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The Failure of Sentencing Guidelines: A Plea for Less Aggregation

Albert W. Alschuler†

The virtues of sentencing guidelines seem straightforward. When a judge may select a sentence for armed robbery anywhere from probation to twenty-five years (as a judge could in the federal courts until the federal sentencing guidelines went into effect),¹ he or she ought to welcome guidelines that provide a starting point. Statutory minimum and maximum sentences may tell a judge what to do with the least serious cases and the most serious, but they leave this judge at sea in evaluating cases in the middle. Moreover, although the problem of sentencing disparity may have been exaggerated, there undoubtedly are both Santa Clauses and Scrooges on the bench. An offender's punishment should not turn on the luck of the judicial draw or, worse, on a defense attorney's ability to maneuver the offender's case before a favorable judge. The vices of unconstrained discretion go beyond idiosyncrasy, caprice, and strategic behavior to invidious discrimination on the basis of race, class, gender, and the like.

These innocent, sensible propositions led to the sentencing reforms of the 1970s and 1980s. The thrust of most reforms was the reduction of sentencing discretion, both of judges and of parole boards. In 1976, the California Uniform Determinate Sentencing Act abolished the state's parole board and established statutory presumptive sentences for all serious offenses.² In the Federal Sentencing Reform Act of 1984, Congress abolished the United States Parole Commission, created a United States Sentencing Commission, and directed this agency to draft sentencing guidelines for the

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¹ See 28 USC § 2114 (1988); Jon Newman, *Federal Sentencing Guidelines: A Risk Worth Taking*, Brookings Rev 29 (Summer 1987).

² Cal Penal Code § 1170 (West, 1991).

federal courts.³ During the years between these two enactments, more than twenty states revised their sentencing laws.⁴ Several states abolished parole; several greatly narrowed the range of judicial discretion; and several promulgated sentencing guidelines, some drafted by sentencing commissions and some by judges.⁵ Pre-guidelines regimes emphasized individualized punishment; to a considerable extent, guidelines regimes substitute punishment based on aggregations of similar cases.

This Article focuses on the movement from individualized to aggregated sentences and argues that this movement has marked a backward step in the search for just criminal punishments. The Article treats the federal sentencing guidelines as its principal paradigm of excessive aggregation but discusses state guidelines and state and federal sentencing laws as well. The aggregative vices of sentencing guidelines are in fact multiplied by legislatively prescribed sentences—particularly by mandatory minimum sentences. Although sentencing by a commission may be preferable to sentencing by a legislature, neither is preferable to individualized sentencing. The sentencing reforms of the past fifteen years have pointed in some useful directions, but in their current form they are bankrupt. These reforms have had consequences that few of their proponents anticipated. Some things are worse than sentencing disparity, and we have found them.

Part I of this Article considers some functions of aggregation and suggests that sentencing guidelines reflect a general movement in legal and social thought toward greater aggregation. Part II examines a significant shift in penal philosophy that the move toward aggregated sentences has yielded: the shift to a harm-based penology. Situational and offender characteristics are as important as social harm in assessing sentences even from a “just deserts” perspective, but these characteristics are almost impossible to quantify and to describe in general language. In the world of sentencing guidelines, form dictates function, and guidelines have dis-

³ Sentencing Reform Act, Pub L No 98-473, 98 Stat 1987 (1984), codified at 18 USC § 3551 et seq (1988). The federal guidelines became effective on November 1, 1987, but many federal judges considered them unconstitutional and started to apply them only after the Supreme Court upheld their constitutionality fifteen months later in *Mistretta v United States*, 488 US 361 (1989).

⁴ See Sandra Shane-DuBow, Alice P. Brown, and Erik Olsen, *Sentencing Reform in the United States: History, Content, and Effect* (U.S. Dept. of Justice, Nat'l Inst. of Justice, 1985) (state-by-state survey); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Correction Act*, 72 J Crim L & Criminol 1550, 1551 (1981).

⁵ Shane-DuBow, Brown, and Olsen, *Sentencing Reform in the United States* at 290-92, Table 32, (cited in note 4).

regarded difficult-to-describe sentencing considerations. Apparently for linguistic and bureaucratic as well as criminological reasons, guidelines have focused on social harm and have dehumanized the sentencing process.

Part III focuses on the claim that guidelines have reduced disparity in sentencing. It contends that researchers who have made this claim have implicitly (and sometimes explicitly) adopted the harm-based norms of guidelines systems. Their findings have been self-fulfilling prophesies. Questions of equality and disparity include an unavoidable normative element and cannot be evaluated from a neutral mechanical perspective. In fact, when one adopts a forthright evaluative perspective, it becomes apparent that the pursuit of equality through sentencing guidelines often has yielded nonsense rules and inequalities.

Part IV describes some of the nonsense and inequality that the federal guidelines have produced. Part V notes the issues of conscience that arise when officials in Washington who lack knowledge of the facts of a case in Minneapolis have dictated a sentence for this case that no one with knowledge of the facts considers appropriate. Judges, prosecutors, and defense attorneys may evade and subvert sentencing guidelines, and this Part briefly considers how they do so. Part VI focuses particularly on plea bargaining as a technique for nullifying sentencing guidelines. Guidelines have confined the discretion of judges but increased the sentencing power of prosecutors.

Part VII examines the relationship between the aggregated sentences and a "severity revolution" in criminal sentences that has helped to double the population of America's prisons within the past decade. In the main, guideline sentences, like other aggregated sentences, are likely to be more severe than sentences based on judicial assessments of the facts of individual cases.

The failure of current sentencing guidelines warrants some retrenchment but does not warrant returning to a system of unguided discretion. Part VIII sketches an alternative approach: a system of guidelines without boxes in which a sentencing commission's resolution of specific, recurring sentencing issues and of paradigmatic cases would provide benchmarks for sentencing judges. In this system, appellate courts would review trial-court adherence to the sentencing commission's rules, statements of principles, and illustrative "normal case" benchmarks in much the same way that these appellate courts now review trial-court adherence to judicial precedent. The problem has not been sentencing guidelines but guidelines that have attempted too much.

I. SOME VIRTUES AND VICES OF AGGREGATION

Aggregation—the treatment of many cases all at once—is often appropriate. Indeed, all legal rules aggregate. Some rules may yield just results in nearly all the cases that fall within their terms. Others are “prophylactic”; they rest on oversimplified generalizations and sacrifice justice in some cases to such goals as certainty, predictability, economy, and ease of administration. In this Part, I consider aggregation as a general style of thought and as a means of promoting equality in sentencing.

A. Aggregation as a Style of Thought

Increased aggregation seems characteristic of current legal and social thought,⁶ and what I have called “the bottom-line collectivist-empirical mentality”⁷ now seems to threaten traditional concepts of individual worth and entitlement. Commentators speak misleadingly of “group rights.”⁸ Judges determine the scope of legal rules, not by examining the circumstances of individual cases, but by speculating about the customary behavior of large groups.⁹

⁶ See Judith Resnik, *The Domain of Courts*, 137 U Pa L Rev 2219, 2220 (1989) (noting the procedural aggregation of individual civil claims through multi-district litigation, bankruptcy, interpleader, class action, consolidation, and informal procedures, and suggesting that “federal courts have become less willing to attend to small cases and individual problems”).

⁷ Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 S Ct Rev 309, 346.

⁸ When an employer has discriminated against Hispanics in hiring, for example, these commentators conclude that the employer owes a remedy to Hispanics as a group. From their aggregative perspective, hiring more Hispanics is simply a matter of corrective justice even when the Hispanics whom the employer might hire are not the Hispanics whom this employer injured. See, for example, Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, in Michael Namorato, ed, *Have We Overcome: Race Relations Since Brown* 173, 179 (Mississippi, 1978) (“At the heart of many of the confusions . . . is the prevailing view that individual and not group rights are at stake in any lawsuit challenging racial discrimination.”).

The recognition of group rights may be an appropriate means of accomplishing general social objectives. As Lloyd Weinreb has observed, however:

Justice as desert . . . is insistently individual. Desert can no more be transferred among members of a racial or ethnic group than it can be transmitted from one generation to the next. References to justice in connection with groups . . . are, strictly, either collective references to individual justice or arguments about social utility.

Lloyd L. Weinreb, *Natural Law and Justice* 229 (Harvard, 1987).

⁹ In *United States v Leon*, 468 US 897 (1984), the Supreme Court held that even the deliberate violation of the Fourth Amendment by a magistrate would not result in the exclusion of unlawfully seized evidence. The Court hypothesized that magistrates as a group violate the Constitution less frequently than police officers as a group: “[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme

Judges review the aggregate management of school districts, hospitals, and prison systems.¹⁰ Social scientists treat injustices as unimportant whenever they are "atypical." We seem increasingly indifferent to individual cases and small numbers.

Of course widespread injustice is more to be deplored than isolated injustice, but atypical cases matter. The injustice that occurs in a single case is not diminished because it does not occur in others, nor is it diminished by the fact that it makes only a ripple in statistical patterns. The issue is not whether the injustice is "typical" but whether institutional arrangements make it more frequent than it needs to be. Indeed, most of the safeguards of our legal system exist for atypical cases.¹¹

B. Aggregation, Guidelines, and Grids

When rules impose severe personal deprivation and moral stigma, the utilitarian objectives of prophylaxis and simplified administration may seem unimportant. Every unnecessary year of imprisonment imposes heavy costs on both the public treasury and the prisoner, and inadequate punishment can cost potential crime victims still more. Even from a purely utilitarian perspective, these stakes are high enough that careful, individualized inquiry is likely to be worth the burden.¹² When sentencing reformers favor "just deserts" in sentencing, moreover, sacrificing this apparently non-

sanction of exclusion." Id at 916.

If, however, magistrates are less inclined to ignore or subvert the Fourth Amendment than police officers, the application of the exclusionary rule to their conduct would simply result in the exclusion of evidence less often. The Supreme Court did not explain why it was appropriate to judge occupational groups rather than individuals. The Court might as reasonably have applied the exclusionary rule to the products of unlawful searches by one police department and not another on the ground that the first department was more "inclined to ignore or subvert the Fourth Amendment."

Critics of *Leon* have challenged the accuracy of the Supreme Court's occupational generalization. They have suggested that magistrates tend to "rubberstamp" police requests for search warrants so that these officials often do subvert the Fourth Amendment. See, for example, Donald Dripps, *Living With Leon*, 95 Yale L J 906, 916-17 (1986). For the most part, however, the critics have challenged only the accuracy of the Supreme Court's generalization, not the appropriateness of generalizing. *Leon's* defenders and its detractors have battled over crude, irrelevant group judgments, and their style of thought has become so commonplace that we may not pause to notice the issue.

¹⁰ See generally Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv L Rev 4 (1982).

¹¹ See Albert W. Alschuler, *Book Review of Charles E. Silberman, Criminal Violence, Criminal Justice*, 46 U Chi L Rev 1007, 1020-21 (1979).

¹² In other words, what economists call error costs are likely to dwarf the costs of inquiry.

utilitarian imperative to the cost-savings that prophylactic rules may produce is incongruous.

In fact, sentencing guidelines are unlike many other prophylactic rules; they do not save work or money.¹³ Developing, revising and administering sentencing guidelines is expensive. The United States Sentencing Commission will spend \$9.6 million during fiscal 1991.¹⁴ Ninety percent of the judges who responded to a survey by the Federal Courts Study Committee reported that the federal guidelines had made sentencing procedures more, not less, time-consuming.¹⁵ Moreover, to implement sentencing guidelines effectively, Congress authorized the appellate review of sentences at the behest of either the defendant or the prosecutor.¹⁶ Sentencing review had been almost nonexistent before the guidelines became effective, but our overburdened federal appellate courts probably now decide about 1000 cases each year concerning application of the guidelines.¹⁷

The principal argument for sentencing guidelines is not ease of administration. It is that, although aggregated sentences may prove unjust in many cases, they limit the play of judicial personality and inhibit discrimination on racial and other grounds. The injustice produced by grouping unlike cases, in other words, is justified as a means of preventing greater injustices.

The picture drawn by the proponents of sentencing guidelines was attractive; every sentence would be determined with knowledge of how judges had treated like cases in the past and with the benefit of the commission's deliberations concerning these cases. For the most part, however, sentencing commissions have not considered cases.¹⁸ They have considered aggregations of

¹³ For the moment, I consider only the costs of administering sentencing systems, not the costs of carrying out the sentences that these systems impose. This Article will suggest, however, that aggregated sentences tend to be more severe (and more costly) than individualized sentences. See Section VII.D.

¹⁴ *Budget of the United States Government: Fiscal Year 1992* Pt 4 at 195 (OMB, 1990).

¹⁵ *Report of the Federal Courts Study Committee* 137 (Apr 2, 1990).

¹⁶ 18 USC § 3742 (1988).

¹⁷ LEXIS counts nearly 1100 court of appeals cases decided in 1990 in which judges used the words "sentencing guidelines." LEXIS, Genfed library, USApp file (Apr 22, 1991). Some of the cases that contained these words may not have concerned application of the guidelines, but the overwhelming majority probably did. By contrast, the phrase "Title VII" appeared in fewer than 450 court of appeals cases decided in 1990 and the acronym "RICO" in fewer than 250 (excluding cases in which this acronym was preceded by "PUERTO" but not cases in which the word might have named a person rather than a statute).

¹⁸ Malcolm Feeley and Jonathan Simon have argued that a "new penology" focusing on "the management of aggregate populations" has replaced an "old penology" which "focused on individuals." Malcolm M. Feeley and Jonathan Simon, *The New Penology: Reformu-*

cases.¹⁹ Moreover, in constructing sentencing guidelines, commissions have chosen a format that makes the disregard of relevant circumstances especially likely—a comprehensive sentencing grid.

In constructing such a grid, a commission considers the seriousness of various offenses in the abstract and arrays these offenses from the most to the least serious along one axis. It devises a means of scoring the seriousness of offenders' criminal histories and arrays criminal history scores along the other axis. Score the crime, score the defendant's prior record, and where the axes intersect, the grid specifies a sentence or sentencing range. The judge may move up a box or two to adjust for aggravating circumstances like carrying a weapon, or down a box or two to adjust for mitigating circumstances like accepting responsibility for the crime.²⁰ Where the judge's finger stops, he or she finds the answer.

Of course the sentencing commission will have checked its scheme against some cases and will have made some adjustments, but it will not have thought very much about where most cases will land on its gameboard of boxes. As the sentencing commission ranks offenses on its grid, one commissioner may ask, "Shouldn't our policy be to send white-collar offenders to prison?" Another may reply, "Oh yes, prison has a marvelous deterrent effect in white-collar cases." The commissioners are not wrong, but as this Article will suggest, both offenders and the public are entitled to a better, less aggregated procedure.²¹

lating Penal Objectives and Implications for Penal Growth, in *Growth and Its Influence on Correctional Policy: Perspectives on the Report of the Blue Ribbon Commission* (Guggenheim Criminal Justice Program, Berkeley, 1990).

¹⁹ Indeed, as I have argued elsewhere, the federal Sentencing Commission provided "not merely sentencing by computer but something more Orwellian—methodologically flawed sentencing by computer." In assessing current sentencing practices, it used as its baseline only cases in which offenders had been sentenced to imprisonment. Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 FRD 459, 467-68 (1988).

²⁰ The Minnesota Sentencing Guidelines, unlike the federal guidelines, list aggravating and mitigating factors without specifying their weight. See *Minnesota Sentencing Guidelines and Commentary* § II.D.2 at 18-20 (1984). The guidelines declare that the listed aggravating and mitigating circumstances as well as unlisted ones may justify departure from the guidelines' narrow penalty ranges. At the same time, these guidelines forbid departure "unless the individual case involves substantial and compelling circumstances." *Id.* at § II.D. The Washington State guidelines are equally confusing. See Andrew von Hirsch, Kay A. Knapp, and Michael Tonry, *The Sentencing Commission and its Guidelines* 182-85 (North-eastern, 1987).

²¹ Defenders of sentencing guidelines sometimes suggest that grids merely provide a convenient way of expressing judgments that could be expressed verbally. Their argument is correct, but a grid makes it easy to assign sentences to cases without thinking about the cases. Moreover, the very use of a sentencing grid makes some sentencing decisions *de facto*.

The federal sentencing guidelines reflect a more ambitious effort to confine discretion than any current state guidelines. The federal sentencing grid has 258 boxes—more than anyone else's. The Sentencing Reform Act encouraged this proliferation of boxes by requiring the Sentencing Commission to specify a range of sentences for "each category of offense involving each category of defendant" and also by providing that whenever a term of imprisonment is authorized (every one of the 258 boxes does specify such a term²²) "the maximum of the [sentencing] range . . . shall not exceed the minimum . . . by more than . . . 25 percent or 6 months," whichever is greater.²³ In addition to insisting upon an extremely narrow sentencing range for every guidelines category, the Sentencing Reform Act allowed judges to depart from the guidelines only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed."²⁴

II. THE MOVE TO A HARM-BASED PENOLOGY

In principle, a comprehensive sentencing grid might work. In practice, this approach has yielded a profound and disturbing change in penal philosophy. It has led to the substitution of crime tariffs for the consideration of situational and offender characteris-

Absent special adjustments, for example, a grid ensures that an increase in an offender's criminal history score will increase her sentence at about the same rate regardless of the current offense.

A grid also is likely to limit judicial consideration of the extent to which the offenses included in an offender's criminal history are similar to her current offense. Two prior drunk driving convictions within the past year might have a greater bearing on whether a drunk driver should be imprisoned than a burglary conviction four years ago, but the burglary conviction might contribute more to the driver's criminal history score. In deciding whether an offender is a professional thief, a prior theft conviction is more significant than a conviction for participating in a barroom fight. In judging whether the offender is quick to resort to violence, however, the barroom fight is the more relevant crime. On a sentencing grid, criminal history is not a story but a score, and all criminal history, once scored, is fungible with all other criminal history.

²² In this respect, the federal sentencing grid differs from most state grids. On the state grids, a line separates the boxes that dictate imprisonment as the presumptive penalty from those that prescribe sanctions other than incarceration. Although the federal guidelines authorize nonincarcerative sanctions for minor crimes, they provide no "in-out" line; they always authorize a sentencing judge to impose a sentence of imprisonment. The Sentencing Commission thus disregarded Congress's directive to provide guidance concerning the choice among prison, fines, and probation. 28 USC § 994(a)(1)(A) (1988).

²³ 28 USC § 994(b) (1988).

²⁴ 18 USC § 3553(b).

tics in even simple and recurring cases. The focus has been on harms, not people.

Nothing in the objectives of the sentencing reform movement dictated this change in emphasis. Equality in sentencing suggested only regularizing current practices, not changing them. Truth in sentencing (another objective of some reformers²⁵) required only the disclosure, not the alteration, of current practices. Some reformers objected to our rehabilitative rhetoric and made retribution (rechristened "just deserts") their battle cry.²⁶ But offenders who have produced comparable harms differ greatly in culpability. A system grounded on "just deserts" need not—indeed should not—focus primarily upon harm.²⁷

Andrew von Hirsch has written, "On a rationale emphasizing proportionality and desert, the factor primarily to be relied upon is the seriousness of the offender's present crime."²⁸ Although von Hirsch offered this statement as a self-evident truth, it seems to me a self-evident falsehood. Desert and proportionality have as much to do with human beings and their circumstances as they have to do with harm.

Imagine that a brutal man (call him Joel Steinberg) and a lover whom he has physically abused for years (call her Hedda Nussbaum) have participated in the same act of child abuse. Imagine further that the battered woman participant has no defense of insanity or duress but that she comes close. The seriousness of the

²⁵ See United States Sentencing Commission, *Sentencing Guidelines Manual* Ch 1 at 2 (1989) ("Guidelines Manual").

²⁶ See Andrew von Hirsch, *Doing Justice: The Choice of Punishments* vii (Northeastern, 1976).

²⁷ For further development of the argument that a retributive or "just deserts" approach to sentencing requires the consideration of offender characteristics no less than a rehabilitative approach, see Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U Pa L Rev 550, 555-63 (1978). What I prophesied in this paper a dozen years ago may have come to pass:

We may find ourselves thinking: "Don't tell us that a robber was 'retarded'. We don't care about his problems. We don't know what to *do* about his problems, and we are no longer interested in listening to a criminal's sob stories. The most important thing about the robber is simply that he is a robber. He committed the same crime as Bonnie and Clyde." Should this sort of sentiment prevail, we will almost certainly have lost something . . . as human beings. One need not know what to do about an offender's problems in order to regard those problems as highly relevant to the punishment that he should receive.

Id at 558.

²⁸ Andrew von Hirsch, *Guidance by Numbers or Words? Numerical Versus Narrative Guidelines for Sentencing*, in Martin Wasik and Ken Pease, eds, *Sentencing Reform: Guidance or Guidelines?* 46, 49 (Manchester, 1987).

crime (judged in the abstract) is the same for both offenders. Still, I think that their "desert" differs greatly and that imposing identical sentences would offend ordinary concepts of "proportionality." The suggestion that "desert" or "retribution" demands a focus on the offense rather than the offender is misconceived.

The United States Court of Appeals for the Fourth Circuit voiced a common misperception: "One of Congress's primary purposes in establishing the Guidelines was . . . to rest sentences upon the offense committed, not upon the offender."²⁹ The statute that created the Sentencing Commission, however, directed courts to consider both the "nature and circumstances of the offense" and the "history and characteristics of the defendant."³⁰

This statutory provision and others expressly require both judges and the Sentencing Commission to take account of offender characteristics.³¹ Nevertheless, Judge Pierre Leval has written:

Offender characteristics have been virtually excluded from the guideline grid calculation leading to the presumptive sentence. . . . If this were the entire story of the Commission's discharge of its statutory duties, a serious question would arise whether the Guidelines must be struck down for failure to conform to the governing statute.³²

Judge Leval concluded that the guidelines were consistent with the statute only because the Sentencing Commission had not attempted to constrain substantially the power of judges to depart from them.³³

In relying upon the departure power, Judge Leval may have been too optimistic. Since he wrote, a number of appellate decisions have discouraged use of the departure power. The United

²⁹ *United States v McHan*, 920 F2d 244, 247 (4th Cir 1990). See also *United States v Brewer*, 899 F2d 503, 507 (6th Cir 1990); *United States v Mejia-Orosco*, 867 F2d 216, 218 (5th Cir 1989).

³⁰ 18 USC § 3553(a)(1).

³¹ See 28 USC § 994(b)(1) (the Sentencing Commission shall establish a sentencing range "for each category of offense involving each category of defendant"); 28 USC § 991(b)(1)(c) (sentences should "reflect to the extent practicable advancement in knowledge of human behavior as it relates to the criminal justice process"); 18 USC § 3552 (requiring a pre-sentence investigation of the defendant and authorizing additional psychological examination when appropriate). But see 28 USC § 994(e) (declaring the "general inappropriateness" of considering some offender characteristics that the preceding subsection had instructed the Commission to consider "to the extent that they do have relevance"—the inclusion of both provisions was apparently the work of a congressional committee attempting to reconcile different versions of the Sentencing Reform Act).

³² *United States v Rodriguez*, 724 F Supp 1118, 1120 (S D NY 1989).

³³ *Id* at 1120-21.

States Court of Appeals for the First Circuit held that neither a pregnancy that would terminate during a prison term prescribed by the guidelines, nor any crime-inducing pressure from the defendant's husband short of a threat of violence, nor the absence of a half-way house in which the defendant could serve her sentence justified a departure from the guidelines.³⁴ The Sixth Circuit held that a defendant's responsibility for the care of small children did not justify any departure.³⁵ The Third Circuit held that a defendant's victory over the drug addiction that had led to his crime did not warrant a departure.³⁶ And the Seventh Circuit held that the mental illness of a person convicted of writing threatening letters to President Reagan did not justify any departure from a guidelines sentence of more than four years without possibility of parole.³⁷

In the Seventh Circuit case, the defendant, a victim of long-term sexual abuse by her father, believed that her now deceased father had commanded her to commit the crime. She long had threatened public officials without acting on one of her threats and had spent much of her adult life in prisons and mental hospitals largely because of these threats. Although, according to the court, "all concede that she never intended to carry out her threats,"³⁸ the guidelines directed that she be sentenced as severely as "a terrorist whose plan was thwarted only by chance."³⁹ After concluding that the defendant had committed a "violent" rather than a "non-violent" offense, the court ruled en banc that the guidelines "categorically limit[] authority to depart on the basis of mental incapacity to cases in which the defendant has committed only non-violent

³⁴ *United States v Pozzy*, 902 F2d 133, 138-40 (1st Cir 1990).

³⁵ *Brewer*, 899 F2d at 508. For criticism of the *Brewer* and *Pozzy* decisions and discussion of the extent to which the guidelines do preclude the consideration of offender characteristics, see Marc Miller and Daniel J. Freed, *Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 Fed Sent Rptr (Vera) 3 (June-July 1990).

³⁶ *United States v Pharr*, 916 F2d 129, 132 (3d Cir 1990). The fact that a jail sentence might disrupt the defendant's long-term treatment was also immaterial. *Id.* at 133. But see *United States v Maddalena*, 893 F2d 815, 818 (6th Cir 1989) (The trial judge "may, but need not, consider the defendant's efforts to stay away from drugs as a basis for departing from the guidelines.").

³⁷ *United States v Poff*, 926 F2d 588 (7th Cir 1991) (en banc).

³⁸ *Id.* at 590-91.

³⁹ The quoted language is from Judge Easterbrook's dissenting opinion, *id.* at 595. In some circumstances, the sentencing guidelines treat offenders who intended to act on their threats more severely than offenders who did not, but this distinction becomes immaterial when an offender is sentenced as a "career criminal" (as the defendant in *Poff* was).

offenses.”⁴⁰ The defendant’s mental illness therefore could not offer a basis for departure, however severe and disabling this illness might have been.

The court’s reading of the guidelines was plainly erroneous (though not for any reason noted by counsel or the dissenting judges).⁴¹ More importantly, neither the majority opinion nor the dissent indicated why the Sentencing Commission would have had authority to “categorically limit” the power of judges to depart from the guidelines had it wished to do so. Courts generally do not bow to directives from administrative agencies, abandoning powers conferred on the courts by statute. Yet neither the majority nor the dissenting opinion mentioned the statutory departure power. The Sentencing Reform Act authorizes departure whenever “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 guidelines.”⁴²

Under this provision, the Seventh Circuit should have asked whether the Sentencing Commission had adequately considered the mitigating circumstances of the defendant’s case when it prescribed the same sentence for her as for a calculating, clear-minded

⁴⁰ Id at 593.

⁴¹ The court relied on the following guidelines language: “If the defendant committed a *non-violent* offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted” *Guidelines Manual* § 5K2.13 (cited in note 25) (emphasis added). In the context of a different provision concerning “career offenders,” the guidelines define “crime of violence” to include a crime of *threatened* violence. Id at § 4B1.2(1). Only the fact that the defendant’s past threats were “crimes of violence” made her a “career criminal” subject to a minimum fifty-one-month sentence in the absence of any departure. Because the defendant had committed a “crime of violence,” the Seventh Circuit majority (Judge Flaum joined by Judges Bauer, Cummings, Wood, Ripple, and Kanne) concluded that the guidelines had “categorically” precluded departure. *Poff*, 926 F2d at 592-93.

The dissenting judges (Judge Easterbrook joined by Judges Cudahy, Posner, Coffey, and Manion) contended that, although the defendant’s threats were “crimes of violence” for one purpose (applying the guidelines’ “career criminal” provision), they were “non-violent offenses” for another purpose (applying the guidelines provision authorizing departure in cases of diminished mental capacity). Id at 594-95.

Neither the majority nor the dissent explained why the Sentencing Commission’s *authorization* of departure in cases of non-violent crime *precluded* departure in all other cases of mental disability. Compare *Guidelines Manual* § 5H1.3 (“Mental and emotional conditions are not *ordinarily* relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five.”) (emphasis added) with id at § 5K2.0 (“Circumstances that may warrant departure from the guidelines . . . cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing.”).

⁴² 18 USC § 3553(b).

terrorist. To ask this question would have been to answer it. Under the statute, moreover, whether a case presents aggravating or mitigating circumstances not adequately considered by the Commission is for the judiciary to resolve, not for the Sentencing Commission to settle through posturing general language.⁴³ In its deference to the Sentencing Commission and its extended, technical parsing of language well removed from the issue, the Seventh Circuit's decision illustrates the mechanistic spirit of our times.

The leading New Jersey decisions on sentencing reform similarly illustrate the tendency of judges to attribute a harm-based penology to a legislature that in fact had disavowed this approach. The New Jersey Supreme Court declared that "the new sentencing philosophy of the [state's penal] Code . . . was offense-oriented and did not focus on the rehabilitation of offenders."⁴⁴ It added in another case that the new Code based sentences on "the gravity of the offense and not the blameworthiness of the offender" and that the Code "require[d] an inexorable focus upon the offense when formulating a sentence."⁴⁵

The court failed to mention the New Jersey legislature's own statement of its objectives, which said in part: "The general purposes of the provisions governing the sentencing of offenders are . . . (2) to promote the correction and rehabilitation of offenders"⁴⁶ In its entirety, this legislative statement of goals effectively declared, "We endorse the entire textbook list of the purposes of punishment; we want to do it all." Language of this generality offers little guidance, but it should have precluded a declaration that the legislature had disavowed rehabilitation and mandated "an inexorable focus on the offense."

The New Jersey court did mention that the legislature had provided a list of mitigating factors for judges to consider. The court did not describe the list, whose contents focused almost entirely on offender characteristics rather than offenses.⁴⁷ Moreover, unlike Congress and the legislatures of a number of other states,

⁴³ See Alschuler, 117 FRD at 463-65 (cited in note 19).

⁴⁴ *State v Hodge*, 95 NJ 369, 471 A2d 389, 392 (1984).

⁴⁵ *State v Roth*, 95 NJ 334, 471 A2d 370, 382, 388 (1984).

⁴⁶ NJ Stat Ann § 2C:1-2(b) (West 1982).

⁴⁷ For example: "The defendant . . . has led a law abiding life for a substantial period of time before the commission of the present offense." "The character and attitude of the defendant indicate that he is unlikely to commit another offense." "The defendant is particularly likely to respond affirmatively to probationary treatment." "The imprisonment of the defendant would entail excessive hardship to himself or his dependents." "The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant." NJ Stat Ann § 2C:44-1(b).

the New Jersey legislature did not abolish parole when it enacted sentencing-reform legislation.⁴⁸ If New Jersey judges now are to focus upon offenses rather than offenders, one wonders what the focus of the New Jersey parole board should be. Perhaps, like the members of different trade unions, judges are to specialize in offenses and the members of the parole board in offenders. The alternative would be for parole authorities to reevaluate the judges' and the legislature's assessment of the seriousness of offenses.

The retention of a system of parole or "indeterminate sentencing" reveals the New Jersey legislature's emphasis on offender characteristics as clearly as its repeated declarations on this subject. The state supreme court appears simply to have projected its own penology onto the legislature.⁴⁹

The change in sentencing philosophy that sentencing guidelines and sentencing reform legislation have produced may be attributable partly to limitations of language. Describing the appropriate influence of situational and personal characteristics on punishment is difficult. Sentencing guidelines have become crime tariffs in part because it is easier to write them that way.

We may sense, for example, that stranger and non-stranger crimes should ordinarily be treated differently. Violence directed against a stranger typically grows out of predatory, instrumental, professional crime or else is the product of sadism. Its terror proceeds partly from its suddenness and from the victim's inability to know where it will stop. Violence directed against a non-stranger typically reflects anger (sometimes sustained, sometimes momentary), provocation (sometimes real, sometimes imagined), and complex, difficult-to-untangle emotions that have developed over the course of an intimate, social, or working relationship. The victim often understands the genesis of this violence and, in most cases, senses that it is likely to stop short of homicide. Nevertheless, a sentencing guideline that directed a judge to reduce a sentence two levels whenever an offender knew his or her victim would be strange. Why reduce a mugger's sentence simply because he or she knew the person whom he or she attacked? The unworkability of this guideline would force us to consider alternatives, and the unworkability of these alternatives (and the next ones) would force us

⁴⁸ NJ Stat Ann § 30:4-123.51 (most inmates eligible for parole after serving one-third of their sentences).

⁴⁹ For an indication of one consequence of the court's twisting of the statute, see note 105.

to confront the inadequacy of our categories. Appropriate sentences depend upon circumstances that we cannot quite name.

In assessing personal and situational characteristics, we might be reminded of a frustrated comment upon language that has become Justice Potter Stewart's most noted line—"I know it when I see it."⁵⁰ Sentencing commissions can quantify harms more easily than they can quantify circumstances. Commissions count the stolen dollars, weigh the drugs, and forget about more important things.

Despite the apparently common view that the desirability of a harm-based sentencing system presents a serious "philosophical" issue, it is difficult to discern any penological argument for such a system. Making "the punishment fit the crime" might serve deterrent purposes if particular punishments were well publicized ("Use a gun and do five years"), but when a harm-based system is complicated enough to require a 258-box sentencing grid, the system does not seem to offer any deterrent advantage. No one expects potential offenders to study the grid. Instead, a harm-based guidelines system relies on the same amorphous style of deterrence as traditional sentencing systems. As sentences are imposed in a series of cases, potential offenders "get the general idea."

Some harm-based systems might be easier to administer than traditional sentencing systems; but as this Article has noted, administrative simplicity is not a virtue of the federal sentencing guidelines. Moreover, everyone seems agreed that rehabilitative and incapacitative goals focus more on offenders than offenses. If, as I have suggested, "desert" also depends more on individual blameworthiness than on social harm, no penological argument for a predominantly harm-based system remains. The talk of sentencing "philosophy" may be in part a pretence. The reasons for a harm-based system are more linguistic than penological. The medium has become the message.

III. A MECHANISTIC VIEW OF EQUALITY

Researchers generally have concluded that sentencing guidelines have reduced disparity,⁵¹ but aggregation is likely to produce

⁵⁰ *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart concurring). Justice Stewart is said to have been unhappy that many people seemed to know him only as the author of this statement.

⁵¹ See Michael Tonry, *Structuring Sentencing*, in Michael Tonry and Norval Morris, eds, 10 *Crime & Justice* 267, 309-11 (Chicago, 1988); Stevens H. Clarke, *Felony Sentencing in North Carolina 1976-1986: Effects of Presumptive Sentencing Legislation* 10 (Institute of Government, UNC at Chapel Hill, 1987) ("the net effect of the [Felony Sentencing Act] has been to reduce . . . variation in felony sentences" although this initial effect of the Act

equality of a delusive sort. Consider as an extreme example a sentencing system with just one rule: "All offenders—murderers, embezzlers and litterers alike—shall be sentenced to five-year prison terms." The uniformity produced by this system would not conform to most understandings of equal justice. Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases. Excessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality.⁵²

Even very narrow rules can be capricious. A rule might, for example, determine every offender's punishment on the basis of his or her maternal grandmother's astrological sign. The consistent application of this rule would not produce equal justice. Equality refers to a sense that like cases are treated alike; and we perceive "likeness" in terms of principles, standards and values. These values need not always be our own, but they must be close enough that we consider them coherent. We cannot conclude that like cases are treated alike when we cannot discover a more plausible organizing principle than Grandma's birthday.

The social scientists who have proclaimed sentencing guidelines successful in reducing disparity have missed this point. Many of them appear to have treated equality as a self-defining concept, overlooking its normative character. These researchers typically have discovered that most offenders convicted of the same offense (or grouped in some other easily measured way) have received similar sentences. Moreover, the offenders' sentences would not have been so closely grouped in an earlier, less aggregated sentencing regime.⁵³

now appears to have "worn off"); Minnesota Sentencing Guidelines Commission, *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation* v (1984) ("Disparity in sentencing decreased under the Sentencing Guidelines."); Terance D. Miethe and Charles A. Moore, *Socioeconomic Disparities under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 *Criminol* 337, 360 (1985) (Minnesota "was largely successful in reducing preguideline disparities."); Pennsylvania Commission on Sentencing, *1983 Report: Sentencing in Pennsylvania* i (1984) ("It appears that Pennsylvania's guidelines are accomplishing their intended goal[] of reducing unwarranted disparity."); Washington State Sentencing Guidelines Commission, *Preliminary Evaluation of Washington State's Sentencing Reform Act* 7 (1986) ("The Sentencing Reform Act has clearly increased consistency in the imprisonment decision.").

⁵² The Tyrant of Dystopia beheads his subjects for all crimes from speeding to treason. He and other law-abiding Dystopians take pride in their system, insisting that they have achieved perfect equality.

⁵³ Some researchers have taken a fancier road to the same conclusion. They have determined what variables have best predicted sentences in both the preguidelines and post-guidelines periods. Then they have pronounced sentencing guidelines successful in reducing

These findings do not justify the conclusion that sentencing guidelines have reduced disparity. They reveal only that the new regime has more consistently applied its own standards. Because sentencing judges in the earlier regime did not purport to apply these standards, this result is unsurprising. The guidelines have taken out more-or-less what they have put in, and researchers have concluded in effect, "Judges in our guidelines system have come closer to following the guidelines than judges did before the guidelines were invented."⁵⁴

The guidelines regime may merely have produced different groupings. For example, this regime may have come closer to treating all offenders who committed the same crimes alike, but it may not have been as successful in treating offenders of comparable culpability alike. Researchers have not shown that the new groupings are more consonant with ordinary concepts of equality than the old ones. Indeed, when the guidelines rest on nonsense standards (as the next section of this Article will contend that some of them do), it may be the judges of the older regime who treated offenders more equally.⁵⁵ Social scientists have invoked undefended and sometimes indefensible concepts of equality in giving favorable marks to guidelines systems.

This argument might be phrased more generally. Unless two sentencing systems employ the same sentencing criteria (and unless the criteria are so uncomplicated that the systems' success in applying these criteria can be measured), which system produces greater "disparity" cannot be evaluated empirically. Because pre-

disparity when circumstances like "offense of conviction" exhibited greater predictive power following implementation of the guidelines. See, for example, Miethe and Moore, 23 *Criminol* at 357-61 (cited in note 51).

⁵⁴ Some researchers have recognized the artificiality of empirical efforts to study disparity but have proceeded anyway. See Kay A. Knapp, *The Sentencing Commission's Empirical Research*, in von Hirsch, Knapp, and Tonry, *The Sentencing Commission and Its Guidelines* at 107 (cited in note 20). After recognizing that "disparity cannot be defined without a specification of rationale" and that "[p]rior to guideline implementation, an explicit policy is usually missing," Knapp proposes that "[i]n a state such as Minnesota where the principal dimensions of the guidelines are the gravity of the current crime and the extent of the criminal record, a study of disparity can use the same data base as the study of preguideline practice." *Id.* at 114.

⁵⁵ Ilene Nagel, a member of the United States Sentencing Commission, has written, "[W]hile every effort was made to treat like offenders alike, less attention was given in the first set of guidelines, partly because of time constraints, to the possibility of over or under-defining like offenders. That is, the emphasis was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 *J Crim L & Criminol* 883, 934 (1990).

guidelines systems and guidelines systems have not purported to apply the same criteria, *all* empirical efforts to determine whether guidelines have “reduced disparity” are misguided.

A social scientist can determine only whether guidelines have reduced particular kinds of disparity—kinds that the researcher or someone else has selected for study on normative grounds. For example, a social scientist can measure disparity among the sentences imposed on defendants who have been convicted of the same crime; disparity among the sentences imposed on defendants with identical criminal records; disparity among the sentences imposed on defendants who have been cajoled into crime, who suffered mental disability, who made restitution to their victims, and who now exhibit remorse; and disparity among the sentences imposed on defendants who committed crimes while wearing sneakers and shouting obscenities in cities of more than 225,000 people. Every empirical effort to measure disparity rests implicitly on a normative concept of appropriate sentencing criteria. And every favorable evaluation of sentencing guidelines has put a rabbit into the researchers’ hat by accepting criteria of the same sort as those incorporated in the guidelines.

IV. EQUAL NONSENSE FOR ALL

Quantitative studies cannot reveal whether guidelines have produced greater equality in sentencing. But Yogi Berra had it right: you can observe a lot by just watching.⁵⁶ You need not look far in fact to observe troubling inequalities produced in the name of equality by sentencing guidelines. In *Chapman v United States*,⁵⁷ for example, the Supreme Court held that a court must weigh blotter paper, gelatin cubes, and sugar cubes containing LSD along with the drug itself in determining an LSD dealer’s sentence. Both mandatory minimum sentencing statutes and, when these statutes are inapplicable, the sentencing guidelines make a dealer’s sentence dependent on the weight of the “mixture or substance” containing the LSD. The Supreme Court construed this language to mean what it appears to say and to require weighing the “carrier medium” as well as the drug. Then it held that basing sentences on the weight of sugar, gelatin, and blotter paper would not raise

⁵⁶ As this Section will reveal, Berra might have spoken of the United States Sentencing Commission when he coined another aphorism: “You have to be very careful if you don’t know where you’re going, because you might not get there.”

⁵⁷ 111 S Ct 1919 (1991), rehearing denied, 1991 US Lexis 4046.

"grave doubts" concerning the constitutionality of the statutes and the guidelines.⁵⁸

A "hit" of LSD impregnated in a sugar cube, however, weighs much more than the same hit in a piece of blotter paper. Under the guidelines, a dealer is likely to pay an awesome price for the crime of using sugar rather than paper. The Supreme Court noted that the guidelines sentence for a first offender who sold 100 doses of LSD in sugar cubes would be 188 to 235 months. The dealer's sentence would have dropped by two-thirds (to 63 to 78 months) had he or she sold the same quantity of LSD in blotter paper. The sentence would have been cut more than in half again (to 27 to 33 months) if the dealer had chosen gelatin capsules. And the sentence would have been cut in more than half again (to 10 to 16 months) if the dealer had sold the LSD in pure form.⁵⁹

Still stranger anomalies might occur. LSD is commonly taken after dissolving the drug in a liquid, and a person who dissolved a single dose in a glass of orange juice would be subject to a mandatory minimum sentence of ten years.⁶⁰ A person who sold 199,999 doses in pure form without any "carrier medium" would be subject only to a five-year minimum.⁶¹ One of the defendants in the case that came before the Supreme Court had received the same sentence for selling 12,000 doses of LSD that he would have received for selling somewhere between one and two million doses of heroin.⁶²

The Supreme Court did recognize limits to what a sentencing court could properly place on the scales of injustice. The Court said, "The term [mixture] does not include LSD . . . in a car, be-

⁵⁸ Id at 1927-28. Most lower federal courts had reached similar conclusions. One judge, however, consulted a dictionary and ruled, strangely, that blotter paper was not a "substance." This ruling reduced the defendant's sentence from about fourteen years to two, and neither the defendant nor his crime changed a bit. *United States v Healy*, 729 F Supp 140 (D DC 1990). Another judge concluded that the water included in a rock of crack cocaine was not part of the relevant mixture or substance. *United States v Chester*, 48 Crim L Rptr (BNA) 1175 (D DC 1990).

Chapman avoided the incongruity of holding sentencing guidelines unconstitutional because, rather than promote equality, they did the opposite. A federal district judge, however, recently held one guidelines provision invalid on the ground that it violated the equality principle. *United States v Osborn*, 756 F Supp 571, 576 (N D Ga 1991) (federal sentencing guidelines are unconstitutional in treating a marijuana plant as the equivalent of 1000 grams of marijuana when no marijuana plant has been known to yield 1000 grams and when the average yield of the most commonly cultivated plant is about 340 grams).

⁵⁹ 111 S Ct at 1924 n 2.

⁶⁰ See *United States v Marshall*, 908 F2d 1312, 1332 (7th Cir 1990) (en banc) (Posner dissenting), aff'd as *Chapman*. If I were ever to try LSD, I am sure that law enforcement agents would break in at just the wrong moment.

⁶¹ Id at 1332-33 (Posner dissenting).

⁶² Id at 1334 (Posner dissenting).

cause the drug is easily distinguished from, and separated from, such a 'container.' The drug is clearly not mixed with [the] automobile; nor has the drug chemically bonded with . . . the car."⁶³ The Court, however, neglected the possibility that an LSD dealer might spill a small quantity of LSD on the back seat of her Mercedes-Benz and that the drug would then mix with the vehicle's upholstery to the same extent it customarily mixes with blotter paper. Whether to weigh the upholstery, the back seat, or the entire automobile in such a case might be problematic.

Both the Supreme Court and the Seventh Circuit (whose ruling the Court affirmed) responded to the inequity of the sentencing guidelines partly by advising drug dealers to take the economist's *ex ante* perspective. Judge Easterbrook wrote for the Seventh Circuit, "Any distributor concerned that sugar cubes weigh more than small squares of paper may reduce his exposure by choosing the lightest brand of paper as a medium."⁶⁴ Chief Justice Rehnquist added for the Supreme Court, "We note that distributors of LSD make their own choice of carrier, and could act to minimize their potential sentences."⁶⁵ In the Seventh Circuit, however, Judge Posner was unimpressed. He wrote in dissent, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."⁶⁶

Guidelines designed to promote equality have produced unequal results—results that scatter years of imprisonment almost by lottery. These results would have been inconceivable in the old regime of discretionary sentencing. Some judges are odd, but determining how many years to imprison someone by weighing sugar cubes and blotter paper is madness.⁶⁷

No other area of federal prosecution has consumed as many public resources or attracted as much attention in recent years as drug crime. Few other areas could have been expected to elicit as much study and reflection on the part of the Sentencing Commission. Even in the area of drug crime, however, Congress and the Commission appear to have pursued their goals of "uniformity" and "proportionality"⁶⁸ by placing cases in strangely defined groups and plucking numbers from the air.

⁶³ *Chapman*, 111 S Ct at 1926.

⁶⁴ *Marshall*, 908 F2d at 1325.

⁶⁵ *Chapman*, 111 S Ct at 1928 n 6.

⁶⁶ *Marshall*, 908 F2d at 1333 (Posner dissenting).

⁶⁷ If judicial decisions are determined partly by what judges have had for breakfast, one wonders what was in the orange juice of Congress, the Sentencing Commission, and the Supreme Court.

⁶⁸ See *Guidelines Manual* Ch 1 at 2 (cited in note 25).

Even were the weight of the carrier medium excluded, basing drug sentences on the weight of the drugs possessed would make little sense for many offenders. For example, a drug courier often does not know the amount, the value, or even the type of drug that he or she has been hired to carry. This offender is frequently a woman traveling with one or more children; she has been selected because a drug dealer thought her unlikely to match a drug courier profile. The dealer may have paid the courier a fee representing a small portion of the value of the drugs. To a person unaccustomed to substantial sums of money, however, this fee might have offered a substantial temptation to crime.

The government almost always charges the courier with possessing drugs with intent to distribute them—the same charge that it would have brought against the dealer. As with the dealer, the length of the courier's imprisonment will turn on the quantity of drugs carried, and years of imprisonment will depend on a circumstance of which she was unaware.⁶⁹

A recent Second Circuit decision illustrates how chance passes as equality under the kind of guidelines that sentencing grids and limitations of language lead sentencing commissions to write. In *United States v Joyner*,⁷⁰ a drug runner who had sold two vials of crack cocaine for ten dollars pleaded guilty to this crime. In calculating the quantity of crack on which the defendant's sentence would be based, the trial judge added the weight of 586 vials of crack that the defendant's supplier kept in his hat and that the police discovered following the runner's arrest. No evidence suggested that the runner knew how much crack was in his supplier's hat; but under the guidelines, the supplier's possession was "part of the same course of conduct . . . as the [runner's] offense of conviction."⁷¹ To avoid sentencing the runner as severely as the supplier, the trial judge made "adjustments" for the runner's "acceptance of responsibility" and "role in the offense"—a role that the judge characterized as "between 'minor' and 'minimal.'"⁷² These adjustments authorized the judge to select a sentence from a range of 63 to 78 months.

⁶⁹ "For example, a courier transporting fifty-five grams of crack earns a base level of 32 which, with no adjustments and no criminal record, translates to a guideline range of 121-151 months incarceration." Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 Fed Sent Rptr (Vera) 63 (Sept-Oct 1990).

⁷⁰ 924 F2d 454 (2d Cir 1991).

⁷¹ Id at 456, citing *Guidelines Manual* § 1B1.3 (cited in note 25).

⁷² Id at 456-57, citing *Guidelines Manual* §§ 3E1.1, 3B1.2 (cited in note 25).

The judge previously had sentenced the supplier to ninety months' imprisonment. Even after the adjustments that the guidelines authorized him to make in the runner's sentence, the judge concluded that a sentence for the runner so close to the supplier's would be "grossly" disproportionate. The judge considered the goal of avoiding disproportion among co-felons a "mitigating circumstance inadequately considered by the Sentencing Commission."⁷³ He therefore "departed" from the guidelines and imposed a sentence of forty months' imprisonment for the \$10 sale of two vials of crack.

The Second Circuit agreed that the weight of the 586 vials possessed by the supplier should have been added to the weight of the two sold by the defendant; but it reversed the trial judge's departure from the guidelines, insisting that he impose a sentence of at least sixty-three months for the \$10 sale. Making the runner's sentence proportionate to the supplier's, Judge Newman observed for the court, would make this sentence disproportionate to the sentences imposed on runners in other courts throughout the United States.

In the world of sentencing guidelines, disproportion apparently is necessary to achieve proportion, and turning a defendant's sentence on the fortuity of how much crack his supplier has in his hat is thought necessary to make sentences less capricious. Of course it also matters whether the supplier and his 586-vial, 39-gram hat have been captured. A judge can infer that every runner has a supplier, but when the supplier has slipped the net, the judge cannot infer the size of the supplier's stash. That, under the guidelines, is the decisive irrelevancy. In this topsy-turvy world, charts, adjustments, departures, and calculations of relevant conduct have displaced judgments concerning the facts of a case because judicial responses to the facts are likely to be subjective and inconstant.⁷⁴

The arbitrariness of the Federal Sentencing Guidelines extends beyond drug cases.⁷⁵ When I criticized the guidelines' restric-

⁷³ Id at 457.

⁷⁴ Compare *United States v Moon*, 926 F2d 204 (2d Cir 1991) (defendant who had attempted unsuccessfully to purchase a kilogram of cocaine from a source other than the one from which he did purchase it should not be sentenced as though he had possessed two kilograms; if, however, the defendant had intended to resell the kilogram that he actually purchased and the kilogram that he attempted to purchase to two *different* customers, the trial court should have sentenced the defendant as though he had possessed two kilograms rather than one).

⁷⁵ One example: the guidelines offer sentence reductions for "minor" and "minimal"

tion of probation unaccompanied by imprisonment,⁷⁶ a member of the Sentencing Commission, Judge Stephen Breyer, responded with a hypothetical case designed to show that the guidelines were not in fact severe.⁷⁷ Judge Breyer noted that the minimum sentence for a person who pleaded guilty to embezzling \$15,000 would be only one month of imprisonment—a month that the embezzler might be allowed to serve in night and weekend confinement.

Judge Breyer failed to note that, had this same embezzler refused to plead guilty, the guidelines would have multiplied her minimum sentence by a factor of four for failure to “accept responsibility” for her crime.⁷⁸ Moreover, a blackmailer who obtained half the proceeds of the embezzlement by threatening to reveal this crime to the authorities would, if convicted at trial, have been sentenced twice as severely as the embezzler herself. (That is, the blackmailer would have been sentenced twice as severely as the embezzler who had been convicted at trial; if convicted at trial, she would have been sentenced eight times more severely than the embezzler who had pleaded guilty.⁷⁹) Moreover, if the embezzler had purchased a \$15,000 diamond ring from a dealer who knew the illicit source of the funds that he received, the dealer would have been guilty of money laundering. He would, if convicted at trial, have been sentenced twenty-four times more severely than the embezzler who pleaded guilty, six times more severely than the embezzler convicted at trial, and three times more severely than the blackmailer convicted at trial.⁸⁰ None of these non-violent first offenders would have profited more than the embezzler herself; and again, these sentences are the product of guidelines whose goal was to promote uniformity in sentencing.

In the Seventh Circuit ruling requiring courts to weigh sugar cubes, blotter paper, and other “carrier-media,” Judge Easterbrook wrote: “Experience with the guidelines suggests . . . [that every] attempt to make the system of sentences ‘more rational’ carries costs and concealed irrationalities, both loopholes and unantici-

participation in an offense, and defendants sometimes argue that they should be charged with joining large conspiracies rather than small ones. The larger the conspiracy, the easier it is to characterize any individual’s participation as minor. See *United States v Zweber*, 913 F2d 705, 708 (9th Cir 1990).

⁷⁶ See text at note 129.

⁷⁷ Judge Breyer’s response appeared in an unpublished but widely circulated letter. Letter from Stephen Breyer to Michael Block (July 30, 1987) (on file with U Chi L Rev).

⁷⁸ *Guidelines Manual* §§ 2B1.1, 3E1.1 (cited in note 25).

⁷⁹ *Id* at § 2B3.3.

⁸⁰ *Id* at §2S1.2. For a more complete analysis of these hypothetical cases, see Alschuler, 117 FRD at 466-67 (cited in note 19).

pated severity. Criminals have neither a moral nor a constitutional claim to equal . . . treatment.”⁸¹

Of course that blows it. If Judge Easterbrook’s assessment is correct, his words should mark the end of the sentencing reform movement, at least in the ambitious form that this movement has taken in the federal courts. Striving for equality, the reform movement often has produced its antithesis.

V. TROUBLED CONSCIENCES

The difference between classifying groups and sentencing individuals can be substantial. When a federal judge considers whether to impose a guidelines sentence that no one familiar with the facts of a case considers appropriate, he or she may confront a difficult issue of conscience.

Most judges probably remain faithful to the law, but one was reduced to tears when he imposed the ten-year minimum sentence that a federal statute (not, in this case, the guidelines) demanded for a 49-year-old dockworker who had knowingly driven a friend to a drug transaction. The defendant had enjoyed a reputation as a reliable and honest worker for 24 years and had no prior criminal record. “We are required to follow the rule of law,” the judge declared from the bench, “but in this case the law does anything but serve justice. It may profit us little to win the war on drugs if in the process we lose our soul.”⁸²

A few judges have defied sentencing guidelines and engaged in civil disobedience. In one case, a judge rejected a defense attorney’s invitation to find that a defendant’s role in the offense was “minimal” or “minor.” The defendant’s role was not minor, and the judge would not make the suggested finding in order to evade the guidelines. Instead, the judge announced from the bench that although the guidelines required a sentence of 51 to 63 months, he would impose a sentence of only thirty months, adding that even this sentence was more severe than the one that he would have imposed in the absence of the guidelines. Despite the judge’s open defiance of mandatory guidelines, the prosecutor later wrote to him, “For your information, the Solicitor General agrees with this office that further appeal is neither wise nor warranted.”⁸³

⁸¹ *Marshall*, 908 F2d at 1326.

⁸² See *New Drug Law Leaves No Room for Mercy*, Chi Trib § 1A at 28 (Oct 5, 1989).

⁸³ See *United States v Aguirre*, Crim No 4-88-50(1) (D Minn), Transcript of Resentencing Proceedings (Apr 21, 1989) and Statement of Reasons (Apr 28, 1989) (on file with U Chi L Rev); Letter from Jerome G. Arnold, United States Attorney, by Douglas R. Peterson,

Another federal judge chose neither to obey nor to defy unjust guidelines. Judge Lawrence Irving—adopting the classic solution to the ethical issue—resigned from the bench because he could not “in good conscience continue to mete out sentences that are unfair.” Judge Irving, a Reagan appointee, cited the case of a 19-year-old drug offender who had been sentenced prior to the guidelines. This offender had served six months in jail and another five years on probation. Knowing that a violation of his probation would lead to further imprisonment, the defendant had remained drug-free throughout the five-year period (a circumstance evidenced by periodic drug-testing). According to Judge Irving, the offender “completed his education, got married, had a child and became a productive, taxpaying member of society.” Under the guidelines, this offender would have been sentenced to twenty years’ imprisonment with no possibility of parole. “That’s heavy,” Judge Irving noted, adding that as a judge he has “had a problem with mandatory sentencing in almost every case that’s come before me.” The judge told the press, “I just can’t do it anymore.”⁸⁴

Federal judges, prosecutors, defense attorneys, and probation officers sometimes have found an easier way to avoid the imposition of unconscionable sentences. They have discovered that “creative interpretation” of the guidelines can outflank reform rhetoric and afford them substantial discretion. The guidelines’ provisions concerning the degree of an offender’s involvement in the offense and the extent of his or her cooperation with the government have proven particularly pliable.⁸⁵ The style of Henry David Thoreau and Martin Luther King, Jr., is not the style of most criminal justice officials; their civil disobedience usually is less public. They are unlikely to recognize it as civil disobedience at all and may call it “being realistic.”

VI. THE CHANGING LOCUS OF DISCRETION

Perhaps the widest loophole of the federal guidelines is revealed by the Sentencing Commission’s statement that its “initial guidelines will not in general make significant changes in current

Assistant United States Attorney, to Hon. James M. Rosenbaum (May 22, 1989) (on file with U Chi L Rev).

⁸⁴ See *U.S. Judge Quits Over Sentencing Rules*, Chi Trib § 1A at 6 (Oct 1, 1990); *Sentencing Protest*, ABA J 41 (Dec 1990). The description in the text is drawn from both news accounts.

⁸⁵ See Stephen J. Schulhofer and Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am Crim L Rev 231, 268-71, 273-74 (1989).

plea negotiation practices.”⁸⁶ In fact, the guidelines and Justice Department policy statements do impose some ambiguous limitations on plea bargaining. With one exception, state sentencing guidelines have imposed no limits at all.⁸⁷

There is no objection to the sentencing discretion of judges that does not also apply in full measure to the discretion that prosecutors and defense attorneys exercise in plea bargaining. Nevertheless, the political power of prosecutors and the fear of swamping the courts have largely immunized plea bargaining—the most important part of the sentencing process⁸⁸—from sentencing reform. The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors.

Indeed, a system of sentencing guidelines that on its face prescribes severe sentences but leaves plea bargaining unconstrained is a prosecutor’s paradise. Sentencing guidelines masquerade as the sentencing commission’s determination of appropriate penalties. In reality, the guidelines are bargaining weapons—armaments that enable prosecutors, not the sentencing commission, to determine sentences in most cases. In operation, the guidelines do not set sentences; they simply augment the power of prosecutors to do so.⁸⁹

In *United States v Redondo-Lemos*,⁹⁰ the court refused to impose the five-year mandatory minimum sentence that Congress had prescribed for possessing between 100 and 1000 kilograms of marijuana with intent to distribute. The defendant was a “mule” (or courier) hired in Mexico to drive a vehicle containing drugs into the United States. Judge Alfredo Marquez observed that a “mule” ordinarily has no idea what quantity of drugs such a vehicle contains. 278 kilograms of marijuana were found in the van that the defendant drove, and because the defendant was unable to

⁸⁶ *Guidelines Manual* Ch 1 at 7 (cited in note 25).

⁸⁷ The Washington legislature required its sentencing commission to promulgate standards concerning plea bargaining, but the resulting standards “are so open-ended that they may leave no basis for effective review.” Schulhofer and Nagel, 27 *Am Crim L Rev* at 234 (cited in note 85).

⁸⁸ In fiscal 1989, 87 percent of the criminal convictions in the United States district courts were by plea of guilty or *nolo contendere*. *Annual Report of the Director of the Administrative Office of the United States Courts* 122, Table S15.

⁸⁹ In a regime of sentencing guidelines, bargaining about the charge is also bargaining about the sentence. See Alschuler, 126 *U Pa L Rev* at 566-68 (cited in note 27) (arguing that plea bargaining in a system of fixed sentences combines the worst features of charge bargaining and sentence bargaining).

⁹⁰ 754 F Supp 1401 (D Ariz 1990).

secure a more favorable bargain (or perhaps because he was too naive, too remorseful, or too ill-advised to seek one), he pleaded guilty to possessing the 278 kilos.

Judge Marquez held that imposing the mandatory five-year penalty for this crime would violate the Fifth Amendment's Due Process Clause and the principle of equal protection that this clause embodies⁹¹: "[I]t does not take long for a district judge to notice that there is great disparity in the charges to which criminal defendants are pleading [guilty] . . . even though the relevant conduct in most cases is very similar."⁹²

To document this observation, Judge Marquez described four other recent cases in the federal district court in Tucson. All involved conduct similar to the defendant's. In all of these cases, the initial charge was the same as that filed against the defendant—possession of between 100 and 1000 kilograms of marijuana with an intent to distribute. In these four cases, however, defendants were permitted to plead guilty to possessing lesser quantities of the drug; they thus avoided the mandatory sixty-month penalty. The four defendants were sentenced to twenty-seven months, eighteen months, twelve months, and three years' probation. Judge Marquez wondered why prosecutors, "some just out of law school," should have "unfettered discretion," while the Sentencing Reform Act and the guidelines have restricted the discretion of judges.⁹³

Judge Marquez's view that the Constitution substantially limits the prosecutor's sentencing discretion is unusual. In *United States v Cobbins*,⁹⁴ the court observed that the Sentencing Guidelines had caused a "*de facto* transfer" of sentencing authority from judges to prosecutors. According to the court, the effect was to recreate "the very disparity that the Guidelines were intended to eliminate."⁹⁵ The court, however, saw no unconstitutionality in affording this sentencing power to prosecutors. Suggesting that *de jure* mattered more than *de facto* and form more than substance, it wrote, "To reframe the question: Does a defendant have a due process right to have his sentence *determined* by an impartial authority? We think the answer to that question is clearly no. . . . [A] defendant has a due process right to be *sentenced* by a judge, but

⁹¹ Id at 1406-09.

⁹² Id at 1403.

⁹³ Id at 1404-05.

⁹⁴ 749 F Supp 1450 (E D La 1990).

⁹⁵ Id at 1456.

no due process right to have that sentence *determined* by a judge.”⁹⁶

Police interrogation manuals have described the “good-cop, bad-cop” stratagem for obtaining confessions. After a police officer acting the role of a “bad cop” has threatened a suspect with harsh treatment, another officer appears as a sympathetic “good cop” and agrees to save the suspect from the actions that the “bad cop” has threatened. The “good cop” offers to help the suspect, however, only if the suspect cooperates. Sentencing guidelines that appear to mandate “tough” sentences but that leave plea bargaining unconstrained have a similar effect. The sentencing commission plays the role of the “bad cop,” threatening the accused with harsh treatment. The prosecutor, the “good cop,” then agrees to protect the defendant, but only if he or she abandons the right to trial. Substantial sentencing discretion remains except for those defendants who claim the right to their day in court.

The power of prosecutors to subvert sentencing guidelines does not suggest that these guidelines are dead letters or that they do not substantially influence the severity of criminal sentences. A regime of shared judicial and prosecutorial discretion may limit severity in a way that a regime of prosecutorial discretion does not. When, for example, a prosecutor and defense attorney sense that a judge is likely to award probation following a trial, the prosecutor cannot very well insist on a one-year term as part of a plea agreement. When, however, sentencing guidelines encourage the judge to impose a five-year term, the prosecutor may obtain one year on a plea—or perhaps two, three, or four. In a guidelines system, sentences are likely to increase when prosecutors wish them to increase. It all depends on how much bargaining power the sentencing guidelines give them.

⁹⁶ Id at 1456, 1458. See also *United States v Mills*, 925 F2d 455 (DC Cir 1991) (District of Columbia prosecutors do not violate the Constitution when they bargain for guilty pleas by threatening to transfer cases from a District of Columbia court to a federal district court and thereby subject defendants to guidelines sentences).

For a description of how “charge bargaining,” “date bargaining,” and “guideline factor bargaining” have sometimes been used to circumvent the federal sentencing guidelines, see Schulhofer and Nagel, 27 Am Crim L Rev at 271-82 (cited in note 85). See also Albert W. Alschuler and Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 Fed Sent Rptr (Vera) 94 (1989) (83 percent of federal district judges surveyed reported that, despite Justice Department regulations restricting this practice, prosecutors had “frequently” entered post-guidelines plea agreements providing for the dismissal of provable charges; the other judges said that prosecutors “sometimes” had done so; and no judge described such plea agreements as “rare”).

VII. FEAR AND LOATHING AND THE POLITICS OF SENTENCING REFORM

The severity of guidelines sentences depends in part on politics—the politics of legislators, of the authority that appoints the sentencing commission, and of the sentencing commissioners themselves. Politics in recent years has pressed toward toughness. This Part describes the “severity revolution” of the 1980s in criminal sentences. It then examines ways in which the structure of sentencing decisions may affect the severity of these decisions—considering whether legislatively decreed presumptive sentences are especially amenable to upward amendment on a one-way ratchet, whether sentencing guidelines drafted by a commission can serve as a buffer against “tough” sentencing legislation, and whether aggregated sentences tend in the main to be more severe than individualized sentences.

A. The Severity Revolution: Politics, Sentencing, and Prison Populations

During the past decade, the American prison population more than doubled.⁹⁷ At the same time, the proportion of Americans who said that criminal sentences were “not harsh enough” increased from 79 percent to 85 percent.⁹⁸ Recent years have marked disturbing milestones in our nation’s penal history. Over one million Americans are currently behind bars, and the United States now incarcerates a substantially higher portion of its population than do the world’s two runner-up nations, South Africa and the Soviet Union.⁹⁹ Both of these nations imprisoned more people per capita than we did a decade ago; but even as our crime rate declined slightly,¹⁰⁰ we overtook them by a substantial

⁹⁷ See United States Department of Justice, Bureau of Justice Statistics, *BJS Data Report*, 1989 78 (1990) (the number of inmates serving sentences—that is, not detained before trial—increased 123 percent between 1980 and 1989).

⁹⁸ John M. Greacen, *Report to Members*, Crim Justice (Winter 1988). Public opinion appears to reflect less what happens in our courts than the failure of the news media to inform and of public officials to lead. Some bias or tilt in news reporting seems almost inevitable. Undue leniency is newsworthy (“Willie Horton is Released on Furlough and Kills Again”); undue severity is not (“Unemployed Nineteen-Year-Old To Serve Ten Years Without Parole for Delivering Small Package of Drugs”). Sentencing errors in one direction tend to be more visible than sentencing errors in the other.

⁹⁹ Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration* 3 (Sentencing Project, 1991). In some non-industrial nations, however—notably China—what proportion of the population is imprisoned is anyone’s guess.

¹⁰⁰ Most members of the public seem unaware that crime rates have declined. See U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statis-*

margin.¹⁰¹ Throughout the United States, nearly one out of four black men in their 20s is currently under some form of criminal restraint—prison, jail, probation or parole.¹⁰²

In California, one person in every 165—including men, women, and children—is imprisoned;¹⁰³ and although the state has undertaken a \$3.2 billion construction program to make room for more, current projections indicate that the \$3.2 billion is not nearly enough.¹⁰⁴ America seems to be creating a new male welfare class housed in penal institutions.

tics—1989 Tables 2.19-2.21 (GPO, 1990). News stories describe upward movements on the generally downward slope (the city's "bloodiest weekend in a decade" and its "five percent increase in juvenile killings last year"), but they rarely describe the downward slope itself. Despite a slight increase in recent years, crime rates are in fact lower today than they were a decade ago in almost every offense category. See BJS Data Report, 1989 at 17 (cited in note 97).

Moreover, the public has heard presidents, drug czars, and others speak of a drug epidemic. See, for example, William J. Bennett, *Introduction*, in *National Drug Control Strategy* 1, 3 (The White House, 1989). Insofar as one can infer the rate of drug offenses from confidential surveys of personal drug use, however, the rate of drug offenses has declined more substantially than the rate of other crimes. Only the number of drug cases in the courts has soared. See *HHS Secretary Announces Great Strides in the War Against Drugs*, 48 Crim L Rptr (BNA) 1287 (1991) (continuing a decade-long trend, current cocaine use declined 45 percent since 1988; the number of defendants convicted of drug trafficking in the state courts doubled, however, during the same two-year period).

More vigorous law enforcement and tougher sentences probably are not the primary causes of decreased drug use. Law enforcement efforts have focused mostly on restricting the supply of drugs, but the price of cocaine and most other illegal drugs is lower today than it was ten years ago. A possible recent upturn in the wholesale price suggests some belated law enforcement success, and one cannot know how far the price might have fallen without America's more than ten-billion-dollar-per-year drug war. Nevertheless, despite our law enforcement efforts, cocaine and heroin have been among the few commodities in America whose prices have moved in the opposite direction from inflation. See Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 249 Science 939, 940 (1989) ("[D]uring the past decade, the wholesale price of a kilo of cocaine has dropped by 80 percent even as the retail purity of a gram of cocaine has quintupled . . ."). As a combination of declining use and declining price suggests, less frequent drug use probably reflects reduced demand more than it reflects reduced supply. People "just say no," and the use of legal drugs (alcohol and tobacco) has declined along with the use of illegal substances.

¹⁰¹ Mauer, *Americans Behind Bars* at 3 (cited in note 99). The imprisonment rate for black men in the United States is more than four times the rate in South Africa. *Id.*

¹⁰² Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* 3 (Sentencing Project, 1990).

¹⁰³ In 1989, 172,000 people were incarcerated in California. California Blue Ribbon Commission on Inmate Population Management, *Final Report* 3 (1990) ("California Commission"). The state's estimated total population was 28,314,000. *The World Almanac and Book of Facts: 1990* 622 (Pharos, 1990).

¹⁰⁴ California Commission at 2-3 (cited in note 103) ("In 1994, when currently authorized construction is completed, prisons will be more overcrowded than they are today . . . Using current projections, it is estimated that an additional \$5.22 billion would be necessary to build sufficient prisons, jails and state youth facilities to meet the demand by 1994.").

In New Jersey, judges imposed 51 prison sentences exceeding ten years in 1979; in 1985—partly as a result of new sentencing legislation—they imposed 1,645.¹⁰⁵ After surveying the populations of state and federal prisons, the American Correctional Association reported that the number of prisoners older than 55 had increased 50 percent within only four years. Prison administrators now are increasingly concerned with providing health care for geriatric inmates, altering facilities to accommodate inmates who have trouble walking, and refocusing educational programs from how to earn high school diplomas to how to qualify for social security benefits.¹⁰⁶

As the number of Americans behind bars has burgeoned, so has the number under other forms of correctional restraint. The Bureau of Justice Statistics offered the following comparison: "At the end of 1980, approximately 1.8 million persons were under the care, custody, or control of a correctional agency or facility. At the end of 1989, total correctional populations numbered nearly 4.1 million adults."¹⁰⁷ By the end of the decade, "[o]ne in every 25 men and 1 in every 173 women were being supervised."¹⁰⁸

Today's crisis in prison populations is partly the product of increased sentence severity. In 1980, the courts sentenced 196 offenders to prison for every 1000 arrests for serious crime; in 1987, the number was 301 out of every 1000.¹⁰⁹ Moreover, in California, the ratio of penitentiary sentences to probated sentences has grown substantially, and so has the proportion of probated sentences that require some incarceration in county jails.¹¹⁰

¹⁰⁵ *Old Inmates Give Prisons New Trouble*, Chi Trib § 1A at 30 (Feb 23, 1989). New Jersey's increase in the number of sentences exceeding ten years seems attributable in part to a new criminal code—in particular to a provision establishing a fifteen-year presumptive sentence for first-degree crimes. With little statutory justification, the New Jersey Supreme Court has discouraged judicial departure from this presumptive sentence. See the decisions discussed at notes 44-45, *State v Hodge* and *State v Roth*. Moreover, sentences of ten years or more often require longer periods of incarceration now than they did a decade ago; mandatory minimum sentences and judicially imposed periods of parole ineligibility have restricted the ability of New Jersey parole authorities to release inmates serving these long sentences.

¹⁰⁶ *Old Inmates*, Chi Trib § 1A at 30 (cited in note 105).

¹⁰⁷ U.S. Dept of Justice, Bureau of Justice Statistics, *Bureau of Justice Statistics Bulletin: Probation and Parole 1989* 1 (Nov 1990).

¹⁰⁸ *Id.*

¹⁰⁹ Sarah Glazer, *Crime and Punishment: A Tenuous Link*, 1989 Editorial Research Rep 586, 595 (Oct 20, 1989). These figures reveal that some change in the post-arrest processing of criminal cases—be it in charging, plea bargaining, adjudication, sentencing, or "all of the above"—has contributed to today's prison crowding.

¹¹⁰ California Commission at 25-26 (cited in note 103).

The greatly increased number of defendants who have been sentenced suggests, however, that more severe sentences are not the primary cause of the current crisis in corrections. Changes in law enforcement resources and technology and in arrest and charging practices (especially in drug cases) have contributed to this problem, as has an increase in the total volume (though not the rate) of crime.¹¹¹

Harsher sentences and more vigorous law enforcement (of drug laws in particular) reflect the changing politics of crime. For political figures to appeal to the public's fear of crime is not new, but the champions of "get tough" solutions seem never to have had the field so completely to themselves.¹¹² Profiles in courage seem rarer and our government less republican.

Political scientists suggest that we live in the time of the "plebiscite Presidency."¹¹³ Political figures can no longer count on the backing of stable coalitions organized along party lines. Their goal is often short-term approval, and they seek issues that promise immediate payoffs and that already have strong public support. Partly for this reason, politicians fear endorsing any position that an opponent can characterize as "soft on crime" in a 30-second television commercial.

This phenomenon seems substantially more marked in America than elsewhere. The politics of capital punishment illustrate the contrast. Every Western democracy other than the United States has effectively abolished the death penalty, and when members of Canada's Parliament proposed reinstatement of this penalty in 1987, the nation's Conservative Prime Minister led a decisive majority in opposition.¹¹⁴ America alone continues to enact new death penalty legislation and to impose capital punishment more frequently.¹¹⁵

¹¹¹ Much more frequent parole revocation has also added to the prison population in California. Sheldon L. Messinger, et al, *Parolees Returned to Prison and the California Prison Population* (California Dept. of Justice, Bureau of Criminal Statistics and Special Services, Jan 1988).

¹¹² This impression is shared by virtually all of the criminal justice practitioners and scholars I know, including some who have been in the field even longer than I have. See generally Stuart A. Scheingold, *The Politics of Law and Order: Street Crime and Public Policy* (Longman, 1984).

¹¹³ See Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* 97 (Cornell, 1985).

¹¹⁴ See *Canada Refuses to Bring Back Death Penalty*, Chi Trib § 1A at 3 (July 1, 1987).

¹¹⁵ See Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge, 1986).

B. Legislative Sentencing and Zimring's Eraser

The members of the sentencing reform movement of the 1970s and 1980s were a strange assemblage of bedfellows. Senators Thurmond and Kennedy sponsored the 1984 statute that created the Federal Sentencing Commission, and the coalition supporting California's Determinate Sentencing Law (DSL) included both the Prisoners' Union and the Police Chiefs. On viewing these alliances, one might have wondered which side was selling the farm. Today we know the answer, and it wasn't Senator Thurmond. Franklin Zimring had the politics of sentencing reform right when he said fifteen years ago that it takes only an eraser and a pencil to change a one-year presumptive sentence to a six-year sentence for the same offense.¹¹⁶

Proponents of the California DSL generally argued that this law would not alter the severity of current sentences. They noted that the statute's presumptive penalties matched the prison terms that offenders had served in the past. Occasionally, however, proponents quietly suggested that the DSL would reduce current penalties; after matching presumptive sentences to the sentences served in the past, the statute provided reductions for "good time."

The reformers were probably too clever. Shortly after implementation of the DSL, the California legislature found the eraser and pencil mentioned by Professor Zimring and used them to mandate prison terms for first offenders convicted of residential burglary.¹¹⁷ This legislation (itself a "prison buster") was the first in a series of laws increasing the DSL's penalties.¹¹⁸

Similarly, in Colorado, the District Attorneys' Association supported sentencing reform legislation. Then, within three months of the implementation of this legislation, the Association urged substantial increases in its penalties. The State Public Defender protested that the district attorneys were reneging on a bargain that had been necessary to secure passage of the new law. In particular, the Public Defender said, the District Attorney of Denver was a "chameleon" who was "switching positions as fast as the wind blows." The District Attorney responded that he had endorsed the

¹¹⁶ Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, 6 Hastings Center Rep 15, 17 (Dec 1976).

¹¹⁷ Cal Penal Code § 462.

¹¹⁸ See generally Susan L. Rhodes, *State Policy-Makers and the "Get Tough" Movement: The Politics of Prison Building and the Prison Overcrowding Crisis in California* (unpublished paper presented at the 1989 Annual Meeting of the Law and Society Association in Madison, Wisconsin) (on file with U Chi L Rev).

reform legislation only to prevent something worse from becoming law: "We never agreed to live with it forever."¹¹⁹

C. Sentencing Guidelines As a Shelter Against the Wind

As public officials responded to and, even more, contributed to America's fear of crime in the 1980s, some reformers thought that sentencing commissions might be an antidote to Zimring's eraser. Non-elective commissions could serve as buffering agencies, making unpopular sentencing decisions that legislators would avoid. Moreover, guidelines based on existing sentencing practices could to some extent "freeze" these practices as public demands for tougher sentences grew louder. Some public officials who voted for sentencing commissions may have sought to lock in current rates during an inflationary period.¹²⁰ The implicit message of legislatures to the sentencing commissions may have been, "Stop us before we kill again."

No one can know whether the "severity revolution" would have been more extreme if Congress and state legislatures had been unable to pass some sentencing issues to commissions. At least in Minnesota and Washington, sentencing commissions probably have had some moderating effect. Legislatures in these states limited the power of the commissions to issue guidelines that would require an expansion of prison capacity,¹²¹ and although these legislative constraints may not have halted the severity revolution, they probably blunted it. Between 1980 and 1990, the per capita imprisonment rate increased 49 percent in Minnesota and 43 percent in Washington. During the same period, the national imprisonment rate doubled; and in California (with its DSL

¹¹⁹ See *Stiffer Sentencing Law Proposed by Tooley*, Rocky Mountain News § 1 at 4 (Oct 21, 1979).

John J. Cullerton, a member of the Illinois House of Representatives, told a conference of Illinois judges that, as Chairman of the House Judiciary Committee, he had struck a bargain with other members of the committee. No member of the committee would seek to increase the sentence for a crime by more than one "level" during a single session of the legislature. "That way," Representative Cullerton explained, "we could leave room to do it again at the next session." Remarks of John J. Cullerton to the Illinois Judges' Association (Dec 10, 1988).

¹²⁰ I have borrowed this fiscal imagery, but I do not recall from whom.

¹²¹ The Minnesota legislation simply required the sentencing commission to take prison capacity into account, but the commission viewed this legislation as imposing a firm capacity constraint. The Washington legislation authorized the commission to propose sentences that would increase the state's prison population only if, at the same time, it submitted an alternate schedule of sentences that would not require an expansion of prison capacity. See Andrew von Hirsch, *The Enabling Legislation*, in von Hirsch, Knapp, and Tonry, *The Sentencing Commission and Its Guidelines* at 62, 69-70 (cited in note 20).

and an eraser-bearing legislature), the imprisonment rate more than tripled.¹²² In states whose sentencing commissions were not encouraged to limit sentences to the capacity of existing prisons, prison populations grew at about the same rate as in states without sentencing guidelines.¹²³

Sentencing commissions sometimes have responded to public demands for greater severity. In the summer of 1988, a series of publicized rapes in Minnesota led the Minnesota Sentencing Commission to double the guidelines sentences for sexual assaults.¹²⁴ In 1984, the Florida Sentencing Commission responded to objections to its guidelines concerning rape sentences with a 20 percent increase in the sentences for all sexual crimes, including indecent exposure.¹²⁵ In 1985, the Florida commission increased guidelines sentences for several other crimes. In 1986, 1987, and 1988, the commission proposed a 20 percent increase in burglary sentences. The Florida legislature rejected the commission's proposals on the ground that the state could not afford the correctional costs.¹²⁶ At least in Florida, the idea of insulating the state legislature from political pressure by passing the buck to a sentencing commission may have backfired.

The political insularity of sentencing commissions has not notably slowed the movement toward greater severity. Legislative directives to tailor sentences to current prison capacities may have had that indicating effect, but sentencing commissions are not well equipped to determine what sentences correctional resources per-

¹²² Michael Tonry, *The Politics and Processes of Sentencing Commissions*, Crime and Delinquency 9 & Table 1 (forthcoming 1991).

¹²³ Michael Tonry, Remarks to the California Attorney General's Conference on Prison Growth and Its Influence on Correctional Policy (Berkeley, California, May 11, 1990).

¹²⁴ Remarks of Debra Dailey, Minnesota Sentencing Commission, at the Annual Meeting of the Law and Society Association (Madison, Wisconsin, June 9, 1989). The Pennsylvania Commission on Sentencing began its 1986-87 *Annual Report* by declaring at page 1, "The Commission toughened its guideline recommendations for drug offenses—especially for major drug dealers and persons distributing drugs to juveniles or distributing drugs near schools." A year later, the Commission's annual report announced (also on page 1), "The Commission developed a separate set of guidelines for drug offenses which significantly toughen the sentence recommendations for drug dealers."

¹²⁵ N. Gary Holten and Roger Handberg, *Florida's Sentencing Guidelines: Surviving—But Just Barely*, 73 *Judicature* 259, 264 (Feb-Mar 1990).

¹²⁶ *Id.* at 264-65. Florida appears to be holding its correctional system together with Scotch tape and "gain time"—ten days per month of "statutory gain time" for obeying institutional rules; as much as twenty days per month of "incentive gain time" for participating in institutional programs; as much as sixty days of "meritorious gain time" for every heroic act; and up to sixty days of "administrative gain time" at the end of each prisoner's sentence. As a result of Florida's repeated liberalization of "gain time," the average inmate now serves only about 35 percent of his or her guidelines sentence. *Id.* at 264.

mit judges to impose. To perform this task effectively, a commission must guess future crime rates, future arrest rates, future prosecutorial charging policies, future plea bargaining practices, and more. An agency operating at the "back end" of the criminal justice system could better determine the extent to which resource limitations require the release of inmates who have not fully served their "just" sentences. Someone probably must decide "how much justice to buy," but a "pity committee" acting with the benefit of hindsight could do this job better than a sentencing commission.¹²⁷

Moreover, legislative directives to match sentences to resources have not always proven effective. In the Federal Sentencing Reform Act, Congress provided that "[t]he sentencing guidelines . . . shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."¹²⁸ From the beginning, however, the Federal Sentencing Commission has seemed more inclined to lead the severity revolution than to slow it. This Commission reported that its initial guidelines would cut the proportion of federal offenders sentenced to probation unaccompanied by imprisonment more than in half—from 41.4 to 18.5 percent.¹²⁹ It noted that the guidelines would increase the severity of current sentences in several offense areas.¹³⁰ The Commission's orientation was indicated by the fact that, although Congress afforded it only a limited time to draft its guidelines, it spent much of this time considering a scheme to resurrect through administrative action some long-dormant federal death penalty statutes. This bizarre proposal failed by one vote. Nevertheless, some members of the Commission's majority indicated that they would view it more favorably once the guidelines were securely in place.

In assessing the political impact of sentencing commissions, the content of their guidelines often may be less important than

¹²⁷ If the creation of such a committee would resemble in some ways the resurrection of a parole board, so be it.

¹²⁸ 28 USC § 994(g).

¹²⁹ Michael K. Block and William M. Rhodes, *The Impact of the Federal Sentencing Guidelines*, Natl Inst of Justice Rep No 205 at 2 (U.S. Dept. of Justice, Sept-Oct 1987).

¹³⁰ United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 68-69, Tables 2 & 3 (1987).

In seeking approval of the guidelines, some Sentencing Commissioners nevertheless contended that the guidelines largely incorporated past sentencing practices. The inaccuracy of this claim and the defective social science used to support it are explored in Albert W. Alschuler, *The Selling of the Sentencing Guidelines: Some Correspondence With the U.S. Sentencing Commission*, in Dean J. Champion, ed, *The U.S. Sentencing Guidelines: Implications for Criminal Justice* 49, 61-90 (Praeger, 1989).

whether legislatures have deferred to them by diminishing the legislatures' own role in sentencing. The federal guidelines do not seem to have slowed Congress's push for ever harsher punishments. Each new Drug Control Act carries penalties more severe than the last. One recent act, for example, imposes a mandatory minimum sentence of five years for the possession of five grams of crack cocaine.¹³¹ Five grams is the weight of two pennies or five paperclips. A gram of crack contains three to five "hits," and five grams seem roughly to mark the borderline between possession for personal use and possession for small-scale dealing. During the fiscal year that ended in the summer of 1989, federal judges sentenced about 400 first offenders for the possession of five grams of crack, and the judges placed 300 of these 400 offenders on probation. Had the same 400 offenders been sentenced under the new statute, the correctional costs to the taxpayers would have gone from \$1.5 million to \$30 million, not including prison construction costs.¹³² The Federal Courts Study Committee, several judicial bodies, and the Sentencing Commission have objected that mandatory minimum sentences are incompatible with the concept of guidelines sentencing.¹³³ There is only a little evidence, however, that Congress has heard them.¹³⁴

D. Aggregation and Severity

Aggregated sentences, whether chosen by a legislature or by a sentencing commission, seem likely to be more severe than individualized sentences. Although rigorous evidence of this proposition probably cannot be developed, events in El Paso, Texas more than a decade ago offer some support for the hypothesis.

¹³¹ 21 USC § 844 (1988).

¹³² Gerry Fitzgerald, *Dispatches From the Drug War: Tough Drug Sentences Sound Great But Don't Work*, Common Cause Mag 13, 15-16 (Jan-Feb 1990).

Political figures still urge more severe sentences for drug offenders. Ed Koch, the former mayor of New York, told a Harvard Law School audience, "The answer to the drug problem is to be much tougher than we are." Koch said that he would respond to the problem of crowded prisons by abolishing "prisoners' rights." Disparaging a judicial ruling entitling every inmate to 60 square feet of living space, he said that he would "put 60 of 'em in one square foot." *Former NYC Mayor Ed Koch Gives Spirited Talk*, Harvard Law Rec 3 (Mar 16, 1990).

¹³³ See, for example, *Report of the Federal Courts Study Committee* at 133-34 (cited in note 15). Unlike sentencing guidelines, mandatory minimum sentences do not allow any departures, and unanticipated cases in which the mandatory minimums produce inappropriate results inevitably arise.

¹³⁴ The Crime Control Act of 1990 does direct the Sentencing Commission to prepare a report on the effects of mandatory minimum sentences. Pub L No 101-647, 104 Stat 4845, § 1703 (1990).

Steve Simmons, then and now the El Paso District Attorney, announced that his office would oppose probated sentences in burglary cases, even those involving first-offenders. The El Paso County judges initially declined to follow the District Attorney's recommendations and awarded probation to most first-offense burglars. These elected judges eventually yielded, however, concluding that they could not withstand the political pressure exerted by the District Attorney's office.

Unlike most other states, Texas permits defendants to elect sentencing by juries. With El Paso's judges unwilling to award probation, virtually all convicted first-offense burglars chose this alternative. In more than 90 percent of their cases, juries awarded probated sentences. The jurors who imposed these sentences may have been the same people who nodded their approval of the District Attorney's policy when they read about it in the newspapers, but sentencing "in the large" and sentencing "in the specific" apparently evoke different responses.¹³⁵

A comparison of aggregated sentencing laws with earlier patterns of individualized sentencing suggests the difference in severity as well. When Congress mandated a five-year penalty for possessing five grams of crack, its members probably assumed that the public would approve. To most members of Congress, the judges who earlier had awarded probation in a majority of the cases in which first-offenders possessed this amount of crack must have seemed woefully soft-hearted. Yet Congress and the public may have forgotten who these judges were—Reagan, Carter, Ford and Nixon appointees to the federal bench. These judges did not cheer for criminals. They were much like the rest of us (perhaps in fact a bit tougher). Indeed, they seemed to differ from the rest of us in only one significant respect: they had studied the facts of their cases and knew a little (or a lot) about the people whom they sentenced.

Officials who have considered the facts of a case seem likely to do a better job of sentencing than officials who have not, and the pleasures that one may derive from expressing indignation about crime do not seem a sufficient reason for rejecting these officials' judgments. Aggregating sentences through guidelines and mandatory sentencing provisions may increase injustice, suffering, and taxes all at the same time.

¹³⁵ See Alschuler, 126 U Pa L Rev at 570 n 53 (cited in note 27).

VIII. TOWARD EQUALITY WITHOUT AGGREGATION

As this Article has recognized, unbounded sentencing discretion produces inequities; and although the discretion afforded by preguidelines systems was less objectionable than the aggregation of current guidelines, a return to preguidelines systems would be unfortunate. This Part advocates a regime of individualized sentencing guided by rules that resolve particular issues and that determine appropriate sentences for recurrent, paradigmatic cases—a regime of administratively drafted guidelines that would guide and bind trial judges in much the same way that judicial precedents guide and bind them.

A. Rules, Standards, and Decision Points

Jurisprudential writers speak of the difference between rules and standards.¹³⁶ As best I can tell, standards are usually “vague rules.” They offer general direction but afford substantial freedom to tailor solutions to circumstances. On occasion in fact, standards may not take the form of rules but may simply recite objectives or list relevant circumstances.

The writers who have discussed rules and standards have paid less attention to another technique for guiding and controlling decisions. A system of judicial precedent affects future decisions partly through its announcement of results. Even in the absence of articulated rules or standards, a series of outcomes or decision points can communicate.

An example is provided by the judicial development of what might be called “implicit” fourth amendment law. The fourth amendment declares that “no Warrants shall issue, but upon probable cause”—in effect, that no warrants shall issue without adequate reason. This declaration is neither much of a rule nor much of a standard, and every effort to articulate the concept of probable cause more precisely appears to have failed. Probable cause does not mean a particular quantum of evidence, and even so amorphous a balance as “the Hand formula”¹³⁷ (the traditional test of negligence, adapted to weigh individual privacy against the magnitude of the anticipated law enforcement gain and the likeli-

¹³⁶ See, for example, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L Rev 379 (1985).

¹³⁷ See *United States v Carroll Towing Co.*, 159 F2d 169, 173 (2d Cir 1947).

hood of achieving it) may fail to capture some things that judges should consider.¹³⁸

Although no one may be able to define the term probable cause or to articulate the standards it embodies, most lawyers, judges and police officers have a fairly clear sense of what it means.¹³⁹ Even before the phrase appeared in our Constitution, English treatise writers had indicated its meaning by offering a series of case illustrations,¹⁴⁰ and decisions under the Constitution have further developed our common understanding of the concept.

We can recognize, for example, that the police officers who rounded up twenty-four suspects in *Davis v Mississippi*¹⁴¹ lacked probable cause. The reason is not that the roundup would have been indefensible if its costs and benefits had been judged afresh; the detention, interrogation, and fingerprinting of "the usual suspects" in Meridian, Mississippi, did enable law enforcement officers to apprehend the perpetrator of a brutal crime. But a course of adjudication had given expression to a set of values and had effectively settled the issue in *Davis v Mississippi* before it arose. A pattern of decisions had shaped and informed our judgment.¹⁴²

Precedents consist of more than outcomes or decision points. Judges explain; generalize outcomes into principles; and articulate rules and standards. Judicial opinions blend rules, principles, standards, rhetoric, and results; the components cannot be neatly sepa-

¹³⁸ See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U Pitt L Rev 227, 243-56 (1984).

¹³⁹ Of course, the concept of probable cause is fuzzy and subject to debate at its edges; but whatever the relative proportion of the edges and the core, the core is larger than it would have been had the constitutional text stood alone, unaided by a history of case-by-case decisionmaking.

¹⁴⁰ See, for example, Matthew Hale, 2 *The History of Pleas of the Crown* 81, 98-104 (Professional Books, 1971) (reprinting 1763 edition); William Hawkins, 2 *A Treatise of the Pleas of the Crown* 118 (London, 8th ed 1824); Michael Dalton, *The Countrey Justice* 277 (Society of Stationers, 1622).

¹⁴¹ 394 US 721 (1969) (a rapist described only as a young black man had left fingerprints that the police hoped to match).

¹⁴² Judge Posner and Judge Easterbrook, concurring in a series of Seventh Circuit cases, may have missed this point. These judges contend that Courts of Appeals should reverse lower-court determinations of probable cause only when these determinations are "clearly erroneous." See *United States v McKinney*, 919 F2d 405, 418-23 (7th Cir 1990) (Posner concurring); *United States v Malin*, 908 F2d 163, 169-70 (7th Cir 1990) (Easterbrook concurring, joined by Posner). The result of this mode of review would be that appellate-court decisions would not settle probable cause issues; they would merely mark the outer bounds of permissible trial-court choices. Judge Posner and Judge Easterbrook have argued that because probable cause determinations are fact-specific, they do not have significant precedential value. I think that this argument neglects the extent to which "decision points" can, over time, guide the resolution of future cases by judges and police officers.

rated. In every ruling, the general and the specific inform each other.

Judges are not the only officials who can use this style of communication, and the development of something like a system of precedent need not depend upon a "gradual process of judicial inclusion and exclusion"¹⁴³—one in which the world generates cases in chaotic order, complicates them unmercifully, leaves gaps among them, and often tricks fallible decisionmakers into false starts. The systematic reconsideration of the facts of past cases (supplemented by the consideration of hypothetical cases) could permit an agency charged with bringing order out of sentencing to develop a precedent-like system of rules, standards and decision points.

B. Normal Crimes Rather than Averages as the Focus of Sentencing Guidelines

In past efforts to systematize sentencing, rules have tended to be overly rigid, and standards have tended to be pap. There is a better way for a sentencing commission to address the problem of disparity. Any commission that did the job correctly would make a marvelous, lasting contribution to the quality of criminal justice. The better way is to focus on what sociologists have called "normal crimes"—recurring paradigmatic cases.¹⁴⁴

Sentencing commissioners should think about the young man from a disadvantaged background who, yielding to the lure of easy money, engaged in small-scale drug dealing. They should consider the woman who led a respectable life until a spouse or lover jilted her and she killed. They should think about the alcoholic who has been convicted twenty times of passing bad checks and who has just done it again, about the bank employee who embezzled a small sum intending to pay it back, and about the lawyer too smart to pay her taxes. They should consider the 22-year-old who, without planning, tried to rob a bank and did not care whether he killed someone in the process. They should think about the chronic shoplifter.

¹⁴³ See *Davidson v New Orleans*, 96 US 97, 104 (1877).

¹⁴⁴ David Sudnow probably invented the term "normal crimes," see David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 *Social Probs* 255 (1965). Daniel J. Freed has used Sudnow's term to indicate what sentencing commissions ought to take as their central focus. Remarks to the Edna McConnell Clark Foundation Sentencing Group (New York, June 18, 1987). I have expressed the same idea more awkwardly. See Albert W. Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 *U Colo L Rev* 237, 245 (1980).

Sentencing judges have seen and considered dozens of these cases. A sentencing commission could read a tall stack of presentence reports in rape cases, burglary cases and tax cases. It could discover what the normal crimes are in each offense area and what sentences judges have imposed for them. It could examine the range of judicial responses to these crimes, the median, the mode, and the mean. Armed with these data and any other information that experts or the public might provide, it could judge for itself what sentences are appropriate. Such a commission would understand the world of conduct that it punished far better than any existing sentencing commission has.

Many guidelines might take the form of descriptions of the generic situations that commonly arise under various offense headings. The guidelines could specify a commission-approved sentence for each recurring situation. No real-world case might fit any of the commission's paradigms exactly, and unusual cases might be far removed from any situation that the commission had considered. But lawyers could use the commission's paradigms at sentencing hearings in much the same way that they now use judicial precedents at other proceedings. A judge could find at least a starting point for deliberation, and he or she might provide reasons for his or her sentences and draw on the guidelines in doing so.

When cases recur frequently with minor variations, sentencing should not be a game of "every judge for herself." Making every judge a sentencing monarch not only risks disparity; it also forces every judge to consider issues that countless judges before her have considered and that other judges may consider before the day's end. This duplication of effort wastes resources and causes unnecessary agony for judges, the defendants whom they sentence, and everyone else.

A sentencing commission not only should determine the appropriate resolution of recurring cases but also should settle recurring sentencing issues. Consider, for example, the range of challenging issues that judges have confronted in sentencing drunk drivers, a range merely suggested by the following list:

- Should a court attempt to distinguish between alcoholic drivers and drivers who can better control their drinking? Should the court order a medical or psychological examination for this purpose after a first conviction? After a second?¹⁴⁵

¹⁴⁵ See James B. Jacobs, *Drunk Driving: An American Dilemma* 183 (Chicago, 1989) ("Many jurisdictions require an alcoholism assessment for every drunk-driving defendant.

- Should an alcoholic driver's inability to control his or her drinking and lack of control once intoxicated mitigate his or her sentence? Or does the alcoholic driver pose a special danger—a danger that a court should regard as an aggravating circumstance? Apart from questions of culpability and dangerousness, might different forms of punishment and treatment be appropriate for alcoholic and non-alcoholic drunk drivers?

- How frequently do treatment programs for alcoholism succeed?¹⁴⁶ To what extent does their success depend upon a participant's motivation? Can forced treatment work? How much time does effective treatment require? Does this treatment ever justify a greater deprivation of liberty than would be warranted if an offender were simply to be punished? How great a deprivation of liberty for purposes of treatment is appropriate following a first conviction, following a second, or following a third? Should a court consider an offender's ability to pay for treatment in deciding whether to order this treatment, or would consideration of the offender's wealth discriminate against poorer defendants?

- Should some offenders be offered a choice between jail and taking an alcohol-control medication like antabuse under a monitor's supervision?¹⁴⁷

- Do drinking-driver schools (at which, among other things, offenders view films of the aftermath of horrifying accidents caused by drunk drivers) reduce recidivism? Do these schools do more than enrich the schools' operators? Should some or all offenders be required to attend these schools?¹⁴⁸

- Should offenders' names be published in local newspapers, or should they be required to publicize their convictions by placing bumper stickers on their cars?¹⁴⁹

- When are suspensions and revocations of drivers' licences appropriate? Are license suspensions effective in keeping drunk drivers from the road?¹⁵⁰ When are occupa-

These routine assessments usually seek to label drunk drivers as either social or problem drinkers.”).

¹⁴⁶ For a discouraging assessment, see *id.* at 181.

¹⁴⁷ See *id.* at 182.

¹⁴⁸ For another discouraging assessment, see *id.* at 183-89.

¹⁴⁹ See *id.* at 121-22.

¹⁵⁰ See Robert B. Voas, *Emerging Technologies for Controlling the Drunk Driver*, in Michael D. Laurence, John R. Snortum, and Franklin E. Zimring, *Social Control of the Drinking Driver* 321, 364 (Chicago, 1988) (“Even though most DUIs whose licenses are sus-

tional licenses that permit offenders to drive to work appropriate for people whose licenses have been suspended? What risks do these limited driving permits pose? When should courts go beyond licensing restrictions to require the impoundment or forfeiture of an offender's vehicle?

- Is "shock" incarceration for twenty-four or forty-eight hours an appropriate sanction for a first offender convicted of drunk driving? For a second offender? Are either short or long jail sentences more effective than alternative punishments in reducing recidivism?

- Is home detention coupled with electronic monitoring an appropriate means of incapacitating some drunk drivers? What roles should community service and criminal fines play in sentencing these offenders? When fines are imposed, should they be uniform, or should they vary with an offender's wealth or income?

- To what extent should drunk driving sentences vary with an offender's level of intoxication, with the quality of his or her driving, with the commission of other traffic offenses, with the legal or illegal character of the intoxicant used, with the offender's age, with involvement in a traffic accident while intoxicated, and with the harm resulting from an accident?

Many of these issues raise general questions of penal policy. Their appropriate resolution could be aided by careful study of a jurisdiction's past sentencing practices; the different sentencing practices of other jurisdictions (both in America and abroad); the effectiveness of treatment programs; individual case histories; the materials submitted by Mothers Against Drunk Driving, Remove Intoxicated Drivers and other interested groups; and the testimony of experienced judges and probation officers. The members of a sentencing commission could draft sound guidelines only by becoming "drunk driving experts." As their work proceeded, these sentencing commissioners would also become armed robbery experts, shoplifting experts, rape experts, and environmental crime experts.

To treat every judge as a *tabula rasa* and charge him or her with "starting over" in judging sentencing issues is to ensure that judges frequently will resolve the issues by muddling through. Every person elected or appointed to the bench should not be ex-

pended continue to drive, research indicates that they have fewer total accidents and traffic citations than comparable groups of offenders who are not suspended.").

pected to address issues of this breadth, consequence, and difficulty without guidance, and state legislatures cannot provide the detailed guidance that judges need. But muddling through looks good when compared to a sentencing commission's declaration that "driving while intoxicated" is a "level 4 offense" on a sentencing grid. This declaration submerges most of the issues worth considering. By aggregating drunk driving cases, it avoids the important work that only a sentencing commission can do. Rather than give tough, recurring sentencing issues greater consideration than judges have provided, the sentencing commission gives them less. Without an awareness of the facts of particular cases and without the spur that the need to resolve these cases can provide, sentencing commissions may be oblivious even to the existence of some important issues.¹⁵¹

In a better guidelines system, some guidelines might take the form of rules: "Requiring an offender to submit to antabuse treatment as a condition of probation is never appropriate." Some might take the form of standards: "The alcoholism of a person convicted of driving while intoxicated should prompt the consideration of incapacitative measures; these measures can, within bounds, legitimately inflict greater deprivation than the sanctions normally imposed on a non-alcoholic offender." And still other guidelines might specify "normal sentences" for "normal crimes": "A generally appropriate penalty for a non-alcoholic first-offender is a fine equal to the offender's take-home salary for a period of two weeks."

Guidelines should be binding rather than voluntary or advisory, but they should bind trial judges only in the way that the rulings of higher courts bind them. When a judge could reasonably distinguish the case before him or her from a "normal case" treated in the guidelines, he or she should be permitted to choose a different sentence. The judge should not be required to assert a "substantial and compelling reason" for departure from the guidelines or to point to "circumstances inadequately considered by the sentencing commission." But he or she should observe the rules and standards established by the guidelines, use their "normal case" sentences as benchmarks, and explain his or her decisions. For example, a judge might declare:

¹⁵¹ Experienced trial judges seem ideally qualified for service on a sentencing commission. The three judicial members of the initial seven-member Federal Sentencing Commission, however, were all appellate judges. Only one had served on a federal district court and so brought "hands on" sentencing experience to his work.

Offender A is a single parent barely managing to support his three daughters, and a fine of two weeks' salary would cause hardship to these children. I will therefore forego the usual fine and will instead sentence Offender A to thirty-six hours in jail. The defendant may serve this sentence during either of the next two weekends when his children are visiting their mother.

Offender B's blood alcohol level was more than twice the legal limit. His crime was substantially more serious than that of a typical first offender. I will sentence him to pay the normal fine *and* to serve thirty-six hours in jail.

A judge's sentences should be subject to appellate review to ensure conformity to the guidelines. Just as appellate courts can sense the degree of freedom and constraint that precedents impose upon lower-court judges, these courts can recognize whether a trial judge has adequately respected the rules, standards and decision points of sentencing guidelines.

For example, Offender A—sentenced to thirty-six hours in jail for his first drunk-driving offense—might argue to an appellate court that the sentencing judge had substantially increased the guidelines penalty. Although the judge apparently regarded this jail sentence as equivalent to the fine of two weeks' salary suggested in the guidelines, Offender A might argue that even a short jail term would be so stigmatizing and frightening that the jail sentence and the fine could not be considered commensurate. Offender A might also contend that it was improper for the sentencing judge to give as her reason for imposing a jail sentence that the fine would harm Offender A's children. As the children's parent, Offender A should have been permitted to judge their interests, and although the court's concern might have justified permitting Offender A to choose between imprisonment and a fine, it did not justify the court's making of the choice.

Offender B might argue that his sentence (including both a jail term and fine) had effectively doubled the penalty suggested by the guidelines. Despite Offender B's unusually high level of intoxication, he might argue that this departure from the benchmark penalty was excessive. Offender B also might contend that the guidelines exhibited a preference for fines over imprisonment and that any increase in the proposed penalty should have taken the form of a larger fine, not a combination of fine and imprisonment.

These arguments do not seem compelling, but some appellate judges might accept them. The interplay of guidelines, trial-court rulings, and appellate review could produce a system of individual-

ized sentences that were bounded and reasonably uniform. Benchmarks could encourage equal justice without aggregating.

Without effective appellate review, "normal case" guidelines might not adequately limit the discretion of judges, but recent history offers little support for the hypothesis that American appellate judges defer unduly to the sentencing decisions of trial judges. The Federal Sentencing Reform Act directs appellate courts to reverse trial-court departures from the federal guidelines only when the departures are "unreasonable,"¹⁵² yet the United States Courts of Appeals have regularly reversed trial judges for injecting too much humanity into their sentencing decisions.¹⁵³ During the five years after the Alaska legislature's authorization of appellate review of sentences (authorization that did not establish standards for review), the state supreme court disapproved 32 percent of the sentences that it considered—12 percent for the misapplication of sentencing law, 5 percent for excessive leniency, and 15 percent for excessive severity.¹⁵⁴ The Alaska legislature later enacted a presumptive sentencing statute,¹⁵⁵ established the Alaska Court of Appeals,¹⁵⁶ and afforded this new court jurisdiction over sentencing appeals.¹⁵⁷ The Court of Appeals has actively reviewed sentencing determinations under the presumptive sentencing law; more importantly, it also has developed a series of "benchmark sentences" to guide trial judges in cases not subject to this law.¹⁵⁸

The review of sentences by the English Court of Appeal (Criminal Division) appears to have brought a substantial degree of order to English sentencing practice.¹⁵⁹ Since 1907, this court has checked individual sentences against the sentences approved in comparable cases to ensure proportionality,¹⁶⁰ and since the 1970s, it also has issued "guideline judgments." To some extent, this

¹⁵² 18 USC § 3742(e)(3).

¹⁵³ See, for example, the cases cited in notes 34-37. See also Michael Tonry, *Sentencing Guidelines and Their Effects*, in von Hirsch, Knapp, and Tonry, *The Sentencing Commission and Its Guidelines* at 16-17 (cited in note 20) (sentencing guidelines in the state courts have brought an end to "doctrines of extreme deference to the trial judge").

¹⁵⁴ Robert C. Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-Alaska L Rev 1, 3 & nn 12-13 (1975).

¹⁵⁵ Alaska Stat §§ 12.55.155-12.55.165 (1990).

¹⁵⁶ Id at § 22.07.010.

¹⁵⁷ Id at § 22.07.020(b).

¹⁵⁸ See Susanne D. DiPietro, *The Development of Appellate Sentencing Law in Alaska*, 7 Alaska L Rev 265, 279-88 (1990).

¹⁵⁹ See D. A. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* xlv (Heinemann, 1970); D. A. Thomas, *Sentencing Guidance: The Court of Appeal and the Crown Court* (Institute of Criminology, Cambridge, 1985).

¹⁶⁰ D.A. Thomas, *Sentencing in England*, 42 Md L Rev 90, 111 (1983).

court combines in one body the roles that this Article suggests for sentencing commissions and reviewing courts. The court's guideline judgments have generally been less grand, less ambitious, less abstract, less mechanistic, and less harsh than sentencing guidelines in America.

In *R v Billam*,¹⁶¹ for example, the court reviewed recent Crown Court sentences for rape and discovered that most offenders had been sentenced to terms of less than three years. Although the court observed that even a noncustodial sentence for rape might be justified "in wholly exceptional circumstances," it concluded that current sentences were "too low."¹⁶²

Recognizing that "[t]he variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence," the court nevertheless offered some "normal crime" sentences, calling them "starting points": five years for an adult offender in a contested case with no aggravating or mitigating features; eight years for an offender who broke into the victim's home or kidnapped her or was in a position of responsibility toward her or committed the rape as a member of a group; and fifteen years for "a campaign of rape involving multiple victims."¹⁶³ The court also offered more general standards: a list of eight aggravating factors (including use of a weapon, repetition of the rape, an unusual degree of planning, and attacking an elderly or extremely youthful victim). It discussed some mitigating circumstances including an offender's youth (which the court said could be considered if the offender were 17 or 18 but not if he were 20).¹⁶⁴

¹⁶¹ 1 All ER 985, 987 (1986).

¹⁶² *Id.*

¹⁶³ Like American courts, American legislatures, and American sentencing commissions, the English Court of Appeal has failed adequately to restrict plea bargaining. The *Billam* benchmarks are only for "contested cases." The court's opinion declared in fact, "The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested." *Id.* at 988.

This language invited judges to grant effectively unreviewable leniency in guilty plea cases—that is, if the Court of Appeal did not intend to review for itself the strength of the Crown's evidence in guilty plea cases and to approve apparently lenient sentences when this evidence suggested innocence. In view of this invitation, perhaps the court should not have criticized average sentences in past rape cases. Past averages might have been driven largely by sentences in guilty-plea cases, and the guidelines judgment in *Billam* might not have altered these sentences.

¹⁶⁴ *Id.* at 987-88.

The *Billam* opinion did not, however, focus greatly on offender characteristics and also seemed to neglect some situational issues.¹⁶⁵ One English scholar has observed that “[t]he Court lacks the supporting staff necessary to prepare adequately for the policy decisions it has to make,”¹⁶⁶ and a sentencing commission would be in a better position to guide the imposition of sentences in normal cases. Nevertheless, the judgments of the Court of Appeal reveal that guidelines can be both more sensitive to circumstances and less confining than the aggregations of American sentencing commissions—and that guidelines can be guidelines rather than chains.

CONCLUSION

Discussions of sentencing procedures sometimes have posed a false dilemma—the choice between an individualized sentencing system in which judges are free to indulge their whims and biases and an aggregated system in which cases are grouped on the basis of a few characteristics and in which unlike cases are treated alike. By focusing on paradigmatic crimes rather than abstract crime categories, a sentencing commission could escape this apparent bind. It could preserve the virtues of individualized sentencing while still giving substantial guidance to judges. A guidelines regime that focused on “normal crimes” would not be as ambitious as existing guidelines systems. It would not demand a substantial and compelling reason for every departure from all-encompassing sentencing guidelines.

This more modest regime would not bring sentencing disparity to an end, but the equality produced by current guidelines systems is illusory. A social scientist might proclaim that the sentencing guidelines of the Kingdom of Myopia had achieved their primary goal of reducing disparity: “Defendants convicted of possessing similar quantities of drugs have received substantially more uniform sentences than defendants did during the pre-guidelines period.” The social scientist’s statement would mean, however, that

¹⁶⁵ For example, the court adverted to the possible distinction between “acquaintance” and “stranger” rape only by saying:

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence.

Id. at 988.

¹⁶⁶ Andrew Ashworth, *Techniques of Guidance on Sentencing*, 1984 Crim L Rev 519, 530.

Myopia's sentencing guidelines had failed to differentiate major drug dealers from couriers and from people who knowingly drove friends to drug transactions. It would mean that drug couriers who knew neither the quantity nor the type of drug that they carried had received different sentences because the drugs in one's suitcase weighed more than those in another's. It would mean that drug runners had received different sentences because one runner's supplier was arrested while carrying a large quantity of drugs and another's either was not arrested, had hidden her supply, or was arrested with a smaller quantity. It would mean that LSD dealers had received substantially different sentences because some had used blotter paper and others sugar cubes as their carrier medium. Moreover, the social scientist's statement would have overlooked the failure of the Myopian monarch, parliament, and sentencing commission to restrict plea bargaining and the resulting transfer of sentencing discretion from judges to prosecutors.

The Myopian criminal justice system would have produced this kind of equality because it abandoned sentencing considerations that virtually all Myopian judges once considered important. The Myopian sentencing commission discovered that these traditional considerations were difficult to quantify, so it substituted others that could be counted more easily. It said something about "the just deserts model of sentencing" when it made this change.

The process of determining appropriate sentences for a series of "normal crimes" would not be inherently tilted toward either offense or offender characteristics and would not require counting anything. It would produce benchmarks, not boxes.

The sentencing reform movement of the 1970s and 1980s sought to be comprehensive, and the effort to produce guidelines or presumptive sentences for every case encouraged excessive aggregation. The symbol of this reform movement was the 258-box federal sentencing grid, which now should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas.

The proposals offered by this Article might prompt a question: "But weren't sentencing commissions always supposed to focus on the specific, to consider paradigmatic cases, to listen to experienced sentencing judges, to become experts on particular offenses, and to try to understand the world of criminal conduct that they punished?" I once thought that the answer to this question was yes. The aggregative style seems so ingrained, however, that sentencing commissioners have apparently assumed that their task

was to consider categories, not cases, and to allocate punishment wholesale.¹⁶⁷

Sentencing guidelines reflect a larger movement toward aggregation in legal and social thought. These guidelines also mark a changed attitude toward sentencing—one that looks to collections of cases and to social harm rather than to individual offenders and the punishments they deserve. The army that America is marching into its prisons and jails may merit incarceration, but these defendants deserve sentences based on more than rough aggregations and statistical averages. They, and we, deserve sentences based on the circumstances of their cases.

¹⁶⁷ Several members of the United States Sentencing Commission apparently considered their work so undemanding that they openly violated the statutory requirement of full-time service on the Commission. See 28 USC § 992(c). During his four years' service on the Commission, for example, Judge Stephen G. Breyer participated in the decision of 248 cases in the United States Court of Appeals for the First Circuit (approximately the same number as every other member of the court). Judge Breyer wrote opinions in 160 of these cases. LEXIS, Genfed library, USApp file (Mar 12, 1991) (revealing only reported cases). Judge Breyer also taught two Harvard Law School courses or seminars each year during his service on the Commission.

Another commissioner, Michael K. Block, moved from Washington to Tucson during his service, returning to the Commission's offices about two days each month. Block urged Congress to make the work of all sentencing commissioners part-time, arguing that the change "would result in a significant savings to U.S. taxpayers" and "wouldn't impair the functioning of the commission." *Take This Job*, Wash Times A1 (July 5, 1989). The commissioners who violated or sought to alter the requirement of full-time service on the Commission plainly did not lack energy, but they may not have appreciated fully the difficulty of sentencing issues and the impact of the resolution of these issues on people's lives. Like many legislators and others who have considered sentencing issues in recent years, they may have exhibited the bottom-line collectivist-empirical mentality.