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Recommended Citation

Albert Alschuler, "Monarch, Lackey, or Judge?," 64 University of Colorado Law Review 723 (1993).

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MONARCH, LACKEY, OR JUDGE

ALBERT W. ALSCHULER*

Marvin Frankel and Leonard Orland sometimes seem to be on the verge of disagreeing with one another.¹ So far as I can tell, however, they never do. At one or two points in his remarks, Frankel even appears to disagree with me, but perhaps he has me mixed up with someone else.

Truly, I do not blame sentencing guidelines for plea bargaining, for the severity revolution of the past fifteen years, or for mandatory minimum sentences. Those things can be found in jurisdictions with sentencing guidelines and in jurisdictions without them. My claims have been more limited—principally that a policy of restricting judicial but not prosecutorial discretion is incoherent. All of Frankel's objections to judicial sentencing discretion apply in full measure to the discretion that prosecutors and defense attorneys exercise in plea bargaining. A policy that restricts the discretion of judges but not prosecutors cannot notably advance the goal of greater certainty in sentencing. Such a policy concentrates discretion in the hands of a single official and tends to make the benefits of discretion available only to defendants who abandon the right to trial.

Again, my objection is not that guidelines increase the *amount* of plea bargaining—something that would seem nearly impossible when ninety-three percent of all state felony convictions are by guilty plea.² It is that when guidelines ignore the most important part of the sentencing process, they cannot accomplish their goal. Moreover, even when the amount of plea bargaining remains the same, guidelines may enhance the power of prosecutors to determine sentences. For many defendants, the entry of a guilty plea is virtually a foregone conclusion, and guidelines may leave only the prosecutor in a position to give these defendants a break. The overall enhancement of prosecutorial power does depend, however, on the severity of the guidelines.³

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1. See Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655 (1993).

2. RICHARD SOLARI, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL JUDICIAL REPORTING PROGRAM, 1988, at 47 tbl. 4.2a (1992). In the 75 largest counties, 94% of all felony convictions are by plea. *Id.* at tbl. 4.2b.

3. See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique*

Leonard Orland has recounted some of the empirical evidence concerning plea bargaining in jurisdictions with sentencing guidelines,⁴ and there is more. For example, both the Minnesota guidelines (the academy's favorites) and the Washington guidelines (number two on the academic hit parade) appear to have increased the frequency of charge-reduction plea bargaining.⁵ My objection to tying the hands of judges while allowing prosecutors to determine the sentences of defendants who plead guilty, however, does not depend on how often the evil materializes. In my view, a regime in which mercy can be given is preferable to a regime in which mercy can only be sold.

Similarly, I do not claim that guidelines have produced the severity revolution—only that they have not slowed this revolution appreciably. Contrary to Leonard Orland's hope, guidelines have not acted "as a buffer, shielding the legislature from the political pressures to respond to ever increasing demands for punitive sanctions."⁶ In Florida, the sentencing commission has in fact proposed tougher sentences than the legislature has been willing to approve.⁷

A policy against expanding prison capacity has slowed the severity revolution in Minnesota and Washington.⁸ Prison capacity constraints, however, should not be confounded with sentencing guidelines. Either measure can (and does) exist without the other. In the absence of other objectives, as Kay Knapp notes,⁹ the goal of matching sentences to resources can best be implemented through administrative mechanisms at the back end of the criminal justice system, not through front-end sentencing guidelines. Moreover, Minnesota's generally successful policy of keeping prison popula-

of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550, 568-69 (1978).

4. Frankel & Orland, *supra* note 1, at 667-69.

5. See Michael Tonry, *Sentencing Guidelines and Their Effects*, in ANDREW VON HIRSCH, ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 16, 38-42 (1987). Cf. Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, FED. SENTENCING REP., Mar./Apr. 1989, at 95 (83% of the federal district judges surveyed reported that 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 agreements as "rare.").

6. Frankel & Orland, *supra* note 1, at 657.

7. See N. Gary Holten & Roger Handberg, *Florida's Sentencing Guidelines: Surviving — But Just Barely*, 73 JUDICATURE 259, 264-65 (1990).

8. See Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 CRIME & DELINQ. 307, 311-13 (1991).

9. Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679 (1993).

tions within bounds has exacerbated the state's jail crowding. Minnesota's overall rate of incarceration in felony cases exceeds the national average.¹⁰

I have suggested that "aggregated" sentencing—determining the sentences for many cases all at once—does tend to produce more severe sentences than individualized sentencing.¹¹ If Marvin Frankel disagrees with that proposition (or indeed with anything else that I have written about plea bargaining, severity, and sentencing guidelines), I hope that he will not be shy. Please, Marvin, speak up.

Frankel thinks it a trick that I have singled out for comment guidelines that are foolish, cruel, and silly. He does not favor that kind. Instead, he prefers wise and beneficent guidelines. Wise and beneficent guidelines, however, have not been easy to come by.

At the outset of the sentencing reform movement, many of us did not realize that. Judges, we said, must have implicit sentencing policies. Let's spell these policies out or even improve them. Let's regularize the actual or, better still, develop thoughtful, comprehensive, and coherent sentencing policies of our own. We'll rein in the outliers and reduce disparity. We can hire wise and knowledgeable sentencing commissioners to do the job.

Describing the appropriate influence of situational and personal characteristics on punishment has proven difficult, however. Sentencing commissions can quantify harms more easily than they can quantify circumstances. These commissions have counted the stolen dollars, weighed the drugs, and forgotten about more important things. Like the Minnesota and Washington commissions, many have grounded their guidelines largely on sweeping statutory definitions of offenses. Then they have included situational and personal characteristics in catch-all, non-exclusive lists of possible grounds for departure. Guidelines of this sort may not greatly confine discretion. To the extent that they make a difference, however, they tend to become crime tariffs.¹² They focus on harms rather than people primarily because it is easier to write them that way.

To appreciate the difficulty of avoiding guidelines of the kind that Marvin Frankel does not like, try your hand at proposing

10. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 736, & n.41 (1991).

11. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 937-38 (1991).

12. See text accompanying *infra* notes 31-36 for further discussion of this issue.

wise and beneficent sentencing guidelines for drug cases. Should you start with drug quantity? The weight of the drugs involved in a transaction does seem relevant.

But what quantity should you weigh? Offender A was a "mule" or courier who did not know what type of drug she was carrying let alone how much of this drug there was. Should you weigh the drug anyway? Offender B was a crop duster who knowingly sprayed a field of marihuana. Should you count the plants in the field and multiply by 366 grams? Offender C knowingly drove a friend to a drug transaction. Should you weigh whatever drugs the friend bought or sold? Offender D unloaded a truck. Should you weigh all the drugs that this offender handled? If Offender D had a helper, should you reduce the amount accordingly? If Offender D offered suggestions to his helper, should you add the drugs handled by the helper back in? If Offender D also gave a suggestion to his boss urging her to buy a new truck, should you weigh whatever drugs the boss's new truck has now carried? Remember: You are doing this to promote uniformity and rationality in sentencing.

You can allow a two-level adjustment for an offender's minor role in the offense (that sounds about right, don't you think?), and you can permit departures. Still, your wise and beneficent guidelines may begin to look foolish, cruel, and silly. Why not just weigh the offender and be done with it?¹³ Is weighing drugs the best way to determine how long to lock people up? If, after some reflection, quantity-based guidelines seem foolish, cruel, and silly, what new, wise, and beneficent guidelines will you propose? Marvin Frankel is confident that good people like you are equal to the task.

Once you abandon the premise that sentencing guidelines must be comprehensive—that every case must have its box—ways to solve the "silliness" problem while affording substantial guidance to sentencing judges appear. I have written about how to draft kinder, gentler, wiser, and more beneficent guidelines myself,¹⁴ and I will say more about kinder, gentler guidelines at the end of these remarks. I, too, favor the rule of law. At the level of generality at which Marvin Frankel invites debate, he will not get much from me.

13. See *United States v. Marshall*, 908 F.2d 1312, 1333 (7th Cir. 1990) (en banc) (Posner, J., dissenting), *aff'd sub nom. Chapman v. United States*, 111 S. Ct. 1919 (1991).

14. Alschuler, *supra* note 11, at 939-49.

He will, however, get plenty from Kay Knapp. Knapp has come to this conference not to bury judicial discretion but to praise it. She contends that judges are the most accountable actors in the criminal justice system and that the principal function of guidelines is to give them *more* power. Frankel speaks of the “sweeping, essentially unreviewable power” of judges in pre-guidelines jurisdictions,¹⁵ but Knapp declares that judicial discretion was all but nonexistent in these jurisdictions. Where Frankel describes pre-guidelines sentencing as a “stark, classic regime of arbitrary power,”¹⁶ Knapp writes, “*Enhancement* of judicial discretion has been fundamental to guideline development.”¹⁷ With both Frankel and Knapp on this program, a critic of state sentencing guidelines must aim at a rapidly moving target.

I doubt that either Frankel or Knapp has the correct answer to the empirical question that divides them—whether judges in pre-guidelines jurisdictions were monarchs or lackeys. Frankel tends to overlook the back end of the criminal justice system, and Knapp tends to overlook the back end of her paper. Parole boards in pre-guidelines regimes reduced the sentencing disparity that might have been created by the varying outlooks of judges and prosecutors. These boards and other authorities kept sentencing judges from exercising anything like the power that Frankel attributes to them. At the same time, the choice between prison and probation was a front-end decision shared by prosecutors and judges. Knapp, whose paper concludes with a thoughtful discussion of alternatives to incarceration, seems strangely to disregard the in-out decision in her earlier discussion of judicial power.

Although pre-guidelines judges may not have been the last of the absolute monarchs, Knapp’s claim that the purpose of sentencing guidelines was to enhance these judges’ discretion ought to cause jaws to drop and eyes to gape. Especially when Marvin Frankel, the founding father of the sentencing reform movement, stands before us, such revisionist history is breathtaking.

Knapp writes: “The rallying cry of the most recent successful presidential campaign, ‘It’s the economy, stupid!’ finds its parallel . . . in ‘truth in sentencing.’ All else is mere detail.”¹⁸

I doubt, however, that you will find the words “truth in sentencing” in Kay Knapp’s writings or in the statements of the

15. Frankel & Orland, *supra* note 1, at 655.

16. *Id.*

17. Knapp, *supra* note 9, at 684 (emphasis added).

18. *Id.* at 686.

Minnesota Sentencing Commission a decade ago. You are likely to find discussions of sentencing disparity instead. I believe that Knapp changed the sign on the wall of her campaign headquarters only last year. The new sign reads, "Veritas in poenis dandis," or "Truth in sentencing." The old one read, "It's the disparity, stupid."¹⁹

Knapp speaks of her new motto—truth in sentencing—without speaking much about truth in sentencing. The people who invented this motto believed that the public was deceived by indeterminate sentencing. Because members of the public read the papers, they knew the sentences announced by judges; but because they did *not* read the papers, they knew nothing about parole and other early release mechanisms.

To the extent that the reformers' concern was justified,²⁰ the cure seemed simple. After calculating the earliest possible date of an offender's release, a judge should have been required to announce this date through a bullhorn. Truth in sentencing did not require any change in sentencing structure; it required truth-telling. That simple solution, however, was not what the reformers had in mind. Treating the statement, "I sentence you to a term of two to ten years," as *untruthful*, the reformers proposed determinate sentencing and sentencing guidelines.

The reformers' familiar, if misleading, use of the phrase "truth in sentencing" is only one of Knapp's uses. She writes:

In fact, "truth in sentencing" is used by commissions in several different senses. One usage refers to *judicial control of sentencing* as opposed to back-end control. Another usage is *close correspondence between the pronounced sentence and time served*. A third sense of truth in sentencing is *adherence to articulated standards*. A final usage is *predictability of time served*.²¹

An agency that articulates standards should not disregard them, but I see nothing untruthful in any of the other practices that Knapp regards as inconsistent with her motto. I have no brief for regimes of indeterminate sentencing grounded on the view that

19. See, e.g., Kay A. Knapp, *Implementation of the Minnesota Guidelines: Can the Innovative Spirit Be Preserved?*, in VON HIRSCH, ET AL., *supra* note 5, at 127 ("The Minnesota Sentencing Guidelines, which became effective May 1, 1980, have been hailed as innovative and successful. The primary goals were to increase uniformity and proportionality in sentencing.").

20. And some sentencing structures *were* confusing.

21. Knapp, *supra* note 9, at 685 (emphasis added).

a parole board can determine when offenders have truly reformed. When the goal is simply to prevent prison crowding, however, I do not understand why a system that includes a measure of back-end decisionmaking cannot be open, principled, and honest. Front-end projections of prison populations often go off-track.²² They have in fact gone off-track in both Minnesota and Washington. And when prison population projections by sentencing commissions go off-track, the response is likely to include back-end, ad hoc adjustments of the sort that Knapp considers dishonest.²³ Knapp reports that substantial back-end discretion has in fact crept into Minnesota's sentencing system.²⁴

Knapp writes, "It must be noted that front-end sentencing authority and judicial sentencing authority are not synonymous. Prosecutors share, and with mandatory minimums sometimes dominate, front-end sentencing authority."²⁵ Prosecutors exercise their share of front-end sentencing power largely through plea bargaining, and plea bargaining mislabels offenses as defendants plead guilty to crimes less serious than those that they apparently committed. In light of this systematic mislabeling, to proclaim that locating discretion at the front end of the criminal justice system enhances "truth in sentencing" ought to cause one to gag.²⁶

22. See Alschuler, *supra* note 11, at 936 ("To [predict future prison populations] effectively, a commission must guess future crime rates, future arrest rates, future prosecutorial charging policies, future plea bargaining practices, and more.").

23. Although front-end decision makers may recognize that correctional resources are limited, they are likely to focus primarily on the punishments that offenders deserve. Back-end decision makers are likely to consider more specifically the extent to which limited resources require the release of inmates who have not fully served their "just" sentences. Back-end release mechanisms effectively convey the message that the public can be tough about crime, but only if it is willing to pay the price. Once again, I see nothing dishonest about placing "justice" specialists at the front end of the sentencing process and "resource" specialists at the back end. If members of the public are deceived by "front end" sentences into believing that they can have tough sentences without paying for them, this sort of arrangement will in fact give them "truth in sentencing."

24. Knapp, *supra* note 9, at 688-89. The situation in Minnesota, however, is not nearly as sad as that in Florida, a jurisdiction that has abolished parole and implemented sentencing guidelines *without* a clear prison capacity constraint. Florida appears to be holding its correctional system together with "gain time"—10 days per month of "statutory gain time" for obeying institutional rules; as much as 20 days per month of "incentive gain time" for participating in institutional programs; as much as 60 days of "meritorious gain time" for every heroic act; and up to 60 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% of his or her guidelines sentence. Holten & Handberg, *supra* note 7, at 264.

25. Knapp, *supra* note 9, at 684.

26. There is, moreover, considerable irony in insisting that the public be fully informed

Just as Knapp speaks of truth in sentencing without speaking much about truth in sentencing, she speaks of sentencing guidelines without speaking about most sentencing guidelines. First, she excludes the federal guidelines.²⁷ Everyone on today's program seems to agree that these guidelines are a disaster. Knapp also prefers not to discuss most state guidelines. She writes, "[R]eferences to sentencing guidelines are to state guidelines systems along the order of those developed in Minnesota, Washington, Oregon, and Kansas."²⁸

Even when Knapp discusses her favorite four, she does not talk very much about guidelines. She talks mostly about moving sentencing discretion from the back end of the criminal justice system to the front end. This change in the locus of authority, however, has little to do with guidelines. A state can have back-end discretion with guidelines, back-end discretion without guidelines, front-end discretion with guidelines, and front-end discretion without guidelines. Parole release guidelines preceded the development of sentencing guidelines in a number of jurisdictions, and a number of jurisdictions have abolished discretionary release on parole without implementing guidelines of any sort.

When talk about guidelines is not much about guidelines, when talk about truth in sentencing is not much about truth in sentencing, and when one of America's most respected students of sentencing turns the principal object of the sentencing reform movement on its head, one may sense a measure of post hoc rationalization for a reform that cannot be justified on the grounds initially offered. Knapp's principal thesis appears to be that a jurisdiction committed both to abolishing back-end discretion and to matching sentences to resources must embrace something like the Minnesota Sentencing Guidelines. As a descriptive matter, her thesis is accurate, but making the normative case for such a sentencing system requires more than a slogan on the wall.

through "truth in sentencing" while whispering that sentencing commissions can insulate the legislature from the public's desire for tough sentences. The goal of "truth in sentencing" apparently is not to facilitate implementation of the public will.

Knapp herself does not seem enamored of prosecutorial power. She proposes to restrict this power through "typical case" offense classifications, adequate and timely flow of information to the sentencing judge from a source independent of the prosecutor, and a clear declaration that sentencing is a judicial responsibility. These supposed safeguards currently exist in Minnesota. However, they have not kept prosecutors from entering charge-reduction plea agreements virtually without restraint. Minnesota judges exercise their discretion in the interstices that prosecutors leave them.

27. Knapp, *supra* note 9, at 679-80.

28. *Id.* at 680.

Before bringing these remarks to an end, I want to offer an argument for sentencing guidelines closer to Marvin Frankel's and Leonard Orland's than to Kay Knapp's. Earlier I asked you to imagine yourself a sentencing commissioner. Now imagine yourself a judge who must sentence several defendants convicted of drunk driving. Doing this job well will require you to confront a number of challenging issues.

Should you attempt to distinguish between alcoholic drivers and drivers who can better control their drinking? Should you order a medical or psychological examination of each offender to assess the extent of his or her drinking problem? How frequently do treatment programs for alcoholism succeed? Can forced treatment work? Should you consider an offender's ability to pay for treatment in deciding whether to order this treatment? Can treatment justify a greater deprivation of liberty than would be appropriate if an offender were simply to be punished? Should offenders be offered a choice between jail and taking an alcohol-control medication like Antabuse? Do drinking-driver schools reduce recidivism? Should offenders' names be published in local newspapers, or should they be required to publicize their convictions by placing bumper stickers on their cars? When are suspensions and revocations of drivers' licenses appropriate? Should you sometimes go beyond licensing restrictions to require the impoundment or forfeiture of an offender's vehicle? Should you order "shock" incarceration, home detention, community service, or fines? When fines are imposed, should they be uniform, or should they vary with an offender's wealth or income? To what extent should your 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 offender's age, with involvement in a traffic accident while intoxicated, and with the harm resulting from an accident?

You may be a good and capable judge, but you should not be expected to address issues of this breadth, consequence, and difficulty without guidance. Sentencing should not be a game of "every judge for herself." When it is, judges are certain to disagree with one another, and troublesome inequalities will result. Moreover, forcing you to consider issues that countless judges before you have considered and that other judges will consider before the day's end is a waste of resources. The effort and uncertainty of your task are likely to cause agony for you, for the defendants you sentence, and for everyone else.

Moreover, you cannot do the job well. You cannot gather extensive data concerning the sentencing practices of other juris-

dictions throughout America and abroad, the past sentencing practices of the courts of your own state, the effectiveness of various treatment programs, and the experiences of knowledgeable judges, probation officers, and others. You must resolve many critical issues just by muddling through. No state legislature will provide the detailed guidance that you need. Only a sentencing commission can do it.

But no sentencing commission has. For the most part, guidelines like Minnesota's and Washington's have incorporated without refinement the definitions of offenses found in state criminal codes—declaring, for example, that “driving while intoxicated” is a “level four offense” on a sentencing grid. Such a declaration submerges most of the issues worth considering. Rather than give tough, recurring sentencing issues greater consideration than judges have provided, sentencing commissions give them less.

Kay Knapp objects that this sort of criticism “overlook[s] the richness of information embodied in a typical case analysis.”²⁹ She maintains that before classifying offenses, a sentencing commission considers “[o]ffender characteristics, victim characteristics, and situational factors.” The commission develops a “very rich and holistic picture of the typical case.”³⁰ There is, however, one difficulty. After developing its “rich and holistic picture of the typical case,” every sentencing commission including Minnesota's and Washington's has forgotten to tell us what it is.

I do not know whether the “typical” drunk driver is an alcoholic or a social drinker, whether his or her blood alcohol level was barely above the legal limit or much higher, whether he or she was driving within the speed limit or well above this limit, and whether he or she caused an accident. Will the typical offender at the left-hand box of level four of the sentencing grid please stand up?³¹

29. *Id.* at 692 n.45.

30. *Id.* at 692.

31. In her rejoinder to these comments, Knapp reiterates that criminal justice insiders understand “typical cases” without being told about them. She writes: “Since Professor Alschuler is not experienced in the nature of the cases in the various jurisdictions, it is not surprising that he does not know what typical cases are. Judges, prosecutors, and defenders, however, have no difficulty discerning them.” Kay A. Knapp, *A Reply to Professor Alschuler*, 64 U. COLO. L. REV. 737, 741 (1993). After reading these comments, I proposed to Knapp that she and I leave the law library, send a survey to the judges, prosecutors, and defenders who “have no difficulty discerning what typical cases are,” and ask these practitioners: “Can any case appropriately be described as the ‘typical’ burglary case?” I also proposed that we ask about the typical rape case, the typical water pollution case, the

If sentencing commissions had shared their “rich and holistic picture of the typical case” with the rest of us, they would have helped sentencing judges like you. You could compare the features of any case before you with the features of the commission’s typical case, and the sentence that the commission had prescribed for the typical case might give you a good sense of the appropriate sentence for yours. A sentencing commission that resolved recurring sentencing issues and that provided benchmarks, not boxes, could make a marvelous, lasting contribution to the quality of criminal justice.

Minnesota’s guidelines have not made that contribution, and whether they have done more good than harm seems to me a close question. The aficionados of state sentencing guidelines sometimes have complained that scholars have not given these guidelines the same attention that they have given the Federal guidelines.³² One reason for this relative neglect may be that most state guidelines simply have not done very much either for good or for ill. Some of us predicted at the outset of the reform movement that they would not. We argued that toying with grids and with theories of punishment (should the Minnesota sentencing grid have a “just deserts in-out line” or a “modified just deserts in-out line?”) would remain overly refined scholasticism so long as reformers averted their eyes from the realities of plea bargaining. In the late 1970s and early 1980s, sentencing reformers seemed reluctant to address the things most obviously wrong. They fiddled at the periphery of the criminal justice system, neglecting the conflagration at the core. Today, after what has probably been the most disastrous decade in the history of American penology, we continue to wonder whether anyone will address the obvious problems of the American criminal justice system—an unwieldy, over-proceduralized system that threatens ever-more monstrous penalties in

typical murder case, the typical aggravated assault case, and the typical drunk driving case. If some respondents surprised me by answering yes to the initial question, I proposed that we give them four or five lines to describe each of the “typical” cases that they had “no difficulty discerning.” I offered to wager that a substantial majority of the respondents either would say no to the initial “is there a typical case” question or, if they answered yes, would describe cases substantially at variance from those described by other respondents. Knapp did not respond to my proposal. I also offered Knapp \$100 for any of the several statements and positions that I believe her rejoinder inaccurately attributed to me—that is, if she could actually find any of these statements and positions in my writing. Again, Knapp did not respond.

32. See, e.g., Knapp, *supra* note 9, at 679; Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium* 64 U. COLO. L. REV. 645 (1993).

order to persuade defendants to abandon the most basic of their rights.³³

When one evaluates the entire package of reforms accompanying the Minnesota guidelines rather than the guidelines themselves, one can easily find things to cheer. Most notably, the efforts of the Minnesota Sentencing Commission to match sentences to prison resources were plainly worthwhile. Other states—California, Colorado, Florida, and Illinois among them—eliminated their correctional systems' principal "back-end" safety valves just as the pressure was building. They did so when the safety valves were most needed, and they did so without providing "front-end" substitutes. Minnesota's mechanism for matching sentences to resources certainly has proven preferable to no mechanism at all. One also must count among the reform package's positive features the systematic collection of sentencing data. Analyses of these data by people like Knapp and Debra Dailey have increased our understanding of criminal justice and the accountability of criminal justice officials. Finally, the appellate review of sentences in Minnesota has promoted judicial accountability. Neither the need for appellate review of sentences nor the need for data collection nor the need for a means of matching punishment to resources, however, makes much of a case for *sentencing guidelines*.

To some extent, the Minnesota guidelines have increased prosecutorial power, and empirical studies claiming that these guidelines have reduced sentencing disparity are nothing but smoke and mirrors.³⁴ Moreover, the grid format of the Minnesota guidelines makes it easy to assign sentences to cases without considering the cases.³⁵ Nevertheless, one cannot object very strongly to guidelines

33. Some nice long division by Knapp and a co-author has yielded an arresting statistic. Dividing the annual budget of the Federal Sentencing Commission by the number of sentences imposed by the federal courts each year reveals that the federal guidelines cost \$315 per case. Kay A. Knapp & Denis J. Hauptly, *State and Federal Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 688 n.30 (1992) (emphasizing that state costs are much smaller). In fact, the federal guidelines cost much more than \$315 per sentence imposed, for an accountant would amortize over a period of time the Commission's budgets during the years before the guidelines went into effect and would add guideline expenses that have appeared in the budgets of Congress, the Department of Justice, and the courts. That the federal criminal justice system pays this high price in each case for a functionless and very ugly gargoyle while insisting that it cannot afford to give the defendant in the same case a trial reveals the system's topsy-turvy values.

34. See Alschuler, *supra* note 11, at 915-18 ("[G]uidelines 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.'").

35. See *id.* at 906-08.

that merely provide a "starting point" for analysis and that require only a plausible statement of reasons to justify departure. In operation, the Minnesota guidelines may fit this description, at least for many judges. The Minnesota Supreme Court generally has been tolerant of departures.

The guidelines themselves, however, are two-faced on this subject. On the one hand, they appear to authorize departure for any reason on their long lists of aggravating and mitigating circumstances and for other reasons as well. On the other hand, they forbid departure "unless the individual case involves substantial and compelling circumstances."³⁶ To the extent that some judges have taken this admonition against departure seriously (or have taken the easy course of following the guidelines mechanically), Minnesota's offense-based guidelines have operated as crude crime tariffs.

I have no particular objection to the Minnesota guidelines in so far as they have *not* restricted discretion, but like Marvin Frankel, Leonard Orland, and Kay Knapp, I favor the concept of sentencing guidelines. I wish that some sentencing commission, somewhere in America, would throw away its grid, focus on specific paradigmatic cases, resolve recurring sentencing issues, and do the important work that only a sentencing commission can do.³⁷

36. See MINN. STAT. ANN. § 244 App. pt. II.D (West Supp. 1993) (rev. Aug. 1, 1992).

37. In the absence of a direct restriction on plea bargaining, guidelines in the format that I suggest might, like other guidelines, be subverted by bargaining prosecutors and defense attorneys. To suppose these guidelines could exert a slight and subtle restraining influence on the bargaining process, however, might not be too naive. After a sentencing commission had set forth its "rich and holistic picture of [a series of] typical cases" and had prescribed a sentence for each of these cases, it would be difficult to view a guideline sentence simply as a number thrown at a box full of diverse cases by bureaucrats with no knowledge of the facts of any case. Unlike most current guideline sentences, which practitioners may view merely as the starting point (or the asking price) in plea bargaining, guidelines in this different format would reflect unmistakably the Sentencing Commission's focused, authoritative determination of the appropriate response to specific sets of facts. Practitioners might hesitate to subvert this authoritative determination or at least might hesitate to subvert it too much. Similarly, if a sentencing commission were to rule particular responses to particular crimes (fines, electronic monitoring, Antabuse treatment, vehicle forfeiture, bumper stickers, or whatever) either "in" or "out," both practitioners and judges might hesitate (at least a little) to reverse its judgments.

