COMPARATIVE ANALYSIS OF DEMOCRACY AND SENTENCING IN THE UNITED STATES AS A MODEL FOR REFORM IN IRAQ

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I. INTRODUCTION

As a country in the midst of a watershed moment, Iraq has the opportunity to reexamine its criminal justice system. One of the major problems under Saddam Hussein's regime was the use of criminal sentencing as a political tool to remove those that threatened the regime.[1] Therefore, in the context of the transition from Saddam's regime to "a federal, democratic, pluralist, and unified Iraq, in which there is full respect for political and human rights,"[2] the government, reexamining the intersection of democracy[3] and the criminal

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[1] *See* Human Rights Watch, *Iraq: The Death Penalty, Executions, and "Prison Cleansing": A Human Rights Watch Briefing Paper*, Mar. 2003, *at* http://www.hrw.org/backgrounder/mena/iraq031103.htm (Mar. 2003); *see, e.g.*, Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 FORDHAM INT'L L.J. 299, 346 (2003) (describing how the "Revolutionary Command Council of the Saddam Hussein government," fearing competition from Muhammad Baqir al-Sadr and the Da'wah party he led, passed a law on March 31, 1980, "sentencing all Da'wah party members and their supporters to death") (citing T.M. Aziz, *The Role of Muhammad Baqir Al-Sadr in Shi'i Political Activism in Iraq from 1958 to 1980*, 25 INT'L J. OF MIDDLE E. STUD. 207, 217 (1993)); Jackie Spinner, *Iraq's New Form Of Justice Seems To Satisfy Few*, WASH. POST, Aug. 4, 2004, at A12 (describing the experience of Luqman Thabit, judge in the Iraqi Central Criminal Court and former

> "chief judge for Hussein's special secret court, in which sentences were often dictated by the Iraqi leader or his sons. Thabit said he was fired and persecuted by Hussein three years ago after he refused to sentence five prostitutes to death. As a matter of law, the women did not deserve death, Thabit said .... Hussein's son Uday had the women executed.").

[2] S.C. Res. 1546, U.N. SCOR, 58th Sess., 4987th mtg. at 1, U.N. Doc. S/RES/1546 (2004).

[3] "Democracy" in the sense of "government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity) or by officers elected by them" not the modern usage "more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege." OXFORD ENGLISH DICTIONARY 442-43 (2d ed. 1989) [hereinafter OED] (s.v. "democracy"). *See also* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, art. 21, U.N. Doc. A/810 (1948) [hereinafter UDHR] (declaring that

> [e]veryone has the right to take part in the government of his country, directly

justice system,[4] must address sentencing reform.[5] This reexamination is crucial for the new Iraqi government because the fact that "[c]rime poses a serious threat to democratic institutions, both by undermining trust in government and by encouraging excessive criminal justice punishment," inextricably links democracy and criminal justice.[6] Any new government in Iraq must earn its citizens' trust after years of dictatorial abuse of that trust.[7] The problem is especially acute because the new Iraqi government is closely associated with the U.S.-led coalition. Therefore, it will face mistrust stemming from Western influence, new government, and the abuses of the former government. While this reexamination may lead to calls for public participation as a general reaction to totalitarianism, the Iraqi government should take the lessons learned from sentencing debates in the United States and insulate sentencing from democratic processes in order to assure justice. Without such insulation we may get an answer to the rhetorical question posed in Gary LaFree's 2002 review of *Punishment and Democracy: Three Strikes and You're Out in California* would "offering the citizens of . . . Iraq . . . more democratic input into sentencing decisions . . . necessarily result in harsher criminal justice penalties[?]"[8]

By contrast, the entrenched government in the United States limits reassessment such that sentencing procedures remained relatively static until a recent decision where the U.S. Supreme Court held that prosecutors must prove beyond a reasonable doubt to a jury all facts used to calculate sentences under the Washington state sentencing guidelines.[9] In her dissent, Justice

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> or through freely chosen representatives . . . . The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.).

[4] "Criminal justice system" in the sense of "the process through which the substantive criminal law is enforced." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1 (10th ed. 2002). The analysis presented here focuses on the very narrow scope of criminal sentencing procedure. It does not address substantive criminal law, which is much more culturally specific such that a purely legal comparison to culturally divergent models would be less fruitful.

[5] *See* Ayad Allawi, Editorial, *A New Beginning*, WASH. POST, June 27, 2004, at B7.

[6] Gary LaFree, Book Review, 27 LAW & SOC. INQUIRY 875, 876 (2002) (reviewing FRANKLIN E. ZIMRING ET AL., *Punishment and Democracy: Three Strikes and You're Out in California* (2001)).

[7] *See* Human Rights Watch, *supra* note 1; *see, e.g.*, Freamon, *supra* note 1; Spinner, *supra* note 1.

[8] LaFree, *supra* note 6, at 886.

[9] Blakely v. Washington, 124 S. Ct. 2531 (2004); *see* Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th

O'Connor described "the practical consequences" of the decision as "disastrous," illustrating the power of the drive to maintain the status quo in sentencing procedures.[10] The practical consequences of implementing even the existing sentencing procedures in Iraq are significant, so the difference between implementing the pre-existing procedure or a revised procedure is less drastic there than it is in countries with entrenched judiciaries.

The balance between democracy and justice is a hard one to strike, whether in a newly forming democracy as in Iraq or after over 200 years of constitutional democracy as in the United States. Since the mid-1970s, criminal sentencing in the United States has become less insulated from popular opinion through legislative implementation of determinate sentencing,[11] mandatory minimum sentences,[12] repeat offender statutes,[13] and truth in sentencing laws.[14] At the extreme end of the spectrum where democracy directly determined sentencing, a citizen-initiated referendum in California overwhelmingly supported the implementation of a broad three strikes law.[15] Reflection on the current state of that balance in the United States is necessary not only for U.S. sentencing reform but also as a model, either positive or negative, for the establishment of democracy and the reformation of criminal justice in post-Saddam Iraq.

No model can account for the unique socio-political context of Iraq. Prime Minister Ayad Allawi stated:

> It should be noted that with all these initiatives, Iraq, like all nations, has a unique cultural and historical national context, with its own customs and values. The democratic system developed

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Cong. (2004) (statement of Commissioner John R. Steer and Judge William K. Sessions, III, Vice Chairs, U.S. Sentencing Comm'n), http://www.ussc.gov/hearings/BlakelyTest.pdf.

[10] *Blakely*, 124 S. Ct. at 2544.

[11] Under determinate sentencing, judges sentence those convicted to "a set term, with the defendant required to serve a high percentage of that term, less credits for good behavior." KAMISAR ET AL., *supra* note 4, at 28.

[12] Mandatory minimum sentences arise where legislatures pass statutes requiring judges to impose minimum penalties for particular offenses. *See id.* at 1498-99.

[13] A repeat offender statute (also known as a "two- or three-strikes-and-you're-out" law) "orders long sentences for offenders who receive [multiple] felony conviction[s]." Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation*, 11 STAN. L. & POL'Y REV. 75, 75 (1999).

[14] A truth in sentencing law "requires that offenders serve a substantial proportion of their imposed prison sentence." *Id.*

[15] LaFree, *supra* note 6, at 877 (referring to California's 1994 Initiative Number 184).

> in Iraq will not and should not be a replica of models imported from the United States, Britain or any other country. Rather, we Iraqis need to find and create the democratic political process that works best for us, while sharing in the universal values of all free nations, benefiting from the experience of other countries and drawing on the advice of international organizations such as the United Nations.[16]

However, comparative analysis of legal systems can be a starting point for further inquiry by experts in the specificities of contemporary Iraq.[17] The analysis undertaken here also leaves open the questions that arise when applying models from adversarial criminal justice systems to an inquisitorial criminal justice system.[18]

This Note begins with an overview of the relationship between democratic processes and sentencing systems. Part III describes, compares, and contrasts four ways sentencing policy may be set in a democracy: (A) direct democracy, (B) representative democracy, (C) delegated authority, and (D) insulated delegation.[19] The section includes analyses of California's "Three Strikes and You're Out" initiative, Georgia's patchwork sentencing legislation, the United States' Sentencing Guidelines, and Minnesota's Sentencing Commission. Each analysis poses four questions:

1. How much democratic control does this method exert over general sentencing provisions and particular sentencing applications?
2. Would the level of democratic control applied lead to excessive punishment?[20]

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[16] Allawi, *supra* note 5.

[17] *See generally* John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on "Legal Processes and National Culture"*, 5 CARDOZO J. INT'L & COMP. L. 51 (1997).

[18] *Cf.* William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992) (describing the institutional resistance to the new Code of Criminal Procedure adopted by the Republic of Italy in 1989 that incorporated significant adversarial procedures into what had previously been a purely inquisitorial system).

[19] *See* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 181-85 (2001).

[20] "Excessive punishment" may be defined as a punishment disproportionate to a crime. Different groups draw their own boundaries to describe proportionate sentences. One relatively

3. Does the level of democratic control applied protect defendants from the arbitrary[21] application of punishment?
4. Is this approach to establishing sentencing policy feasible?

These analyses lead to the conclusion that Iraq's new government should institute an insulated delegation model to create sentencing policy with ample allowance for judicial discretion. Such a model prevents excessive punishment, protects against arbitrary punishment, and is a feasible approach to establishing sentencing policy.

II. BACKGROUND

To what extent does the democratic process impact criminal sentencing? Professor Philip Pettit described the relationship between the democratic process and criminal sentencing as an "outrage dynamic"[22] that "will operate in any society where the media can give exposure to crime, where this exposure will give rise to outrage, and where the public authorities are forced to respond to that outrage, in particular to respond in a manner that reflects the feelings in the community."[23] He goes on to argue that the media and public outrage cannot be curbed in a democratic society.[24] However, Pettit offers the

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clear line of demarcation is the death penalty. Various international human rights agreements set boundaries based on international norms regarding proportionality in imposing the death penalty. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art 6, para. 2, 999 U.N.T.S. 171, 174 (*entered into force* Mar. 23, 1976) (declaring that "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes"). However, what constitutes a disproportionate sentence short of the death penalty remains a gray area. *Compare id.* art. 8, para. 3 (allowing "in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court"), *with* UDHR, *supra* note 3, art. 5 (declaring that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). This Note does not attempt to define the parameters of proportionate sentencing in Iraq; it merely evaluates methods of determining sentencing policy in terms of the relationship between crimes and punishments.

[21] "Arbitrary" defined as "founded on prejudice or preference rather than on reason or fact." BLACK'S LAW DICTIONARY 100 (8th ed. 2004). *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (naming "the appearance of equal treatment" as "one of the most substantial . . . values" of judicial decisions).

[22] Philip Pettit, *Democracy and Punishment: Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 428-30 (2002).

[23] *Id.* at 441.

[24] *Id.*

possibility "of removing from the public authorities the onus of having to respond in kind to feelings of outrage on the part of their constituents."[25] In Iraq, the new government must create a system that will insulate criminal sentencing from temporary popular demands.

The new government must balance the necessity of responding to public concern over the current post-war lawlessness[26] with the necessity of reestablishing a criminal justice system that has been undermined by dictatorial control.[27] At first glance, especially after years without a democratic system, the best solution seems to be a direct democratic process of setting sentencing policy. However, the failure of such a process in California suggests otherwise. The fifty-one U.S. criminal justice systems offer examples along a spectrum of democratic determination of sentencing policy, from the electorate determining sentencing policy by popular vote to elected representatives appointing insulated officials who determine sentencing policy. Iraq's new democratic government should institute a relatively undemocratic system to set sentencing policy based on an insulated delegation model in order to avoid the problems of excessive punishment, arbitrary application, and infeasibility found in models that are more directly democratic.

A. The Evolution of Democracy's Interaction with Criminal Sentencing

The modern story of sentencing in the United States is one of increasing distrust of government officials as manifested by a movement to constrict judicial discretion.[28] Until the mid-1970s, the standard sentencing procedure in both federal and state courts was an indeterminate sentencing process whereby the judge would sentence an offender to a range of years and the parole board would determine when, within that range, the offender would be released based on whether or not that individual had been "rehabilitated."[29] In

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[25] *Id.*

[26] *See* Greg Jaffe & Alexei Barrionuevo, *U.S. Estimates 5,000 Iraqi Resisters*, WALL ST. J., July 28, 2003, at A5, 2003 WL-WSJ 3975250; Farnaz Fassihi, *Iraqi Shiites Are Split on Political Role*, WALL ST. J., Sept. 2, 2003, at A13, 2003 WL-WSJ 3978440.

[27] *See* Human Rights Watch, *supra* note 1; *see, e.g.*, Freamon, *supra* note 1, at 343-47; Spinner, *supra* note 1.

[28] For a summary of the history of sentencing in the United States in the context of separation of powers that involves many of the same concerns addressed here see Jessica S. Intermill & William E. Martin, *Separation of Powers Doctrine and the Feeney Amendment: The Constitutional Case for Judicial Discretion in Sentencing*, 27 HAMLINE L. REV. 391, 402-16 (2004).

[29] *See* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL

the mid-1970s, both liberals and conservatives began vocally opposing indeterminate sentencing.[30] Liberal opposition, responding to the civil rights movement, saw the judiciary as a remaining bastion of racial discrimination.[31] Conservative opposition, responding to a decade of increasing crime, deemed the rehabilitative principles behind indeterminate sentencing ineffective.[32] Both liberals and conservatives argued that the problem was that the indeterminate sentencing process allowed judges and parole boards unfettered discretion.[33] Both had the goal of consistent sentences for consistent crimes.[34]

In response, many state legislatures and the U.S. Congress instituted sentencing commissions empowered to set either mandatory or advisory sentencing guidelines. "Sentencing commissions differ in many particular respects. The membership of the commission, the amount of legislative control, [and] the nature of their authority to draft guidelines without legislative action are some of the major ways in which these sentencing commissions differ."[35] Many state legislatures instituted determinate sentencing and passed a patchwork of mandatory minimum sentencing, three-strikes-and-you're-out, and truth in sentencing laws.[36] Whether through sentencing commissions or patchwork legislation, the judiciary lost significant independence throughout the United States.

The independence of Iraq's judiciary began to shrink earlier than that of their U.S. colleagues. British occupation and administration began during World War I and ended when Iraq became an independent kingdom in 1932.[37]

JUSTICE, 1950-1990, at 3-21 (1993).

[30] *See* ZIMRING ET AL., *supra* note 19, at 212.

[31] *See* KAMISAR ET AL., *supra* note 4, at 1498.

[32] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.5 (1986).

[33] *See* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 724-25 (1999).

[34] *See* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 744-45 (2001).

[35] Blake Nelson, Note, *The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions*, 10 LAW & INEQ. 217, 222 n.21 (1992).

[36] *See* Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 685 (1993) (describing how the term "truth in sentencing" is used to describe four different ideas: (1) "judicial control of sentencing as opposed to back-end control" by parole boards, (2) "close correspondence between the pronounced sentence and time served," (3) "adherence to articulated standards," and (4) "predictability of time served").

[37] U.S. CENT. INTELLIGENCE AGENCY, *Iraq*, *in* THE WORLD FACTBOOK, http://www.cia.gov/cia/publications/factbook/geos/iz.html (last updated Oct. 19, 2004).

"A 'republic' was proclaimed in 1958, but in actuality a series of military strongmen have ruled [Iraq] since then."[38] Even before the rise of the Ba'ath regime that began with the coup on July 17, 1968, the government of Iraq was not democratic and opposed "judicial scrutiny of [its] political actions."[39] However, before the coup, the Iraqi judiciary "enjoyed a certain degree of independence in fulfilling its duties and making its rulings, which were characterized by the principle of even-handedness, solid substantiation and profound legal reasoning," and resulted in case law that had value as precedent.[40] The government's concern with upholding "the sphere of social order and individual rights" led to judicial independence, albeit limited, and "ensured a modest level of justice" in that sphere.[41]

After the coup, the Ba'ath party subsumed the legislative, executive, and judicial branches of government under the ultimate power of Saddam Hussein.[42] The Ba'ath regime "eliminate[d] any remaining role for an independent judiciary" by "dissolv[ing] the Judicial Council" and replacing it with " 'the justice council' headed by the minister of justice who reported to the President. As a consequence, the Iraqi judge [became] a mere functionary following orders from the political power."[43] Hence, under Saddam Hussein the judiciary lost any semblance of independence.

The Coalition Provisional Authority clearly asserted control of the criminal justice system of Iraq. On June 18, 2003, L. Paul Bremer III, Administrator of the Coalition Provisional Authority in Iraq, issued Coalition Provisional Authority Order Number 13 creating the Central Criminal Court of Iraq[44] and

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[38] *Id.*

[39] Working Group on Transitional Justice in Iraq & Iraqi Jurists' Association, *Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society* 20 (Mar. 2003) [hereinafter *Road*], *at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf (Select "Iraqi Freedom").

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 21.

[44] *The Central Criminal Court of Iraq*, Ord. No. 13, Coalition Provisional Authority, CPA/ORD/18 June 2003/13 (2003). *See generally* Working Group on "Transitional Justice in Iraq" Meets in Washington (July 12, 2002) (describing how the U.S. Department of State convened the Working Group on Transitional Justice in Iraq, "a group of Iraqi jurists[,] . . . Iraqi-Americans and international experts, . . . to discuss how to promote the rule of law in Iraq, and how to initiate judicial reform"), http://www.usembassy.it/file2002_07/alia/a2071506.htm; Iraqi Jurists' Association, Inaugural Announcement (describing The Iraqi Jurists' Association as a London-based, non-partisan group of Iraqi jurists, primarily living abroad, that opposed Saddam Hussein's regime and are currently working to reestablish the rule of law in Iraq), http://www.

Coalition Provisional Authority Memorandum Number 3 modifying the Iraqi Law on Criminal Proceedings of 1971.[45]

B. Current Concerns in the United States and Iraq Regarding the Effects of Democracy on Criminal Sentencing

Data on the Federal Sentencing Guidelines can give some indication of the concerns regarding similar reductions in judicial independence across the United States. At the federal level, research has shown that the United States Sentencing Guidelines have limited judicial independence to such an extent that

> [a]t least one federal district court judge has since resigned in protest over the Guidelines, while something akin to a mutiny occurred in one federal court when forty-three district court judges in the Second Circuit took the remarkable step of publicly denouncing the Guidelines' constriction of judicial discretion. Many other district judges, convinced that "there is something profoundly wrong with this guidelines system," refrain from public comment or suffer stoically.[46]

Arguing against expansion of legislative control, Scott C. Idleman, quoted "the somewhat tart words of José Cabranes, a widely respected federal circuit

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ija2.co.uk/html/fe.html (last visited Oct. 23, 2004).

[45] *Criminal Procedures*, Mem. No. 3, Coalition Provisional Authority, CPA/Mem/18 Jun 2003/3 (2003). *See generally* IRAQ LAW ON CRIMINAL PROCEDURES of 1971 (English translation), https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf (last updated May 28, 2004).

[46] Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 471 (1993) (citing *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A22; Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1109 (1992); United States v. Dibiase, 687 F. Supp. 38, 41 n.18 (D. Conn. 1988); *Supposedly "Scientific Sentencing" Is a "Dismal Failure"*, CONN. L. TRIB., Jan. 20, 1992, at 14; Stuart Taylor, Jr., *Federal Judges Bound and Gagged by Mandatory Criminal Sentencing*, RECORDER, Jan. 23, 1992, at 6; Committee on Federal Courts, New York Bar Ass'n, *Transforming the Sentencing "Guidelines" into (Just) Guidelines: Comments on the Federal Govt's Study Committee Proposal*, RECORD 675, 676-77 (1992); JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS OF THE FORTY-EIGHTH JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT 150 (West 1987), cited in United States v. Harrington, 947 F.2d 956, 967 n.12 (D.C. Cir. 1991) (Edwards, J., concurring)).

judge, [who stated] 'the Sentencing Guidelines system is a failure—a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system.' "[47] These anecdotes proved to be representative of a larger trend in a number of empirical studies collected by Professor Doris Marie Provine, who wrote:

> In a 1992 survey by the Federal Judicial Center, only 16% of the district judges surveyed described themselves as supporters of the guidelines, and 79% declared themselves ready to repeal most or all mandatory minimum sentences. A 1996 center survey indicated that time had not softened these negative attitudes: 73% of district judges and 69% of appellate judges surveyed stated that mandatory guidelines are unnecessary . . . . Mandatory minimums leave even less room for judicial discretion, which helps explain why all of the federal circuits have gone on record to oppose them.[48]

Judges are not merely protecting their turf. Commentators widely condemn the reduction of judicial discretion. For example, Charles J. Ogletree, Jr., criticized the Sentencing Guidelines for failing to "[a]ddress the [u]nderlying [p]urposes of the [c]riminal [s]anction," "[a]llow [a]dequate [c]onsideration of [o]ffender [c]haracteristics," and "[a]ccount for [p]rison [o]vercrowding."[49] Ogletree attributed federal prison overcrowding to the compound effect of the sentencing guidelines and existing federal sentencing statutes "reduc[ing] the availability of probationary sentences and increas[ing] the average time served for violent offenses."[50] Ogletree specifically called for more judicial discretion by arguing that "the Commission should have realized that it is a person who stands before the bar to accept the punishment imposed by the court."[51] This

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[47] Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 261 (citing José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992, at 2).

[48] Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 841 (1998) (citations omitted).

[49] Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1952-54 (1988).

[50] *Id.* at 1955. *See, e.g.*, Act of Oct. 12, 1984, Pub. L. No. 98-473, § 218(a), 98 Stat. 1837, 2027 (repealing 18 U.S.C. § 4205(a), which had allowed parole for federal sentences, and 18 U.S.C. §§ 4161-4166, which had allowed statutory good time reductions of time served).

[51] Ogletree, *supra* note 49, at 1953.

call for individualized review parallels the demand made by the Working Group on Transitional Justice in Iraq and Iraqi Jurists' Association that, "[s]entencing decisions should be made specific to the individual defendant."[52]

The Iraqi legal community has expressed goals for post-conflict criminal justice reform. A major facet of the Working Group on Transitional Justice in Iraq and Iraqi Jurists' Association's March 2003 *The Road to Re-establishing Rule of Law and Restoring Civil Society* stated that

> [i]n both its legislation and its actions the Iraqi regime has violated (and continues to violate) every aspect of humanitarian law as set forth in international covenants and the Universal Declaration of Human Rights. This includes imposing or increasing sentences with the death penalty without regard to the well-established legal principles that:
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> - There is no crime and therefore no punishment without a specific text in the penal code.
> - Criminal laws cannot be retroactively applied.
> - The accused is innocent until proven guilty.
> - Sentencing decisions should be made specific to the individual defendant.
> - There should be no more than one punishment for the same crime.[53]

Both Iraq and the United States are at crisis points regarding their respective judiciaries' independence.[54] Iraq has no acceptable historical models.[55] The United States has fifty-one different models, but determining which model most successfully balances the need for democratic input and the need for an independent judiciary requires comparative analysis.

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[52] *Road, supra* note 39, at 16.

[53] *Road, supra* note 39, at 16.

[54] *See generally* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004) (discussing changes in recent law further restricting federal judicial sentencing discretion).

[55] *See Road, supra* note 39, at 26 (stating "that any attempt to enforce any of Iraq's past constitutions since 1925 will antagonize one group or another in Iraq and provoke senseless disputes").

III. LEGAL ANALYSIS

The following analysis adopts the analytical model put forth by Franklin E. Zimring and his coauthors in *Punishment and Democracy*. Their framework fits well because, in developing this analytical model of punishment and democracy for application in the United States, the problem Zimring and his coauthors pose is equally pertinent in a post-Saddam Iraq: "Where [should] the power to punish . . . be located in democratic systems of government"?[56] Zimring and his coauthors define democracy as "a system of governance in which those who exercise government power are subject to the electoral control of citizens by majority vote."[57] In most modern democracies, each criminal sentence is determined by two levels of decision-making.[58] First, general provisions including which actions result in which consequences "and which types of offenders will be eligible for which types of punishment . . . are . . . usually promulgated by legislative bodies," but can also come from sentencing commissions and "in some recent cases, voters."[59] Second, sentencing judges and parole authorities determine "particular application of these rules to a convicted offender determin[ing] which kinds and amount of punishment will be imposed in the case of a particular person."[60] The power of determining sentences is thus distributed among branches of government: the legislative branch primarily determines general provisions, the judicial branch is responsible for particular applications, and the executive branch influences sentences through parole authorities and correctional officials where time off for good behavior applies.[61] This separation of powers model is conducive to the Working Group's goal of reinstituting three independent

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[56] ZIMRING ET AL., *supra* note 19, at 182-83.

[57] *Id.* at 183; *cf.* Coalition Provisional Authority, Basic Elements of Democracy, http://www.cpa-iraq.org/democracy/basic_elements.html (last visited Oct. 23, 2004) (defining the elements of democracy as "[p]opular sovereignty," including "[a] people . . . 'social contract' agreement among elements . . . form a single self-governing country," "[s]elf-governing country," and "[c]itizens/citizenship"; "[e]lections and voting—free, periodic" including "[m]ajority/supermajority rule" and "[m]inority rights"; and "[r]epresentation" including "[l]egislatures," "[f]orms of representation," and "[e]quality"). *But see* LaFree, *supra* note 6, at 887 (taking issue with Zimring's definition of democracy because it "limits the discussion mostly to differences in how closely punishment is tied to majority voting and pays little attention to other potentially important characteristics of democracy in America").

[58] ZIMRING ET AL., *supra* note 19, at 182.

[59] *Id.* (referring to California's 1994 Initiative Number 184).

[60] *Id.*

[61] *Id.* at 182-84.

branches of government in Iraq.[62] In the United States, "democratically elected legislatures usually select general provisions of penal legislation but leave to judges and expert administrative bodies the details of policy and the particular decisions in individual cases. This division of authority is utterly typical of modern government and is in no sense peculiar to criminal punishment."[63]

Zimring and his coauthors delineate four levels of interaction between democracy and criminal punishment: (A) direct democracy, (B) representative democracy, (C) delegated authority, and (D) insulated delegation.[64] This Note will examine these four levels of connection between democracy and punishment to evaluate each as it might work in Iraq. Sentencing procedures in California, Georgia, the U.S. federal system, and Minnesota illustrate these levels of interaction.

A. Direct Democracy

Under a direct democracy model, "the punishments available and imposed in particular cases are selected by the majority vote of participating citizens."[65] Direct democracy is the most democratic system of determining sentences.[66]

Though examples of particular application by an entire community's majority vote are theoretical[67] or extragovernmental,[68] Zimring provides two examples of systems that "move pretty close to some form of direct democracy."[69] The first example is the use of juries in the penalty phase of criminal trials thereby requiring "direct involvement of the citizenry in the particular application of punishment."[70] Juries commonly participate in the sentencing phase of U.S. death penalty cases.[71] Kansas requires "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a

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[62] *Road, supra* note 39, at 26.

[63] ZIMRING ET AL., *supra* note 19, at 184-85.

[64] *Id.* at 183-84.

[65] *Id.* at 183.

[66] *Id.*

[67] For example, imagine a referendum on how long Martha Stewart should serve in prison for her conviction for "obstructing a government investigation into her sale of ImClone Systems Inc. stock." Kara Scannell, *Executives on Trial: Stewart and Ex-Broker Seek New Trial, Faulting Prosecutors*, WALL ST. J., June 11, 2004, at C3, 2004 WL-WSJ 56931695.

[68] *See, e.g.*, Reuters, *Peruvian Burned Alive for Stealing Gas Cannister*, Oct. 7, 2004, *available at* WL 10/7/04 RTRENGNS 21:56:48.

[69] ZIMRING ET AL., *supra* note 19, at 183.

[70] *Id.*

[71] *Id.*

prior conviction, [ ] be submitted to a jury and proved beyond a reasonable doubt" in all felony cases.[72] In the wake of *United States v. Booker*, juries may become involved in the sentencing phase of all U.S. felony cases if legislatures attempt to rescue sentencing guidelines.[73] The second example, and primary focus of *Punishment and Democracy*, is the passage of a general provision by popular referendum "that requires a single punishment for the entire class of cases covered by the general provisions."[74] California presents the best example of direct democracy because of the highly publicized rise of the public initiative in that state.[75] Under pressure from a public initiative, California's legislature passed the citizen-drafted three strikes law—better described as a repeat offender law as it includes penalties for two "strikes" or more.[76] California's three strikes law[77] has been described as "a dangerous example of growing populist influence over sentencing outcomes in America."[78] Beyond procedural direct democracy, the three strikes initiative and the follow-up mandatory sentencing initiatives aim at substantive direct democracy as well. Mandatory sentencing avoids discretionary power "because government officials (particularly judges) are not to be trusted. In this regard, one of the great attractions of the initiative process . . . is that it bypasses the process of representative democracy."[79] Of the four methods to determine sentencing policy compared here, citizen-drafted initiatives exert the highest level of democratic control over general sentencing provisions because initiatives bypass representative democracy.

Regarding the second point of comparison, it is unclear whether direct democracy is the most likely of the four methods to lead to excessive punishment if employed in post-Saddam Iraq. The California three strikes initiative provides the best example of how direct democratic control of sentencing policy leads to excessive punishment.[80] When given the opportu-

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[72] KAN. STAT. ANN. § 21-4716(b).

[73] United States v. Booker, 125 S. Ct. 738, 779 (2005) (Stevens, J., dissenting).

[74] *Id.*

[75] *Id.* at 139; *see, e.g.*, Jackie Calmes & John Harwood, *In California Vote, Gov. Davis Is Out, Schwarzenegger In*, WALL ST. J., Oct. 8, 2003, at A1, 2003 WL-WSJ 3982109 (describing the power of the initiative in California to recall Governor Gray Davis).

[76] ZIMRING ET AL., *supra* note 19, at 139.

[77] CAL. PENAL CODE ANN. § 667 (West 2003).

[78] LaFree, *supra* note 6, at 875.

[79] ZIMRING ET AL., *supra* note 19, at 142.

[80] *See* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (5-4 decision) (Souter, J., dissenting) (arguing California's three strikes law violates the Eighth Amendment prohibition of cruel and unusual punishment because it results in "sentence[s] grossly disproportionate to the offense[s]

nity to amend their " 'Three Strikes' law to require increased sentences only when [the offender's] current conviction is for [a] specified violent and/or serious felony" 52.7% of California's voters chose to leave the existing language of the statute intact.[81] Individual, highly publicized incidents have been shown to sway public opinion such that direct democratic responses become referenda on what punishment the latest high-profile criminal deserves rather than a rational implementation of broadly applicable policy.[82] LaFree reasons that the highly publicized Klaas kidnapping-sexual assault-murder by a "twice-convicted violent offender who had recently been paroled from the state prison system" led California citizens to ask for extremely harsh punishments for recidivist offenders in Initiative Number 184 even though California's three strikes law had been passed earlier that year.[83] Professor Philip Pettit expressed concern that setting sentencing policy by political reaction to public indignation creates a system "in danger of representing a 'tyranny of the avengers.' . . . Even those who laud the rule of popular will must admit that the [outrage] dynamic is subject to too much exploitation by media or politicians to count as a channel for the undistorted expression of that will."[84] In post-Saddam Iraq, public outrage along a number of factional lines[85] could lead to radical sentencing policy if direct democracy was employed.[86]

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for which [they are] imposed"); *see also* Scalia, *supra* note 21, at 1180 (stating that one of a judge's "most significant roles . . . [is] to protect the individual criminal defendant against the occasional excesses of [the] popular will, and to preserve the checks and balances within our system that are precisely designed to inhibit swift and complete accomplishment of that popular will").

[81] Cal. Sec'y of State, *Official Voter Information Guide: Proposition 66*, http://www.voterguide.ss.ca.gov/propositions/prop66-title.htm (last visited Feb. 4, 2005); Cal. Sec'y of State, *State Ballot Measures*, http://www.ss.ca.gov/elections/sov/2004_general/formatted_ballot_measures_detail.pdf (last visited Feb. 4, 2005).

[82] *See* Pettit, *supra* note 22, at 441.

[83] LaFree, *supra* note 6, at 877; *see* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 196-201 (1998) (recounting the killings of Megan Kanka and Polly Klaas and the subsequent legislative responses).

[84] Pettit, *supra* note 22, at 440 (citing CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 203 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748)).

[85] Susan Sachs, *The Sheik Takes Over; In Iraq's Next Act, Tribes May Play the Lead Role*, N.Y. TIMES, June 6, 2004, § 4, at 14.

[86] *See* Howard LaFranchi, *Why Direct Elections in Iraq Could Backfire*, CHRISTIAN SCIENCE MONITOR, Feb. 10, 2004 (reporting that one "problem with elections in transitional countries is that they can tend to favor the more radical elements in a society"), 2004 WL 58692805. While LaFranchi implicates a religion-specific concept of radicalism, the plurality described by Sachs could lead to structural radicalism in the sense that in a pluralistic direct democracy, the plurality

Iraqis have two concerns in tension with one another: crime and mistrust of government.[87] According to the Iraqi Jurist Association, "[t]he absence of legitimate legislative and judicial authorities, as they were turned into tools in the service of tyranny, oppression, repression, depredation and murder, has lead [sic], in turn, to a rapid and unprecedented rise in crime, corruption and social and family disintegration in Iraq."[88] LaFree states in his summary of Zimring and his colleagues' argument, "harsh punishments may be more likely to accompany periods of high mistrust in government because these are times when crime likely appears to be a bigger problem and when judges are more likely to be seen as overly lenient on offenders."[89] This theory does not apply as neatly to Iraq, therefore it is less clear whether direct democracy would lead to general provisions for excessive punishment.

Regarding the third point of comparison, direct democracy merely shifts the possibility of arbitrary application rather than eliminating it. In California, the three strikes law has merely removed power from judges and shifted it to prosecutors. In general, as judicial discretion becomes narrower,[90] sentencing power shifts to prosecutors.[91] For example, the prosecutor may choose not to charge the accused with crimes that fall under the three strikes law. The capacity for arbitrary application shifts with discretion.[92] In Iraq, prosecutors already wield significant power.[93] Therefore, arbitrary application would simply shift from the sentencing phase to the charging phase.

In addition to not preventing arbitrary application in individual instances, a directly democratic method of reforming sentencing policy as a whole is not feasible. In California, the number of signatures required to get an initiative on the ballot is very high and the signature collection process costs a

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would determine sentencing with which the majority may disagree. *See id.*; Sachs, *supra* note 85.

[87] *See* Press Release, United States Department of Defense, Ambassador Bremer Statement from Baghdad, Iraq (May 15, 2003), http://www.defenselink.mil/transcripts/2003/tr20030515-0186.html.

[88] Inaugural Announcement, *supra* note 44.

[89] LaFree, *supra* note 6, at 883.

[90] *See* Margaret Graham Tebo, *Questions on Sentences: Changes to Guidelines Become a Separation-of-Powers Dispute*, A.B.A. J., July 1989, at 13, 13 (describing reaction to U.S. legislation limiting judges' sentencing discretion).

[91] LaFree, *supra* note 6, at 880-81.

[92] KAMISAR ET AL., *supra* note 4, at 1498-99.

[93] *See generally* IRAQ LAW ON CRIMINAL PROCEDURES (1971) (English translation), https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf (last updated May 28, 2003).

significant amount of time and money.[94] Furthermore, as the recent elections in Iraq illustrated, violence and factional boycotts could severely undermine the legitimacy of a directly democratic process.[95] To pass multiple sentencing policies by means of initiative or referendum would be both time and cost prohibitive even if elections were legitimate. Therefore, the system-wide reform Iraq should undergo would not be feasible under a direct democracy model.

B. Representative Democracy

Under a representative democracy model, the citizenry elects representatives to determine general provisions and/or particular applications.[96] When the citizenry elects "legislators who promulgate the general provisions of penal law," that portion of sentence determination is decided through representative democracy.[97] When the legislature passes general provisions that "have mandatory penalties, the particular applications have also been selected by representative democracy, so in formal terms the selection of individual penalties takes place only one step removed from majority vote."[98]

Another method of representative democracy that is becoming more common in the United States is the election of judges.[99] Though there is significant separation of power between the legislative and judicial branches in terms of an individual's sentencing determination, where both are subject to representative democracy there is only one step "between public sentiment

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[94] Cal. Sec'y of State, *2004 Initiative Update* (explaining that

> California uses the direct initiative process, which enables voters to bypass the Legislature and have an issue of concern put directly on the ballot for voter approval or rejection. There are two types of initiatives that can be placed on the ballot: 1) *statute revision*, which requires signatures equal to five percent of the total votes cast for Governor in the preceding gubernatorial election, and 2) *constitutional amendment*, which requires signatures equal to eight percent of the Governor's total vote in the preceding gubernatorial election),

http://www.ss.ca.gov/elections/elections_j.htm (as of Sept. 27, 2004).

[95] *See* John F. Burns, *Iraqis Begin Tabulating Results of Milestone Election*, N.Y. TIMES, Feb. 1, 2005, at A8.

[96] ZIMRING ET AL., *supra* note 19, at 183.

[97] *Id.*

[98] *Id.*

[99] *Id.*; *see id.* at 186 (stating that, as of 2001, twenty-seven states required that trial judges be elected and eleven states required "periodic election review for judges selected by state executives").

and penal choice."[100] Legislators are subject to public approval at the polls for their handling of general sentencing provisions. Where judges are also elected, judges are subject to public approval at the polls for their application of sentences. Representative democracy exerts less democratic control over general sentencing provisions than direct democracy. Regarding particular sentencing applications, representative democracy via election of judges exerts slightly less democratic control than where juries make determinations in sentencing phases. Regarding both general sentencing provisions and particular sentencing applications, representative democracy exerts more democratic control than either delegated authority or insulated delegation.

Representative democracy is a common method of determining general sentencing provisions and is becoming more common in terms of particular applications. Canada, France, Italy, the United Kingdom, Germany, Japan, Russia, and (in some respects) the U.S. federal government determine general provisions through representative democracy.[101] Among the fifty states of the United States, forty-two determine general provisions via representative democracy.[102] Thirty-eight U.S. states determine particular applications via representative democracy.[103]

Georgia's patchwork of sentencing legislation presents a classic example of general sentencing provisions determined by representative democracy. The two major pieces of sentencing legislation are the Repeat Offender statute and the Seven Deadly Sins statute. The Repeat Offender statute, O.C.G.A. § 17-10-7, requires judges to impose the maximum sentence prescribed by statute for the current offense where the offender has previously been convicted of a felony.[104] This statute does carve a small space for judicial discretion in that

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[100] *Id* at 184.

[101] *Id.* at 185 (see Table 10.1) (describing the situation in G-7 nations before Russia joined to make it the G-8 in 1998); Ilya V. Nikiforov, *Russia*, *in* WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS, (describing Russia's criminal justice system where the popularly elected legislature determines general sentencing provisions), http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjrus.txt (last visited Oct. 23, 2004); *see* ZIMRING ET AL., *supra* note 19, at 186 (reporting that "[t]he United States at the federal level delegates most general policies to a sentencing commission").

[102] ZIMRING ET AL., *supra* note 19, at 186-87 (see Table 10.2).

[103] *Id.*

[104] Beyond general provisions for mandatory sentencing ranges, some individual criminal statutes also have built-in enhanced sentences for recidivist offenders. *See, e.g.*, O.C.G.A. § 16-13-30 (prescribing one range of sentences for first offenders and a higher range of sentences for recidivist offenders convicted of possession, manufacturing, etc., of certain controlled substances); Partain v. State, 228 S.E.2d 292, 294 (Ga. Ct. App. 1976), *aff'd*, 232 S.E.2d 46 (Ga.

"unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense."[105] The Seven Deadly Sins statute, O.C.G.A. § 17-10-6.1, defines murder or felony murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery as "serious violent felon[ies]."[106] When sentencing offenders convicted of these offenses, the statute requires judges to impose "a mandatory minimum term of imprisonment of ten years."[107] Furthermore, this statute curtails important judicial discretion regarding imprisonment versus probation by requiring that "no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court."[108] The Seven Deadly Sins statute also imposes requirements, resembling truth in sentencing, on the amount of time served.[109] Additionally, offenders under this statute are exempt from first offender protections including consideration for early release.[110]

The proliferation of mandatory minimums, repeat offender statutes, and truth in sentencing laws indicates that representative democracy has almost the same likelihood of leading to excessive punishment as direct democracy. However, the legislative compromise process tends to diffuse radical changes.[111] If the multiethnic and multireligious background of Iraq gives rise to multiparty democracy,[112] the political process will be more likely to diffuse radical change by requiring coalitions to cooperate. On the other hand, it is easy for politicians to run for election under the rubric of law and order by championing ever harsher sentencing legislation.[113] Likewise, politicians find

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1977) (illustrating that because Georgia does not require a minimum amount to support a conviction for drug possession, successive convictions for relatively minor drug possession offenses force judges to sentence petty drug addicts at the higher range under O.C.G.A. § 16-13-30).

[105] O.C.G.A. § 17-10-7(a).

[106] O.C.G.A. § 17-10-6.1(a).

[107] O.C.G.A. § 17-10-6.1(b).

[108] *Id.*

[109] O.C.G.A. § 17-10-6.1(b)-(c).

[110] *Id.*

[111] ZIMRING ET AL., *supra* note 19, at 193.

[112] *See, e.g.*, U.S. CENT. INTELLIGENCE AGENCY, *Lebanon*, *in* THE WORLD FACTBOOK (describing how representatives in Lebanon's National Assembly are "elected by popular vote on the basis of sectarian proportional representation"), http://www.cia.gov/cia/publications/factbook/geos/le.html (last updated Oct. 19, 2004).

[113] *See* Judge K.L. McIff, *Views from the Bench: Getting Smart as Well as Tough on Crime*, UTAH B.J., Nov. 1998, at 41, 41.

it difficult to oppose increased sentences because they must then face their constituency's accusations of being soft on crime. With this lack of support for reasonable sentencing, representative democracy is more likely to lead to excessive punishment than either delegated authority or insulated democracy.

Representative democracy offers no guarantee that arbitrary sentencing will be adequately reduced. As under direct democracy, the power to determine sentences shifts to prosecutors because they retain power to determine the charges against a defendant. Consequently, the power to arbitrarily apply sentences shifts to prosecutors. Additionally, a patchwork legislative system omits some crimes that may thereby be subject to arbitrary application by judges. Furthermore, judges subject to reelection may take the same tack as law and order legislators and arbitrarily impose a sentence based on public opinion.[114] Therefore, whether representative democracy would reduce arbitrary application is unclear. Since arbitrary application was the primary tool of political oppression under Saddam Hussein, representative democracy does not resolve this problem sufficiently for use in Iraq.

Despite the apparent feasibility of representative democracy, its shortcomings render it an inappropriate solution in Iraq. In terms of feasibility, representative democracy costs less than voter initiatives in that if there is a legislature in place it can address general sentencing reform. In addition, the duration of the term of office coupled with staggered elections somewhat insulate legislators and judges such that they may develop expertise that makes the process under their control more efficient. Election of judges is clearly more efficient than referenda on every sentence for every criminal convicted. However, these advantages are outweighed by patchwork legislation's main drawbacks, which include that it (1) makes application difficult and (2) encourages inconsistent theories of punishment that undermine long-term governmental stability. Thus, representative democracy's weaknesses should preclude it from consideration in Iraq.

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[114] *Cf.* Bill Rankin, *Caution Urged in Juvenile Sentencing: Slain Girl's Father Calls for Stricter Sentences for Violent Georgia Preteens*, ATLANTA J.-CONST., May 2, 2004 (reporting on the pressure to allow judges "to impose stricter sentences on preteens convicted of violent crimes" rather than the current statutory maximum of two years in the wake of a twelve-year-old being accused of murder), 2004 WL 77160471.

C. Delegated Authority

Under a delegated authority model, "an elected legislature or executive delegates the power to set punishment rules or to make particular applications to government actors who have not been elected."[115] The significant structural "difference between representative democracy and delegated power is the lack of a direct link between an elected official and a particular rule or decision. The elected official has no direct responsibility for a particular outcome in a delegational system."[116] Appointees who make decisions about sentencing are subject to nomination and approval by elected officials who are in turn subject to public approval at the polls for their selection of appointees. Therefore, delegated authority exerts less democratic control over general sentencing provisions and particular applications than direct democracy or representative democracy. Delegated authority exerts slightly more democratic control than insulated delegation.

Delegated authority is not as common as representative democracy as a method of determining general sentencing provisions or particular applications among nations with highly developed economies. Among G-8 nations, only the U.S. Federal Sentencing Commission determines sentences through delegated authority.[117] Delegated authority is relatively common within the United States where many states' executives still appoint judges,[118] parole boards, sentencing commissions, and correctional officials.[119]

The most controversial example of delegated authority in sentencing is the United States Sentencing Commission. Congress intended the United States Sentencing Commission's Sentencing Guidelines "to limit judicial discretion of courts for downward and upward departures from the guideline sentences."[120] "The United States Sentencing Guidelines were created in

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[115] ZIMRING ET AL., *supra* note 19, at 184.

[116] *Id.*

[117] *Id.* at 185 (see Table 10.1).

[118] *See generally* American Judicature Society, Judicial Selection in the States, http://www.ajs.org/js/ (describing the selection process for judges state by state) (last visited Oct. 23, 2004).

[119] ZIMRING ET AL., *supra* note 19, at 184; *id.* at 186 (reporting that as of 2001, twenty-three states still appointed judges rather than electing them and twelve of those states had no periodic election review of judges selected by state representatives).

[120] James C. MacGillis, Note, *The Dilemma of Disparity: Applying the Federal Sentencing Guidelines to Downward Departures Based on HIV Infection*, 81 MINN. L. REV. 229, 234 (1996) (citing 18 U.S.C. § 3553(b) (1994) (directing the court to follow the sentence range, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

response to the Sentencing Reform Act of 1984 . . . and apply to all federal crimes committed after November 1, 1987."[121] The U.S. Sentencing Commission chose "to develop a highly mechanical, 'quasi-elemental' basis for federal sentencing guidelines."[122] The Commission devised a system of assigning point values to elements of each offense with points to be added for specified aggravating factors and points to be subtracted for specified mitigating factors.[123] The United States Supreme Court stated in *Williams v. New York* that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[124] This parallels the legal principle espoused by the Working Group that "[s]entencing decisions should be made specific to the individual defendant."[125] However, in upholding the constitutionality of the U.S. Sentencing Guidelines, the U.S. Supreme Court held that the limited consideration of the past life and habits mandated by the Guidelines was sufficient.[126]

One of the primary arguments supporting the contention that the U.S. Sentencing Commission has failed is that it was not sufficiently insulated from the political process.[127]

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guidelines that should result in a sentence different from that described"); S. REP. NO. 98-225, at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3262 (noting the rejection of an amendment that would have expanded the opportunities for judges to depart from the sentencing guidelines)).

[121] Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 979 (2002) (citing Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993)).

[122] Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 682 (1992) (citing Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3 (1991)).

[123] *Id.* at 685.

[124] Williams v. New York, 337 U.S. 241, 247 (1949). However, the rehabilitationist rhetoric of this pre-Federal Sentencing Guidelines case may be considered out of date.

[125] *Road, supra* note 39, at 16.

[126] *See* Mistretta v. United States, 488 U.S. 361 (1989).

[127] MICHAEL TONRY, SENTENCING MATTERS 83-89 (1996). State sentencing commissions have not been immune to political influence, in particular regarding public outcry for greater severity. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 935 (1991).

> Representative Rodino, the Chairman of the House Judiciary Committee, . . . explained why . . . judges rather than presidential appointees should be given the task of writing sentencing guidelines: "A presidentially appointed panel can too easily be dominated by political interests. The temptation to seek public approval by appearing tough on crime and therefore to propose standards biased in favor of prosecution and incarceration might prove too great."[128]

One of the explanations for the overly complex design of the original Sentencing Guidelines is the means of appointment to the Sentencing Commission that resulted in the initial set of seven appointees including only four practitioners, with a relatively small time in practice between them.[129] Finding sentencing commissioners with sufficient experience is not the problem in Iraq; the problem will be finding commissioners not associated with the former regime and who do not share the mindset, fostered by that regime, that judges are political functionaries.[130] Some commentators suggest the Sentencing Commission can be saved by employing "a real administrative process—one that embraces the ideal of transparency and accountability, one that routinely lays out its reasoning and gathers or creates evidence to support its choices."[131] Delegated authority without sufficient insulation merely adds a layer of bureaucracy over a political process rather than effectively creating a well-respected and expert decision-making body.

The delegated authority model can lead to excessive punishment in two ways: (1) through integration of mandatory minimum sentencing laws and (2) by the narrow nature of a guidelines system resulting in higher penalties. First, integration of mandatory minimum sentences passed by Congress into the

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[128] Kate Stith & Steven Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (quoting Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 131 (1984)).

[129] *See* U.S. Sentencing Comm'n, Former Commissioners of the United States Sentencing Commission (listing Judge William W. Wilkins, Jr., Chairman; Judge (later Justice) Stephen G. Breyer; Judge George E. MacKinnon; Ilene H. Nagel (Professor of Law and Sociology, University of Indiana Law School); Helen G. Corrothers (Member, U.S. Parole Commission); Michael K. Block (Professor of Law and Economics, University of Arizona); Paul H. Robinson (Professor of Law, Rutgers Law School)), http://www.ussc.gov/general/Oldcomms.htm (last visited Oct. 23, 2004).

[130] Craig T. Trebilcock, *Note from the Field: Legal Cultures Clash in Iraq*, ARMY LAW., Nov. 2003, at 48, 48-49.

[131] Miller & Wright, *supra* note 33, at 728-29.

overall guidelines scheme has inflated punishment for all crimes.[132] When the legislature passes a mandatory minimum sentencing law under a delegated authority model, the sentencing commission can either read that law as an exception to the guidelines or rearrange the guidelines for all crimes around the new law.[133] This rearrangement increases "the severity of the guideline sentences generally," such that "the sentences for many crimes not covered by the mandatory provisions" are also increased.[134] Reading mandatory sentencing laws as exceptions to the guidelines could resolve this particular problem. Second, a guidelines system's narrow matrix generally results in higher sentences. "To the extent that narrow guidelines produce the tendencies toward excess . . ., their force on the front end of the sentencing process will tend toward unnecessarily high sentences."[135]

The U.S. Sentencing Guidelines have not protected punishment from arbitrary application in two respects. First, the U.S. Sentencing Guidelines result in arbitrary sentences for the same bad acts relative to state penal codes. The Guidelines contain common law crimes insofar as they occur on exclusively federal jurisdictions—like national parks.[136] "Because [such] offenses . . . are rare in the federal system and, when prosecuted federally, are likely to be extreme cases, the guidelines in these areas are essentially symbolic. As such, setting the penalties at very high levels is of no systemic significance, despite its significance to the individual statistic, and may even be inappropriate."[137] When federal prosecutors make the decision to prosecute these crimes the punishments are usually more serious than they would be for the same offense in state court. Therefore, in terms of particular application the Guidelines have led to both excessive punishment and arbitrary application based on whether federal prosecutors choose to prosecute or leave the case for state prosecution.

Second, the Federal Sentencing Guidelines' mechanical approach, like the Georgia example described above, increases the likelihood of arbitrary application because they transfer "federal sentencing discretion to the prosecutor."[138] "[T]he prosecutor may or may not choose to present evidence

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[132] TONRY, *supra* note 127, at 96-98.

[133] *Id.* at 96-97.

[134] *Id.* at 97.

[135] ZIMRING ET AL., *supra* note 19, at 213.

[136] Knapp & Hauptly, *supra* note 122, at 692-93.

[137] *Id.* at 693 (citations omitted).

[138] *Id.* at 682 (citing 11TH CIRCUIT SENTENCING INST., JUDICIAL SURVEY REPORT (Nov. 1991) (on file with the U.C. Davis Law Review)).

to show the presence of aggravating factors . . . dramatically affect[ing] the guidelines sentence."[139] Before the Guidelines took effect, "the prosecutor's decision [not to present evidence to show the presence of aggravating factors] as a trade for a plea simply lowered the maximum available sentence. Under mechanistic guidelines, conversely, the prosecutor's refusal to present evidence of weapon use in a crime might dramatically reduce the actual time served."[140] This sort of built-in fictitious charge in the context of a Iraqi judiciary recovering from an absence of legitimacy would severely undermine that recovery.

In terms of feasibility of implementation, "[m]any critics contend that the federal guidelines are too rigid, too detailed, or too complicated."[141] Knapp and Hauptly contend that under the U.S. Sentencing Guidelines "every possible element of every possible offense must be considered and either included or excluded in every sentencing decision. Such an approach starts with simple elements that achieve enormous complexity very quickly. That complexity drains the time and energy of every actor in the criminal justice system."[142] The already capital-starved Iraqi courts cannot sustain a further drain of court resources.

D. Insulated Delegation

Under an insulated delegation model, sentencing is set by appointees further distanced from the electorate. Insulated delegation takes the appointees of the delegated authority model and employs strategies to protect the appointment process and the appointees from popular influence. "Strategies . . . devised to create government actors less subject to democratic influence than normally appointed officials" include, "long terms in office (including life tenure for judges) and staggered terms that do not coincide with

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[139] *Id.* at 686.

[140] *Id.*

[141] *Id.* at 682 (citing FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMISSION 133-43 (Apr. 2, 1990); Marc Miller & Daniel J. Freed, *The Commission Under Fire: Constructive Advice or Destructive Attack?*, 2 FED. SENTENCING REP. 207-09 (1990)).

[142] Knapp & Hauptly, *supra* note 122, at 686-88 (citing 11TH CIRCUIT SENTENCING INST., JUDICIAL SURVEY REPORT, at question 15 (Nov. 1991) (on file with the U.C. Davis Law Review); FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMISSION at 137 (Apr. 2, 1990)). This complexity and concomitant inefficiency will inevitably increase in the wake of *Blakely*. *See Blakely*, 124 S. Ct. at 2544. *But see Booker*, 125 S. Ct. at 779.

the electoral cycles of the persons who appoint the power holder."[143] The purpose of such insulating tactics is "to reduce the power of electoral majorities to influence punishment rules and outcomes."[144] The public elects an official who nominates someone who then must be approved. Once approved the appointee will have a long term in office, possibly life tenure, or staggered terms that do not coincide with the appointing or approving officials'. Insulated delegation is the least democratic system of determining sentences examined by this Note.[145]

Insulated delegation is a common method of determining particular sentencing applications, but is relatively rare in terms of general sentencing provisions. In terms of G-8 nations, Canada, France, Italy, the United Kingdom, Germany, Japan, and the United States' federal judiciary determine particular applications through insulated delegation.[146] These nations "use insulated judicial officers to administer punishments at the retail level, with judicial discretion quite wide in most systems and rather more narrow in the U.S. scheme."[147]

Under an insulated delegation system, "allocation of responsibility . . . often locates individual decisions in institutions effectively removed from representative democracy, whether in the judicial branch (where conscious insulation from democratic controls is quite common) or administrative bureaucracies like parole boards and prison systems (where low-visibility decisions are made without substantial legislative oversight)."[148] Among the fifty states of the United States, eight have sentencing commissions that have issued sentencing guidelines that "go beyond mere advice to constrain the discretion of sentencing judges" such that they may be described as establishing general

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[143] ZIMRING ET AL., *supra* note 19, at 184.

[144] *Id.* Zimring and his coauthors problematize the concept of insulated delegation by making it fungible with delegation in many practical respects, but leave it as a separate—at least theoretical—construct to further their Federal Reserve System model for the criminal justice system. *Id.*

[145] *See id.*

[146] *Id.* at 185 (see Table 10.1) (describing the situation in G-7 nations before Russia joined to make it the G-8 in 1998); Nikiforov, *supra* note 101 (describing Russia's criminal justice system where judges alone determine particular applications and are insulated to an extent in that "[f]irst-time judges are elected for a 5-year period of probation and after that they are elected to a life term").

[147] ZIMRING ET AL., *supra* note 19, at 186; *see* Nikiforov, *supra* note 101.

[148] ZIMRING ET AL., *supra* note 19, at 185.

provisions via insulated delegation.[149] Twelve U.S. states employ insulated delegation in the particular application of criminal sentences.[150]

Minnesota, the primary model of insulated delegation in shaping general sentencing provisions, was the first state to create a Sentencing Commission charged with determining Sentencing Guidelines.[151] State guidelines systems like Minnesota's

> have three things in common. First, their policies are realistically grounded in clearly articulated principles regarding both the purposes and goals of a sentencing system. Second, their sentencing policies are easily understandable and functional because they are experientially grounded in the concept of "usual case" [that takes into account offender characteristics, situational factors, relationship between victim and offender, victim characteristics, and nature of the harm]. Finally, these states developed all policies with a specific eye toward implementation.[152]

Beyond the legislature's initial determination of the fundamental policies guiding the Sentencing Commission, these state bodies remain insulated through long tenures and staggered appointments. The most convincing argument for insulating sentencing policymaking is that it "avoid[s] placing a vulnerable area of governance in an arena where it can be used as an opening wedge for broader attempts to undermine the credibility of government."[153]

Two factors reduce the likelihood of excessive punishment in insulated delegation as compared to delegated authority: (1) complete delegation from the legislature and (2) liberal departure standards for judges. First, unlike the U.S. Sentencing Guidelines, which were overrun by mandatory minimum sentencing legislation,[154] in an insulated delegation model the legislature may pass laws regarding the overall purpose of criminal punishment[155] or

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[149] *Id.* at 186-87 (see Table 10.2).

[150] *Id.*

[151] Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 279 (1993).

[152] Knapp & Hauptly, *supra* note 122, at 681.

[153] ZIMRING ET AL., *supra* note 19, at 232.

[154] *Id.* at 213.

[155] *See, e.g.*, MINN. STAT. § 364.01 (2003) (declaring the general purpose of criminal justice in Minnesota to be rehabilitation).

criminalizing particular activities,[156] but the legislature completely delegates all power regarding general sentencing provisions to the commission.[157] Some state sentencing commissions have been more successful at remaining insulated from the political process.[158] Commentators hold up Minnesota's Sentencing Commission as an example of a well-selected group in part due to its insularity.[159]

Second, allowing judges to depart from guidelines if they provide sufficient grounds counters narrow guidelines' tendency towards excessive punishment. Commentators often cite the Minnesota Guideline's departure standard for its success.[160] This built-in flexibility allows judges to depart from the guidelines when circumstances not addressed in the guidelines arise. Allowing judges to depart from the guidelines and complete delegation from the legislature makes the insulated delegation model the least likely to result in excessive punishments.

Minnesota's insulated delegation model reduces arbitrary application. Where all of the other models merely shift the power of arbitrary application of sentences from judges to prosecutors, Minnesota's liberal allowance for judicial departure checks prosecutors' power by allowing for deviation from the sentencing guidelines. In addition, the requirement that judges write grounds for departures creates transparency that allows for substantive appellate review. Furthermore, judges insulated from the political process would be less likely to impose a sentence based on public opinion or pressure from the legislative or executive branches of government.

The insulated delegation model is feasible for application in Iraq. This model could take advantage of Iraq's experienced legal community by appointing well-respected experts to the commission. This commission would make decisions based on consistent theories of punishment. This insulated expertise and consistency would give the new government legitimacy and long-term stability. Completely delegating the authority to the commission would allow the legislative body to focus on the innumerable and urgent tasks the new government faces. A streamlined guidelines matrix like Minnesota's

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[156] *See, e.g.*, MINN. STAT. § 609.80 (2003) (criminalizing stealing access to cable television).

[157] *See, e.g.*, MINN. STAT. § 244.09 (2003).

[158] ZIMRING ET AL., *supra* note 19, at 213.

[159] Greg Rogers, Comment, *Criminal Sentencing in Colorado: Ripe for Reform*, 65 U. COLO. L. REV. 685, 695-96 (1994).

[160] Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1482 (1997); *see* MINN. STAT. § 244.10 (2003) (allowing judges to deviate from the guidelines).

would make application simpler than under the other methods. This simplicity at the sentencing phase would help to conserve the criminal justice system's resources.

IV. CONCLUSION

Now that the new Iraqi government is in a position to reassess how it governs its people, one aspect to consider is sentencing procedure. Iraq would do well to consider the copious scholarship on the U.S. federal and state models and examine the balance between democracy and criminal sentencing. California's citizen-drafted criminal sentencing initiative serves as an example of direct democracy and reveals its primary shortcoming—overreaction to popular sentiment. In Iraq, the potential for post-emancipation backlash against former oppressors makes such potential for overreacting to popular sentiment untenable. Georgia's patchwork legislation serves as an example of representative democracy and reveals its primary shortcomings—difficult application and inconsistent theories of punishment that undermine long-term governmental stability. In the short term, Iraq needs a criminal sentencing paradigm with a short learning curve to address the backlog of pending criminal cases. Over time, the representative democracy approach runs counter to Iraq's need for governmental stability. The U.S. Sentencing Guidelines serve as the model for delegated authority and reveal their primary shortcoming—the significant concentration of discretion in the prosecutor. After a totalitarian regime, the last thing Iraq needs is concentration of power in any one group. Furthermore, the potential for manipulation of facts in order to elicit pleas would undermine the legitimacy of a newly reformed Iraqi judicial system.

While insulated delegation is the least democratic method of establishing sentencing policy, it best addresses the needs of a post-Saddam Iraq. The Minnesota Sentencing Guidelines serve as the model for insulated delegation. There are four advantages to this model. First, the system is accountable to the electorate through appointment by elected officials. Second, this restriction on judicial discretion is least likely to lead to excessive punishment. Third, this system allows for judicial departure with an opportunity for appellate review to check arbitrary application. Finally, by basing the guidelines on the usual case, the learning curve for judges, prosecutors, and defense attorneys would be relatively short.

In conclusion, in light of the experience of various jurisdictions in the United States, to further the goals of a post-Saddam Iraq, a sentencing

commission based on the insulated delegation model, as illustrated by Minnesota's Sentencing Commission, should set criminal sentencing policy. A Minnesota-style system would not lead to excessive punishment, would protect punishment from arbitrary application, and would be feasible to implement and maintain.