation:

> [I]ncapacitation is impossibly open ended as a general principle of criminal punishment. If persons who present some threat of future crime are to be confined, why not confine all of them indefinitely? The balance of desert and proportionality with preventive potential, as well as rough calculations of cost and benefit--these are the inescapable elements of decisions about the scope of preventive confinement in modern criminal justice. [FN56]

Lastly, the traditional view of incapacitation also fails to take into account the criminogenic consequences of mass incarceration. A 2003 study found that incarceration levels can have an adverse effect on crime rates once they exceed a given level, likely about 1.5% of the population. [FN57] High levels of incarceration lead to social disorganization and instability, and create environments that encourage additional criminal activity. [FN58]

***1438** Given current levels of incarceration, there is good reason to believe that the American criminal justice system has passed the point of diminishing returns. One in every one hundred American adults is incarcerated, [FN59] and one in thirty is under the supervision of the criminal justice system as either a probationer, parolee or inmate [FN60] Those are the highest rates of any country in the world. [FN61] With only five percent of the world's population, America has roughly thirty percent of the world's prisoners. [FN62] Among young

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black men the numbers are truly shocking: One in nine between the ages of twenty and thirty-four is imprisoned. [FN63] The numbers are so disturbing not only for the amount of human suffering they represent, but also because they exist in the name of such an uncertain cause.

Once again, the point is not that incapacitation cannot reduce crime; it surely can to some extent. But in addition to the moral concerns about the use of preventive detention, there are serious questions about its efficiency and effectiveness in reducing crime--questions that must be answered by any sentencing authority invoking its name.

C. Legitimacy

Assuming that punishment can play a role in deterring non-risk averse actors, and assuming it can be successfully communicated to the community, the effectiveness of punishment in reducing crime also faces the challenge of legitimacy. As Professor Paul Robinson and others have written about extensively, there is disutility in imposing ***1439** sentences that are perceived as unfair. [FN64] When sentences conflict with lay notions of justice, people are less likely to provide assistance or cooperate with the criminal justice system, and they are less likely to internalize the desired norms of criminal law rules, thereby decreasing compliance with those rules. [FN65]

Professor Tom Tyler has concluded that the public's law-abiding behavior is "powerfully influenced by people's subjective judgments about the fairness of the procedures through which the police and the courts exercise their authority." [FN66] He explains that "[c]ooperation and consent--'buy-in'-- are important because they facilitate immediate acceptance and long-term compliance. People are more likely to adhere to agreements and follow rules over time when they 'buy into' the decisions and directives of legal authorities." [FN67]

David Kennedy, whose work has been the source of many highly-touted law enforcement initiatives, including those of the Department of Justice, places great importance on the role of legitimacy in controlling crime:

> Scholars in a variety of settings have consistently found that perceptions of fairness on the part of those subject to rules and enforcement action are central to their willingness to accept authority. "Research has found that people obey the law not just because they are afraid of being punished or because they believe the law is morally right, but also because they believe the law and its enforcement is impartial and being fairly administered" . . . . For deterrence to be as effective as it can be, offenders should believe that the rules to which they are subject flow from rightful sources, are imposed on them in fair and respectful interactions, and serve purposes widely viewed as moral and correct. They very often do not believe these things. [FN68]

Kleiman adds another element to the importance of legitimacy: its role in psychologically altering the perception of potential offenders in reducing the perception that enforcement and punishment depend on luck or bias. [FN69] In his discussion of the effectiveness of the H.O.P.E. program, he notes that the program is "transparently fair, and it encourages probationers to adopt the viewpoint that what happens to them depends on what they do rather than on random chance, a viewpoint conducive to any sort of effort to break bad habits." [FN70]

***1440** Encouraging a perception of the criminal justice system as a rational and unbiased system is vital to counteract opinions of individual behavior as only loosely associated with prosecution and punishment.

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D. Summary

The foregoing discussion highlights the challenges in using sentence severity as a means for controlling crime. It is not meant to suggest that severity can never reduce crime; rather, the discussion highlights the serious obstacles that severity faces, and it provides a roadmap for the sorts of enforcement strategies and sentencing practices that are likely necessary to have any chance at surmounting those obstacles.

The next Part explores an enforcement program--federal felon-in-possession prosecutions--whose primary purpose is crime control through sentence severity. The prosecutions have been a source of intense scrutiny and controversy for the past twenty years, yet as I discuss in Part III the judiciary has paid virtually no attention to the effectiveness of the prosecutions.

II. Projects "Triggerlock" and "Safe Neighborhoods"

A. Background

In 1991, Attorney General Richard Thornburgh announced the federal initiative Project Triggerlock, which directed federal prosecutors to work with state and local authorities to federally prosecute gun possession cases in order to impose stiffer sentences than state courts would otherwise impose. [FN71] The initiative relied primarily on the enforcement of 18 U.S.C. § 922(g), the so-called felon-in-possession statute, which prohibits the possession of firearms by persons previously convicted of a felony. Triggerlock was announced at a time of historically high crime rates and during a long period of increasing ***1441** national politicization of crime. [FN72] Its stated goal was to reduce violent crime by imposing severe sentences on unlawful gun possessors. [FN73]

Over the next ten years, the initiative resulted in double the number of federal gun possession prosecutions, and over fifteen years, nearly triple the number. [FN74] In combination with increasingly severe penalties, the prosecutions raised the number of prisoners in federal custody for firearms offenses from roughly 3400 in 1990 to over 31,000 in 2009. [FN75] The systematic involvement of the federal government in prosecuting gun cases that were the result of local police arrests, and that would have otherwise been prosecuted in state court, is considered by many to be "[t]he most important change in federal-local interaction during the 1990s." [FN76]

Throughout this extraordinary rise in federal gun prosecutions, critics have attacked the programs mostly on grounds unrelated to the question of their effectiveness. One of the earliest critics was Chief Justice William Rehnquist. He repeatedly warned of the trend to federalize local criminal activity and strongly opposed a proposal by New York State Senator Alfonse D'Amato that would have made virtually every crime committed with a gun a federal offense. [FN77] In his 1991 annual report on the federal courts, Rehnquist stated that such a proposal was "inconsistent with long-accepted concepts of federalism" and would "swamp federal prosecutors, thus interfering with other federal criminal prosecutions." [FN78] In 1995, he authored the blockbuster opinion in United States v. Lopez, [FN79] striking down the federal Gun Free ***1442** School Zones Act of 1990. Although the opinion was famous for its broad assertion of federalist principles, some have convincingly argued that it was a more targeted attack on the federal trend toward "police courts." [FN80]

Joining the many critics of Triggerlock on federalism grounds [FN81] are those who focus on the unfairness of severe federal punishment for a select few defendants. The whole purpose of the prosecutions is to impose

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sentences for gun possession that are more severe than those a defendant faces in state court. And they are often far more severe, resulting in terms of incarceration exponentially longer than the state counterparts. Yet, while federal prosecutions have increased dramatically, they still comprise only a fraction of the number of state cases for similar or worse conduct involving firearms. In 2006, the latest year for which we have complete state and federal statistics, there were four state felony convictions for weapons possession offenses for every federal conviction. [FN82] More significantly, the number of violent and firearm-related offenses prosecuted in the state courts dwarfs the numbers in federal court, especially those that felon-in-possession cases are meant to impact. The ratio of state to federal convictions for homicide was 59 to 1; [FN83] for robberies it was 32 to 1; [FN84] and for aggravated assaults it was 195 to 1. [FN85] These figures are the reason Professor Sara Sun Beale refers to the programs as the "cruel lottery." [FN86] They can have the perverse result of selecting certain offenders for harsh federal treatment despite the fact that most offenders who commit more serious crimes continue to be prosecuted under a more lenient state court system. [FN87]

***1443** Adding to the concerns about Triggerlock is its significantly disparate impact on African Americans. Despite representing only twelve percent of the United States population, African Americans constitute roughly a quarter of all federal defendants, and over half of all defendants convicted of weapons charges. [FN88] In some federal districts, the disparity is much starker. In an early challenge to Project Exile, one of the highest profile Triggerlock programs, a federal district judge in Richmond, Virginia, found that "[t]he vast majority, and perhaps as many as ninety percent of the defendants prosecuted under Project Exile are African American." [FN89] The court also found that the jury pool for the Circuit Court for the City of Richmond, from where most defendants were removed, was seventy-five percent African American, while the jury pool for Richmond's federal district was only ten percent African American. In a 2006 challenge to the Project Safe Neighborhoods (PSN) program in the Eastern District of Michigan, the Federal Public Defender Office submitted reports revealing that, of sixty-eight "pending firearm cases with state origin," sixty were African American defendants. [FN90] Estimates for the Southern District of New York and the Southern District of Ohio also suggest that the defendants in felon-in-possession cases are over eighty and ninety percent African American, respectively. [FN91]

The fact that African Americans are heavily over-represented in Triggerlock prosecutions should come as no surprise. The initiative largely targets inner-city, high-crime, minority-populated areas, and is active in every one of the thirty cities with the largest African American populations. [FN92] The combination of targeting high-crime urban areas, coupled with the decision to federally prosecute only those with prior felony convictions--a group that already over-represents African Americans--virtually ensures a racially skewed pool of defendants.

Despite the criticisms, however, the programs continued to grow. Although concerns about federalism, fairness, and racial equality engaged the critics, they did little to dampen political support for the ***1444** programs. Nor, ultimately, was the judiciary amenable to challenges on those grounds. [FN93] This was in large part due to the perceived crime reduction success of the prosecutions. [FN94]

The following subparts examine the particular challenges faced by federal felon-in-possession prosecutions in reducing violent crime and the various ways that the Department of Justice has attempted to address them.

B. Felon-in-Possession Prosecutions and Crime Control

Felon-in-possession prosecutions, without additional law enforcement programs, are particularly susceptible

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to the flaws of relying on lengthy sentences as deterrents. By definition, they target recidivist offenders--those who have already shown themselves to be generally less risk-averse with higher discount rates. And they do so in a way that does not address the need to create more immediate disincentives. The prosecutions derive from local and state law enforcement arrests, not from any patrol or enforcement activity by federal agents. Thus, potential offenders do not actually see any difference in the streets from the existence of federal enforcement; the only impact is felt after a prosecution has been initiated.

In addition, the knowledge hurdles to the prosecutions are even higher than those in the criminal justice system generally. As mentioned above, federal prosecutions of firearms offenses remain a fraction of the state firearm-related prosecutions. [FN95] Not only do the sheer numbers create problems for communicating federal sentences, but the counterintuitive nature of the sentences and the experience of the targeted offenders in the state criminal justice system pose additional obstacles. Offenders with prior felony convictions overwhelmingly obtained those prior convictions in the state system. [FN96] To the extent that offenders have first-hand knowledge of the penal "market price" for various crimes, it comes from their experience in that system, where sentences for crimes involving actual violence are often lower than the ***1445** felon-in-possession sentences. [FN97] Thus, not only does the federal system have the problem of educating the public about penalties that are counter-intuitively high, but, in many cases, it must also overcome targeted offenders' affirmatively erroneous knowledge about the law.

Media coverage also likely skews the popular perceptions of the severity of punishment. While there have not been any studies on the topic, individual felon-in-possession cases do not tend to receive media attention because they do not generally involve victims or sensational stories. When they do receive attention, it is almost certainly because the defendant is a celebrity, many of whom are prosecuted in state court. Recent high-profile cases have involved NFL star Plaxico Burress, hip-hop artist Lil Wayne, and NBA star Gilbert Arenas, who received sentences of two years imprisonment, [FN98] one year imprisonment, [FN99] and two years probation, [FN100] respectively. Those cases and most publicized cases like them involve far lower sentences than those imposed on a daily basis in federal court. And yet, in comparison to the time and energy spent on debating actual penalties, precious little is spent on their perception. In discussing the federal Armed Career Criminal Act, which is the federal version of a three-strikes law, Kennedy states:

> It would be possible to tell those facing federal three-strikes laws that they faced such a prosecution the next time they were arrested: We know, after all, who they are, since such a possibility is predicated on their criminal records, which could simply be examined to create a list. . . . We virtually never do anything of the kind. [FN101]

In addition, the issue of legitimacy is particularly acute in felon-in-possession cases. Not only are the prosecutions highly racially skewed, but they likely conflict with lay notions of fairness. A recent study conducted in the Northern District of Ohio by federal District Judge James S. Gwin examined juror opinions of appropriate sentences. [FN102] Between 2007 and 2009, in twenty-two criminal cases where the jury returned a verdict of guilty, individual jurors (a total of 261) were asked ***1446** to recommend a sentence for the defendant they had just convicted. [FN103] In addition to the information they had learned about the offense from the trial, the jurors were given the defendant's criminal history. [FN104] Six of the twenty cases were felon-in-possession cases and in every one, the median juror-recommended sentence was significantly lower than that of the Guidelines and proportionally lower than that of the other types of offense. [FN105] The results were as follows, in order of greatest percentage disparity to least: (1) Guidelines median 46 months, juror median 3 months; (2) Guidelines median 212 months, juror median 36 months; (3) Guidelines median 79 months, juror median 18 months; (4) Guidelines median 51.5 months, juror median 18 months; (5) Guidelines median 110 months, juror median 60

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months; and (6) Guidelines median 24 months, juror median 15 months. [FN106]

The survey supports the common sense notion that sentences for gun possession that are often more severe than sentences for offenses involving the actual use of violence, even those involving the use of guns, run counter to most people's intuitions of justice. And as Robinson and others have demonstrated, these counter-intuitive sentences do not just implicate retributive concerns, they create disutility. [FN107] The counter-intuitive nature of the federal penalties poses problems not just for communicating their existence, but also for fostering compliance and the "buy-in" considered so essential by leading criminologists. [FN108]

Lastly, the incapacitative benefits of lengthy sentences for gun possession are particularly uncertain. The basis for the steep severity of federal sentences arises almost entirely from an offender's prior record. [FN109] But the prior conviction(s) of the offender need not relate to the offense of conviction, gun possession, or any crime of violence to trigger the steep increases. [FN110] Indeed, the majority do not. [FN111] The preventive detention rationale is particularly worrying because the predictive basis for the sentence is so unclear. [FN112]

The foregoing discussion demonstrates the particular difficulty that the federal government faces in using felon-in-possession prosecutions to impact crime rates. The Department of Justice is aware of these ***1447** challenges and has developed programs to try to address them. The following subparts discuss those efforts.

C. Operation Ceasefire and Project Exile

In 1996, researchers from Harvard's Kennedy School of Government joined with local federal law enforcement agencies and prosecutors to begin a focused, deterrence-based program to combat high levels of youth gun violence in Boston. [FN113] The centerpiece of the program was direct communication of the potential of federal prosecution to groups of known offenders while simultaneously offering them a variety of social and employment services. [FN114] The initiative relied on data-driven research to identify people and places most at risk, and then employed small "offender notification meetings" as well as individual home visits by police and probation officers to communicate the messages. [FN115] The program also included efforts to disrupt gun markets through supply-side interventions. [FN116]

Although the effectiveness of the program remains the subject of intense controversy, figures in its immediate aftermath seemed to suggest that the program was a success. In the two-and-a-half years after implementation, youth gun violence declined by approximately sixty percent and there was not a single youth homicide in Boston. [FN117]

The year after Boston's Operation Ceasefire began, the United States Attorney's Office in Richmond, Virginia, began Project Exile, a joint federal and state initiative to prosecute gun possession cases in federal court at a time when Richmond had one of the highest homicide rates in the country. [FN118] Like Ceasefire, Exile relied on a combination of tools in its effort to deter gun possession, but it used a more general media campaign rather than the focused messaging in Boston. The initiative included training for local law enforcement, a public relations campaign aimed at increasing community involvement in crime fighting, and an advertising campaign designed to get out the message ***1448** that "An Illegal Gun Gets You Five Years in Federal Prison." [FN119] As Richmond's United States Attorney stated at the time, Project Exile was intended as an "aggressive, innovative, and creative approach to reducing the murder rate, by changing the culture of violence . . . through a comprehensive, multi-dimensional strategy." [FN120]

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In the ensuing years, Richmond's homicide rate dropped dramatically. Although subsequent studies of Project Exile's impact on that reduction present conflicting and uncertain conclusions, and generally range from none to little, [FN121] it was touted at the time as a tremendous success and received bipartisan praise. Republicans rallied around the program as a sensible alternative to "more hurdles and delays for legal gun owners," [FN122] while President Clinton extolled the crime reduction results achieved by the work that "federal prosecutors and the ATF are doing in Richmond." [FN123]

1. Empirical Evidence

Empirical evidence regarding the causes of rising and falling crime rates is notoriously complex and unreliable. The sheer number and scope of factors that affect criminal activity make it virtually impossible to isolate specific causes. [FN124] At the time that Boston and Richmond instituted their famous initiatives, crime rates were dropping precipitously nationwide. Theories abound as to the causes. They include economic, demographic, policing, criminal justice, and even abortion and environmental-related explanations. [FN125]

Studies focusing specifically on the Triggerlock programs have arrived at different conclusions about their effectiveness at reducing violent crime rates. In 2003, the first statistical analysis of Project Exile's impact on Richmond's homicide rate was conducted by Stephen ***1449** Raphael and Jens Ludwig. They concluded that there was no support for the claim that Exile had an impact:

> [T]he impressive declines in gun homicide rates in Richmond around the time of Project Exile can be almost entirely explained by the fact that the city had unusually large increases in gun homicides through the mid-1990s, and that cities with larger-than-average increases in gun homicide rates subsequently experience unusually large declines. [FN126]

In short, they found that the drop in homicide rate was likely a regression to the mean.

A later study disagreed, albeit only slightly. That study by Richard Rosenfeld, and others, examined Project Exile, Operation Ceasefire, and a highly touted local initiative in New York called Compstat. The study applied a growth curve analysis to data from the ninety-five largest United States cities to analyze the effectiveness of the programs. [FN127] The study found no evidence "supportive of a program impact on homicide trends for Boston's Operation Ceasefire or New York's Compstat." [FN128] With respect to Richmond, the "results inspire somewhat greater confidence in the existence of a difference between Richmond's firearm homicide trend and the average trend for the sample, although the differences may have been quite small." [FN129]

D. Project Safe Neighborhoods

In 2001, drawing upon the political popularity and apparent successes of Exile and Ceasefire, the Bush Administration announced its intention to institute those programs nationwide. The initiative was named Project Safe Neighborhoods, and it became the federal government's most formal and extensive expansion into local law enforcement. [FN130] Now in effect to some degree in all ninety-four United States districts, the program has spent over three billion dollars since its inception "to fund local and federal prosecutors; provide resources for law enforcement; support research and community outreach partners; fund a national media campaign; and provide training, technical assistance, and research functions." [FN131] Primarily relying on the models ***1450** from Richmond and Boston, as well as variations on those programs in other cities, PSN was "designed as a collaborative problem solving initiative utilizing a strategic research-based model to reduce firearms violence through enforcement, deterrence, and prevention." [FN132]

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The program was designed to increase federal prosecutions and sentences, as well as to use a variety of other tools to achieve reductions in violence. Specific non-prosecution based strategies included: (1) "offender notification meetings," adapted from Boston's program of holding small meetings with parolees and probationers to inform them of new aggressive prosecution policies, and to offer job training and social services assistance; (2) large-scale media campaigns such as those employed in Richmond, advertising strict federal gun laws on buses and billboards throughout the city; (3) increased home visits to parolees and probationers; and (4) data-driven research to identify areas of increased criminal activity in order to increase law enforcement patrols in those areas. [FN133]

1. Empirical Evidence on PSN

In 2009, a research team led by Edmund McGarrell and funded by the Department of Justice issued a report detailing its work training and supporting PSN task forces. [FN134] The team also engaged in research meant to gauge the effectiveness of PSN. [FN135] Although the report painted a rosier picture of PSN's success than did the independent studies of Triggerlock and Ceasefire, it still acknowledged the extreme challenges of drawing accurate conclusions. As the report stated, various PSN strategies were implemented throughout the country "with greatly varying levels of intensity and greater and lesser integration with other PSN strategies." [FN136] In addition to the usual difficulties in assessing programmatic effects on crime, those variations created "enormous challenges for evaluation of impact." [FN137]

The researchers used two methods to attempt to evaluate PSN, one involving a series of discrete case studies in different cities and the other employing analysis of "violent crime patterns in all [United States] cities of 100,000 population or greater" and comparing PSN cities to non-PSN cities. [FN138] Two of the case study cities employed a Project Exile approach, and the results were "consistent with PSN ***1451** having an impact on gun crime." [FN139] Seven cities implemented more multiple intervention strategies similar to Operation Ceasefire. [FN140] All seven experienced declines in gun crime after implementation; five showed statistically significant declines, one was not statistically significant, and one was no different from other control neighborhoods. [FN141]

The second research method, studying all United States cities with a population of 100,000 or more, indicated that PSN target cities achieved a 4.1% decline in violent crime as opposed to a 0.9% decline in non-PSN target cities, and that the higher the level of PSN "dosage," a combination of implementation factors, the greater the decline. [FN142] Once again, the study concludes that the figures are "consistent with an interpretation of PSN having an impact on the trend in violent crime." [FN143]

Thus, the results of the case studies and the nationwide survey show numerous correlations between PSN programming and reductions in gun crime, but as with most studies, firm conclusions about causation are hard to draw. Complicating matters further is the question of what aspects of the PSN programs are responsible for any impact on crime rates. Even if the programs as a whole could be said to reduce gun crime, jurisdictions vary significantly in their emphasis on different "levers," whether it be law enforcement training, community outreach, media campaigns, increased levels of prosecution, or longer sentences.

2. The Chicago Study

The most comprehensive study of a single PSN program was conducted in Chicago by Andrew Papachristos, Tracey Meares and Jeffrey Fagan. [FN144] The Chicago PSN model utilized all aspects of both Boston's Operation Ceasefire and Richmond's Project Exile, but "the majority of Chicago's PSN programming occurs . . . at the

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community level, prior to any criminal act." [FN145] In other words, the focus is on prevention. The programming includes "community outreach and ***1452** media campaigns, school-based programs, and various programs specifically geared toward known gun offenders." [FN146]

The centerpiece of the program, and the aspect that the authors found most effective, was the offender notification meeting component, similar to the one first developed in Boston. [FN147] Twice a month, ex-offenders with a history of gun violence and gang participation who have recently been placed on probation or parole are invited to attend a "notification forum." [FN148] Although the forums are not mandatory, attendance is nearly ninety-eight percent. [FN149] The one-hour meetings are conducted by law enforcement personnel, community members and ex-offenders. [FN150] The first fifteen to twenty minutes are spent discussing law enforcement initiatives, including increased levels of prosecution for gun possession, conviction rates, severe sentences, and specific examples of offenders in the neighborhood, likely known to the attendees, who have been convicted and sentenced. [FN151] They also discuss the crime problem in the neighborhood and the reasons they are collaborating to solve it. [FN152]

An ex-offender speaks for the next fifteen minutes. [FN153] He discusses the need to reduce the levels of violence, the problem of intra-racial violence, and the reasons why he stopped engaging in criminal activity. [FN154] He also talks about how he was able to find work and lead a law-abiding life. [FN155]

The last part of the forum is devoted to speakers from different government and community agencies who talk about available programs, including "substance-abuse assistance, temporary shelter, job training, mentorship and union training, education and GED courses, and behavior counseling." [FN156] Many of the speakers and attendees remain after the conclusion of the meeting to meet individually about goals and plans. [FN157]

The results from the Chicago intervention were extremely promising. Although the Papachristos study suffers from many of the same methodological challenges as the previously cited studies, the authors note some advantages to the Chicago findings, namely that, unlike Boston, the number of homicides was large enough to avoid ***1453** some of the "noise" that was present in the Operation Ceasefire study, and, unlike Richmond, there was no large spike in homicides immediately preceding the intervention such that the subsequent drop was not easily explained by a regression to the mean. [FN158] Using a "quasi-experimental" model by comparing two "treatment" police districts with two adjacent control districts, the study analyzed the effect of PSN on homicide, aggravated assault, and aggravated batteries. [FN159] The authors concluded that, although there was no decline in aggravated assaults or aggravated batteries, there was a large and statistically significant decline in homicide rates in the treatment districts as compared to the control districts. [FN160]

Perhaps most significantly, the authors attempted to differentiate among the different PSN components to assess the components' individual impact. They concluded that of the five measures (attendance at notification meetings, number of federal prosecutions, length of federal sentences, number of gun seizures, and an index of all the components), the "percentage of gun offenders in a [police] beat who have attended a PSN forum appears to have the largest effect of all the PSN indicators, particularly on gang-related homicides." [FN161] By contrast, "[t]he only variable not to have a significant effect was the person-month sentence received from federal PSN prosecution." [FN162]

The Chicago study's finding that the impact of effective communication and efforts to achieve "buy-in" were far more significant than severity of sentence at reducing homicide rates should come as no surprise to most criminologists. The results comport with the recent work discussed in Part I, examining the utility of sentence

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severity as a means for reducing crime and the various strategic approaches thought to be necessary for effective programs.

3. Sporadic Implementation

And yet, while the PSN designers recognize the need for a variety of non-punitive components, those components are only sporadically implemented. The McGarrell study of PSN implementation in 252 large cities throughout the United States found that 170 were considered either "low dosage" or "non-treatment" cities; 33 were "medium dosage;" and 35 were "high dosage." [FN163] The "dosage" referred to the ***1454** level of implementation of all of the various PSN components. [FN164] Moreover, the researchers concluded that the "accountability dimension of PSN proved challenging," with only sixty percent of districts submitting data in the peak reporting year of 2002, and dropping to only ten percent in 2005. [FN165]

Thus, although federal prosecutions of felon-in-possession cases have increased dramatically nationwide, compliance with the sort of programming thought to be most effective varies considerably, and in many districts, appears to be extremely weak. Moreover, data collection is poor, making evaluation of most programs nearly impossible.

III. Systemic Sentencing

As discussed in Part I, severity of sentence has a complex relationship with crime reduction, and the relationship can vary widely depending on a host of factors. Until now, the focus on assessing those factors at sentencing has been largely confined to offender characteristics. This Part suggests that judges expand the focus to also include the characteristics of the government's prosecutorial programs.

It should be noted that others have written extensively in advocating for the morality and wisdom of using cost-benefit analysis as the primary method of arriving at an appropriate sentence. [FN166] The claim here is much more limited. It merely suggests that when we do in fact base sentences on utilitarian grounds, we ought to scrutinize those grounds carefully and expand our vision of the costs and benefits to include the government's crime control efforts and the "use" to which they put sentences.

This Part first discusses the recent trend in favor of using evidence-based methods to assess offender-specific characteristics. It then explores how those same methods might be used to evaluate law enforcement and prosecutorial programming in the context of PSN prosecutions. Lastly, it discusses the institutional role of judges in the sentencing process and why judicial consideration of prosecutorial strategy fits comfortably within a traditional separation of powers framework.

***1455** A. Evidence-Based Sentencing

Broadly speaking, evidence-based practices involve "the use of scientific research to improve the quality of decision making." [FN167] Evidence-based sentencing typically refers to the use of empirical research to help gauge an offender's risk of recidivism and amenability to diversionary and correctional rehabilitation programs. [FN168] A common actuarial assessment is the Level of Service/Case Management Inventory (LS/CMI), which measures risks and needs based on a scoring model that includes criminal history, education level, employment experience, family and marital status, leisure and recreational activities, companions, alcohol and drug use, behavioral attitude, and antisocial patterns. [FN169]

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The assessments have become increasingly popular in routine sentencing courts and in various types of problem-solving courts, such as drug and mental health courts. [FN170] According to the American Law Institute's latest draft of the Model Penal Code's sentencing provisions, at least eight states are beginning to use assessment tools as a part of sentencing. [FN171] Virginia in particular has moved aggressively toward incorporating evidence-based practices. It passed a statute in 2007 that mandates risk assessment of all felony offenders with the explicit statutory goal of "placing [twenty-five] percent of such offenders in one of the alternative sanctions" available under Virginia law. [FN172]

Yet, although evidence-based sentencing has attracted many adherents, it remains controversial. First, by definition, it weights forward-looking utilitarian concerns over retributive notions of blame and just deserts. For those who believe that retribution should be the guiding philosophy of any sentence, risk assessment ought to play a limited role, at best, in fashioning sentences. And, in addition to basic disagreements about the philosophical bases for punishment, there are also concerns about due process and individualized sentencing. Should society really increase a sentence based on a statistical model that suggests a greater likelihood for future criminal behavior? The notion ***1456** smacks of preventive detention and a sort of "sentencing profiling" that may or may not actually portray the offender being sentenced. [FN173]

Lastly, there are concerns about exacerbating disparities based on wealth, education, legal assistance, and other resources. [FN174] Those defendants who are better able to marshal experts to challenge and supplement their assessments will receive better sentences. They will also be in better positions to alter the actuarial "dynamic factors" (those subject to change), such as employment or drug or mental health treatment, in ways that will improve their scores.

The most straightforward response to the criticisms is that all of those same failings exist at sentencings that do not employ evidence-based methods. Although theorists may not agree on the purposes of sentencing, as a matter of practice, judges routinely consider the need for deterrence and public safety when imposing sentence. [FN175] Judges do so either as a matter of course, or as required by legislative mandates that specifically require such consideration. [FN176] Unfortunately, in most instances, courts do so by relying on intuition and judgment unguided by any scientific evidence. One of evidence-based sentencing's most vocal proponents, Oregon trial judge Michael Marcus, has aptly noted that using risk and needs assessment to inform sentencing decisions "is not competing with sentencing that is accurate, free of false positives, fair, responsibly in pursuit of public purposes, kind to offenders or to victims, or rational." [FN177]

Nor are actuarial assessments, when properly used, the determining factor in any given sentence. Even proponents typically suggest they be used to guide, rather than replace, what is too-often unguided professional judgment. [FN178] And to avoid the more serious concerns about individual culpability and due process, actuarial assessments should be used with the aim of reducing incarceration, not increasing it. As Professor Margaret Etienne noted in discussing the potential pitfalls of evidence-based sentencing, "actuarial tools are on firmer legal ground when used as shields rather than as swords." [FN179] Although the distinction between the denial of a benefit and the imposition of a penalty may be hard to justify as a matter of theory, the distinction surely exists as a matter of legal doctrine. As Etienne states:

> ***1457** A defendant who receives a higher sentence because the evidence shows that her status as a victim of child abuse makes her more likely to recidivate may have a due process claim. On the other hand, a seventy-year old defendant who receives a lighter sentence because evidence shows that her status as a senior citizen makes her less likely to reoffend, has no due process claim and would not contest her

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lowered sentence if she did. [FN180]

This Part suggests that, just as courts could benefit from consulting empirical data on the likely risks and needs of the particular defendant before them as part of an effort to reduce incarceration levels in ways that are responsive to concerns about public safety, so too could they benefit from an assessment of how a sentence fits into an overall crime reduction strategy. While examination of enforcement strategies can be complex, in many ways, the consideration is less fraught than that of individual characteristics such as the likelihood of recidivism. It would not involve the use of offender-specific factors, both static and dynamic, that may disadvantage minority and poor defendants. And the data collected, as well as the challenges to it, would be generally applicable and publicly available so that less well-resourced defendants would be placed on equal footing with the better resourced.

Admittedly, there are no actuarial assessments such as the LS/CMI from which to draw conclusions about the current state of crime control efforts. And as we have seen in the research on Triggerlock and PSN, studies on the relationship between law enforcement programming and crime rates are notoriously complex. One might reasonably wonder how judges can be expected to have enough confidence in the studies to draw conclusions sufficient for guidance in sentencing.

Yet, while firm conclusions are difficult to draw, like many other sentencing factors whose nature and effects are uncertain, judges can be guided by the best available evidence in combination with sound theory as to the relationships among sentencing, law enforcement, and crime control. Professor Robert Weisberg has described the reluctance to use empirical proof to guide legal reform as "modern tragic skepticism," and he suggests that policy-makers should not be paralyzed in efforts to reform sentencing law by the failure to fully meet the exacting standards of modern statistics. [FN181] In discussing the few steps taken by the latest drafters of the Model Penal Code: Sentencing toward the use of empirical evidence (and lamenting the ones not taken), Professor Weisberg praises the drafters' adoption of "the second-best idea: [W]e should do the right thing while imposing at least a modest burden of ***1458** proof to establish that what we do, as measured however imperfectly by our best available social science, is consistent with our goals." [FN182] Although criminal justice scholars continue to debate what works in systemic efforts to reduce crime, a few basics seem clear to most scholars, including the architects of PSN and other highly-touted law enforcement initiatives. With respect to the impact of sentencing, severity is likely one of the weaker tools in efforts to deter crime, but to the extent that it can work at all, it must be paired with effective communication strategies. [FN183] The message itself is not the only factor in determining a successful strategy; the "architecture" of the message can be equally vital, meaning that officials must communicate more than just the existence of sanctions to citizens--they must convey why those sanctions exist and what rationale lies behind enforcement policies. [FN184] Communities themselves are likely more effective at deterring crime than are formal legal sanctions, [FN185] and "deliberate moral engagement" in coordination with community members is often the most effective way to reach repeat offenders. [FN186]

The evidence and theory will surely change and improve over time, and as they do, they will provide better guidance to judges. In the meantime, research and data will improve more rapidly if they are subject to adversarial testing in the courtroom. If the results actually matter to sentencing outcomes, litigants and experts will be incentivized to produce useful and accurate work. While the obstacles are real, the attempt to surmount them is highly preferable to the status quo with its blind reliance on assumptions about the relationship between sentencing severity and crime reduction without regard to programming.

The examination may also provide the added benefit of creating incentives for law enforcement to create better programming. First, it could do so because higher sentences are likely a potent motivator for law enforce-

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ment officials. [FN187] Second, the mere act of questioning prosecutors and discussing more effective strategies and results in other districts has the potential for improved programming. [FN188] It seems safe to say that no prosecutor's office would enjoy the prospect of continually defending, on the record, its poor crime control efforts. When we think about sentencing as providing incentives for behavior, ***1459** we typically think only of incentives as they relate to the offender being sentenced and the community at large that may be generally deterred. Yet, there is good reason to think that those most likely to be incentivized are the lawyers in the courtroom who are repeat players and who have the greatest information about the imposition of sentences.

It is also worth remembering that the level and type of law enforcement programming would not be the primary driver of most sentences. Individual offense and offender characteristics should remain at the fore as they traditionally have. Programming's importance in the sentencing process should grow in proportion to the claims made by the government, or the reasoning implicit in the Sentencing Guidelines, about the need for severe sentences as a means for reducing crime.

In this respect, the proposal is about burdens of proof. If the federal government seeks to prosecute crimes that are also regularly prosecuted in state court at the expense of racial equality and fairness, not because of a particular federal interest, severe harm, or state inability, but because of the purported overall crime control benefits, it ought to demonstrate those benefits--or if not fully demonstrate them, at least offer some explanation that can be held to some level of scrutiny. And we know that a real exploration of those issues will involve an examination of the sorts of community-based programs that the designers and advocates of PSN have found necessary for its success. [FN189]

A. Systemic Sentencing and Felon-in-Possession Prosecutions

Felon-in-possession prosecutions provide an ideal model for examining systemic sentencing. First, they have been the subject of intense study by criminologists and legal scholars, providing tremendous insight into the significant financial, social and moral costs of the programs, as well as their potential benefits, namely the reduction of violent crime and all that comes with it. Those studies provide a wealth of information for use by practitioners and the bench.

Second, the prosecutions and sentences are primarily driven by crime control rationales. The federal intervention exists not because the act of gun possession itself is so heinous--indeed the Supreme Court has recently held that the act is a cherished and fundamental constitutional right [FN190]-- but because its commission by those with prior ***1460** criminal records is viewed as risking other harms, most notably those associated with violent crime.

In theory, all criminal prosecutions are highly discretionary, but in practice, it is particularly true for crimes that do not involve victims and would otherwise be punished in a different jurisdiction. The federal decision to prosecute unlawful gun possession is not based on the inherent severity of the offense, unique harm to federal interests, or the refusal or inability of state authorities to prosecute. Instead, the decision is justified as part of a targeted effort to reduce violent crime via deterrence and incapacitation by imposing federal sentences that are more severe, and sometimes much more severe, than those imposed in state court.

Yet there are compelling reasons to question the soundness of that justification. All the factors that make sentencing severity a difficult method for reducing crime are exacerbated in federal felon-in-possession prosecutions. Communication is difficult because of the vast disparity in the number of cases in federal court as op-

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posed to state court, and because the penalties are often counterintuitive compared to state penalties for more serious offenses. [FN191] Racial disparities and the appearance of irregular enforcement can cause resentment and impede "buy-in." [FN192] And the targets of the programs, prior offenders, have already shown themselves less susceptible to threats of punishment. [FN193]

Researchers and criminologists working with the Department of Justice have recognized these problems and have developed ways to solve them, but implementation has been highly sporadic. [FN194] Despite the large and growing body of literature examining felon-in-possession programs, the federal judiciary has virtually ignored the discussion. Not a single judicial opinion cites to any of the empirical studies of the programs or addresses any of the components of the programs thought to be central to their success or failure. The federal government's most formal and institutional involvement in street crime is based almost entirely on utilitarian concepts of deterrence and incapacitation as means for reducing violent crime, yet challenges to the prosecutions and the severe sentences have not squarely engaged those theories. [FN195]

Although one might argue that even in poor programming districts, a more severe sentence will still result in some increased crime reduction, the real issues are: at what cost and for what benefit? If we think of state sentences as providing the baseline "market price" for ***1461** crimes that are overwhelmingly prosecuted in state court, we ought to be asking how useful it is to charge the marked-up federal prices.

In addition, the disparity in programming across districts provides an independent basis for consideration. All else being equal, a sentence imposed in the name of crime control in a district without effective programming should not be the same as one imposed in a district with effective programming. The sentence in the non-effective district achieves less bang for the buck, that is, each unit of punishment likely results in less crime reduction. The Sentencing Guidelines do not take into account these variations, and typically, prosecutors seek the same Guideline sentence across districts no matter the level of programming. There is thus great disparity across districts in the amount of utility being sought and achieved by imposition of the same sentence.

One response to the disparity in programming among districts might be to impose higher sentences in districts with poor programming. After all, if one aim in considering programming is to achieve a similar level of utility, a higher penalty is needed to compensate for the failings in communication, legitimacy and buy-in. But there are serious problems with that approach. First, it assumes that we are able to achieve "optimal" utility by increasing sentences without changing the level of programming. That is, the approach relies ever more heavily on the sole lever of severity of sanction as a means for achieving crime control, the lever which most agree is the weakest of those available to deter criminal conduct. [FN196] And it does so in the face of the many added difficulties that the federal government faces, as described in Part II.

The approach would also significantly exacerbate the problems of legitimacy and equality. The "cruel lottery" would become even crueler because the difference between state and federal sentences would become more extreme. Those defendants who live in districts where there has been no attempt at government outreach would be punished more severely than defendants in those districts where the outreach exists but the defendants failed to respond to it.

Lastly, it would provide the wrong incentives for law enforcement. To the extent that United States Attorney's Offices and law enforcement personnel are motivated in part by seeing a "payoff" to their work in the form of lengthier sentences, [FN197] increasing sentences where programming is poor incentivizes poor programming.

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***1462** 1. Application at Sentencing

Consideration of programming would require judges to first obtain information about what programming is actually occurring and then determine whether and how to use the information to impose a specific sentence.

a. Information Gathering

Either through direct questioning of prosecutors or by delegating the task to probation officers for inclusion in a presentence report, judges should require disclosure of the specifics of the government's programming. Courts can begin by inquiring about the sort of activities that the designers of PSN and the Department of Justice recommend for effective programming. For instance, how is the government communicating its enforcement efforts and sentences? Is the government engaging in any sort of focused messaging, such as offender notification meetings for high-risk populations, including probationers and parolees? What are the attendance figures for those meetings? Who else besides law enforcement and potential offenders are present at the meetings? What other community outreach or media efforts has the government made?

In addition to questions about input variables, courts should inquire about output measures. Has the government engaged in any statistically significant surveys to gauge how successful its communication efforts have been? Are residents of targeted areas aware of potential federal prosecutions and penalties? Do they perceive them as legitimate and fair? What do the data show about the effect of the programming on local crime rates?

Courts could also inquire into aspects of programming that have implications for the effectiveness of specific deterrence and selective incapacitation in reducing crime. In other words, how might the existence of community programs inform our “sorting” of offenders to ensure the best use of resources? A relevant factor in that process is a given individual's response to the programming that exists. To the extent that community notification meetings are being conducted by the government, judges should ask whether this defendant was present at any of those meetings. If not, was he notified of the meetings or encouraged or required to attend? Was he offered any sort of job, education, or treatment programs? Did he take advantage of them? All else being equal, we might judge an offender more likely to reoffend if he had been directly placed on notice of an enforcement program prior ***1463** to his gun possession, had its importance explained in a way that conveyed its legitimacy, and been provided opportunities to build a law-abiding life.

Lastly, courts should examine the government's rehabilitation and reentry programs. This is a distinct inquiry from offender-based inquiries that seek to assess an individual's odds of successful reform. Although offender-based assessments are important, they are limited by the available programming. In other words, it does no good to assess an offender for potential substance abuse or mental health treatment if those treatment programs do not exist or are ineffective. Felon-in-possession cases provide a telling example of the disconnect between purported crime control reasons for the lengthy sentences and the reality of crime control benefits: The Federal Bureau of Prisons specifically excludes felon-in-possession inmates from the early release incentive of its most highly touted rehabilitation program, the Residential Drug Abuse Program (RDAP).

Again, courts could inquire about the available data on outcome measures. Most importantly for purposes of the felon-in-possession cases, courts could seek data comparing recidivism rates for similarly situated felon-in-possession offenders who received different sentences in the state and federal systems.

There will undoubtedly be competing views of what all of this information says about the effectiveness of a given program, and there will surely be questions of reliability and accuracy in the government's responses. The

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hope is that over time and through the filter of the adversarial process, those questions can be resolved sufficiently enough to make informed judgments about the quality of the programming and the rationality of the sentences.

b. Application to the Sentence

Once the programming has been examined, judges will need to decide what, if any, impact the quality of the programming should have on the sentence. This Article does not set forth a precise model for converting a given level of programming to a particular sentence. Just as a wide variety of offender-specific characteristics are not easily susceptible to quantification and translation to a specific sentence, neither is the level of law enforcement programming. Instead, this Article suggests that judges employ a rough sliding scale, with obvious instances of non-existent or poor programming resulting in a discounting of any crime control rationale for the severity of a sentence.

***1464** Federal judge and law professor Gerard Lynch once wrote an article discussing the difficult realities of imposing sentence and why judging severity is not an exact science. As he stated:

> [O]nce it is agreed that a given defendant ought to go to jail, or even that his sentence should be 'serious' or 'severe,' how do we argue about whether a five-or ten-year sentence is too much, or a three- or seven-year sentence too little?. . . For most people, including most judges, prosecutors and wardens, whether a certain number of years of incarceration is too much, too little or just right for a particular offense (at least within a very large range of tolerance set by grossly excessive or lenient extremes) probably depends more on what they are accustomed to than on any reasoned or deeply intuited belief in a particular level of sentence. [FN198]

When it comes to federal felon-in-possession prosecutions, however, there is at least a baseline by which we can measure the often elusive concept of severity: state sentences. Even in an advisory Guidelines era, federal sentences for illegal firearms possession typically far outstrip their state counterparts; indeed, that is the entire justification for the prosecutions. [FN199] This disparity might not concern us so much for offenses that are mostly prosecuted by federal authorities, such as securities fraud or large-scale interstate drug-trafficking, where the federal penalties create the "market price" for the illegal conduct. But where the vast majority of firearms-related crime is prosecuted in state court, including nearly all such crime involving the actual use of violence, we ought to be much more circumspect about the ability of sporadically severe sentences to impact crime rates. And we should be especially careful in the absence of any coordinated strategy to surmount that fundamental obstacle. At the very least, consideration of prosecutorial programming would prompt a more rigorous discussion of the underlying rationale behind those disparately high sentences.

The next subpart moves from the discussion of why judges ought to engage in that analysis to a consideration of whether they are the appropriate institutional actors to do so. It concludes that systemic sentencing is firmly grounded in the mandate of the Sentencing Reform Act, the jurisprudence of Booker and Kimbrough, [FN200] and in traditional notions of separation of powers.

***1465** B. Systemic Sentencing and Separation of Powers

One objection to judicial exploration of law enforcement strategy surely comes from a separation of powers standpoint. Congress and the Sentencing Commission have far greater ability to engage in fact finding on the topic of crime control strategy and are far more legitimate sources of uniform policy-making. [FN201] The Ex-

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ecutive maintains the expertise and the responsibility of resource allocation that makes it the natural branch to determine what specific strategies to employ. [FN202] And both are far more politically accountable than the Judiciary. [FN203] The following subpart examines those objections and concludes that they do not counsel against the judicial role in assessing strategy.

1. The Judiciary v. The Legislature

a. Federal Sentencing Background

For the vast majority of United States history, federal judges have had extraordinary discretion at sentencing. Before 1984, the overwhelming majority of federal criminal statutes contained only a maximum sentence, allowing judges to sentence defendants to terms of imprisonment or monetary fines anywhere from zero to the maximum with virtually no appellate review. [FN204] In the rare instances in which statutes contained mandatory minimums, those "mandatory" sentences could be suspended in favor of probation. [FN205] During this time, judges were free to impose sentences on any basis that did not violate the Constitution. [FN206]

That era came to a sudden halt in 1984 with passage of the SRA and the creation of the U.S. Sentencing Commission. The SRA was passed at a time of soaring crime rates, and during a period when crime ***1466** had increasingly become a national political issue. [FN207] The broad judicial discretion at sentencing led to calls for reform from both sides of the political aisle. [FN208] From the left came concerns that federal judges were imposing unduly and disparately harsh sentences on African Americans while treating white defendants, especially those convicted of financial crimes, too leniently. [FN209] From the right, there were calls for tougher sentences across the board. [FN210]

To accomplish the goal of providing more uniformity and rationality in sentencing, the SRA created the Sentencing Commission and gave it the mission of developing a system of sentencing guidelines that would incorporate the goals of "deterrence, incapacitation, just punishment, and rehabilitation" of the criminal defendant. [FN211] Those goals roughly corresponded to the SRA's direction to judges of what factors to consider when imposing sentence:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection . . .
>
> (2) the need for the sentence imposed --
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. [FN212]

In a separate subsection, judges were also instructed to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." [FN213]

Although this laundry list of factors expressed often competing retributive and utilitarian goals, in practice, judges rarely considered, at least explicitly, the underlying instructions from the SRA at sentencing. [FN214]

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This was so because beginning in 1987 the Commission's Sentencing Guidelines Manual went into effect, virtually binding judges to a narrow sentencing range based on two factors--the ***1467** Offense Level and the defendant's Criminal History Category--that were meant to incorporate all of the SRA's sentencing goals. [FN215] The Offense Level consists of a base number that corresponds to the offense of conviction, to be increased or decreased depending on various aggravating or mitigating factors. [FN216] The Criminal History Category is calculated by tallying a defendant's prior convictions and assigning points to those convictions depending on the prior sentence imposed. [FN217] The Offense Level is meant to be a measure of the severity of the offense while the Criminal History Category is primarily meant as a proxy for a defendant's risk of recidivism. [FN218] Both combine to create a defendant's sentencing range, and with few exceptions before 2005, judges were bound by that range.

In 2005, the Supreme Court radically altered federal sentencing by striking down the mandatory nature of the Guidelines. In Booker, [FN219] the Court found that the judge-determined process of deciding a defendant's Offense Level, with its factual findings by a preponderance of the evidence standard, violated the Sixth Amendment right to a jury trial. [FN220] The remedy was to make the Guidelines advisory, still requiring judges to determine the Guidelines range but no longer binding them to the result, with the ultimate sentence reviewable only for its "reasonableness." [FN221] No longer bound by the strict mandates of the Sentencing Commission, judges were required to pay renewed attention to the underlying purposes of sentencing as expressed in § 3553(a). And Booker's progeny, particularly Kimbrough, [FN222] made clear just how free they were.

In Kimbrough, the district court sentenced the defendant below the advisory Guidelines range because of a policy disagreement with the infamous one hundred to one crack/powder cocaine disparity. [FN223] The Fourth Circuit vacated the sentence on the grounds that a general disagreement with the policy relating to the crack/powder disparity was "per se unreasonable." [FN224] The Supreme Court reversed, finding that judges may indeed impose sentences based on policy disagreements with the Sentencing Commission.

Importantly, the Court stated that judges are particularly free to disagree with the Sentencing Commission in those instances where the ***1468** Guidelines provision at issue does not "exemplify the Commission's exercise of its characteristic institutional role." [FN225] That role is best fulfilled when the Commission bases "its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." [FN226] With respect to the crack/powder disparity, the Court found that the Commission had not done so.

Kimbrough was the Court's most emphatic statement that it meant what it said in Booker. While appellate courts are permitted to apply a presumption of reasonableness to a sentence that falls within the Guidelines, [FN227] and district courts must still use the Guidelines as a "starting point and the initial benchmark," [FN228] the ultimate sentence is largely left to the discretion of the district court so long as its decision is reasonably grounded in the principles of § 3553(a).

b. Congressional Authorization of Systemic Sentencing

The primary reason then that systemic sentencing does not pose a danger to congressional authority is that Congress has already authorized it. Section 3553(a) commands judges to impose sentences that are "sufficient, but not greater than necessary" to comply with a host of traditional goals of punishment, including the need "to afford adequate deterrence to criminal conduct," "promote respect for the law," and "to protect the public from further crimes of the defendant." [FN229]

For all the reasons previously discussed, any realistic appraisal of the adequacy of a sentence in attending to

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those goals must include consideration of systemic factors. A sentence that purports to be concerned with public safety, deterrence, and respect, must account for whether and how it will be communicated to the public--particularly to communities that are specifically targeted for enforcement.

Still, one might reasonably ask whether it would make more sense for Congress or the Commission to explicitly authorize those considerations. After all, the list of § 3553(a) factors is arguably so broad and inclusive that virtually anything can be rationalized as a legitimate consideration at sentencing, and accounting for law enforcement strategies will lead to, or at the very least contribute to, the sort of increased disparity that led to the sentencing reforms of the SRA.

***1469** The problem with this line of argument is that it can be applied to any sentencing factor. Disparity is a complex issue and efforts to contain it have often led to solutions worse than the problem. Piecemeal identification of precise factors that may and may not be considered at sentencing is a task that has never been suitable to Congress and is one with which the Sentencing Commission has struggled mightily, encountering constant criticism. It is widely acknowledged that even under the pre-Booker era mandatory Guidelines system, there was enormous disparity in the criminal justice system. [FN230] Professor Kate Stith and others have written extensively about how the mandatory Guidelines did little to reduce disparity-- both because of the shift to non-uniform prosecutorial discretion and because judges still sentenced differently, governed by different sentencing philosophies and different thresholds for applying departures. [FN231]

As Kenneth Culp Davis, a supporter of the Guidelines regime, acknowledged, "[i]n the whole legal system, the worst pockets of injustice are clearly not in the federal or state courts, in federal or state legislative bodies, or in federal agencies. The worst pockets of injustice are probably in the activities of police and prosecutors." [FN232]

The real question in thinking about disparities is not about how to entirely prevent them, but how to ensure that the disparities that do exist are justified, identifiable, and as transparent as possible. While judicial questioning of law enforcement strategy certainly has the potential to create disparity in the same way that adding any variable to the sentencing equation does, it also has the potential to shed some light on the much murkier process of law enforcement decision-making and to hold it accountable in a manner consistent with the latest evidence about what works and what does not.

As discussed, the SRA already provides judges with the authority to play this role. Although some variation in application is inevitable, as the Supreme Court said of its decision in Booker, "[w]e cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure." [FN233] Such is the nature of our current sentencing process, and it is likely for the better.

***1470** c. Systemic Sentencing and Felon-in-Possession Cases

Returning to felon-in-possession cases, this subpart examines how judges might consider systemic factors while following the framework mandated by Booker and Kimbrough. Those cases allow sentencing judges to look behind the Guidelines, especially in instances where the Commission has not relied on empirically sound data or the sort of expertise that provides it with an institutional advantage over the judiciary. [FN234] The first step in that process is to examine the underlying rationale of the advisory Guideline sentence upon which the government typically relies in requesting particular sentences.

At the same time that Project Triggerlock was first being considered in 1991, the Sentencing Commission

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was in the process of significantly increasing the Guidelines' sentences for unlawful gun possession. In December 1990, the Firearms and Explosive Materials Working Group (Working Group) of the Sentencing Commission issued a report proposing upward revisions to the Guidelines' ranges for firearms offenses. [FN235] The impetus for the proposal was the Working Group's finding that, between 1987 and 1989, judges were departing upwardly from the Guidelines' ranges at a rate of 8.4% in gun cases as compared to an overall upward departure rate of 3.5%, suggesting that judges found the ranges too low. [FN236] The Working Group discovered that a central consideration guiding the severity of sentences was the intended purpose of the gun possession, that is, whether the gun was possessed in connection with some "actual or intended unlawful or criminal use." [FN237] The report also found that those at the high end of the Criminal History Category were receiving "extraordinarily high average sentences" of thirty-eight months. [FN238]

The Working Group, however, did not recommend adjusting the Guidelines incrementally upward to conform to these findings. Instead, it focused on the recent congressional passage of the Armed Career Criminal Act (ACCA), which created a mandatory minimum sentence of fifteen years for gun possessors with three prior "violent felonies" or "serious drug offenses." [FN239] Using that figure as a benchmark, the Working Group recommended, and the Commission adopted, a steep increase in the firearms Offense Level, not based on the severity of the ***1471** offense as measured by a defendant's actual or intended use of a gun, but rather based entirely on prior convictions. [FN240] The resulting increase in sentencing severity was extreme. Whereas prior to the amendment, an offender who possessed a gun without any actual or intended use and who was at the high end of the Criminal History Category would likely face an "extraordinarily high" sentence in the range of three years imprisonment, [FN241] that same offender would now face a likely sentence of eight to ten years, or possibly fifteen to twenty-five if he qualified for ACCA. [FN242]

The dramatic increase in sentencing severity based on a defendant's prior convictions represented a significant shift in sentencing philosophy. Rather than focusing on the severity of the conduct and the culpability of the offender, the Guidelines used a proxy for the risk of recidivism--criminal history--to advance the goals of deterrence and incapacitation. [FN243]

While retributive grounds certainly exist for increasing a sentence for repeat offenders, severe penalties based on prior convictions have their most principled grounding in utilitarian theories of punishment. As Robinson has noted in examining incapacitation as a theory of punishment:

> By committing an offense after a previous conviction, an offender might be seen as 'thumbing his nose' at the justice system. Such disregard may justify some incremental increase in punishment over that deserved by a first-time offender, but it seems difficult to justify the doubling, tripling, or quadrupling of punishment because of nose-thumbing. The recidivist nature of a second robbery is only one of many characteristics that determine blameworthiness. Lay intuitions may see the nose-thumbing as making the second robbery more condemnable than the first but not more condemnable than the second robbery itself, and certainly not twice as condemnable as the second robbery. [FN244]

***1472** As Robinson explains, although the retributive rationale for "nose-thumbing" has a legitimate role in sentencing, it does not explain the sort of exponential increase in the types of sentences present in the felon-in-possession Guidelines. [FN245] The felon-in-possession Guidelines ranges are so high precisely for the same reason that the crack ranges at issue in Kimbrough are so high--they were pegged to congressional mandatory minimums which themselves had no grounding in data. [FN246]

Under these circumstances, judicial exploration of the government's law enforcement programming is both

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sound and authorized by statute and case law. With the Guidelines ranges heavily based on a utilitarian rationale of crime control, but not grounded in empirical evidence, felon-in-possession sentences are ripe for a close examination of what works and what does not in the relationships among programming, crime, and severity. [FN247]

2. The Judiciary v. The Excecutive

Even with legislative grounding, some might argue that judicial questioning of enforcement strategy violates basic notions of separation of powers and prosecutorial discretion. United States Attorneys' Offices and federal law enforcement agencies could reasonably assert that more community involvement and notification meetings might be nice, but they have elected to place their resources elsewhere in ways that, in their professional and expert judgment, are likely to do more ***1473** good. The Executive Branch is charged with deciding how best to enforce criminal laws, the democratic political system holds it accountable, and any judicial involvement in that process would be activism of the worst kind.

While the argument is valid as far as it goes, it misses the mark. Consideration of government strategies at sentencing does not require that any particular programming be implemented; it only requires explanation of the programming so that it can be evaluated in an open process that attempts to be true to the statutorily mandated purposes of sentencing. Judges would not require certain law enforcement strategies; they would consider how those strategies relate to the usefulness and legitimacy of a particular sentence.

Although this distinction between permissible judicial authority and impermissible over-stepping ought to be straightforward, courts have all too often confused the proper boundary. In numerous challenges to felon-in-possession sentences, federal courts of appeals have misapprehended the nature of separation of powers doctrine and been overly expansive in their notions of prosecutorial discretion.

a. “Unwarranted Disparities” and Felon-in-Possession Challenges

i. Pre-Booker

In the fifteen years between the announcement of Project Triggerlock and the decision in Booker, defendants often challenged the severity of their federal sentences by comparing them to more lenient state sentences and referencing the “unwarranted disparities” provision of the SRA. One of the early challenges arose out of Boston's Operation Ceasefire, and it resulted in a First Circuit opinion that was widely followed by other federal courts of appeals in rejecting the disparities argument.

On January 10, 1995, Eric Snyder was arrested by Boston police for illegally possessing a .32 caliber pistol located in a briefcase in the trunk of his car. [FN248] Initially charged in Massachusetts District Court, he faced a likely state sentence of between one and two and a half years in prison. [FN249] As part of Operation Ceasefire, however, he was prosecuted in federal court and was subject to the Armed Career Criminal Act, where he faced a mandatory minimum of fifteen years and a Guidelines' sentence of twenty-two to twenty-seven years. [FN250] Upon his conviction, ***1474** the district court downwardly departed from the Guidelines' range and imposed the mandatory minimum of fifteen years by citing the enormous disparity in punishment between state and federal courts. In so doing, the court excoriated the Government for the use of its “absolute discretion” in selecting which defendants of many would be subject to the harsh treatment, stating that the decision to prosecute the “local offense” in federal court raised “fundamental issues of fairness in sentencing under the due process clause and de facto selective prosecution under the equal protection clause of the United States Constitu-

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tion." [FN251]

Ultimately, the district court grounded its ruling in the SRA's "unwarranted disparities" provision. Although the court acknowledged that Congress was concerned with disparities within the federal system, it nonetheless found that the "federalization of this 'local' crime," done purely for the sake of dramatically increasing Snyder's sentence, violated congressional efforts at uniformity in the criminal justice system generally.

On the government's appeal of the sentence, the First Circuit emphatically disagreed with the district court. [FN252] The Court held that consideration of federal/state sentencing disparities was "flatly incompatible" with the congressional goal of promoting uniformity among federal sentences. [FN253]

> Congress and the Sentencing Commission erected the present sentencing structure against the skyline of an extant criminal justice system . . . and that system includes overlapping state and federal criminal jurisdiction. . . . It is implausible to suppose that the Commission over-looked this large reality and therefore failed to account for it in formulating the guidelines. [FN254]

The Court particularly took issue with the district court's criticism of the government's use of its charging discretion:

> Different branches of government have different responsibilities and the power to determine when to prosecute and when to refrain is, within broad limits, a prerogative of the Executive Branch. Accordingly, it is a 'bedrock principle of our system of criminal justice' that a federal judge may not interfere with the government's prosecutorial decisions solely to vindicate his subjective view of the wisdom of a given enforcement strategy. [FN255]

The Snyder court's reasoning tracked that of earlier courts of appeals denying downward departures in drug cases based on state/federal disparities and holding that the choice of forum was ***1475** entirely "within the province of prosecutors." [FN256] According to the argument, the Sentencing Commission "did not intend that decisions traditionally within the prosecutor's ken, and within constitutional bounds, be counterbalanced by a sentencing court." [FN257]

Thus, a dynamic developed whereby federal courts of appeals equated sentencing challenges with challenges to charging decisions. In United States v. Deitz, the Eighth Circuit rejected another early challenge based on federal/state sentencing disparities by stating, "[c]hoice of forum, however, is a decision that lies safely within the realm of prosecutorial discretion, and the Guidelines were not designed to make inroads into this exclusive territory of the executive branch." [FN258]

The structure of these arguments is not surprising given that many of the sentencing challenges were presented straightforwardly by defendants as a means to correct the perceived abuse of prosecutorial discretion. Indeed, the dissent in Deitz stated as much: "The federal sentencing judge should have the discretion to correct a prosecutorial wrong by equitably adjusting Deitz's sentence to that which he would have received in state court . . . . Such judicial power must be exercised if we are to preserve some fairness in our federal criminal justice system." [FN259]

During the pre-Booker, mandatory Guidelines era, every federal court of appeals to decide the issue of state/federal disparities followed the reasoning of Deitz and Snyder and rejected the claim that sentencing courts were permitted to consider the disparity as "unwarranted." They did so not only based on the legislative history of the SRA and the belief that looking to state sentences would re-inject the sorts of local disparities that Congress intended to eliminate, but also out of a reluctance to tread on executive territory.

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ii. Post-Booker

One might have expected the landscape to shift significantly in the wake of Booker and the new regime of advisory Guidelines. And yet defendants have continued to fail to convince federal judges to reduce their sentences based on lower state penalties.

The Sixth Circuit's decision in United States v. Malone is typical. [FN260] Malone was arrested by state police in Michigan and ***1476** charged with possession with the intent to distribute marijuana and illegal possession of two firearms. [FN261] His case was federalized pursuant to a PSN program, and at trial, he was acquitted of the firearms charges but convicted of the marijuana charge. [FN262] The Guidelines called for a sentence of fifty-one to sixty-three months, but the district court downwardly departed to a sentence of twenty-four months citing Michigan's state system and the fact that Malone "very likely would have received a lower period of incarceration, possibly probation" in state court. [FN263]

The Sixth Circuit vacated the sentence using the same reasoning as the Pre-Booker line of cases rejecting state/federal disparities as a legitimate sentencing consideration. [FN264] Relying on Snyder and five other circuits that decided the issue after Booker, the court joined in holding that the "unwarranted disparities" provision of the SRA referred exclusively to disparities within the federal system:

> Malone committed a federal offense, he was tried and convicted in federal court; thus, he is to be sentenced by a federal judge applying federal law. There are inherent disparities between federal and state court sentences, but such is the nature of a federalist system involving two independent sovereigns each having their own criminal justice systems. [FN265]

The Sixth Circuit's opinion is emblematic of federal decisions. Courts have often viewed challenges to sentences based on the federal/state disparities as challenges to federal charging decisions. Indeed, at virtually the same time Malone was decided, the Sixth Circuit explicitly conflated prosecutorial discretion in the charging phase with the sentencing phase. In United States v. Wallace, the district court sentenced Steven Wallace to 200 months imprisonment (where the Guidelines range was 262-327) for his possession of a gun in connection with his possession with intent to distribute marijuana. [FN266] Wallace objected to the sentence because the district court refused "to take into account the racially discriminatory nature of the Public [sic] Safe Neighborhoods program, which he contends disproportionately, selects Blacks for federal prosecution." [FN267] In rejecting the claim, the court held that racial discrimination was "not the sort circumstance contemplated in any of the § 3553(a) factors" and that "[i]n any event, to set forth a selective-prosecution claim, Wallace must present some ***1477** evidence tending to show that the Project Safe Neighborhoods program has a discriminatory effect and intent." [FN268]

But, of course, Wallace was not making a selective prosecution claim. Instead, he was asking the court to consider racial disparity as a factor in his sentence. Regardless of the merits of the argument, the strict requirements of a selective prosecution claim need not be met. Yet the court explicitly employed the strict standard in the charging context to a sentencing phase where judges have much greater authority.

Wallace is consistent with federal appellate courts' general view that consideration of the federal/state dynamic at sentencing is somehow subversive, an end run around federalism and equal protection challenges to charging decisions. As the argument goes, it may be unfair that similarly situated offenders receive different treatment based on which system charges them, but such is the nature of dual sovereignty. To hold otherwise would diminish the federal government's unique interest in enforcing its own laws. [FN269]

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Missing from the opinions is a discussion of how the disparities might affect the crime control rationale underlying the prosecution and requested sentence. There is no analysis of how the lower sentences in state court, where the vast majority of firearm-related crime is prosecuted, might affect the ability of a federal court to achieve deterrence, shape norms and ultimately advance public safety. Those goals are mandated by § 3553(a) and espoused by the Department of Justice and the Sentencing Commission, but left entirely unexplored at sentencing.

iii. Systemic Sentencing and Prosecutorial Discretion

In the era of mandatory Guidelines, prosecutorial charging decisions and agreements regarding enhancements and reductions ***1478** virtually assured specific sentences. [FN270] Not only did this shift alter the courthouse power dynamic, but it created a highly legalized and litigious sentencing process. Whereas federal prosecutors were once largely satisfied with obtaining an appropriate conviction and leaving sentencing to judges, [FN271] now they were deputized as the lawyers for the Sentencing Commission, defending its Guidelines and guarding against downward departures.

It should come as no surprise that in a system where charging decisions led directly to sentencing outcomes, prosecutors (and courts) began to view challenges to sentences as challenges to prosecutorial discretion. But that view is born of recent practice, not out of any traditional view of separation of powers. [FN272] Indeed, one commentator has recently noted that prosecutorial discretion does not originally derive from separation of powers doctrine at all. [FN273] Instead, it is purely a function of the historical ability of prosecutors to issue the writ of nolle prosequi, that is, the ability to not prosecute. [FN274]

Judicial consideration of law enforcement programming would not interfere with this core Executive prerogative. Admittedly, sentences that account for programming may have an impact on enforcement strategy; indeed it is hoped they would. But that does not make consideration of the strategies illegitimate or undesirable. Holding prosecutors accountable for the utility of their proposed sentences has the potential to greatly improve crime control efforts, and judges are perfectly appropriate actors to create those incentives.

Conclusion

The suggestion that judges inquire into crime control strategies at sentencing has implications beyond gun cases. Since 1990, the number of federal prisoners has roughly quadrupled. [FN275] The increase has not been fueled by offenders who have caused actual harm by engaging in violence or by stealing or destroying property, or planning or attempting to do those things. Nor has it come from offenders engaged in complex ***1479** interstate organizations or high-level fraud that the federal government is uniquely well-equipped to enforce. As a percentage of the federal prison population, those offenders' numbers have dropped by more than half. [FN276] Instead, the increase comes mostly from offenders with prior criminal records who have committed offenses such as unlawful gun possession, illegal reentry after deportation and low and mid-level drug dealing--offenses that risk harm to people or property but do not necessarily involve any actual or intended injury. [FN277]

Despite the heavy toll on racial equality and the high financial and social costs of mass incarceration, proponents of the prosecutions and lengthy sentences typically justify them on the basis of crime control and improved public safety. [FN278] But those claims have not been closely scrutinized at sentencing, and no attention has been paid to how the usefulness of a particular sentence may vary according to the type and level of law enforcement programming.

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One reason for the failure of courts to engage in this sort of inquiry is a reluctance to intrude on Executive authority. Another may be the difficulty and uncertainty of assessing the quality of programming and then applying that assessment to a specific sentence. The foregoing discussion has attempted to explain why neither is a valid obstacle to programming's consideration.

This Article's focus on the utility of sentences is not meant to suggest that the severity of the offense and the blameworthiness of the offender are unimportant or secondary features of sentencing. Indeed, they are most important--so important that if we are to discount them in favor of utilitarian theories of crime control, as felon-in-possession prosecutions and many others do, we ought to do so very carefully.

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[FN1]. See Edmund F. McGarrell, Project Safe Neighborhoods--A National Program to Reduce Gun Crime: Final Project Report 71 (2009), available at http://www.ncjrs.gov/pdffiles1/nij/grants/226686.pdf.

[FN2]. The term refers to individuals who violate federal and state criminal prohibitions on possessing a firearm any time after having been convicted of a felony. The federal prohibition is found at 18 U.S.C. § 922(g) (2006).

[FN3]. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics tbl.6.0023 (Ann L. Pastore & Kathleen Maguire eds., 33d ed. 2009), available at http://www.albany.edu/sourcebook/pdf/t600232009.pdf.

[FN4]. See McGarrell, supra note 1, at 1.

[FN5]. See infra Part II (discussing many districts where over eighty and ninety percent of defendants are African American); see also Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979 (1995); Mark Osler, Indirect Harms and Proportionality: The Upside Down World of Federal Sentencing, 74 Miss. L.J. 1 (2004).

[FN6]. Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987-2011 (1984).

[FN7]. 543 U.S. 220 (2005).

[FN8]. See, e.g., Sanford H. Kadish et al., Criminal Law & Its Processes 92-105 (8th ed. 2007).

[FN9]. Id.; see also Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

[FN10]. Kadish et al., supra note 8; see also Mark A.R. Kleiman, When Brute Force Fails 3 (2009).

[FN11]. In discussing “severity” of sentence, I am generally referring to length of incarceration, though, as discussed below, people may view and experience severity quite differently.

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[FN12]. Richard Posner, Economic Analysis of Law 15-16 (7th ed. 2007); Becker, supra note 9, at 176-77.

[FN13]. Steven D. Levitt, Deterrence, in Crime: Public Policies for Crime Control 435, 438 (James Q. Wilson & Joan Petersilia eds., 2002).

[FN14]. Id. at 437.

[FN15]. Id.

[FN16]. Id.

[FN17]. Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 Oxford J. Legal Stud. 173, 173 (2004); Michael Tonry, Purposes and Functions of Sentencing, 34 Crime & Just. 1, 28 (2006).

[FN18]. Cesare Beccaria, An Essay on Crimes and Punishment (Adolph Caso ed., International Pocket Library 1983) (1764); Kleiman, supra note 10, at 74; Becker, supra note 9, at 176.

[FN19]. See Kleiman, supra note 10, at 78-80; see also Becker, supra note 9, at 176 n.12 ("Some judges preoccupy themselves with methods of punishment. This is their job. But in preventing crime it is of less significance than they like to think. Certainty of detection is far more important than severity of punishment." (internal quotation marks omitted)).

[FN20]. David M. Kennedy, Deterrence and Crime Prevention 11 (2009) (summarizing the studies and concluding, "[i]n general, the certainty, and to a lesser extent, the swiftness of sanction mattered more than the severity of sanction, to the extent that many researchers concluded that severity was all but or in fact irrelevant"); James Q. Wilson & Richard Herrnstein, Crime and Human Nature (1985); Robinson & Darley, supra note 17.

[FN21]. Kennedy, supra note 20, at 11.

[FN22]. Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 Geo. L.J. 949, 953 (2003) ("If a criminal law rule is to deter violators, three prerequisites must be satisfied: The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense.").

[FN23]. Id.; see also Becker, supra note 9.

[FN24]. Robinson & Darley, supra note 22, at 953.

[FN25]. In one of the more astounding findings on this topic, a study by the Bureau of Alcohol, Tobacco, and Firearms (ATF) revealed that serious firearms offenders, "who had been prosecuted, sentenced and were interviewed while incarcerated dramatically underestimated the magnitude of their current sentence." Kennedy, supra note 20, at 26 (citing Bureau of Alcohol, Tobacco, & Firearms, Protecting America, The Effectiveness of the Federal Armed Career Criminal Statute 13 (1992)).

[FN26]. Id.

[FN27]. Id. at 35.

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[FN28]. Kent A. McClelland & Geoffrey P. Alpert, Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences, 1 J. Quantitative Criminology 307 (1985).

[FN29]. Eleni Apospori & Geoffrey Alpert, Research Note: The Role of Differential Experience with the Criminal Justice System in Changes in Perceptions of Severity of Legal Sanctions Over Time, 39 Crime & Delinq. 184 (1993).

[FN30]. See Ben M. Crouch, Is Incarceration Really Worse? Analysis of Offenders' Preferences for Prison Over Probation, 10 Just. Q. 67 (1993).

[FN31]. Id.

[FN32]. For a survey of the research, see Kennedy, supra note 20, at 37.

[FN33]. John M. Darley, On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences, 13 J.L. & Pol'y 189, 204-05 (2005).

[FN34]. See Kleiman, supra note 10, at 34-41; Pew Ctr. on the States, The Impact of Hawaii's HOPE Program on Drug Use, Crime and Recidivism (2010), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_HOPE_Brief_ web.pdf; Jeffrey Rosen, Prisoners of Parole, N.Y. Times, Jan. 8, 2010, at MM36, available at http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html.

[FN35]. Kleiman, supra note 10, at 35.

[FN36]. Id.

[FN37]. Id. at 35-37.

[FN38]. Id.

[FN39]. Id. at 36-41.

[FN40]. Id. at 39.

[FN41]. Id.

[FN42]. Id. at 40.

[FN43]. See, e.g., Cass Sunstein, Why Societies Need Dissent 39-53 (2003).

[FN44]. Kleiman, supra note 10, at 85.

[FN45]. Id.

[FN46]. Franklin E. Zimring & Gordon Hawkins, Incapacitation--Penal Confinement and the Restraint of Crime 3 (1995).

[FN47]. Id. (“Incapacitation now serves as the principle justification for punishment in American criminal justice: offenders are imprisoned in the United States to restrain them physically from offending again while

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they are confined.”).

[FN48]. Id.

[FN49]. Id. at 53-59. Zimring and Hawkins have written extensively about the complicating features of incapacitation as a means for reducing crime:

> Just as the reaction of a co-offender group can determine whether individual-level incapacitation is translated into lower crime rates in the community, a number of characteristics of the social environment from which offenders are removed will influence the extent to which the incapacitation of individuals can result in lower community crime rates. Are there potential or actual offenders at large with the necessary skills to commit the offenses that would substitute for those the imprisoned offender would have committed? Are the criminal opportunities this offender would have exploited known or easily discovered by others? Are the risks and benefits associated with those crimes in this community setting attractive to other potential offenders?

Id. at 54-55.

[FN50]. Bruce Western, Punishment and Inequality in America (2006); Leonard M. Lopoo & Bruce Western, Incarceration and the Formation and Stability of Marital Unions, 67 J. Marriage & Fam. 721 (2005); Michael Massoglia, Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses, 49 J. Health & Soc. Behav. 56 (2008).

[FN51]. For a discussion of the costs of incarceration on employment, marital status, families and communities, and the criminogenic consequences of those costs, see Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Calif. L. Rev. 323, 345-49 (2004).

[FN52]. Id.

[FN53]. See, e.g., Robinson & Darley, supra note 22, at 964.

[FN54]. Tonry, supra note 17, at 32.

[FN55]. Id.

[FN56]. Zimring & Hawkins, supra note 46, at 3.

[FN57]. Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization, 20 Just. Q. 33 (2003).

[FN58]. In describing some specifics of the phenomenon, Clear et al., explained:

> [F]amily members had to support the additional financial burden of paying for phone calls from inmates, traveling to visit them, and financially supporting them on their return to the community. Residents suffered from other effects, such as problems associated with the stigma of incarceration in the family and the neighborhood, in addition to problems with self-esteem and attenuated social relationships. Many residents reported withdrawing from community life in the aftermath of a family member's incarceration. Thus, it seems likely that high incarceration rates concentrated in certain communities could increase social disorganization by depleting the already limited resources of community members and by damaging the social networks that serve as the basis for social capital and ultimately provide private and parochial social control.

Id. at 38; see also Brown, supra note 51.

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[FN59]. Pew Ctr. on the States, One in 100: Behind Bars in America 2008, at 3, 5 (2008) [hereinafter Pew Ctr. on the States, One in 100], available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf ("America also is the global leader in the rate at which it incarcerates its citizenry, outpacing nations like South Africa and Iran. In Germany, 93 people are in prison for every 100,000 adults and children. In the U.S., the rate is roughly eight times that, or 750 per 100,000.").

[FN60]. Pew Ctr. on the States, One in 31: The Long Reach of American Corrections 4-5 (2009) [hereinafter Pew Ctr. on the States, One in 31], available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_ report_FINAL_WEB_3-26-09.pdf.

[FN61]. Brett C. Burkhardt, Criminal Punishment, Labor Market Outcomes, and Economic Inequality, 34 Law & Soc. Inquiry 1039, 1040 (2009).

[FN62]. John F. Pfaff, The Durability of Prison Populations, 2010 U. Chi. Legal F. 73, 73.

[FN63]. Pew Ctr. on the States, One in 100, supra note 59, at 3.

[FN64]. Paul H. Robinson et al., The Disutility of Injustice (Scholarship at Penn. Law, Paper No. 287, 2010), available at http://lsr.nellco.org/upenn_ wps/287.

[FN65]. Id.

[FN66]. Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 284 (2003).

[FN67]. Id. at 286.

[FN68]. Kennedy, supra note 20, at 60-61.

[FN69]. Kleiman, supra note 10, at 65.

[FN70]. Id.

[FN71]. Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 374-75 (2001) [hereinafter Richman, Exile].

[FN72]. See, e.g., David C. Anderson, Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice (1995); Stuart a. Sheingold, The Politics of Street Crime: Criminal Process and Cultural Obsession (1991).

[FN73]. While the stated goal of Triggerlock was to reduce violent street crime, critics contend that the initiative was primarily designed to reduce growing support for the Brady Bill in Congress - a bill that would have included much broader regulatory restrictions on gun sales and ownership that were strongly opposed by conservatives and the NRA. For a full accounting of the politics behind the initiative, see Richman, supra note 71.

[FN74]. Compare Sourcebook of Criminal Justice Statistics--2002 tbl.5.10. (Kathleen Maguire & Ann L. Pastore eds., 30th ed. 2002), available at http:// www.albany.edu/sourcebook/pdf/sb2002/sb2002-section5.pdf (showing 2713 firearm prosecutions filed in 1990), with Sourcebook of Criminal Justice Statistics tbl.5.10.2009 (Ann L.

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Pastore & Kathleen Maguire eds., 33d ed. 2009), available at http://www.albany.edu/sourcebook/pdf/t5102009.pdf (showing 5875 firearm prosecutions filed in 2001 and 9403 in 2004).

[FN75]. Sourcebook of Criminal Justice Statistics tbl.6.0023.2009 (Ann L. Pastore & Kathleen Maguire eds., 33d ed. 2009), available at http:// www.albany.edu/sourcebook/pdf/t5102009.pdf.

[FN76]. Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Just. 377, 397 (2006) [hereinafter Richman, Violent Crime Federalism].

[FN77]. See Sara Sun Beale, The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors, 51 Duke L.J. 1641, 1648 (2002); Richman, supra note 71, at 398.

[FN78]. William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, Third Branch, Jan. 1992, at 1, 3.

[FN79]. 514 U.S. 549 (1995).

[FN80]. Beale, supra note 77, at 1648-55 (noting that the federalism revolution never really materialized, with the only other significant restriction of congressional Commerce Clause power coming in United States v. Morrison, 529 U.S. 598 (2000), which struck down portions of the Violence Against Women Act and which was similar to Lopez in its connection to “low-status family and police courts”).

[FN81]. See, e.g., Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276 (2005); Beale, supra note 77, at 1648; Sam J. Ervin, III, The Federalization of State Crimes: Some Observations and Reflections, 98 W. Va. L. Rev. 761 (1996); Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879 (2005).

[FN82]. See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., Bureau of Justice Statistics, Felony Sentences in State Courts, 2006--Statistical Tables 9 (2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting 38,010 felony convictions (and many more misdemeanors) for weapons offenses in state courts while there were only 8831 in federal courts).

[FN83]. Id. (reporting 146 federal” murder/nonnegligent manslaughter” convictions as compared to 8670 in state courts).

[FN84]. Id. (reporting 1323 federal robbery convictions as compared to 41,740 in state courts).

[FN85]. Id. (reporting 514 federal aggravated assault convictions as compared to 100,560 in state courts).

[FN86]. Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 997 (1995).

[FN87]. Id.

[FN88]. See Bureau of Justice Statistics, Federal Criminal Case Processing Statistics, Off. Just. Programs, http://bjs.ojp.usdoj.gov/fjsrc/var.cfm?t=new (last visited Mar. 30, 2011) (select “Prisoners Entering Federal Pris-

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on, Tables"; then select "2008" from the dropdown menu; then select "Offense Type" under "Select a Variable"; then select "Add Column"; then select "Race" under "Select a Variable"; then select "All Values" under "Select Display Values"; then select "Display as PDF") (showing 4604 African Americans entered federal prison on weapons charges in 2008 out of a total of 8495).

[FN89]. United States v. Jones, 36 F. Supp. 2d 304, 307 (1999).

[FN90]. United States v. Thorpe, 471 F.3d 652, 658 (2006). For a full discussion of the case, see Dominique Camm, Reversing the Standard: The Difficulty in Proving Selective Prosecution, 31 N.C. Cent. L. Rev. 93 (2008).

[FN91]. Bonita Gardner, Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement, 12 Mich. J. Race & L. 305, 317 (2007).

[FN92]. Id.

[FN93]. See infra Part III.

[FN94]. Id.

[FN95]. See supra Part II.A.

[FN96]. Although I am not aware of any database that characterizes federal prisoners' prior convictions by jurisdiction, the vast difference in the numbers of persons convicted in state versus federal court makes it a virtual certainty that prior convictions were overwhelmingly obtained in state court. In 2006, for instance, 1,132,290 adults were convicted of felonies in the state systems as compared to 72,983 in the federal system. See Rosenmerkel et al., supra note 82, at 9.

[FN97]. For instance, the average state sentence for aggravated assault, roughly half of which involved the use of a firearm, was forty-one months as compared to the average federal sentence for firearm possession of eighty-eight months. Id.

[FN98]. John Eligon, Burress Will Receive Two-Year Prison Sentence, N.Y. Times, Aug. 21, 2009, at A23, available at http:// www.nytimes.com/2009/08/21/nyregion/21burress.html.

[FN99]. John Eligon, For Lil Wayne, Third Sentencing Date Yields a Year at Rikers, N.Y. Times, Mar. 8, 2010, at A19, available at http:// www.nytimes.com/2010/03/09/nyregion/09lilwayne.html.

[FN100]. Paul Duggan, Arenas Avoids Jail Sentence in Gun Incident, Wash. Post, Mar. 27, 2010, at B1, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032603887.html.

[FN101]. Kennedy, supra note 20, at 29.

[FN102]. James S. Gwin, Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?, 4 Harv. L. & Pol'y Rev. 173, 186-92 (2010).

[FN103]. Id.

[FN104]. Id.

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[FN105]. Id. at 174-75.

[FN106]. Id. at 188-89.

[FN107]. See Robinson et al., supra note 64.

[FN108]. See supra Part I.C.

[FN109]. See infra Part III.

[FN110]. See infra Part III.

[FN111]. For data and analysis regarding federal law enforcement, prosecutions, and incarcerations, see generally Fed. Just. Stat. Resource Center, http://fjsrc.urban.org (last visited Mar. 30, 2011).

[FN112]. See supra Part I.B.

[FN113]. For a discussion of how the program began as well as additional programs run by the lead researcher, David Kennedy, see John Seabrook, Don't Shoot, New Yorker, June 22, 2009, at 32. See also McGarrell, supra note 1 (presenting research findings in a report funded by the Department of Justice and authored by researchers who worked with U.S. Attorney's Offices throughout the country to gather data on the implementation and impact of PSN).

[FN114]. McGarrell, supra note 1, at 8-9.

[FN115]. Id.

[FN116]. Id.

[FN117]. Id.

[FN118]. Richman, Exile, supra note 76, at 379.

[FN119]. Steven Raphael & Jens Ludwig, Prison Sentence Enhancements: The Case of Project Exile, in Evaluating Gun Policy: Effects on Crime and Violence 251, 254 (Jens Ludwig & Philip J. Cook eds., 2003); Richman, Exile, supra note 76, at 379.

[FN120]. Richman, Exile, supra note 76, at 379.

[FN121]. Raphael & Ludwig, supra note 119 (concluding that the impact was at the “none” end of the range); Richard Rosenfeld et al., Did Ceasefire, Compstat, and Exile Reduce Homicide?, 4 Criminology & Pub. Pol'y 419, 419 (2005) (concluding that the impact was possibly a “little”).

[FN122]. Richman, Exile, supra note 71, at 382 (citing Press Release, U.S. Senate Republican Policy Comm., Of Criminals and Guns: The ‘Project Exile’ Solution (Sept. 30, 1998), available at http://rpc.senate.gov/releases/1998/Exile-kf.htm).

[FN123]. Id. at 385 (citing President William Jefferson Clinton, Radio Address to the Nation: Gun Violence (Mar. 20, 1999)).

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[FN124]. Richard A. Berk, Knowing When to Fold 'Em: An Essay on Evaluating the Impact of Ceasefire, Compstat, and Exile, 4 Criminology & Pub. Pol'y 451 (2005).

[FN125]. See generally Kadish et al., supra note 8, at 104-05; John J. Donohue III & Steven Levitt, The Impact of Legalized Abortion on Crime, 116 Q.J. Econ. 379 (2001).

[FN126]. Raphael & Ludwig, supra note 119, at 275 ("[The] finding is robust to a variety of ways to analyze the available data, including decisions about whether to measure changes in homicide rates in actual or proportional terms or to define the treatment as the existence of an Exile-type program or instead as the actual number of federal firearm convictions secured.").

[FN127]. Rosenfeld et al., supra note 121, at 419.

[FN128]. Id. at 438.

[FN129]. Id.

[FN130]. McGarrell, supra note 1, at iii.

[FN131]. Id.

[FN132]. Id.

[FN133]. Id. at 9-10.

[FN134]. Id. at 24.

[FN135]. Id.

[FN136]. Id. at 21.

[FN137]. Id. at 23.

[FN138]. Id. at v.

[FN139]. Id. at vi.

[FN140]. Id.

[FN141]. Id.

[FN142]. Id.

[FN143]. Id. at vii.

[FN144]. Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, Attention Felons: Evaluating Project Safe Neighborhoods in Chicago, 4 J. Empirical Legal Stud. 223 (2007); see also Kennedy, supra note 20, at 4 (referring to the Papachristos study as the "best evaluation to date").

[FN145]. Papachristos et al., supra note 144, at 230.

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[FN146]. Id. at 226.

[FN147]. Id. at 260.

[FN148]. Id. at 231.

[FN149]. Id. at 248.

[FN150]. Id. at 231-32.

[FN151]. Id. at 232.

[FN152]. Id.

[FN153]. Id.

[FN154]. Id.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id.

[FN158]. Id. at 262-65.

[FN159]. Id.

[FN160]. Id.

[FN161]. Id. at 260.

[FN162]. Id.

[FN163]. McGarrell, supra note 1, at 138, 142.

[FN164]. Id. at 141-42.

[FN165]. Id. at iv.

[FN166]. See, e.g., Darryl Brown, Cost-Benefit Analysis in Criminal Law, 92 Calif. L. Rev. 323 (2004).

[FN167]. Richard Redding, Evidence-Based Sentencing: The Science of Sentencing Policy and Practice, 1 Chap. J. Crim. Just. 1, 2 (2009).

[FN168]. Margareth Etienne, Legal and Practical Implications of Evidence-Based Sentencing by Judges, 1 Chap. J. Crim. Just. 43, 45 (2009).

[FN169]. Kirk Heilbrun, Risk Assessment in Evidence-Based Sentencing: Context and Promising Uses, 1 Chap. J. Crim. Just. 127, 138 (2009).

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[FN170]. Id. at 137-39.

[FN171]. Model Penal Code: Sentencing 70-75 (Discussion Draft No. 2, 2009) (including Virginia, Kansas, Missouri, North Carolina, Alabama, Oregon, Washington, and Wisconsin).

[FN172]. Va. Code Ann. § 17.1-803(6) (West, Westlaw through 2011 Reg. Sess. cc. 1-3).

[FN173]. Etienne, supra note 168, at 50.

[FN174]. Id. at 51-52.

[FN175]. See, e.g., Michael H. Marcus, Conversations on Evidence-Based Sentencing, 1 Chap. J. Crim. Just. 61 (2009).

[FN176]. See, e.g., 18 U.S.C. § 3553(a) (2006).

[FN177]. Michael H. Marcus, MPC--The Root of the Problem: Just Deserts and Risk Assessment, 61 Fla. L. Rev. 751, 757 (2009).

[FN178]. See, e.g., Michael H. Marcus, Conversations on Evidence-Based Sentencing, 1 Chap. J. Crim. Just. 61 (2009) (providing an account of the evidence-based sentencing movement).

[FN179]. Etienne, supra note 168, at 51.

[FN180]. Id. at 35 n.31 (citing Gregg v. Georgia, 428 U.S. 153, 199 (1976)) ("[S]entence reduction is viewed as mercy while a sentence enhancement is viewed as punishment that must be legally justifiable.").

[FN181]. Robert Weisberg, Tragedy, Skepticism, Empirics and the MPCS, 61 Fla. L. Rev. 797, 797 (2009).

[FN182]. Id. at 825.

[FN183]. See supra Part I.

[FN184]. Papachristos et al., supra note 144, at 237-38.

[FN185]. Kennedy, supra note 20.

[FN186]. Id. at ii.

[FN187]. See, e.g., Sonja B. Starr, Sentence Reduction as a Remedy for Prosecutorial Misconduct, 97 Geo. L.J. 1509, 1524-33 (2009) (cataloguing various prosecutor incentives and explaining why severity of sentence is a common motivator); see also Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 896, 928 (2005).

[FN188]. See, e.g., Sunstein, supra note 43; Robert B. Cialdini et al., The Transsituational Influence of Social Norms, 64 J. Personality & Soc. Psychol. 104 (1993).

[FN189]. See supra Part II.

[FN190]. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 554 U.S. 570

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(2008).

[FN191]. See supra Part II.B.

[FN192]. See supra Part II.B.

[FN193]. See supra Part I.A.

[FN194]. See supra Part II.D.

[FN195]. See infra Part III.B.

[FN196]. See supra Part II.

[FN197]. See Starr, supra note 187.

[FN198]. Gerard E. Lynch, Sentencing Eddie, 91 J. Crim. L. & Criminology 547, 549-50 (2001).

[FN199]. See supra Part II.A.

[FN200]. Kimbrough v. United States, 552 U.S. 85, 109 (2007).

[FN201]. See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 579-98 (2001).

[FN202]. Id.

[FN203]. Id.

[FN204]. Kate Stith & José A. Cabranes, Fear of Judging 9 (1998).

[FN205]. Id. at 19 (stating that judges exercised this option first as a matter of inherent right and later, after the Supreme Court disallowed the practice, under the authority of the National Probation Act of 1925).

[FN206]. Id.

[FN207]. 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).

[FN208]. Id.

[FN209]. Id.

[FN210]. Id.

[FN211]. 28 U.S.C. § 991(b)(1)(A) (2006); U.S. Sentencing Guidelines Manual ch. 1, pt. A, introductory cmt. (2010).

[FN212]. 18 U.S.C. § 3553(a).

[FN213]. Id. § 3553(a)(6).

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[FN214]. See Stith & Cabranes, supra note 204.

[FN215]. U.S. Sentencing Guidelines Manual ch. 1, pt. A, introductory cmt. (2010).

[FN216]. See id. ch. 1, pt. B.

[FN217]. See id.

[FN218]. See, e.g., Linda Drazga Maxfield, Measuring Recidivism Under the Federal Sentencing Guidelines, 17 Fed. Sent'g Rep. 166 (2005).

[FN219]. 543 U.S. 220 (2005).

[FN220]. Id. at 243-44.

[FN221]. Id. at 246, 262.

[FN222]. 552 U.S. 85 (2007).

[FN223]. Id. at 91, 93.

[FN224]. Id. at 91.

[FN225]. Id. at 109.

[FN226]. Id.

[FN227]. Rita v. United States, 551 U.S. 338, 347, 351 (2007).

[FN228]. Gall v. United States, 552 U.S. 38, 49 (2007).

[FN229]. 18 U.S.C. § 3553(a) (2006).

[FN230]. See, e.g., Kate Stith, The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion, 117 Yale L.J. 1420 (2008).

[FN231]. Id. at 1452.

[FN232]. Kenneth Culp Davis, Administrative Law of the Eighties §9:1 to 3, at 280 (1989).

[FN233]. United States v. Booker, 543 U.S. 220, 263 (2005).

[FN234]. Kimbrough v. United States, 552 U.S. 85, 109 (2007).

[FN235]. U.S. Sentencing Comm'n, Firearms & Explosive Materials Working Group Report (1990).

[FN236]. Id. at 8.

[FN237]. Id. at 9.

[FN238]. Id.

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[FN239]. Id. at 19.

[FN240]. Id.

[FN241]. Id.

[FN242]. Compare U.S. Sentencing Guidelines Manual § 2K2.1 (1987), with U.S. Sentencing Guidelines Manual § 2K2.1 (1992).

[FN243]. In creating the Criminal History category of the Guidelines, the Sentencing Commission acknowledged that while accounting for prior convictions addressed all four purposes of sentencing, the criminal history score was primarily "designed to predict recidivism" and was meant to be used as a "risk measurement tool." In contrast, the Offense Level is "not designed to predict recidivism" and for the vast majority of offenses its calculation is independent from an offender's criminal history. See U.S. Sentencing Comm'n, Research Series on the Recidivism of Federal Guideline Offenders, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 13-15 (2004), available at http://www.ussc.gov/Research/Research_ Publications/Recidivism/200405_Recidivism_Criminal_History.pdf.

[FN244]. Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1436-37 (2001).

[FN245]. With respect to the felon-in-possession Guidelines, the Sentencing Commission departed from its standard practice of relying solely on the criminal history score to reflect an offender's prior convictions, and included prior convictions in the Offense Level calculation as well. Indeed, it is the single biggest aggravating factor in tallying the felon-in-possession Guideline range, often increasing a sentence from probation or several months in prison to many years of incarceration, irrespective of an offender's reason for possessing the gun.

Nor does the prior conviction need to relate to the offense of conviction, gun possession, to trigger the steep increases. Indeed, the vast majority do not. Thus, the thumb-nosing, retributive rationale is even more tenuous in most cases because it is dependent on a general theory of punishing rule-breaking-writ-large rather than a persistent refusal to stop engaging in a particular activity.

[FN246]. Id. at 1.

[FN247]. One might argue that if it is legitimate for judges to take into account the presence or absence of programs like offender notification meetings, why not also have judges consider the quality of the local public schools or the available health care or local unemployment rates. These too are systemic factors that impact the likelihood that an offender will recidivate and that may affect how "useful" a sentence will be in deterring future criminal conduct.

Perhaps judges should take into account those other factors. That is a topic for another day, and one that has been addressed in some fashion by several scholars. I limit my proposal here to those things that are within the ability of federal prosecutors to control and which, by the Department of Justice's own studies, are programs they should be conducting. At sentencing, judges do not have before them representatives from the Departments of Education, Labor or Health and Human Services. The government entity standing before them is the U.S. Attorney's Office, and it is that entity that initiated the prosecution and that seeks a particular sentence.

[FN248]. See United States v. Snyder, 954 F. Supp. 19, 20 (D. Mass. 1997).

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[FN249]. Id. at 20 & n.1.

[FN250]. Id. at 20.

[FN251]. Id. at 21.

[FN252]. United States v. Snyder, 136 F.3d 65 (1998).

[FN253]. Id. at 69.

[FN254]. Id.

[FN255]. Id. at 70.

[FN256]. United States v. Dockery, 965 F.2d 1112, 1117 (D.C. Cir. 1992); see also United States v. Haynes, 985 F.2d 65 (2d Cir. 1993); United States v. Deitz, 991 F.2d 443 (8th Cir. 1993).

[FN257]. Dockery, 965 F.2d at 1117.

[FN258]. Deitz, 991 F.2d at 448.

[FN259]. Id. at 450 (Bright, J., dissenting).

[FN260]. 503 F.3d 481 (6th Cir. 2007).

[FN261]. Id. at 483.

[FN262]. Id.

[FN263]. Id.

[FN264]. Id. at 485.

[FN265]. Id. at 486.

[FN266]. 240 F. App'x 91, 91 (6th Cir. 2007).

[FN267]. Id. at 93.

[FN268]. Id. at 94.

[FN269]. Similar reasoning is seen in opinions about disparities within the federal system. See United States v. Arrelucea-Zamudio, 581 F.3d. 142 (3d Cir. 2009) (discussing different approaches taken by courts in the context of challenges by illegal reentry defendants to sentences that are not automatically discounted as they are in some districts that utilize a “fast-track” sentencing process); United States v. Buckendahl, 251 F.3d 753 (8th Cir. 2001) (addressing an argument for departures based on prosecutors' refusal to grant use immunity under section 1B1.8 of the Guidelines in comparison to other districts where they routinely do; and holding that “[t]he Guidelines were not meant to infringe upon the usual discretion of the executive branch, and contemplating judicial review of prosecutorial decisions about extending section 1B1.8 protection in these cases convinces us that this same rationale should apply...[because] any effort to police this area would improperly infringe upon the

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discretion of the prosecutor's office to determine enforcement priorities, resource allocations, and other decisions which courts are institutionally unable to make").

[FN270]. See, e.g., Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211 (2004).

[FN271]. See Stith, supra note 230, at 1433 & n.40 ("[T]he 1980 version of Principles of Federal Prosecution cautioned prosecutors not to make 'sentencing recommendations' unless required to do so by a plea agreement or where warranted by 'the public interest.'").

[FN272]. Rebecca Krauss, The Theory of Prosecutorial Discretion in Federal Law, Origins and Development, 6 Seton Hall Circuit Rev. 1 (2009).

[FN273]. Id .

[FN274]. Id.

[FN275]. See Sourcebook of Criminal Justice Statistics Online tbl.6.0023.2009 (33d ed. 2009), available at http:// www.albany.edu/sourcebook/pdf/t600232009.pdf (showing that the total number of federal prisoners rose from 58,659 in 1990 to 206,784 in 2009).

[FN276]. Id. (showing that as a percentage of federal prisoners, robbers have decreased from 13.3% to 4.6%; other violent offenders have gone from 5.8% to 2.9%; "property" offenders have moved from 7.4% to 3.5%; extortion, bribery and fraud offenders have decreased from 7.4% to 4.9%, and continuing criminal enterprise offenders have moved from 1.1% to 0.3%).

[FN277]. Id. (showing that weapons possession offenders have increased from 5.8% to 15.1%; drug offenders have remained relatively consistent at just over 50% but because they comprise the majority of federal prisoners, they are the most responsible in raw numbers for the quadrupling of the total figure; immigration offenses constitute the bulk of the remaining increase, having moved from 0.8% to 11.1%).

[FN278]. McGarrell, supra note 1.
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