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## Who Now Sits atop the Pyramid of Violence?

Harrison Weimer

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# Who Now Sits atop the Pyramid of Violence?

Harrison Weimer\*

*This Note seeks to provoke a conversation about the rise in power of federal prosecutors at the expense of district court judges, focusing on the controlled-substances context. While referencing Robert Cover's portrayal of the justice system as a "pyramid of violence," this Note shows how the federal mandatory-minimum sentencing laws and the U.S. Sentencing Commission's Sentencing Guidelines brought about this change. These sentencing schemes have anchored what prosecutors and judges deem an appropriate sentence. Prosecutors are thinking about sentences while deciding what charges to bring. After a discussion about sentencing legislation and current sentencing procedures, this Note identifies a need for reform in the federal criminal justice system. The elimination of mandatory sentencing laws, the normalization of departure from the Guidelines, and the creation of the executive prosecutor role are reforms identified in this Note.*

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*We begin, then, not with what the judges say, but with what they do. The judges deal pain and death. That is not all that they do. Perhaps that is not what they usually do. But they do deal death, and pain. From John Winthrop through Warren Burger they have sat atop a pyramid of violence . . . .<sup>1</sup>*

- Robert Cover

#### INTRODUCTION

The introduction of the U.S. Sentencing Guidelines (Guidelines)<sup>2</sup> and the Anti-Drug Abuse Act of 1986<sup>3</sup> forever changed the landscape of the punishments delivered by federal courts to criminal defendants.<sup>4</sup> Prior to 1987,<sup>5</sup> district court judges enjoyed wide discretion in choosing how to sentence criminals and, per legal scholar Professor Robert Cover, “they have sat atop a pyramid of violence.”<sup>6</sup> With the implementation of the Guidelines by the U.S. Sentencing Commission (Commission) and mandatory minimums passed by Congress for controlled-substance offenses, the Commission and federal prosecutors have now

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1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) (emphasis omitted).  
2. U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sent’g tbl. (U.S. SENT’G COMM’N 2018).  
3. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).  
4. See, e.g., Edwin Meese III, U.S. Att’y Gen., Remarks of the Honorable Edwin Meese III Attorney General of the United States on the Sentencing Commission’s Guidelines Before the American Law Institute 11 (May 22, 1987), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/05-22-1987.pdf> [<https://perma.cc/Y3Z2-A4U3>] (“These guidelines mark a decisive turning point in the history of the federal criminal justice system. They point us towards the sound, predictable, tough yet rational sentencing structure that the federal system long has needed.”).  
5. Magdelaine Jensen, *This Issue in Brief*, 55 FED. PROB. 1, 1 (1991) (“Y[ears from] now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice.”).  
6. Cover, *supra* note 1.

challenged district court judges for the top spot on this pyramid.<sup>7</sup> More so than judges, these major players in the federal criminal justice system limit judicial discretion in sentencing and now play a bigger role in determining the price defendants pay. Professor Cover, although writing before the mandatory-minimum era, failed to acknowledge the limiting role of district court judges because of the minimal number of trials held in federal court.<sup>8</sup>

This Note seeks to show how the Commission and federal prosecutors dictate the punishment outcomes for defendants in controlled-substances cases more so than district court judges. While the Anti-Drug Abuse Act's mandatory minimums are binding, and while the Guidelines anchor judges' decisions during sentencing,<sup>9</sup> federal prosecutors use these quantitative limits on judicial discretion as a tool to push plea bargains to advance their position to the top of the pyramid of violence. To restore fairness and individualism to the criminal justice system, mandatory sentencing provisions must be put to rest, departure from the Guidelines should be normalized, and executive prosecutors should be explored as a possibility in prosecutorial offices.

## I. CONSTRUCTING THE PYRAMID

### A. *Violence and the Word*

Professor Cover, a liberalist, was a legal scholar and professor at Yale Law School until 1986.<sup>10</sup> Professor Cover wrote, as the introductory sentence of his most famous article *Violence and the Word*, “Legal interpretation takes place in a field of pain and death.”<sup>11</sup> Professor Cover meant that when a judge formulates an interpretation of the text of the law, somebody else loses liberties such as freedom,

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7. A federal criminal defendant is sentenced under both sentencing schemes if there are mandatory-minimum laws that apply to the case. See U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16–17 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) [<https://perma.cc/H4SS-JSP7>] [hereinafter U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES].

8. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty> [<https://perma.cc/W76U-Y4MX>].

9. Although Congress enacted a “mandatory” guidelines system in the Sentencing Reform Act of 1984, in 2005 the Supreme Court held that a mandatory sentencing system was unconstitutional. *United States v. Booker*, 543 U.S. 220, 226–27 (2005). The guidelines were then deemed “advisory.” *Id.* at 246–47. However, the advisory Guidelines continue to anchor federal sentencing determinations. *Peugh v. United States*, 569 U.S. 530, 549–50 (2013).

10. Guido Calabresi, Michael J. Graetz, Barbara A. Black, Stephen Wizner, David Brion Davis, Tanina Rostain, Owen M. Fiss & James Ponet, *Tributes to Robert M. Cover*, 96 YALE L.J. 1699, 1699 (1987).

11. Cover, *supra* note 1, at 1601.

children, or property.<sup>12</sup> This legal interpretation is constrained by the need to anesthetize the judge against feeling responsible for the violence and by the need to convince other officials to carry out the sentence.<sup>13</sup> Therefore, the judge “s[its] atop [this] pyramid of violence.”<sup>14</sup>

Although sentencing is routine to a judge’s duties, judges are removed from the practical implications of their sentences and are not forced to carry out the very “violence” they authorize. Professor Cover notes that “[t]he violence of the act of sentencing is most obvious when observed from the defendant’s perspective.”<sup>15</sup> While Professor Cover’s work is a seminal piece that first emphasized the role of violence in legal interpretation, Professor Cover’s work now incorrectly identifies the judge as the leading role in this setting because the role of the prosecutor has risen to the top. To be fair to Professor Cover, the U.S. criminal justice system has shifted since *Violence and the Word*. Mandatory minimums and the Guidelines of today were not part of the legal landscape considered by Professor Cover.

### *B. Implementation of the U.S. Sentencing Guidelines*

The passage of the Sentencing Reform Act of 1984 ultimately resulted in the creation of the Guidelines.<sup>16</sup> The Act’s objective was to improve the ability of the criminal justice system to combat crime through an effective yet fair sentencing procedure.<sup>17</sup> With honesty, clarity, and proportionality in mind, Congress sought practical uniformity in sentencing by lessening the wide inequalities in sentences imposed for similar criminal offenses committed by similar offenders.<sup>18</sup> The Guidelines were a response to critics who thought “[b]oth by substantive controls and through procedural revisions the unchecked powers of the untutored judge should be subject to a measure of regulation. The vague, indefinite, and uncritical use of indeterminate sentences calls for restriction through meaningful definitions and discriminating judgments.”<sup>19</sup> The Guidelines manual, first released in 1987, has generally been updated annually.<sup>20</sup> The most recent manual is the 2018 version.<sup>21</sup>

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12. *Id.* This loss of liberty can be in the form of incarceration, monetary damages, custodial rights and privileges, or other means. When a judge decides how to interpret or apply the written text of a law, the decision often has negative real-world effects on at least one of the parties.

13. *Id.* at 1626–27.

14. *Id.* at 1609.

15. *Id.* at 1608.

16. 18 U.S.C. § 3551.

17. S. REP. NO. 98-225, at 69 (1983) (explaining that 18 U.S.C. § 3551 “should permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender, while at the same time resulting in the imposition of sentences that treat offenders consistently and fairly”).

18. *Id.*

19. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 41 (1972).

20. See *Guidelines Archive*, U.S. SENT’G COMM’N, <https://www.usc.gov/guidelines/archive> [<https://perma.cc/FES6-HFTQ>] (last visited July 20, 2021).

21. *Id.*

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
<b>Zone A</b>						
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b>						
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
<b>Zone C</b>						
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
<b>Zone D</b>						
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

November 1, 2016

Figure 1: Sentencing Table.<sup>22</sup>

In controlled-substances cases, the offense level, which directs the sentence for each defendant, is primarily driven by the quantity of the controlled substance.<sup>23</sup> Offense levels, seen in figure 1, range from one to forty-three, and enhancements for playing a leadership role, possessing a firearm, or obstructing justice can drive up this number but play a very minor role compared to the quantity of the

22. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, sent'g tbl. (U.S. SENT'G COMM'N 2018).

23. *Id.* § 2D1.1(c).

substance.<sup>24</sup> For example, possession of 450 kilograms or more of cocaine yields a base offense level of thirty-eight<sup>25</sup> while 2 kilograms to 3.5 kilograms of cocaine yields a base offense level of twenty-six,<sup>26</sup> but firearms or obstruction-of-justice enhancements only warrant an additional two points.<sup>27</sup> The enhancements, found in Chapter Three of the Guidelines, are applied after the base offense level is identified.<sup>28</sup> Adjustments can shift the offense level up or down depending on their nature.<sup>29</sup> To put the above offense levels in the context of the length of sentence to be imposed, a convicted defendant with an offense level of thirty-eight warrants a sentence of 235 to 293 months while an offense level of twenty-six warrants a sentence of sixty-three to seventy-eight months.<sup>30</sup> An enhancement for abuse of position of trust or use of special skill, for example, adds two points to the base offense level.<sup>31</sup> In the scenario above, the offense levels would be adjusted to forty and twenty-eight, yielding sentences of 292 to 365 months and seventy-eight to ninety-seven months, assuming the defendant has no criminal history.<sup>32</sup>

The Guidelines indicate the Commission's preference for punishing primarily based on the quantity rather than on the role in the operation. Enhancements serve as adjustments rather than as a weighted starting point. Initially, the Guidelines often provided harsher sentences than those indicated by the mandatory minimums of the Anti-Drug Abuse Act of 1986.<sup>33</sup> Since the implementation of the Guidelines and the decreased intensity of the U.S. War on Drugs, the corresponding offense level for each quantity of drug has become more forgiving for defendants. For example, the "Crack Minus Two Amendment" of 2007 reduced by two points the base offense levels assigned by the Drug Quantity Table for each quantity of crack cocaine.<sup>34</sup> The Commission expanded this reduction through the "Drugs Minus

24. *See id.* ch. 3. Criminal history plays a larger role than leadership or firearm enhancements but less of a role than the quantity of a controlled substance. *See id.* ch. 4 (identifying how criminal history and criminal livelihood are calculated and affect the sentencing); *supra* Figure 1.

25. U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(1) (U.S. SENT'G COMM'N 2018).

26. *Id.* § 2D1.1(c)(7).

27. *Id.* §§ 2D1.1(b)(1), 3C1.1.

28. *See id.* ch. 3.

29. *See id.*

30. Both advisory sentence ranges assume no criminal history. *See supra* Figure 1. "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence." U.S. SENT'G GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2018).

31. U.S. SENT'G GUIDELINES MANUAL § 3B1.3 (U.S. SENT'G COMM'N 2018).

32. *See supra* Figure 1.

33. *See, e.g., Mandatory Minimums and Sentencing Reform*, CJPf.ORG, <https://www.cjpf.org/mandatory-minimums> [<https://perma.cc/4ENC-NDF7>] (last visited July 20, 2021) ("For over two decades beginning in 1987, the sentencing guidelines had a near-mandatory quality, and provided for sentences for drug quantities greater than the minimum trigger quantities in the drug statute (21 U.S.C. 841(b)(1)), and provided for sentences longer than the mandatory minimum sentence for that drug.").

34. *See* U.S. SENT'G GUIDELINES MANUAL app. C, amends. 706, 711 & 713 (U.S. SENT'G COMM'N 2018).

Two Amendment,” which then reduced by two points the base offense levels assigned by the Drug Quantity Table for all drugs in 2014.<sup>35</sup>

*C. The Anti-Drug Abuse Act of 1986*

The Anti-Drug Abuse Act of 1986 substantially revised the federal drug laws, introducing mandatory-minimum sentences.<sup>36</sup> Mandatory-minimum sentencing laws force a district court judge to hand down a prison sentence based on the charges a prosecutor brings against a defendant. The prosecutor, in part, bases the charges he or she brings on the quantity and type of drugs. Judges can still sentence more than the mandatory minimum but cannot go below. These laws strip a judge’s traditional authority to account for the nuances and actual circumstances—whether mitigating or aggravating—of the crimes alleged and the characteristics of the individual defendant when imposing the sentence. For example, the 1986 Act required a minimum sentence of five years for drug offenses that involved 5 grams of crack, 500 grams of cocaine, 1 kilogram of heroin, 40 grams of a substance with a detectable amount of fentanyl, 5 grams of methamphetamine, 100 kilograms or 100 plants of marijuana, among other drugs.<sup>37</sup> These wide-ranging quantities for different drugs indicate the differing internal priorities of the War on Drugs. To put it into context, “[f]or methamphetamine, offenders face a minimum five-year sentence for distribution of five grams, the weight of five Sweet-n-Low packets, when a heavy user might go through a gram in a day.”<sup>38</sup> As the quantity of drugs increase, the mandatory-minimum sentence increases accordingly. On the most severe end of the spectrum, “[i]f any person commits [another] violation after a prior conviction for a serious drug felony . . . and if death or serious bodily injury results from the use of such substance[, the defendant] shall be sentenced to life imprisonment.”<sup>39</sup> Mandatory minimums apply in a little less than half of the federal controlled-substance cases in the United States.<sup>40</sup>

Unlike the corresponding system of the Guidelines, which now provides an advisory sentence range after the computation of circumstances by the judge,

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35. See KIM STEVEN HUNT, DAVID RUTTER & TODD KOSTYSHAK, U.S. SENT’G COMM’N, *RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 1* (2020).

36. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).

37. 21 U.S.C. § 841(b)(1)(B); e.g., *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

38. *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

39. 21 U.S.C. § 841(b)(1)(B). Mandatory minimums were also put in place for recidivism. See, e.g., 21 U.S.C. § 841 (requiring life sentence if a defendant has two or more prior drug felonies). This was changed with the implementation of the First Step Act in 2018. See First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5220, 5220 (codified as amended at 21 U.S.C. § 841).

40. In the fiscal year 2016, mandatory minimums were used less often in federal drug offenses (44.7% in fiscal year 2016 versus 66.1% in fiscal year 2010) but continued to result in long sentences for drug offenders. U.S. SENT’G COMM’N, *MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4–5* (2017) [hereinafter U.S. SENT’G COMM’N, *MANDATORY MINIMUM PENALTIES*].

mandatory-minimum laws allow no room for judicial discretion.<sup>41</sup> The average sentence for drug offenders convicted of an offense carrying a mandatory minimum is ninety-four months of imprisonment, more than double the average sentence for offenders whose drug offense does not carry a mandatory minimum.<sup>42</sup> In practice, “Congress abandoned the idea that [f]ederal judges—appointed by the President and confirmed by the U.S. Senate—have the wisdom and training to identify the most serious drug offenders and punish them appropriately.”<sup>43</sup>

Although Congress passed the mandatory-minimum laws with an aim towards prosecuting major drug traffickers, this has not been the case. Almost three-quarters of federal inmates serving time for drug offenses were sentenced under mandatory minimums.<sup>44</sup> In 2009, the Commission reported that “high-level” suppliers or importers comprised only 10.9% of federal defendants.<sup>45</sup> Through the Anti-Drug Abuse Act of 1986, Congress wanted to impose heavy penalties for certain kinds of serious cases, including those involving drugs, to deter crime and create consistency in penalties across federal districts.<sup>46</sup> However, judges have been unable to exercise their discretion to combat the negative effect these mandatory minimums have had on low-level, nonviolent offenders. Many of these low-level offenders have received draconian sentences that pale in comparison to those of violent offenders.<sup>47</sup> For example, a “mule”—a low-level person who carries a large quantity of illicit drugs, often inside of his or her body—can be punished either strictly based on the amount in his or her body or based on the whole operation.<sup>48</sup> However, the Guidelines attempt to “reward” those who play minimal roles in the crime by adjusting their

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41. See *id.*; see also Lori Atherton, *Federal Judge, Former U.S. Attorney Discuss Mandatory Minimum Sentences at Michigan Law*, UNIV. MICH. L. SCH. (Nov. 26, 2018), [https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law\\_112618.aspx](https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law_112618.aspx) [[https://web.archive.org/web/20190801235727/https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law\\_112618.aspx](https://web.archive.org/web/20190801235727/https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law_112618.aspx)].

42. U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES, *supra* note 40, at 36.

43. See, e.g., *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

44. Mandatory-minimum penalties continue to have a significant impact on the size and composition of the federal prison population. Approximately half (49.1%) of all federal inmates are drug offenders and 72.3% of those offenders are serving a mandatory minimum. U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES, *supra* note 40, at 4.

45. *Id.* at 45. Wholesalers of any amount made up 21.2%; street-level dealers made up 17.2%, and couriers made up 23.1% of those sentenced for drug offenses. *Id.* Only 2.2% were managers or supervisors. *Id.* The rest of federal drug defendants were other low-level offenders, even marginally involved friends and family of the accused. *Id.*

46. See Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 201 (2019) (“The members of Congress who voted for these changes believed they would minimize unwarranted disparities in sentencing, make criminal sentences more transparent, and improve public safety.”).

47. Atherton, *supra* note 41.

48. “When the traffickers got to know that I held an American passport, they realized that they could use me to mule illicit drugs into the United States of America. I was instructed to swallow drugs and board a plane.” *Drug Mules: Swallowed by the Illicit Drug Trade*, UNITED NATIONS OFF. ON DRUGS & CRIME, [https://www.unodc.org/southasia/frontpage/2012/october/drug-mules\\_-swallowed-by-the-illicit-drug-trade.html](https://www.unodc.org/southasia/frontpage/2012/october/drug-mules_-swallowed-by-the-illicit-drug-trade.html) [<https://perma.cc/M4LG-C9VE>] (last visited July, 20, 2021).

offense level.<sup>49</sup> These discrepancies that exist between the intent behind mandatory minimums and their effect are not an issue of the past; drug offenses remain the most commonly charged offenses carrying mandatory-minimum penalties.<sup>50</sup>

#### *D. Why Judges Are Not on Top*

Prior to 1986, the federal sentencing system was almost entirely unregulated. Judges sentenced with minimal legal constraints, and review by appellate courts almost never overturned district court sentences.<sup>51</sup> However, judges are no longer at the top of the pyramid of violence because they are now restricted by the Guidelines and mandatory minimums. With the implementation of the Guidelines and mandatory minimums, both the Commission and federal prosecutors now play bigger roles than they did before 1987. Although no longer mandatory, the Guidelines continue to be the starting point—and most of the time the endpoint—for district judges when determining sentences.<sup>52</sup> The Guidelines anchor judges' and prosecutors' thinking during punishment. Since the Supreme Court ruled to make the Guidelines advisory to preserve a defendant's Sixth Amendment right to a trial by jury in *United States v. Booker* in 2005, there have been eight Supreme Court cases that directly discussed the Guidelines.<sup>53</sup> Collectively, these eight decisions have “not only significantly affected the sentencing practices of the district courts but also have reinstated a deferential standard of review in the appellate courts. Nonetheless, the Commission and the guidelines continue to play an important role in federal sentencing.”<sup>54</sup>

However, the mandatory minimums completely remove room for any judicial discretion and often force judges to sentence in a manner they may view as unjust. Eastern District of Michigan Judge Avern Cohn said,

“The most sacred quality that judges guard most is discretion, which is choice . . . . Mandatory minimums take that choice away from a judge. You're obligated to follow the statute, and if you don't follow the statute [sic], your decision is going to go to the court of appeals and get reversed. And judges don't like to have their decisions reversed.”<sup>55</sup>

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49. U.S. SENT'G GUIDELINES MANUAL § 3B1.2 (U.S. SENT'G COMM'N 2018).

50. U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 40, at 16.

51. *See, e.g., Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”).

52. *See United States v. Booker*, 543 U.S. 220, 246–47 (2005).

53. *See, e.g., Rita v. United States*, 551 U.S. 338, 341 (2007); *Gall v. United States*, 552 U.S. 38, 40 (2007); *Kimbrough v. United States*, 552 U.S. 85, 90–93 (2007); *Irizarry v. United States*, 553 U.S. 708, 709–10 (2008); *Spears v. United States*, 555 U.S. 261, 265–66 (2009) (per curiam); *Nelson v. United States*, 555 U.S. 350, 351–52 (2009) (per curiam); *Dillon v. United States*, 560 U.S. 817, 819 (2010); *Pepper v. United States*, 562 U.S. 476, 480–81 (2011).

54. U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 10 (2012).

55. Atherton, *supra* note 41.

Judges' discretion is now limited by the Guidelines and mandatory minimums, yet prosecutors are able to use the Guidelines and mandatory minimums when charging. Further, prosecutors routinely use the Guidelines as a tool for pushing plea bargains.<sup>56</sup>

Professor Cover's statements now overemphasize the role of the judge when it comes to convicting and sentencing. Although judges legitimize the "violence" that stems from the federal criminal justice system, the legal interpretation articulated by judges, as discussed by Professor Cover, is also limited by the fact that only two percent of those charged with drug offenses in federal court go to trial.<sup>57</sup> Additionally, most of these trials are tried by juries, not the bench.<sup>58</sup>

While the Guidelines were published after Professor Cover's *Violence and the Word*, he would likely agree that the Guidelines and mandatory minimums further remove the judge morally and ethically from the "violence" they authorize by further limiting their legal interpretation and discretion.<sup>59</sup> After leaving the courtroom, a defendant's sentence is traditionally carried out by the Federal Bureau of Prisons or the U.S. Probation and Pretrial Services office. Since the publication of *Violence and the Word*, federal prosecutors, aided by the Commission and the Guidelines, have entered the legal landscape with more power to wield violence.

## II. RISE TO THE TOP

### A. The U.S. Sentencing Commission

The Commission is an independent agency in the judicial branch created by Congress as part of the Sentencing Reform Act of 1984.<sup>60</sup> The President nominates the seven voting members of the Commission.<sup>61</sup> These members must then be confirmed by the Senate.<sup>62</sup> There must be at least three federal judges on the Commission.<sup>63</sup> Furthermore, there cannot be more than four members from the same political party on the Commission.<sup>64</sup> The Attorney General, or Attorney General's designee, and the chair of the U.S. Parole Commission serve as nonvoting

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56. Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), <https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html> [<https://perma.cc/4P4L-W627>] ("After decades of new laws to toughen sentencing for criminals, prosecutors have gained greater leverage to extract guilty pleas from defendants and reduce the number of cases that go to trial, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.")

57. Only 499 of the 21,771 drug cases filed in federal district courts went to trial in 2018. Gramlich, *supra* note 8.

58. *Id.*

59. See Cover, *supra* note 1, at 1626–27.

60. *Organization*, U.S. SENT'G COMM'N, <https://www.usc.gov/about/who-we-are/organization> [<https://perma.cc/4Q45-QVWS>] (last visited July 20, 2021); 18 U.S.C. § 3551.

61. *Organization*, *supra* note 60.

62. *Id.*

63. *Id.*

64. *Id.*

members of the Commission.<sup>65</sup> The agency's mission is to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted in federal district court.<sup>66</sup> Further, the Commission advises Congress on crime policy and research.<sup>67</sup>

The Commission sits higher on the pyramid of violence than district court judges. The Commission is the sole determiner of what offense level is warranted by each quantity of each controlled substance.<sup>68</sup> From there, the Commission then dictates what advisory guideline sentence range is warranted by each offense level. Therefore, the Commission can control the sentence of controlled-substance offenders based primarily on the quantity of narcotics a defendant is responsible for. The Commission formally limits judicial discretion by indicating where the judge must start sentencing computation.<sup>69</sup>

Judges have generally disliked the Guidelines since its first release in 1987 because the Guidelines effectually eliminated their discretion and were commonly perceived as draconian.<sup>70</sup> In 2010, the Commission conducted a survey of federal judges to garner opinions of the makeup and practical impact of the Guidelines.<sup>71</sup> Question Eight of the survey asked judges, in their opinion, about the appropriateness of the Guidelines and whether they thought the sentencing ranges were too high or too low.<sup>72</sup> Of the drug offenses listed in the survey,<sup>73</sup> about 57% thought the sentencing ranges were appropriate, about 4.5% thought the ranges were too low, and about 38% thought the ranges were too high.<sup>74</sup> Although there is some consensus on the appropriateness of the Guidelines, over forty percent of the judges surveyed would prefer to sentence outside of the sentencing ranges for controlled-substance offenses.<sup>75</sup>

For better or for worse, judges are initially bound by calculating the advisory sentence under the Guidelines. However, a judge's decision is final even if it is

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65. *Id.*

66. *About*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about-page> [https://perma.cc/AE8W-KSE6] (last visited July 20, 2021).

67. *Id.*

68. *See Drug Cases*, U.S. SENT'G COMM'N, <https://www.ussc.gov/drug-cases> [https://perma.cc/8Z6L-GTXM] (last visited July 20, 2021).

69. *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”).

70. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 724 (2005).

71. *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 1–4 (2010) [hereinafter U.S. SENT'G COMM'N, RESULTS OF SURVEY].

72. *Id.* at pt. III, tbl.8.

73. Heroin, powder cocaine, crack cocaine, methamphetamine, marijuana, ecstasy, and oxycodone. *Id.*

74. *See id.*

75. *Id.*

outside the Guidelines' range as long as it is reasonable.<sup>76</sup> At the same time, sentences that are within the Guidelines' range are presumed to be reasonable.<sup>77</sup> Unlike judges before 1987, judges now must give a justification for departures from the advisory sentence range.<sup>78</sup> The Supreme Court has further advocated that the greater the variance from the advisory guideline range, the more significant the justification must be.<sup>79</sup>

In addition to updating and releasing the annual Guidelines, the Commission also produces reports about the practical implications of the Guidelines. Through these reports, the Commission gathers sentencing data and makes formal recommendations to Congress. These recommendations have suggested

a strong and effective [federal] sentencing guidelines system best serves the purposes of the Sentencing Reform Act. . . . [If] Congress decides to exercise its power to direct [federal] sentencing policy by enacting mandatory minimum penalties, . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently. . . . Congress [should] request prison impact analyses [from the Commission] as early as possible in its legislative process whenever it considers enacting or amending [mandatory minimum] penalties . . . .<sup>80</sup>

In 2011, the Commission explained that it “stands ready to work with Congress on measures that can be taken to enhance the strength and effectiveness of the current guidelines system and address the problems with certain mandatory-minimum penalties.”<sup>81</sup> With the ability to formally interact with Congress, the Commission is in a unique position compared to federal judges. Although the Commission is an extension of the judiciary, the same separation of powers that traditionally divides the two branches seems to be milder.

### B. Federal Prosecutors

In district courts, one of the roles of the U.S. Attorneys is to prosecute criminal cases brought by the federal government.<sup>82</sup> U.S. Attorneys have all the resources of the government and traditionally have federal agents to assist them in the

76. See *Kimbrough v. United States*, 552 U.S. 85, 111 (2007).

77. See *Rita v. United States*, 551 U.S. 338, 347 (2007). “A substantively reasonable sentence is one that is ‘sufficient, but not greater than necessary’ to accomplish [18 U.S.C.] § 3553(a)(2)’s sentencing goals.” *United States v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009) (quoting 18 U.S.C. § 3553(a)).

78. See *United States v. Ressay*, 679 F.3d 1069, 1089 (9th Cir. 2012) (“When a sentencing judge decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” (quoting *United States v. Carty*, 520 F.3d 984, 991 (2008)).

79. *United States v. Plaza*, 471 F.3d 876, 879 (8th Cir. 2006); *Gall v. United States*, 552 U.S. 38, 50 (2007).

80. U.S. SENT’G COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES, *supra* note 7, at 2–3.

81. *Id.*

82. 28 U.S.C. § 547.

prosecution of federal defendants.<sup>83</sup> In addition to the availability of these crucial resources, the number of U.S. Attorneys has grown substantially. At the turn of the century, “the number of attorney and non-attorney positions more than tripled, from around 3,000 to over 10,000. And they continue to grow, though at a lesser pace.”<sup>84</sup>

The Guidelines, and especially the mandatory minimums, have removed power from judges and brought immense power to federal prosecutors. As discussed above, the charge brought against a defendant indicates the total offense level or triggers the mandatory minimum, which in effect dictates the sentence a defendant will receive. Through the Guidelines’ Sentencing Table, “[t]he sentencing process now involves the rote consideration of a matrix of impersonal data dominated by often irrelevant drug quantities and other circumstances that can be shaped by the prosecutor’s charging choices.”<sup>85</sup> There is no judicial review of the charging decisions made by prosecutors. Mark Osler, who worked as a federal prosecutor in Detroit, said, “I had all the power. It was about whether I filed a notice of enhancement or gave points for acceptance of responsibility. It’s not reviewable. It’s within the discretion of the prosecutor.”<sup>86</sup> So, if a statute carries a lengthy minimum sentence, a judge does not have a remedy to lighten the sentence or revise the charge a defendant is facing. Rather, prosecutors, in effect, sentence convicted defendants by the charges they bring, and prosecutors typically charge drug defendants with offenses carrying mandatory-minimum sentences.<sup>87</sup> Osler notes a primary difference between federal judges and federal prosecutors: judges’ work is done with transparency at the forefront, while prosecutors’ decisions are made in darkness.<sup>88</sup> Although the Presentence Investigation Report, which calculates the Guidelines for a judge, is completed by Federal Probation and Pre-Trial Services, the recommendations by federal prosecutors carry significant weight.<sup>89</sup> Furthermore, judges often accept the Presentence Investigation Report as is and make sentencing choices based on its contents.<sup>90</sup>

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83. U.S. Dep’t of Just., Just. Manual § 3-1.20 (2018).

84. Nora V. Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 FED. SENT’G REP. 165, 166 (2018).

85. See, e.g., *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

86. Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> [<https://perma.cc/QA2M-GVQ5>].

87. HUM. RTS. WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 3 (2013).

88. Van Meter, *supra* note 86.

89. See *Sentencing Project: Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989–1990: IV*, 79 GEO. L.J. 1089, 1094 (1991) (“The presentence investigation report (PSI) plays a critical role in the judge’s determination of the applicable sentencing guideline range and in the imposition of an appropriate sentence.”).

90. See Jennifer Niles Coffin, *Tap Dancing Through the Minefield: Navigating the Presentence Process*, 31 CHAMPION 10, 10 (2007) (“[T]he presentence report . . . functions as the most powerful inertial force in the sentencing process.”).

Prosecutors effectively use the Guidelines and mandatory minimums through plea bargains. Because prosecutors have charging discretion, “[p]rosecutors frequently threaten to bring charges carrying long mandatory-minimum sentences and longer guidelines sentences.”<sup>91</sup> Prosecutors claim they are not “punishing” defendants with lengthier sentences when they refuse a plea bargain, but rather are “rewarding” defendants who, by pleading guilty, spare the criminal justice system the expenditure of time and resources needed for a trial.<sup>92</sup> However, from the perspective of the defendant who is looking at the significance of the penalty faced at trial, there is no difference.<sup>93</sup> These threats can easily persuade a defendant to plead guilty.

Often, prosecutors making charging decisions are fully expecting the defendant to plead guilty. To secure the guilty plea,

prosecutors may then offer to lessen the charges, they may offer to reduce the ones that do not carry mandatory sentences, to stipulate to sentencing factors that lower the sentencing range under the sentencing guidelines or, at the very least, to support a reduced sentence based on the defendant’s willingness to accept responsibility for the offense, i.e., to plead guilty.<sup>94</sup>

Prosecutors can also ask for *Booker* waivers.<sup>95</sup> A *Booker* waiver occurs when prosecutors press defendants to contract into a plea agreement that stipulates that the Guidelines are mandatory or that stipulates to a particular Guidelines sentence.<sup>96</sup> *Booker* waivers restrict a defendant’s right to petition the judge for a more lenient sentence.<sup>97</sup> But, charging practices and plea negotiations vary widely within the country’s ninety-four judicial districts. Thirty-two percent of district court judges expressed that charging decisions by federal prosecutors were the number one reason for sentencing disparities across the federal criminal justice system.<sup>98</sup>

While there may be some benefits to entering into a guilty plea, it is not without its negative consequences. Plea bargains erase the possibility of appeal on the merits and remove all grounds for legal defenses.<sup>99</sup> Furthermore, defendants often are incentivized to testify against others in exchange for leniency.<sup>100</sup> As a result of these tools available to prosecutors, every year at least ninety-five percent of federal drug defendants plead guilty.<sup>101</sup> Plea bargaining can yield higher sentences

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91. *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

92. See Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 328–29, 343–44 (2014); HUM. RTS. WATCH, *supra* note 87.

93. HUM. RTS. WATCH, *supra* note 87, at 7.

94. *Id.* at 4.

95. See *United States v. Booker*, 543 U.S. 220, 246–47 (2005).

96. *Id.*

97. Klein, *supra* note 70, at 735.

98. See U.S. SENT’G COMM’N, RESULTS OF SURVEY, *supra* note 71, at pt. V, tbl.16.

99. See Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 875–78 (2010).

100. See Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 34–35, 39–40 (2017).

101. See *Mandatory Minimums and Sentencing Reform*, *supra* note 33.

for defendants who opt to go to trial.<sup>102</sup> For example, federal prosecutors offered to let Patricio Paladin plead in return for a twenty-year sentence for cocaine distribution.<sup>103</sup> He is now serving a life sentence without the opportunity for parole because he refused to plead.<sup>104</sup> In recent years, the average sentence for federal drug offenders convicted after trial was three times higher than that received after a guilty plea.<sup>105</sup> The possibility of a longer sentence places enormous pressure on defendants to plead guilty, whether or not they are actually innocent or have a strong legal defense.

In addition to plea bargains, prosecutors also hold the power to ask a judge to grant departures. The Guidelines section 5K1.1 authorizes a departure from the Guidelines range if the offender provided substantial assistance to law enforcement and the government files a motion to that effect.<sup>106</sup> However, Guidelines section 5K1.1 does not authorize courts to impose a sentence below a mandatory-minimum penalty.<sup>107</sup> For mandatory-minimum cases, prosecutors may file a motion pursuant to 18 U.S.C. § 3553(e) with the court to permit a judge to sentence below the mandatory-minimum sentences if a defendant has substantially aided the government's efforts to prosecute others.<sup>108</sup> However, judicial discretion is still limited because "[s]uch sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission."<sup>109</sup> A prosecutor has full discretion on whether to file this motion with the court.

On the other hand, prosecutors may file motions to increase the penalties should a defendant not plead guilty. Under 21 U.S.C. § 841(b)(1), prior felony drug convictions can dramatically increase a mandatory-minimum drug sentence.<sup>110</sup> If a prosecutor files a motion informing the court of two prior convictions for a defendant facing a one-year mandatory-minimum sentence on the current drug offense, the minimum sentence increases.<sup>111</sup> Under 18 U.S.C. § 924(c), prosecutors can file charges that radically increase a defendant's punishment if a firearm was involved in the drug offense.<sup>112</sup> The first conviction imposes a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime, while

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102. See also, e.g., HUM. RTS. WATCH, *supra* note 87, at 1–2 (“Weldon Angelos was offered a plea of 15 years for marijuana distribution and gun possession. He refused the plea and is now serving a 55-year sentence.”).

103. *Id.* at 1.

104. *Id.*

105. *Id.* at 2.

106. U.S. SENT’G GUIDELINES MANUAL § 5K1.1 (U.S. SENT’G COMM’N 2018).

107. *Id.*

108. 18 U.S.C. § 3553(e).

109. *Id.* The U.S. Sentencing Guidelines Manual section 5C1.2 also allows for a safety valve for defendants who are sentenced under a mandatory-minimum offense but meet a certain criterion under the statute. However, few drug-offense defendants meet this criterion, and judges are directed to impose a sentence that falls within the advisory Guidelines range. U.S. SENT’G GUIDELINES MANUAL § 5C1.2 (U.S. SENT’G COMM’N 2018).

110. See 21 U.S.C. § 841(b)(1).

111. *Id.*

112. 18 U.S.C. § 924(c); HUM. RTS. WATCH, *supra* note 87, at 5.

second and subsequent convictions each carry twenty-five-year consecutive sentences, resulting in disturbingly long sentences.<sup>113</sup>

### III. A NEED FOR REFORM

#### *A. Prosecutors on Top*

Formally, the Commission and the mandatory minimums sit “atop [the] pyramid of violence.”<sup>114</sup> These Guidelines ranges and mandatory minimums place official quantitative limits on judicial discretion. Through the lens of uniformity and predictability, the Guidelines give the perception to a judge that there is a right answer when it comes to sentencing a defendant. However, by limiting judicial discretion, the Guidelines and mandatory minimums open the door to an unfair and unjust criminal “justice” system, where special circumstances and actual defendant culpability become unimportant and not part of the immediate sentencing calculus.<sup>115</sup> There are many cases where first-time drug offenders—who played minimal roles in a larger criminal organization—are sentenced simply on the type and the quantity of drugs, leaving the judge with no remedy. The adjustments that attempt to “reward” a minimal participant do not drastically shift the offense level down.<sup>116</sup> Furthermore, grounds for judicial departure from the advisory sentence are somewhat limited. The Guidelines list specific reasons and policies that should warrant departure.<sup>117</sup> Normalizing departure from the Guidelines, or making it easier to justify departure from Chapter Three of the Guidelines, would restore some of the judicial discretion judges once enjoyed.

A policy of distrust of the judiciary and judicial discretion has led to the creation of such an unfair and unjust system. The federal criminal justice system entrusts judges with wide discretion at trial, which determines innocence or guilt, yet rejects judicial discretion when it comes to the imposition of a sentence.<sup>118</sup> Operating in tandem, the Guidelines and mandatory minimums have made it very “difficult—and often impossible—for a judge to impose a relatively light rather than a heavy sentence, to find an alternative to incarceration where [it] seems unproductive, [and] to avoid sentences that impose unreasonable social costs.”<sup>119</sup> As Professor Cover notes, “The act of sentencing a convicted defendant is among these most routine of acts performed by judges.”<sup>120</sup> Yet, judges have had their discretion in sentencing stripped away.

113. See 18 U.S.C. § 924(c)(1)(A)–(C).

114. Cover, *supra* note 1.

115. See William W. Schwarzer, Commentary, *Judicial Discretion in Sentencing*, 3 FED. SENT’G REP. 339, 340 (1991).

116. See *supra* Section I.B.

117. See U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. K (U.S. SENT’G COMM’N 2018).

118. Schwarzer, *supra* note 115, at 341. For example, judges rule on evidentiary objections that determine what the factfinder can consider when making its guilt determination.

119. *Id.*

120. Cover, *supra* note 1, at 1607.

Informally, and more importantly, practically, prosecutors now sit “atop [the] pyramid of violence.”<sup>121</sup> Discretion shifted from judges to prosecutors. With the ability to drive sentences using plea bargains and be the gatekeepers of departures from mandatory minimums and the Guidelines, federal prosecutors now are in the driver’s seat. Charging decisions and plea bargains allow a prosecutor to dictate the potential sentence within a small range. These prosecutorial decisions are largely unreviewable on appeal, and “even when courts agree that prosecutors have sought egregiously long mandatory sentences for drug offenses, they will not rule the sentences so disproportionate as to be unconstitutionally cruel.”<sup>122</sup> Because the mandatory minimums and Guidelines curtail judicial discretion, prosecutors have assumed much of the role of sentencing; prosecutors effectively sentence convicted defendants based on charges they decide to bring.

### B. *What Do We Do Now?*

Now, the question is whether discretion should be restored to judges, and if so, how should it be restored in light of the Guidelines and mandatory minimums. The first step towards restoring the discretion that judges once enjoyed is to remove the statutorily imposed mandatory minimums, which can only be removed by Congress. Forcing judges to hand down unreasonably lengthy sentences fails to produce fair and just results. Many judges find that mandatory-minimum laws prevent them from practicing the principle that a convicted criminal offender should receive a punishment proportional to his or her crime and culpability.<sup>123</sup>

A one-size-fits-all solution is not the panacea to creating a more just sentencing system, especially when the United States leads the world in incarceration rates.<sup>124</sup> According to the Equal Justice Initiative, the “United States Department of Justice shows the United States still incarcerates its citizens at a rate 5 to 10 times higher than other industrialized countries.”<sup>125</sup> With the advisory Guidelines and proper appellate review to keep discretion in sentencing within reason, there is no place in our system for mandatory-minimum sentences that primarily serve a prosecutor’s mission to strong-arm defendants into entering a guilty plea.<sup>126</sup> The Guidelines, if properly used as an advisory starting point by

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121. *Id.* at 1609.

122. HUM. RTS. WATCH, *supra* note 87.

123. See 18 U.S.C. § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the statute].”).

124. Sintia Radu, *Countries with the Highest Incarceration Rates*, U.S. NEWS & WORLD REP. (May 13, 2019, 12:18 PM), <https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates> [https://web.archive.org/web/20190514060918/https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates].

125. *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), <https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/> [https://perma.cc/PS2X-ZGHT].

126. See HUM. RTS. WATCH, *supra* note 87.

judges, reduce the sentencing disparities that sparked their existence in the first place. But normalizing departures from the Guidelines is necessary in order for the Guidelines to actually be just a starting point.

Additionally, the criminal justice system can focus efforts on making plea bargains more effective, if not on reducing the dominant role of plea bargains. One proposal is to have “executive prosecutors” in each office only dedicated to conducting the plea-bargaining process with defense counsel.<sup>127</sup> Executive prosecutors would “have full responsibility for evaluating the facts of all cases assigned to them, deciding what sentence recommendations should be made upon conviction following trial, and determining to what extent a recommendation should be reduced upon the entry of a guilty plea.”<sup>128</sup> The recommendations from executive prosecutors should be based solely on the crime committed, the defendant’s criminal background, and the strength of the state’s case.<sup>129</sup> The executive prosecutor, devoted solely to plea bargaining, would develop great skills in discerning the best outcome in the most difficult cases.<sup>130</sup> Furthermore, when plea bargaining is placed in the hands of a few people, uniformity and consistency in results for defendants will be increased.<sup>131</sup> However, getting the “right” person in this position could pose a great challenge. Because the executive prosecutor will not be the lead attorney on the case, reliance on subjective evaluations of the defendant and “conflict[s] between office policies and . . . personal goals will be minimized.”<sup>132</sup>

In order to effectuate this solution, prosecutors must also be pressed to exercise their charging discretion with fairness in mind. A maximum sentence mentality does not promote any of the aims of clarity, honesty, and uniformity, which were primary considerations in the shaping of the Guidelines. Although charging discretion is a necessary part of the role of a prosecutor, “the final say over sentences defendants receive must come from independent federal judges who have no personal or institutional stake in the outcome of a case other than to ensure justice is done and rights are respected.”<sup>133</sup> Mandatory sentencing strips all of this discretion. Arguably, the Guidelines make it harder for judges to exercise this discretion because their initial sentencing inquiry must be calculated a certain way. Judges who have been appointed by the President and confirmed by the Senate are in a better position than elected and hired prosecutors to determine the ultimate fate of defendants.<sup>134</sup>

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127. See Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 453–54 (1971).

128. *Id.* at 454.

129. *Id.*

130. *Id.*

131. *Id.* at 455.

132. *Id.* at 454–55.

133. HUM. RTS. WATCH, *supra* note 87, at 12.

134. Although judges are not directly accountable to the public, the President and Legislative Branch are directly accountable through elections.

## CONCLUSION

In 1986 and 1987, judicial discretion was formally limited for the first time by the introduction of mandatory minimums and the U.S. Sentencing Guidelines. Mandatory minimums have forced judges to issue excessively long sentences, including life sentences, for those defendants convicted of drug offenses. The mandatory minimums do not allow for individual evaluation of each defendant and remove the humanizing component of sentencing so integral to the role of the judge. The Guidelines, released by the U.S. Sentencing Commission, provide advisory sentencing ranges for all offenses. For drug offenses, the primary driver of the sentence is the quantity of the substance, while possessing firearms, playing a leadership role, or having a criminal history can also increase the sentencing range. Although the Guidelines are no longer mandatory after the Supreme Court's ruling in *United States v. Booker*, judges are still required to start their analysis by calculating the appropriate Guideline range and may make departures only when there are compelling reasons.<sup>135</sup>

With the implementation of the mandatory minimums and Guidelines, Professor Cover's assertion that judges sit "atop [the] pyramid of violence" has been greatly altered.<sup>136</sup> Although the mandatory minimums and Guidelines formally limit judicial discretion, informally, federal prosecutors have risen to the top of this pyramid. With the ability to threaten draconian sentences for defendants who do not plead guilty, prosecutors are almost always able to secure plea bargains and punish those who do not accept responsibility for their alleged crimes.<sup>137</sup> In practice, prosecutors now sit "atop [of this] pyramid of violence" because, with the implementation of the mandatory minimums and the Guidelines, when they charge a defendant, they are also sentencing the defendant.<sup>138</sup> Prosecutors are thinking about the sentence when they decide which charges to file at the outset of the case.

To restore the role of sentencing to the judge, mandatory minimums must disappear from our federal criminal justice system. Judges must be allowed to exercise their discretion and have the final say in how convicted drug offenders should be sentenced. Because federal judges are appointed by the President, confirmed by the Senate, and represent a neutral party as the judiciary, they are in a better position than prosecutors to be making the sentencing decisions for federal offenders. This can be accomplished through making departure from the Guidelines more mainstream. Another reform, the idea of the executive prosecutor, would reduce plea bargains' ability to unfairly drive sentences. Although reforms are in progress, we will not see judges return to their position "atop [of the] pyramid of violence" until formal, quantitative limits do not impede judicial discretion.<sup>139</sup>

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135. *United States v. Booker*, 543 U.S. 220, 265–68 (2005).

136. Cover, *supra* note 1.

137. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1. (U.S. SENT'G COMM'N 2018).

138. Cover, *supra* note 1.

139. *Id.*

