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## THE ORIGINAL INTENT OF UNIFORMITY IN FEDERAL SENTENCING

Michael M. O'Hear\*

Uniformity has become a dominant objective of the federal sentencing system, but there is curiously little agreement, or even sustained analysis, as to what uniformity really means or how to achieve it. By way of illustrating the confusion, one need look no further than the Supreme Court's recent decision in *United States v. Booker*, in which the Court found unconstitutional the federal sentencing system that had been in place since 1987.<sup>1</sup> The Court split over the remedy. Justice Breyer, writing for a majority, held that the United States Sentencing Guidelines, previously binding on judges, should be made merely advisory.<sup>2</sup> Four dissenters would have retained the mandatory character of the guidelines, but required jury fact-finding to implement them.<sup>3</sup> Breyer rejected jury fact-finding as inconsistent with the principle of uniformity in sentencing, which he characterized as "Congress' basic goal" in adopting the guidelines system in the 1980s.<sup>4</sup> The dissenters agreed that uniformity was Congress' goal, but argued that their remedy was actually truer to that intent.<sup>5</sup> Indeed, Justice Stevens went so far as to assert that "uniformity is *eliminated* by the majority's remedy."<sup>6</sup> In short, while invoking the same objective of uniformity, Breyer and Stevens ultimately reached diametrically opposite conclusions as to what that shared objective actually entailed.

At one level, of course, the meaning of uniformity is clear enough: similarly situated defendants should get similar sentences, while

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I am especially pleased and honored that this Article appears in the *University of Cincinnati Law Review* on the thirty-fifth anniversary of Judge Marvin Frankel's seminal lecture on federal sentencing at the University of Cincinnati College of Law, which laid the groundwork for the sentencing reform movement that is my subject. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) (reprinting the 1971 lecture). Judge Frankel's vision of a more humane and dignified sentencing process remains a compelling one, and this Article is dedicated to his memory.

1. 543 U.S. 220, 226 (2005).

2. *Id.* at 246.

3. *Id.* at 271–72 (Stevens, J., dissenting in part); *id.* at 313 (Thomas, J., dissenting in part).

4. *Id.* at 253.

5. *Id.* at 299 (Stevens, J., dissenting in part).

6. *Id.* (emphasis added).

differently situated defendants should get appropriately different sentences.<sup>7</sup> Put differently, uniformity seeks to eliminate *unwarranted* sentencing disparities, but also to provide for *warranted* disparities. The problem lies in distinguishing the warranted from the unwarranted.<sup>8</sup> What factors, in other words, will be considered relevant in distinguishing among defendants at sentencing? For instance, does the fact that a defendant is a single parent with small children justify a different sentence than would be given an otherwise identically situated defendant? How about if the defendant has a drug dependency problem or a physical disability? Should it matter that the defendant pled guilty, thereby saving the government the expense of going to trial?

In order to address such questions in a coherent fashion, we are in need of some clearer thinking about the *value* of uniformity, that is, the good we hope to accomplish through the pursuit of more uniform sentencing. This Article examines the question through the lens of history. My central concern is this: in the thinking of prominent reformers who played important roles in shaping the federal sentencing system, how exactly was uniformity conceptualized and why was it viewed as desirable? This historical analysis will not only illuminate the questions raised in *Booker* regarding congressional intent, but also reveal alternative ways of thinking about uniformity that may enrich the ongoing debate over the future of federal sentencing.

The history begins in 1973, with the publication of Judge Marvin Frankel's influential call for the development of sentencing guidelines for the federal courts,<sup>9</sup> and proceeds through enactment of the so-called Feeney Amendment in 2003, which made several important changes to the guidelines system. Other distinguished scholars have told the story of federal sentencing reform before,<sup>10</sup> but none with my particular point of focus: the rise and evolution of what I call the "uniformity ideal" in federal sentencing.

7. The term "uniformity" is sometimes used more narrowly to refer only to treating like cases alike; I use the term in the broader sense indicated by *Booker*. For further discussion of the semantic difficulties, see Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 249-50 (2005). For a contrasting approach to the terminology problems, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381-89 (2005).

8. See Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) ("[D]isparity is not a self-defining concept.").

9. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

10. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9-77 (1998); MICHAEL TONRY, *SENTENCING MATTERS* 9-13, 72-79 (1996); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993).

I use the label as a nod to Professor Francis Allen, who so eloquently dissected the decline of the “rehabilitative ideal” in the 1970s.<sup>11</sup> It is appropriate to invoke the rehabilitative ideal for at least three reasons, each of which will be elaborated in this Article. First, when the rehabilitative ideal went into decline, it was the uniformity ideal that emerged as the new governing principle of the federal sentencing system. Second, the uniformity-enhancing reforms, as originally conceived by Frankel and his contemporaries, were intended to rationalize and humanize the criminal justice system in much the same way that the rehabilitative ideal was originally intended to rationalize and humanize. Third, much as critics argued in the 1970s that rehabilitation was an uncertain concept that might be misused as cover for irrational and inhumane practices, it is now apparent that uniformity is also an elastic principle that may be invoked to camouflage dubious policies.

As the remedy debate in *Booker* suggests, the uniformity ideal has meant quite different things to different people. Much of the difficulty stems from the tension between two distinct approaches to uniformity, which I describe as the predictability paradigm and the purposes paradigm. Under the predictability paradigm, defendants should be distinguished only in ways that can be anticipated well in advance of sentencing, perhaps even in advance of the commission of the crime. This paradigm favors simplicity and bright-line rules, and disfavors sentencing factors that are relatively subjective in nature, such as intent and character. Under the purposes paradigm, by contrast, sentencing factors are deemed relevant or irrelevant based not on their operational predictability, but on their contribution to recognized objectives of sentencing, such as retribution and deterrence. Because these objectives are many, and their implementation potentially dependent on a variety of subjective variables, the purposes paradigm may support a sentencing system that is both analytically richer and less transparent than would be favored under the predictability paradigm.

Both paradigms find support in Frankel’s work. Subsequent reformers have typically emphasized one or the other, and the varying attempts to strike a balance between the two have exerted an important influence over the development of federal sentencing policy. In general, the movement has been toward greater predictability. The *Booker* remedy, however, reversed the trend. Thus, one of the most pressing questions facing federal sentencing policy now is whether to embrace

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11. See FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

the purpose-driven model of uniformity that “won” in *Booker*, even at some cost to the predictability values that Congress has favored in recent years.

Yet, the story of the “original intent” of the uniformity ideal—which I locate in Frankel and in the various efforts (ultimately successful) to translate Frankel’s ideas into federal legislative reform in the 1970s and 1980s—is incomplete if it covers only predictability and purpose-driven sentencing. There is another crucial theme, albeit one that has faded from view in policymaking debates over the past two decades: showing respect for the dignity of criminal defendants. This was a central, but now frequently overlooked, concern of Frankel’s. Indeed, many of the scholars who have written about Frankel’s contributions have lost sight of this aspect of his vision, characterizing his work simply as a “rationalist, good-government proposal.”<sup>12</sup> Uniformity, however, was originally supposed to be both rationalizing *and* humanizing. In particular, as we will see, Frankel and many of contemporaries were deeply concerned with the way that defendants experienced the criminal justice system, with the way that the *process* could itself function as punishment, and with the tendency of the process to undermine defendants’ sense of respect for the law. This not to deny that Frankel was a good-government rationalist, but it is to suggest that this rather bloodless characterization misses important and emotionally resonant strands of his thinking that have much to contribute to the ongoing debate over uniformity in federal sentencing.

The Article proceeds as follows. Part I describes eight essential problems that sentencing reformers have encountered in attempting to give content to the uniformity ideal. Part II traces the genealogy of federal sentencing reform from Frankel to Feeney. This history will focus on the widely varying ways that uniformity advocates have addressed the eight essential problems. Part III elaborates on the conflict between the predictability and purposes paradigms. Viewed through this lens of this conflict, the path from leading reform proposals in the 1970s to the Feeney Amendment was largely a journey from purposes to predictability, with *Booker* now potentially giving new life to the purposes approach. Finally, Part IV describes the dignity agenda that originally lay behind the uniformity ideal, the particular threat posed to that agenda by unchecked prosecutorial power, and the reinvigoration

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12. TONRY, *supra* note 10, at 89. See also Kevin R. Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 548 (Michael Tonry ed., 1998) (“Frankel’s central concern was that discretionary actors such as judges and parole officials followed no rhyme or reason beyond their own personal instincts. Punishment decisions, more important than much of the other routine business of the courts, were deserving of at least a comparable degree of care.”).

of the agenda by recent developments.

### I. EIGHT ESSENTIAL QUESTIONS

In order to justify and implement the uniformity ideal, reformers have grappled with a host of difficult questions. This Part outlines eight of particular importance. While this list is by no means exhaustive,<sup>13</sup> it does get at most of the major fault lines in the federal sentencing debate.

First, *why do we care about uniformity?* Uniformity resonates with our most basic instincts about the rule of law: *of course*, the similarly situated should be treated the same. But why exactly ought we adopt any particular changes to sentencing law at any particular time in the name of uniformity? What precisely is the problem with the status quo? It hardly seems adequate to answer that we have not realized an abstract ideal of the rule of law. In order to justify major reforms, uniformity advocates have always sought to identify more concrete harms caused by the status quo. In particular, they have invoked two types of interests: (1) the protection of defendants, particularly from the feelings of anxiety and degradation aroused by subjecting them to unchecked discretionary power; and (2) the protection of society at large, particularly from deterrable crime and from a general erosion of confidence in the legal system. As we will see, the general trend has been away from defendant protection, and toward crime reduction, as uniformity's preeminent objective.

Second, *what is the role of purposes?* Implementing the uniformity ideal requires the development of criteria for determining which defendants should be treated the same and which differently. Many leading uniformity advocates have assumed that such criteria would be derived from one or more of the traditionally recognized purposes of sentencing: deterrence, incapacitation, rehabilitation, and just deserts.<sup>14</sup>

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13. For instance, other important questions relate to the relevance of local circumstances, see Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357, 360–63 (2004); victim preferences, see Wayne A. Logan, *Victims, Survivors and the Decisions to Seek and Impose Death*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (James R. Acker & David R. Karp eds., 2005); and third-party effects of the sentence, see Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002).

14. For a concise summary of these purposes, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 13–18 (3d ed. 2001). A deterrence-based punishment seeks to convince the general community (and, in some formulations, the offender himself or herself) not to commit (or repeat the commission of) the crime for which the offender is being sentenced. An incapacitation-based punishment relies on confinement and supervision in order to prevent future crimes by offenders who are believed to represent particularly important recidivism threats. A rehabilitative sentence will involve some form of therapy, treatment, or training to help address the underlying causes of criminal behavior.

Some have contemplated a discriminating process, in which a few of the traditional purposes would be favored and others downplayed or excluded. Others have contemplated a more inclusive approach, in which all of the traditional purposes would be brought to bear and balanced against one another. However, uniformity need not necessarily be purpose driven. An alternative "empirical" approach, which has proven quite important in the development of federal sentencing law, relies on an analysis of past practices. Under this approach, the factors that serve to distinguish defendants are those that have typically been considered important in previous cases.

Third, *what is the role of offender characteristics?* Potentially relevant offender characteristics include such factors as criminal history, family responsibilities, socioeconomic status, prior good works, and the like. Whether such characteristics count in a uniformity scheme may turn on how the purposes question is answered. If uniformity is structured around the purpose of general deterrence, for instance, then few, if any, offender characteristics are apt to be considered relevant.<sup>15</sup> Rehabilitation and incapacitation, by contrast, give much greater emphasis to the offender's background and personal circumstances.<sup>16</sup>

Fourth, *what is the role of real-offense characteristics?* By the time of sentencing, the offender will have been formally convicted of one or more specific crimes. In a "charge-offense" system, the crime of conviction will play a central role in determining the sentence. Legislatures, however, often draft criminal statutes broadly enough to encompass real conduct of widely varying severity, while prosecutors may manipulate the crime of conviction through their charging and plea-bargaining decisions. A uniformity scheme might therefore look to "real-offense" characteristics in order to distinguish among defendants who have been formally convicted of the same crime. For instance, a real-offense system might require a longer sentence for the bank robber who openly brandishes a loaded weapon than for the bank robber who merely carries a toy gun in his pocket. Even assuming the adoption of a real-offense system, however, questions remain as to which types of real-offense characteristics ought to be considered relevant and how much weight they ought to be given relative to other sentencing factors. As we will see, federal policymakers have chosen to give an unusually

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Just deserts, a form of retributive punishment, is often contrasted with the foregoing utilitarian purposes of punishment; desert does not seek future crime prevention per se, but rather demands punishment as a moral imperative in its own right, often seen as necessary to affirm the status of victims or show respect for the personhood of defendants.

15. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 6-7 (1987).

16. *Id.*

heavy weight to real-offense characteristics, particularly those related to the amount of harm caused or threatened by the offender's conduct.

Fifth, *to what extent will uniformity be implemented through rules?* Students of law are familiar with a distinction between "rules" and "standards."<sup>17</sup> In a rules-based regime, outcomes will be strictly determined by the presence or absence of a discrete set of objective factors, without any formal role for judicial discretion or value judgments. Rules will inevitably be over-inclusive and under-inclusive because they do not tie sentencing outcomes directly to the underlying values we really care about, and because their authors cannot possibly anticipate and address all of the potentially relevant variation in the real world. A standards-based regime, by contrast, will require judges to render normative judgments in light of whatever purpose or purposes are embodied in the uniformity scheme. Standards thus appear less crude and mechanical than rules, but may operate with less predictability.

Sixth, *how will uniformity affect severity?* Uniformity contemplates the elimination of outlier sentences, that is, sentences that are either too high or too low relative to some "correct" sentence for a particular category of cases. But what is the correct sentence? Under a strict empirical approach, the right sentence would, in some sense, be the average sentence. Purpose-driven approaches, particularly of the inclusive variety, offer less clarity. In structuring uniformity, then, general presumptions about sentence length and the appropriateness of incarceration may play an important role. In light of such presumptions, uniformity might adopt a general preference for "leveling up" (i.e., a focus on reducing the number and degree of relatively low sentences) or "leveling down" (i.e., a focus on reducing the number and degree of relatively high sentences), or attempt to find a position of severity-neutrality (i.e., target high and low sentences equally). Such preferences might be pursued on an across-the-board basis, or might vary by the type of offense or offender. For instance, we might adopt a leveling-down approach for first-time offenders, and a leveling-up approach for recidivists. As we will see, federal sentencing policy has increasingly pursued a broad leveling-up agenda.

Seventh, *does uniformity encompass prosecutorial decisions?* Uniformity advocates have typically focused on disparity in judicial decisionmaking. Yet, there is no reason to believe that prosecutors are inherently any more rational or consistent in their decisions than judges. These prosecutorial decisions include three of particular importance: (1)

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17. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976).



whether to pursue or decline federal criminal charges; (2) which charges to bring; and (3) what concessions, if any, to make in the course of plea-bargaining. Recognizing the risk of prosecutor-created disparity at these points in the process, a uniformity scheme might seek to regulate, or correct for, the exercise of prosecutorial discretion. For instance, prosecutors might be made subject to binding charging and plea-bargaining guidelines. Alternatively, uniformity might take prosecutorial decisions as a given; in effect, uniformity would be defined as the like treatment of defendants who have been prosecuted in a like manner.

Eighth, *what is the role of the defendant's cooperation?* During investigation and prosecution, a defendant may be more or less cooperative with law enforcement and court personnel. At a minimum, we would hope that the defendant would refrain from obstruction of justice or flight from custody. But a defendant may do much more: enter a timely plea of guilty, saving the government the expense of preparing for trial; provide assistance in the investigation or prosecution of other offenders; or voluntarily remediate harm caused by the offense.<sup>18</sup> In practice, defendants vary widely in the scope and value of their cooperation. Such variations might or might not be considered an appropriate basis on which to distinguish among otherwise similarly situated offenders. As we will see, despite much criticism (and uncertain theoretical grounding), federal sentencing law has given great weight to cooperation.<sup>19</sup>

## II. UNIFORMITY: FROM FRANKEL TO FEENEY

This Part traces the genealogy of the pre-*Booker* federal sentencing system, with special attention to the eight questions outlined above. Major sentencing reform proposals of the 1970s are covered, along with the Sentencing Reform Act of 1984 (SRA), the United States Sentencing Guidelines adopted pursuant to the SRA in 1987, and the modifications to the guidelines regime contained in the 2003 Feeney Amendment. First, though, in order to understand the context in which the uniformity

18. I use a broad definition of cooperation, encompassing any behavior that would be regarded as socially desirable by law enforcement and court personnel. See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility,"* 91 NW. U. L. REV. 1507, 1511 (1997). "Cooperation" is sometimes used more narrowly to refer to providing assistance in the apprehension and prosecution of another offender. See, e.g., Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 23–26 (2003).

19. For a discussion of the tension between cooperation benefits and the traditional purposes, see Simons, *supra* note 18, at 23–26. Professor Simons argues that at least some types of cooperation have underappreciated value as forms of retribution or atonement, and that these attributes of cooperation help to justify cooperation benefits within traditional punishment paradigms. *Id.* at 4–5.

advocates of the 1970s operated, we must consider the decline of the so-called “rehabilitative ideal.”

*A. Decline of the Rehabilitative Ideal*

The rehabilitative ideal functioned as the central organizing principle of American sentencing systems for much of the twentieth century.<sup>20</sup> Professor Allen defined this ideal as “the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfaction of offenders.”<sup>21</sup> In order to effectuate these purposes, federal sentencing law embraced probation, parole, and the indeterminate sentence.<sup>22</sup> In this system, when a judge imposes a sentence of imprisonment, the amount of time actually served is determined by a parole board, which is supposed to assess the offender’s progress towards rehabilitation.<sup>23</sup> The judge-imposed sentence, however, sets parameters: in general, prisoners must serve at least one-third, but no more than two-thirds, of their sentences before release.<sup>24</sup>

The rehabilitative ideal suffered a “stunning” crash in prominence in the 1970s,<sup>25</sup> perhaps most notably among the liberals, academics, and criminal justice professionals who had been its most reliable defenders.<sup>26</sup> Allen identified three “principal propositions” on which the critique of the rehabilitative ideal rested.<sup>27</sup> First, there was the “nothing works” proposition: “there is no evidence that an effective rehabilitative technique exists . . . we do not know how to prevent criminal recidivism through rehabilitative effort.”<sup>28</sup> Second, the rehabilitative ideal was

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20. ALLEN, *supra* note 11, at 6. See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).

21. ALLEN, *supra* note 11, at 2.

22. *Id.* at 6.

23. Reitz, *supra* note 12, at 543.

24. STITH & CABRANES, *supra* note 10, at 20.

25. Reitz, *supra* note 12, at 544.

26. ALLEN, *supra* note 11, at 7, 9–10. Illustrating the loss of support from the left, the American Friends Service Committee issued a highly influential attack on the rehabilitative ideal in 1971. *Id.* at 7. See G. RICHARD BACON ET AL., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE* (1971).

27. ALLEN, *supra* note 11, at 33.

28. *Id.* at 57. See, e.g., JAMES Q. WILSON, *THINKING ABOUT CRIME* 170 (1975) (“[T]here is little or no evidence that available correctional systems will produce much rehabilitation”); BACON ET AL., *supra* note 26, at 9 (“There is neither consensus among the experts nor validation by research of any categories of diagnosis for criminal behavior.”). The “nothing works” catchphrase was derived from an

inconsistent with “the political values of free societies.”<sup>29</sup> Rehabilitation, of course, purported to be apolitical: this was a medical model of crime that did not, on its face, implicate the distribution of wealth or power in society.<sup>30</sup> However, criminal justice responses to the civil rights and antiwar movements of the 1960s cast doubt on the claims of political neutrality.<sup>31</sup> This experience, in turn, strengthened a basic “liberal unease” with rehabilitation: “efforts to influence by coercive means the very thoughts, feelings, and aspirations of offenders threaten trespass by the state upon areas of dignity and choice posited as immune by the liberal creed.”<sup>32</sup>

Finally, “the rehabilitative ideal has revealed itself in practice to be peculiarly vulnerable to debasement and the serving of unintended and unexpressed social ends.”<sup>33</sup> “Central among the causes of debasement is the conceptual weakness of the rehabilitative ideal.”<sup>34</sup> Ambiguity surrounds not only the means of achieving rehabilitation, but also “the very notion of what rehabilitation consists.”<sup>35</sup> In light of this ambiguity, it was not difficult for officials to camouflage self-interested policies or crude corporal punishment as “therapeutic.”<sup>36</sup>

Whatever the merits of this critique, the decline of the rehabilitative ideal created something of an ideology vacuum. At a time when the public increasingly demanded reform to address rising crime rates, what principle would help legislators restructure the sentencing system? Uniformity emerged as the answer.<sup>37</sup>

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oversimplified reading of an influential empirical survey by Robert Martinson. See Reitz, *supra* note 12, at 544 (discussing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974)).

29. ALLEN, *supra* note 11, at 34.

30. *Id.* at 35.

31. *Id.* at 36.

32. *Id.* at 44–45. See also NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 26 (1974) (arguing that coerced rehabilitation should be rejected based on “historical evidence about the misuse of power and from more fundamental views of the nature of man and his rights to freedom”); BACON ET AL., *supra* note 26, at 40 (associating rehabilitative ideal with “steady expansion of the scope of the criminal justice system and a consolidation of the state’s absolute power over the lives of those caught in the net”).

33. ALLEN, *supra* note 11, at 34.

34. *Id.* at 51.

35. *Id.* at 52.

36. *Id.* at 53–54. See also MORRIS, *supra* note 32, at 13 (arguing that rehabilitative programs “have been corrupted to punitive purposes”); BACON ET AL., *supra* note 26, at 39–40 (“The authority given those who manage the system . . . has concealed the practices carried on in the name of the treatment model.”).

37. See, e.g., Robinson, *supra* note 15, at 8 (“In many respects, uniformity has become a goal in and of itself, apart from satisfying the purposes of sentencing.”). Others have taken the view that retribution, or just deserts, replaced rehabilitation as the “governing rationale for sentencing policy.”

B. Frankel's Criminal Sentences: Law Without Order

The late Marvin Frankel provided much of the impetus for federal sentencing reform with the publication of his classic *Criminal Sentences: Law Without Order* in 1973.<sup>38</sup> The book grew out of Frankel's experiences as a federal district court judge in the era of indeterminate sentencing. Frankel and his colleagues on the bench had the authority to determine sentences within broad ranges, typically extending from probation up to a high statutory maximum term of imprisonment, with essentially no appellate review.<sup>39</sup> Frankel decried the "horrible" sentencing disparities resulting from this regime.<sup>40</sup>

In order to address the disparity problem, Frankel urged Congress to resolve once and for all the important policy problems of sentencing, such as whether retributive objectives ought to be considered and whether sentences should be reduced on the basis of cooperation.<sup>41</sup> He also urged the adoption of "a kind of detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading."<sup>42</sup> These "sentencing guidelines" (to use a label later applied to Frankel's proposal) would be developed by an expert commission and then consulted by judges during the sentencing process.<sup>43</sup> As we will see, commission-drafted guidelines became a central feature of subsequent reform proposals, although different reformers have had very different ideas about the nature of the

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TONRY, *supra* note 10, at 13. See also Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000) (describing efforts of state courts and legislatures "to repudiate utilitarian purposes and interpolate retributive ones" into nominally utilitarian sentencing systems). While retributive approaches may occupy a position of particular strength in the academy, see Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 846–47 (2002), it is less clear that these approaches have attained a dominant status elsewhere. Federal sentencing law, in particular, may be better characterized as consequentialist than retributive, specifically favoring incapacitation and deterrence. Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 415–16 (2002). *But cf. infra* note 260 (discussing debate among scholars as to whether federal guidelines embody "modified just deserts" approach). Indeed, as we will see, neither Congress nor the Sentencing Commission has expressly endorsed retribution as the exclusive, or even the primary, purpose of the sentencing guidelines. What both Congress and the Commission *have* expressly endorsed—repeatedly and unequivocally—is the objective of uniformity.

38. Stith & Koh, *supra* note 10, at 228.

39. *Id.* at 225–27.

40. FRANKEL, *supra* note 9, at 21. Later researchers, however, have demonstrated that pre-guidelines studies of disparity were methodologically flawed and that claims of widespread racial discrimination in sentencing, in particular, had little empirical support. STITH & CABRANES, *supra* note 10, at 106–12.

41. FRANKEL, *supra* note 9, at 107, 112–13.

42. *Id.* at 114.

43. *Id.* at 118.

guidelines.

Frankel's uniformity scheme, it is important to note, was motivated by a concern for *defendants*. To be sure, Frankel often spoke in abstract terms of "the rule of law," or a "government of laws, not of men," as his objective.<sup>44</sup> But whenever Frankel moved from this highest level of generality, it became clear that he saw defendants as the real victims of disparity. The harm suffered by defendants had at least four dimensions. First, Frankel argued, it was an affront to the *dignity* of defendants to subject them to potentially arbitrary or malicious exercises of power. "There is dignity and security," he wrote, "in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as a bland, fungible 'equal' before the law."<sup>45</sup> No such assurance was available, however, in a world of vast, unguided judicial discretion at sentencing.

Second, Frankel saw a problem of *fair notice*:

[I]n the great majority of federal criminal cases a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between.<sup>46</sup>

This lack of predictability caused defendants to experience unnecessary anxiety and anger,<sup>47</sup> and impaired their ability to make well-informed decisions about their conduct.<sup>48</sup>

Third, Frankel believed that unjustified disparities fostered a sense of *resentment* by prisoners against the legal system:

The absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison. Philosophers have agreed for ages on the ideal that the person suffering punishment should be guided to understand and, in the ultimate hope, realize the justice of the affliction. . . . The splatter of varied sentences, with the unexplained variations left to be seen as random or worse, nourishes the view that there is no justice in the law.<sup>49</sup>

This sense of resentment might impair the rehabilitation of prisoners<sup>50</sup> and otherwise interfere with the effective management of prisons.<sup>51</sup>

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44. See, e.g., *id.* at 5, 3.

45. *Id.* at 11.

46. *Id.* at 6.

47. *Id.* at 96–97.

48. *Id.* at 5, 10, 19.

49. *Id.* at 42–44.

50. *Id.*

51. See *id.* at 17 (quoting prison official who characterized prison strike as response to harsh sentencing practices of one particular judge).

Fourth, Frankel believed that disparity harmed defendants by resulting in unduly *harsh sentences*. “My basic premises about sentencing,” he wrote, “include a firm conviction that we in this country send far too many people to prison for terms that are far too long.”<sup>52</sup> It is clear, based on the many anecdotes he related, that his mental image of disparity was of judges handing out unduly long sentences on the basis of factors that—in Frankel’s view—should receive little or no weight. Consider, for instance, one anecdote that, in Frankel’s own words, “epitomizes” his reasons for writing the book:

Judge X . . . told [Frankel] of a defendant for whom the judge . . . had decided tentatively upon a sentence of four years’ imprisonment. At the sentencing hearing in the courtroom, after hearing counsel, Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the “kangaroo court” in which he’d been tried, and the legal establishment in general. Completing the story, Judge X said [to Frankel], “I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of the four.” . . . [T]hink about it. . . . a year in prison for speaking disrespectfully to a judge.<sup>53</sup>

In such anecdotes, Frankel does little to hide his contempt for judges who would *increase* sentences on the basis of whim or bias,<sup>54</sup> but Frankel relates no comparable stories of arbitrary lenience.

Underscoring this view—that the uniformity ideal was intended to be protective of defendants—Frankel drew explicit parallels between his reform proposal and the Supreme Court’s then-recent decision in *Furman v. Georgia*,<sup>55</sup> which temporarily outlawed capital punishment. Noting the Court’s criticism of American capital sentencing as “wanton,” “freakish,” and a “lottery,” Frankel argued that similar labels might be affixed to noncapital sentencing, possibly raising similarly weighty constitutional objections.<sup>56</sup>

Frankel was not the first author to rail against sentencing disparities. For instance, uniformity had been a central plank in the platform of the great eighteenth-century Italian reformer Cesare Beccaria.<sup>57</sup> Closer to

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52. *Id.* at 58.

53. *Id.* at 18.

54. *See, e.g., id.* at 17 (“The books and the reliable folklore are filled with . . . horror stories—of fierce sentences and orgies of denunciatory attacks upon defendants.”).

55. 408 U.S. 238 (1972).

56. FRANKEL, *supra* note 9, at 103–04.

57. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 57–59 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).

Frankel's time, the influential administrative law scholar Kenneth Culp Davis had recently proposed that judicial sentencing discretion be curtailed through the adoption of guidelines.<sup>58</sup> Various other measures to address disparity had also been proposed or tested by 1973.<sup>59</sup> Indeed, Frankel's critique of judicial discretion echoed much of the broader critique of the rehabilitative ideal: too much power was being given to officials in the criminal justice system who did not really know what they were doing, and who were prone to use their power in ways that were arbitrary and cruel.

Frankel's significance stems not from the content of these sorts of claims, but from three other sources. First, in a manner reminiscent of Beccaria, Frankel melded the anger and eloquence of radical criminology with a liberal, rationalist sensibility, embodying an implicit faith in the ability of representative legislatures and well-informed experts to ameliorate the social problems of crime and punishment.<sup>60</sup> Second, as a judge himself, Frankel offered a compelling insider's perspective, peppered with anecdotes and bearing something of "true-life confessions" quality. Third, and perhaps most importantly, Frankel wedded the concept of sentencing guidelines for the first time to the concept of the expert agency. His guidelines would be drafted by a sentencing commission, which he envisioned as a quasi-scholarly body that would conduct research and develop guidelines through a process of ongoing study and experimentation.<sup>61</sup>

If Frankel was vague on a great many points, leaving issues like the purposes of punishment to be resolved by the legislature, this tendency may have also contributed to his influence. By avoiding or downplaying controversial issues, Frankel could couch his uniformity proposal as an apolitical reform. At a time when the apolitical pretensions of the rehabilitative ideal were under assault, the promise of a more neutral organizing principle for the criminal justice system must have held great

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58. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 133–41 (1969).

59. Mechanisms in use by the date of Frankel's book included sentencing institutes, which provided a forum for judges to discuss sentencing standards and criteria, and sentencing councils, through which judges could obtain the views of colleagues on particular cases. *Id.* at 134–35.

60. For a concise description of radical criminology and its critique of the indeterminate, rehabilitative system, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1234–38 (1998). For instance, the AFSC Report, reflecting the radical perspective, argued that the concepts of "crime" and "justice" were defined and enforced for the benefit of socioeconomic elites. BACON ET AL., *supra* note 26, at 10–11, 16. While Frankel certainly felt that white middle-class defendants benefited from judicial discretion, he suggested no such systematic "conspiracy theory" and essentially accepted the legitimacy (if not necessarily the wisdom) of legislative definitions of crime.

61. FRANKEL, *supra* note 9, at 118–20.

appeal.

Indeed, it is striking how close in spirit Frankel's writing was to the nominally apolitical, mid-century rehabilitative ideal: the criminal punishment system would be administered by neutral experts (now a sentencing commission, instead of therapists and parole boards), with an eye to improving the attitude and satisfaction of offenders and facilitating their successful reintegration into society.<sup>62</sup> In essence, Frankel's version of the uniformity ideal was intended to do the same things as the rehabilitative ideal, but it was expected to achieve more success because it would avoid the anxiety- and resentment-inducing uncertainties and abuses of the indeterminate sentencing system.

### *C. Yale Workshop: The Pursuit of Purposeful Sentences*

In an effort to develop a more detailed reform proposal, the Yale Law School sponsored an important workshop for criminal justice policymakers and practitioners in 1974 and 1975.<sup>63</sup> Workshop participants, including Frankel himself, met monthly to discuss sentencing and related topics.<sup>64</sup> The results of their deliberations, including specific legislative language, were published in book form in 1977 under the title *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*. Workshop participants had the ear of Senator Edward Kennedy of Massachusetts, and an early draft of the workshop's report became the basis for a sentencing reform bill introduced by Kennedy in 1975.<sup>65</sup>

The Yale group characterized the disparity problem much as Frankel did. The group shared his view that disparity created a "perception by inmates . . . that their sentences have been imposed in a random and unjust way, under a tyrannical system sanctioned by law."<sup>66</sup> This

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62. For an eloquent and influential exposition of the rehabilitative ideal along these lines, see KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1968). Menninger's agenda, like Frankel's, was distinctly humanizing, *see, e.g., id.* at 10 ("The more fiercely, the more ruthlessly, the more inhumanely the offender is treated . . . the more certain we are to have *more* victims."), and rationalizing, *see, e.g., id.* at 17 (criticizing failure of criminal justice system to make use of insights of behavioral science).

63. *See* TONRY, *supra* note 10, at 12 (characterizing first sentencing commission legislation introduced in Congress as a "direct outgrowth" of Yale workshop); PIERCE O'DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* xi-xii (1977) (describing purposes and organization of Yale workshop).

64. Other participants included District Court (and later Second Circuit) Judge Jon O. Newman; Department of Justice official (and later Sentencing Commission member) Ron Gainor; Yale professors Dennis Curtis, Daniel Freed, Barbara Underwood, and Stanton Wheeler; and several high-ranking federal prison and parole officials. O'DONNELL ET AL., *supra* note 63, at xii.

65. *Id.* at 88.

66. *Id.* at 10.



perception, in turn, impaired effective prison administration and offender rehabilitation.<sup>67</sup> The Yale group also shared Frankel's belief that sentencing disparity was in tension with the constitutional guarantee of equal protection.<sup>68</sup> However, the Yale Report also explicitly characterized sentencing disparity as a threat to public respect for the law,<sup>69</sup> marking a subtle shift from Frankel's concern for the satisfaction of criminal defendants to a concern for public satisfaction more generally. Later reformers emphasized and elaborated on this theme.

Like Frankel, the Yale group recognized the need for a uniformity scheme to address purposes of punishment. The Yale report endorsed four such purposes (deterrence, incapacitation, rehabilitation, and denunciation)<sup>70</sup> and contemplated that the sentencing judge in each case would determine an appropriate sentence to achieve each purpose. The sentence actually imposed would be the *longest* of the four purpose-specific sentences.<sup>71</sup> However, the proposal also specifically prohibited sentences that were disproportionate to the gravity of the offense.<sup>72</sup>

The Yale group contemplated that offender characteristics, such as the offender's mental and physical condition, would play an important role in the implementation of this purpose-driven approach to sentencing.<sup>73</sup> Indeed, the group went out of its way to condemn mandatory minimum sentences that prohibited consideration of individual offender characteristics.<sup>74</sup> On the other hand, the group had reservations about real-offense sentencing. In particular, the Yale report decried the practice of sentencing on the basis of crimes that were alleged in a presentence report, but not formally charged and prosecuted.<sup>75</sup>

The Yale group was also skeptical of routine imprisonment: "The foundation of the proposed system," the report declared, "is a presumption against incarceration."<sup>76</sup> In general, the group would have limited incarceration to cases in which deterrence or incapacitation was

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67. *Id.*

68. *Id.* at 33.

69. *Id.* at 38, 58.

70. *Id.* at 107.

71. *Id.* at 52.

72. *Id.* at 53. The drafters seem chiefly to have had in mind a safeguard to prevent property crimes from being treated more severely than serious violent crimes. *Id.* at 53–54. In any event, the gravity-based cap reflects the concept of "limiting retributivism" that is particularly associated with the late Norval Morris. See MORRIS, *supra* note 32, at 73; ALLEN, *supra* note 11, at 72.

73. O'DONNELL ET AL., *supra* note 63, at 108.

74. *Id.* at 16, 34.

75. *Id.* at 46.

76. *Id.* at 35.

an overriding concern.<sup>77</sup> The proposal was thus expected to reduce prison populations.<sup>78</sup>

Finally, the Yale group would have implemented uniformity through broadly defined standards: What sentence is necessary for deterrence? For rehabilitation? For incapacitation? While the Yale group contemplated the development of sentencing guidelines by a commission, these guidelines were not to be binding, but, rather, merely a matter for the court's consideration in light of the overriding goal of furthering the authorized purposes of sentencing.

In retrospect, the Yale group's proposal makes for a fascinating "road not taken" in federal sentencing reform. The group sought, above all, to force judges to consider purposes in a systematic fashion; the model of uniformity is one in which defendants are differentiated, not on the basis of rules, but on the basis of a structured, deliberative process relating sentences to broad public policy considerations on a case-by-case basis. Among other things, this model reflects considerable confidence in the capabilities of the judiciary, which was not altogether consistent with Frankel's personal views. The model also seems in tension with Frankel's emphasis on predictability, for it seems unlikely that one could anticipate in advance the outcome of such a broad analysis of purposes and offender characteristics. While the Yale group shared Frankel's leveling-down instincts and desire for a more open, rational, and self-conscious sentencing process, other reformers would build on Frankel's skepticism of judges and his call for predictability.

#### *D. TCF Task Force: Deterrence and Predictability*

Concurrent with the deliberations of the Yale workshop, the Twentieth Century Fund (TCF) assembled its own blue-ribbon Task Force on Criminal Sentencing.<sup>79</sup> The Task Force's report, which was authored by Professor Alan Dershowitz of Harvard Law School, reached quite different conclusions than that of the Yale group.<sup>80</sup> For instance, in explaining why disparity was a matter of concern, the Task Force much more clearly emphasized crime control.<sup>81</sup> The report asserted:

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77. *Id.*

78. *Id.* at 38.

79. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT vii (1976) [hereinafter TCF REPORT].

80. Other members of the Task Force included former Governor of California Edmund G. Brown, Sr.; the noted criminal law theorist Andrew von Hirsch; Stanford Law Professor Barbara Babcock; and several judges and law enforcement officials. *Id.* at ix.

81. *See, e.g., id.* at 3 (defining the report's "intended objective" as "reform in the system of criminal justice that can ultimately lead to a lower crime rate").

[U]nless these unfair disparities are drastically reduced, our criminal justice system will suffer increasing losses of respect and credibility among every segment of our society . . . .

. . . .

. . . Where equal treatment is not the rule, potential offenders are encouraged to play the odds, believing that they too will be among the large group that escapes serious sanction. Hence, the ineffectiveness of today's sentencing system in conveying the message that violations of the criminal law will be punished, thus weakening the deterrent value in prison sentences.<sup>82</sup>

While acknowledging the "keenly felt" sense of injustice among prisoners arising from perceived disparities,<sup>83</sup> the Task Force did not dwell on this concern to the same extent as Frankel and the Yale group.<sup>84</sup> Rather, the Task Force focused its attention on "continual dilution of the deterrent effect of the criminal justice system."<sup>85</sup> Thus, in sharp contrast to Frankel, the Task Force offered plenty of data and anecdotes purporting to demonstrate that sentences were often too *short*.<sup>86</sup>

With its emphasis on deterrence and desert, and comparatively less interest in rehabilitation and incapacitation, the Task Force offered little room in its proposal for the consideration of offender characteristics. More specifically, the Task Force's proposed scheme of "presumptive sentencing" required the legislature (or a sentencing commission) to determine a precise sentence for each "subcategory" of crime.<sup>87</sup> Each subcategory would represent the commission of a particular crime in a particular manner.<sup>88</sup> The presumptive sentence would be increased according to a predetermined formula based on prior convictions.<sup>89</sup> The sentence could also be increased or decreased by up to fifty percent if the number of aggravating circumstances in the case substantially exceeded the number of mitigating circumstances, or vice versa.<sup>90</sup> By way of illustration, the Task Force identified twenty aggravating and

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82. *Id.* at 4, 6–7.

83. *Id.* at 6.

84. For instance, the Task Force provided no discussion of the effect of disparities on prison management and offender rehabilitation.

85. *Id.* at 34.

86. *See id.* at 4–5.

87. *Id.* at 20.

88. For instance, the Task Force contemplated five distinct subcategories of burglary, from burglary of a dwelling when the occupants were home and involving the brandishing of a weapon (with a presumptive sentence of twenty-four months) to burglary of a clearly abandoned dwelling (with a presumptive sentence of probation). *Id.* at 56–57.

89. *Id.* at 20.

90. *Id.* at 46.

mitigating circumstances for armed robbery, all of which relate to the circumstances of the crime, the degree of harm risked or caused, and the defendant's culpability, motive, or role in the offense.<sup>91</sup> In short, the Task Force contemplated that, aside from criminal history, the determination of both the presumptive sentence and the availability of some variation from the presumptive sentence would be governed, not by *offender* characteristics, but by *offense* characteristics, and that these characteristics would include real-offense factors.

With respect to severity, the Task Force also took a different position than Frankel or the Yale group. As noted above, the Task Force expressed equal concern with overly lenient as with overly harsh sentences.<sup>92</sup> And, in order to enhance the deterrent value of criminal law, the Task Force urged that "a larger number of criminals who have committed serious offenses should serve time in confinement."<sup>93</sup> On the other hand, the Task Force also argued that the length of time served by inmates should, in general, be reduced.<sup>94</sup> Put differently, the Task Force contemplated a greater number, but a shorter average length, of prison terms. Thus, the Task Force expected "no significant effect on the size of prison populations."<sup>95</sup>

The Task Force also parted company with the Yale group on the question of rules versus standards:

[S]entencing policies should be expressed in considerable detail. We favor *explicit* presumptive sentences for various offenses. And we believe that the factors that make a particular offense more or less serious for sentencing purposes should be clearly set out.

... [W]e are disagreeing with the trend in recent "model" sentencing statutes—a trend that eschews detail and favors general principles.<sup>96</sup>

The Task Force's preference for rules over standards may be clearest in its sympathy for mandatory minimums and "flat-time" schemes, i.e., strictly predetermined sentences for each crime. The Task Force found "many virtues" in such systems, but ultimately rejected them because of statutory overbreadth in the definition of some crimes.<sup>97</sup>

Because of its desire for such a dramatic decrease in *judicial* discretion, the Task Force was forced to grapple with the problem of *prosecutorial* discretion, particularly the prospect that prosecutors would

91. *Id.* at 44–45.

92. *Id.* at 4.

93. *Id.* at 31.

94. *Id.* at 32.

95. *Id.*

96. *Id.* at 25.

97. *Id.* at 17.

undermine uniformity through their charging and plea-bargaining practices.<sup>98</sup> For instance, the Task Force was troubled by the question of how to sentence “a defendant simultaneously charged with several offenses that grew out of the same or a connected transaction or are closely related in time.”<sup>99</sup> Rather than attribute too much weight to the prosecutor’s charging decisions in such cases, the Task Force concluded, “The best solution would probably be to devise a sophisticated system in which every additional crime in a series carried an increment of punishment but not the full increment of a consecutive sentence.”<sup>100</sup> Likewise, the Task Force anticipated that the prosecutor’s discretionary power would be curtailed by discontinuing the practice of reducing sentences based on the prosecutor’s recommendation of lenience or the defendant’s entry of a guilty plea.<sup>101</sup>

Like the Yale proposal, the Task Force’s model of reform represents an intriguing “road not taken.” With a rules-based system focusing on a limited number of sentencing factors, the Task Force offered a predictability that sharply differentiates its approach from that of the Yale group. In its emphasis on predictability, as well as its skepticism of judicial discretion, the Task Force echoed important themes of Frankel. On the other hand, the Task Force’s preoccupation with crime control and its amenability to routine incarceration did not reflect Frankel’s views, but did foreshadow the future direction in which the uniformity ideal would evolve.

#### *E. Early Kennedy Bills: Deterrence and Discretion*

The contrasts between the reports of the Yale group and the TCF Task Force (rules versus standards; bias for or against incarceration; weight given to rehabilitative purposes and offender characteristics; emphasis on crime control versus defendant rights; amenability to real-offense sentencing; and attentiveness to the prosecutor as a potential source of disparity) have largely set the parameters for the debate over uniformity and sentencing guidelines ever since. The remainder of this Part focuses on how the debate has played out in the federal lawmaking arena.<sup>102</sup>

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98. *Id.* at 26.

99. *Id.* at 27.

100. *Id.* at 27–28.

101. *Id.* at 26.

102. I have focused on the proposals of the Yale group and the TCF Task Force as precursors to federal sentencing reform because of the prominence of their authors, the connections of the groups to Frankel and Kennedy, and the stark contrasts in their approaches. However, a number of other noteworthy sentencing reform proposals were advanced in the 1970s in order to address the disparity

In tracing the movement of uniformity from the realm of blue-ribbon working groups to the legislature, the key figure is undoubtedly Senator Edward Kennedy. Kennedy was an enthusiastic supporter of the Yale group and wrote a glowing foreword to the published Yale report.<sup>103</sup> In fact, an early draft of the Yale report formed the basis of a sentencing reform bill introduced by Kennedy in 1975.<sup>104</sup> Kennedy also had connections to the TCF Task Force through Dershowitz, with whom he consulted on the development of later reform bills.<sup>105</sup>

Kennedy introduced another sentencing commission bill (S. 181) in early 1977, followed shortly by a broader criminal law reform measure (S. 1437), which included substantially all of S. 181.<sup>106</sup> The Senate ultimately passed S. 1437 in 1978.<sup>107</sup> While the House proved unreceptive to sentencing reform at first, Kennedy's persistent efforts paid off in 1984 with passage of the SRA, a law that incorporated many crucial features of the early Kennedy bills.<sup>108</sup> In short, the 1975 and 1977 bills constitute a direct link between the pre-legislative ferment of the early and mid-1970s and the guidelines system that was finally adopted. Yet, Kennedy's version of the uniformity ideal in these bills was different in important respects both from what preceded and what followed.

In language very similar to that of the TCF Task Force, Kennedy presented uniformity as a crime control measure:

The impact of sentencing disparity on our criminal justice system and, therefore, on the effectiveness of the national effort against crime, is real and immediate. An important prerequisite in any crime-fighting program—certainty of punishment—is absent. The criminal justice

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problem. *See, e.g.*, NAT'L ADVISORY COMM'N ON CRIM. JUSTICE STDS. AND GOALS, CORRECTIONS 146–47, 177–79 (1973). Additionally, federal sentencing reform was also fueled by empirical studies that purported to demonstrate the existence of widespread sentencing disparity. STITH & CABRANES, *supra* note 10, at 106–07. Stith and Cabranes, however, have identified several important deficiencies in these studies. *Id.* at 107–12. In any event, despite their historical significance, the early empirical studies did not systematically address the *normative* questions that are of particular concern in this Article: why do we care about uniformity, and how should the uniformity ideal be implemented? For instance, the so-called Second Circuit study involved a survey in which judges were asked to impose hypothetical sentences based on a given set of facts. *Id.* at 108. While such a study may or may not be an appropriate method of determining variations in judicial attitudes towards sentencing, it will not tell us which factors *ought* to be considered relevant.

103. Sen. Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM vii, x (1977).

104. *Id.* at ix.

105. Stith & Koh, *supra* note 10, at 232–33.

106. *Id.* at 233.

107. *Id.* at 234.

108. For a complete list of these features, see STITH & CABRANES, *supra* note 10, at 40.

system is seen as a game of chance in which the potential offender may "play the odds" and gamble on receiving a lenient term of imprisonment or, indeed, no jail sentence at all. Disparity, therefore, undercuts the entire concept of sentencing as an effective deterrent or punishment. . . . Our current sentencing practices nurture an already growing public cynicism about our own institutions, a cynicism which inhibits corrective action and stimulates disrespect for law.<sup>109</sup>

In S. 181,<sup>110</sup> Kennedy identified three appropriate purposes of punishment: deterrence, incapacitation, and desert.<sup>111</sup> Kennedy's treatment of purposes contrasts in some notable ways with that of the Yale group. First, Kennedy dropped rehabilitation, of which he was avowedly skeptical,<sup>112</sup> from the list of approved purposes. Second, Kennedy envisioned desert as a full-fledged purpose on par with the other purposes, whereas the Yale group had conceived of desert only as a *limitation* on the maximum sentence that might be imposed. Third, Kennedy did not suggest any particular method for addressing the inevitable tensions between different purposes. While the Yale group indicated that the purpose producing the longest sentence should control, Kennedy left the matter open.<sup>113</sup> Sentencing judges were simply required to consider all of the purposes (as they were also required to consider new sentencing guidelines that would be drafted by a commission). Resolving conflicts between these various considerations was up to judges on a case-by-case basis.

Kennedy contemplated that this analytical process would involve consideration of offender characteristics.<sup>114</sup> Indeed, his bill directed the sentencing commission, when drafting guidelines, to consider several specific offender characteristics: age, mental and emotional condition, physical condition, drug dependence, criminal history, and dependence upon criminal activity for a livelihood.<sup>115</sup> In his openness to offender

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109. Kennedy, *supra* note 103, at viii. While giving less emphasis to the point, Kennedy echoed the Yale group's view that disparity was also unfair to offenders. Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353, 362 (1979).

110. S. 181, as Kennedy's first reform bill after the completion of the work of the TCF Task Force and the Yale group, will be the principle focus of the remainder of this Section.

111. S. 181, 95th Cong. § 3579(a)(2) (1977).

112. Kennedy, *supra* note 109, at 354 ("Current findings suggest that [the rehabilitative] approach, although noble in design, has failed dramatically.").

113. See S. REP. NO. 95-605, at 902 (1977) ("[C]oncentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations and the intelligent exercise of judicial discretion.").

114. S. 181 § 3579(a)(1).

115. *Id.* § 3803(b). See also S. REP. NO. 95-605, at 930 ("By including such considerations in the formulation of sentencing guidelines, uniform treatment of the characteristics for all defendants similarly situated will be promoted.").

characteristics, Kennedy seems closer to the Yale group than the TCF Task Force. Indeed, like the Yale group, Kennedy made clear his disdain for mandatory minimums because of their failure to “take into account the individual characteristics of the offenders.”<sup>116</sup>

Kennedy’s bill also contemplated the consideration of a rich array of real-offense characteristics, including the nature and degree of the harm caused, whether there was a breach of public trust, role in the offense, and (despite the Yale group’s reservations) other criminal activity not resulting in a conviction.<sup>117</sup> Kennedy’s bill did not, however, explicitly address the issue of prosecutorial discretion. Elsewhere, though, Kennedy did write of the need “to establish some form of guideline system for prosecutors as well.”<sup>118</sup>

Kennedy did not endorse the Yale group’s leveling-down approach to severity. The Kennedy bills included no presumption against imprisonment—an omission that provoked explicit criticism from the Yale group.<sup>119</sup> This is not to say, however, that Kennedy intended his bills to *increase* incarceration rates. Indeed, in contrast to the TCF Task Force, Kennedy made clear that, in general, he did not wish for more offenders to be sentenced to prison.<sup>120</sup> On the other hand, he believed that “[w]e will always need prisons for certain offenders.”<sup>121</sup> In short, Kennedy seemed to adopt a position of greater neutrality than either of the working groups as to the frequency of terms of imprisonment.

Kennedy did join the Yale report, however, in rejecting mandatory sentencing guidelines, leaving it to the court to determine what weight to give to the guidelines in light of the authorized purposes of sentencing.<sup>122</sup> The court could sentence outside the guidelines range “if it makes as a part of the record, and discloses to the defendant in open court at the time of sentencing, a statement of the specific reason or reasons.”<sup>123</sup> Indeed, because Kennedy did not even establish a clear framework for resolving tensions between the purposes of punishment, his bills seemed to contemplate even more judicial discretion than did the Yale proposal.

On the whole, Kennedy’s bill was far closer in spirit to the Yale group than it was to the TCF Task Force: sentencing was purpose-driven,

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116. Kennedy, *supra* note 109, at 369.

117. S. 181 § 3803(b).

118. Kennedy, *supra* note 109, at 381.

119. O’DONNELL ET AL., *supra* note 63, at 89.

120. Kennedy, *supra* note 103, at vii.

121. *Id.*

122. S. 181 § 3579(a).

123. *Id.* § 3579(b).



attentive to a wide array of offender and offense characteristics, and highly discretionary. Particularly when contrasted with the rules-based approach of the TCF Task Force, it is hard to see how S. 181 would deliver the sort of predictability that Kennedy's rhetoric promised. In a sense, Kennedy adopted the Task Force's way of characterizing the nature of the disparity problem (disparity undercuts deterrence and public respect for the law), but the Yale group's method of structuring a solution. Given tensions between the two approaches, it should not be surprising that Kennedy's bills evolved considerably over time. In particular, the Yale group's original structure, while never entirely eliminated from the Kennedy proposals, was gradually modified so as to conform more closely to the Task Force's emphasis on predictability and crime control.

#### *F. The SRA: Diminishing Judicial Discretion*

The Kennedy bill, now referred to as the Sentencing Reform Act, finally won passage in 1984.<sup>124</sup> While marked by the increasingly punitive anticrime politics of the 1980s, the SRA also carried forward many important themes of earlier reform efforts. For instance, proponents of the SRA asserted that the bill would not only address rising crime rates, but also benefit defendants.<sup>125</sup> Thus, in characterizing the nature of the disparity problem—the elimination of which was said to be the “primary goal” of the SRA<sup>126</sup>—the Senate Committee Report sounded themes that echoed both the Yale group (fairness to defendants) and the TCF Task Force (crime control):

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124. Stith & Koh, *supra* note 10, at 261–66. The critique of the rehabilitative ideal and the rise of the uniformity ideal actually led to important legislative reforms on the state level several years before Congress adopted federal reforms. See, e.g., ALLEN, *supra* note 11, at 8 (describing 1976 California law). By 1980, sentencing guidelines systems had been adopted by six counties and three states. JACK M. KRESS, *PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES* 10 (1980). The earlier state experiences with sentencing guidelines, particularly Minnesota's, played an influential role in the development of the federal legislation. Indeed, backers of the SRA touted Minnesota's success and noted the “substantial similarity between the Minnesota legislation and this Federal sentencing reform measure.” S. REP. NO. 98-225, at 62 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3245. A thorough consideration of the influence of the state experience on the development of the uniformity ideal at the federal level, and vice versa, lies beyond the scope of this Article, but merits further research.

125. S. REP. NO. 98-225, at 39, 49, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222, 3232. Because the SRA emerged from the Senate Judiciary Committee, this Senate Committee Report on the bill constitutes the most relevant legislative history. For a detailed account of the “masterful” legislative maneuvering that led to enactment of the Senate bill, notwithstanding the House Judiciary Committee's preference for a very different sort of sentencing reform, see Stith & Koh, *supra* note 10, at 264–66.

126. S. REP. NO. 98-225, at 52, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons.<sup>127</sup>

As to purposes, the SRA took essentially the same approach as the early Kennedy bills: deterrence, incapacitation, and desert were all endorsed without any particular conceptual framework for resolving tensions.<sup>128</sup> Unlike S. 181, the SRA also endorsed rehabilitation, but in a much more limited fashion than the other purposes: rehabilitation might be considered in setting the terms and conditions of a sentence, but not as a justification for a decision to incarcerate for a particular length of time.<sup>129</sup>

While the SRA did not otherwise prioritize particular purposes, its proponents contemplated that uniformity would be purpose-driven. Purposes would come into play at two different levels. First, the new Sentencing Commission would derive sentencing guidelines from an analysis of purposes. Proponents made clear that the SRA was “not designed to require the Sentencing Commission to recommend a continuation of current sentencing practices.”<sup>130</sup> Rather, as the Senate Committee put it, “Logic and reason on the part of the Sentencing Commission, as reviewed and accepted by the Congress, will control the length of the recommended terms.”<sup>131</sup> Second, in implementing the new guidelines regime, sentencing judges would themselves “consider what impact, if any, each particular purpose should have on the sentence in each case.”<sup>132</sup> (As we will see, however, the ability of judges to do this

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127. *Id.* at 46. While sounding familiar themes, the passage reflects a notable rhetorical shift. Uniformity is here presented as a matter of balancing defendant interests and public interests, with defendant interests associated with low sentences and public with high. In many earlier characterizations of the public interest in sentencing, the public interest had been associated, not with high sentences per se, but with “a more equitable, rational, and certain approach to sentencing.” See, e.g., Kennedy, *supra* note 109, at 369.

128. See S. REP. NO. 98-225, at 67, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3250 (explaining that “the Committee has not favored one purpose of sentencing over another”). The relevant portions of the SRA have been codified at 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(a)(2).

129. 18 U.S.C. § 3582(a) (2002).

130. S. REP. NO. 98-225, at 61, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3244. The House Committee’s report on sentencing reform legislation took a similar position. See H.R. REP. NO. 98-1017, at 100 (1984) (“[D]escriptive guidelines merely lock future decisionmaking into the wisdom—and the errors—of the past.”).

131. *Id.* at 116. See also 28 U.S.C. § 994(m) (“The Commission shall not be bound by [past] average sentences . . .”).

132. S. REP. NO. 98-225, at 77, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260.

was undercut by other provisions of the SRA.)

As to offender characteristics, the SRA carried forward language from the early Kennedy bills indicating that sentencing judges were to consider the "history and characteristics of the defendant."<sup>133</sup> On the other hand, there is good reason to believe that, over its many years of development, the sentencing reform legislation contemplated a steadily decreasing role for offender characteristics. There was a subtle change, for instance, in the treatment of the specific characteristics that had been addressed by S. 181 (age, mental and emotional condition, physical condition, and drug dependence).<sup>134</sup> Where S. 181 would have directed the Sentencing Commission to "consider" these factors in drafting the sentencing guidelines, the SRA instead commanded the Commission to "consider whether . . . [they] have any relevance" and to "take them into account only to the extent they do have relevance."<sup>135</sup> Demonstrating further skepticism of offender characteristics, the SRA also mandated that the guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant,"<sup>136</sup> and that the Commission ensure that the guidelines "are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."<sup>137</sup>

The SRA contemplated real-offense sentencing;<sup>138</sup> in the words of the Committee Report, "There would be expected to be . . . several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances."<sup>139</sup> The SRA also contemplated some regulation of prosecutorial discretion. In particular, the statute authorized the Sentencing Commission to devise guidelines for the acceptance or rejection of plea bargains by judges.<sup>140</sup> The provision was

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133. 18 U.S.C. § 3553(a)(1). *See also* S. REP. NO. 98-225, at 53, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3236 ("[T]he judge is directed to impose sentence after a *comprehensive* examination of the characteristics of the particular offense *and the particular offender*." (emphasis added)).

134. S. 181, 95th Cong. § 3803(b) (1977).

135. 28 U.S.C. § 994(d).

136. *Id.* § 994(e).

137. *Id.* § 994(d).

138. *See* S. REP. NO. 98-225, at 75, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3258 (listing real-offense characteristics that should be considered by the sentencing judge).

139. *Id.* at 168. The House Judiciary Committee, however, expressed strong reservations about the "use of sentencing guidelines based on allegations not proved at trial." H.R. REP. NO. 98-1017, at 98 (1984).

140. 28 U.S.C. § 994(a)(2)(E). The House version of the sentencing bill went even further: "[T]he legislation also directs the Department of Justice to issue guidelines for U.S. Attorneys to use in deciding what charges to bring and what plea bargains to make. The bill also requires the Judicial Conference to prescribe guidelines for judges to use in accepting plea agreements, and authorizes the

intended to “assure that judges can examine plea agreements to make certain that prosecutors have not used plea-bargaining to undermine the sentencing guidelines.”<sup>141</sup> On the other hand, the SRA offered unqualified support for distinguishing among defendants on the basis of their cooperation with prosecutors.<sup>142</sup>

With respect to severity, the old leveling-down agenda is manifest in at least two provisions: (1) a mandate that judges “impose a sentence sufficient, but not greater than necessary, to comply with” the approved purposes of sentencing;<sup>143</sup> and (2) a mandate that the Commission “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”<sup>144</sup>

However, these vague, question-begging commands<sup>145</sup> must be viewed in the context of an even greater volume of leveling-up language.<sup>146</sup> For instance, the SRA directed the Commission to ensure “the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”<sup>147</sup> More specifically, the SRA mandated a “term of imprisonment” for violent crimes that result in serious bodily injury;<sup>148</sup> a “substantial term of imprisonment” for five broadly defined categories of defendants;<sup>149</sup> and

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rejection of plea agreements that do not conform to the Department of Justice guidelines.” H.R. REP. NO. 98-1017, at 36. The House Committee presciently observed, “Discretion appears to be an enduring component of any sentencing policy. Allocating sentences purely on the basis of the offense and the offender’s prior record will not eliminate discretion, but merely shift the discretion to an earlier stage.” *Id.*

141. S. REP. NO. 98-225, at 63, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3246.

142. See 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

143. 18 U.S.C. § 3553(a) (emphasis added).

144. 28 U.S.C. § 994(j).

145. How is one to apply the “not greater than necessary” principle when the approved purposes of sentencing are essentially indeterminate and often in conflict with one another? Does “general appropriateness” imply there are some cases in which it would be appropriate to incarcerate a first-time, non-serious offender? What is a “serious offense”? Subsequent commentators have found merit in Representative Conyers’ criticism of the leveling-down language as “purely cosmetic.” Stith & Koh, *supra* note 10, at 272.

146. The leveling-down provisions reflected the preferences of the House Judiciary Committee. See H.R. REP. NO. 98-1017, at 37 (1984) (“Too often prison is used for people who could just as effectively be punished through nonincarcerative sentences.”). The Senate version of sentencing reform, however, was the one ultimately adopted. *Supra* note 125.

147. 28 U.S.C. § 994(m).

148. 28 U.S.C. § 994(j).

149. The categories include defendants who (1) have two or more prior felony convictions; (2)

a “term of imprisonment at or near the maximum” for certain drug crimes and crimes of violence committed by repeat offenders.<sup>150</sup> The SRA’s proponents also expected that the bill would result in longer sentences for white-collar offenders.<sup>151</sup>

In light of these mandates, it should not be surprising that the SRA expressly contemplated the possibility that federal prison populations would expand under the guidelines.<sup>152</sup> While the SRA’s proponents may have wished for a decrease in sentence length for some categories of offenders, they expected offsetting increases for other categories.<sup>153</sup> They certainly did not desire any form of general leveling down.<sup>154</sup>

Finally, and perhaps the most important departure from the early Kennedy bills, the SRA contemplated mandatory guidelines—albeit through some marvelous legislative doublespeak that left some uncertainty as to exactly how binding the “mandatory” guidelines would be. On the one hand, Congress retained language from the early Kennedy bills now codified as 18 U.S.C. § 3553(a), that directs the sentencing judge to “consider” the guidelines, in the same way that the judge is directed to “consider” the purposes of sentencing, on a case-by-case basis. The language seems to suggest—and was certainly originally intended by Kennedy to suggest—that a judge might decline to impose a guidelines sentence in a particular case if the judge determined that the guidelines sentence was inconsistent with the statutory purposes of sentencing.<sup>155</sup>

On the other hand, Congress also included contradictory language,

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derived a substantial portion of their income from criminal activity; (3) participated in racketeering activity in a managerial or supervisory capacity; (4) committed a violent felony while on release pending trial, sentence, or appeal in another felony case; or (5) committed a specified drug crime. 28 U.S.C. § 994(i).

150. 28 U.S.C. § 994(h).

151. See S. REP. NO. 98-225, at 76 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259.

152. 28 U.S.C. § 994(g).

153. See S. REP. NO. 98-225, at 61, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3244 (“The Committee is of the view that the Sentencing Commission will probably find, for example, that the sentences for some violent offenders are too low and that sentences for some property offenders are too high to serve the purposes of sentencing.”).

154. For instance, the Senate Committee insisted that the government be given a right to appeal sentences because, otherwise, there might be a general leveling down. “Appellate review for the defendant alone would not be an effective weapon to fight disparity, since the appellate court could reduce excessive sentences but not raise inadequate ones. The effort to achieve greater uniformity, therefore, might unintentionally result in a gradual scaling down of sentences to the level of the more lenient ones.” *Id.* at 65.

155. This was also how the House legislation was structured. See H.R. REP. NO. 98-1017, at 43 (1984) (“[T]he determination based on the particular circumstances of the case, that a sentence outside the guidelines is the least severe measure sufficient to serve the purposes of sentencing would be an adequate reason for departure from the guidelines.”).

not found in the early Kennedy bills, but now codified as 18 U.S.C. § 3553(b), commanding that the sentencing judge follow the guidelines in all cases, unless the judge finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the guidelines].”<sup>156</sup> The language converts the normative question suggested by Section 3553(a) (“Would the guidelines sentence be just in this case?”) into an empirical question (“Has the Commission thought about all of the pertinent circumstances present in this case?”). Moreover, the provision further specifies, “In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.” Section 3553(b) thus substantially undercut the authority of the sentencing judge to undertake an independent assessment of the purposes of sentencing.

Viewing the evolution of the Kennedy proposal from S. 181 to the SRA, it seems that the TCF Task Force “won” and the Yale group “lost.” This is not to say that the SRA contemplated a guidelines system that would exactly mirror the Task Force’s plan, but, rather, that the *direction* of evolution generally favored the Task Force’s version of uniformity. Particularly, in comparison with S. 181, the SRA was considerably less receptive to offender characteristics, judicial discretion, and the case-by-case consideration of purposes. Additionally, the SRA thoroughly repudiated the Yale group’s leveling-down agenda.

#### *G. The Guidelines: Neglecting Purposes and Defendant Perspectives*

Passage of the SRA led to formation of the Sentencing Commission and, in 1987, promulgation of the guidelines. The guidelines have undergone some changes since then, but the basic structure adopted in 1987 remains intact. At the heart of the guidelines lies a two-dimensional grid, with which one may determine the applicable sentence range (e.g., 30–37 months) using the two variables of “offense level” and criminal history.<sup>157</sup> These two variables are quantified through the

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156. Most of this language was originally inserted into the Kennedy reform bills through a floor amendment to S. 1437, one of the 1977 bills, which was proposed by Senator Gary Hart. Stith & Koh, *supra* note 10, at 245–46. This language was then retained through the various subsequent iterations of the Kennedy reforms. A 1987 amendment added the “of a kind, or to a degree” phrase. Miller & Wright, *supra* note 10, at 747–48.

157. U.S. SENTENCING GUIDELINES MANUAL ch. 5, Pt. A (2003).

application of hundreds of pages of rules set forth in chapters two through four of the official Guidelines Manual. Most of the sentencing factors incorporated into these provisions serve to *increase* sentence length; the guidelines include few mitigating factors. Perhaps the most important mitigating factor is “acceptance of responsibility,”<sup>158</sup> which reduces the offense level by two or three points and which is normally granted as a matter of course to defendants who plead guilty.<sup>159</sup> (This represents, on average, about a 25%–35% reduction in sentence length.<sup>160</sup>) After determining the applicable guidelines range, the court might select a sentence within that range or, under certain circumstances, “depart” upward or downward from that range.<sup>161</sup> The most common basis for departure is the defendant’s “substantial assistance in the investigation or prosecution of another person,” but this sort of departure may only be granted upon the prosecutor’s motion.<sup>162</sup> Alternatively, as indicated in the SRA, the court may depart on the basis of an aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”<sup>163</sup>

In many respects, the work of the Commission was dictated, or at least strongly suggested, by the SRA. In other respects, the first Sentencing Commission left its own distinctive imprint on the federal system’s evolving uniformity ideal, reflecting the particular mix of personalities on the Commission. Members of note included Judge (now Justice) Stephen Breyer; Paul Robinson, a criminal law professor known for his support of the just deserts approach to sentencing; and Michael Block, an economics professor who advocated efficient deterrence and the use of cost-benefit analysis in developing the guidelines.<sup>164</sup>

In attempting to minimize unwarranted disparity, the Commission emphasized two purposes. First, echoing the TCF Task Force, the Commission wished for guidelines to provide greater certainty of punishment, and, hence, a stronger deterrent effect.<sup>165</sup> Second, the

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158. *Id.* § 3E1.1.

159. O’Hear, *supra* note 18, at 1509.

160. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2488–89 (2004).

161. U.S. SENTENCING GUIDELINES MANUAL Pt. 5K (2003).

162. *Id.* § 5K1.1.

163. *Id.* § 5K2.0.

164. See, e.g., Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 395 (1991).

165. See U.S. SENTENCING GUIDELINES MANUAL § 1A4(d) (1987) (“The Commission’s view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of

Commission wished for the guidelines to ensure greater proportionality of punishment.<sup>166</sup> This goal, while not systematically elaborated, seemed chiefly to entail calibrating punishment to objective, harm-based offense characteristics.<sup>167</sup> This goal might plausibly have been intended to advance deterrence and/or desert purposes.<sup>168</sup> In any event, the Commission recognized that there was tension between its goals of certainty and proportionality.<sup>169</sup> Carried to an extreme, the proportionality ideal would seek to tailor sentences “to fit every conceivable wrinkle of each case”—an “unworkable” objective that would “seriously compromise the certainty of punishment.”<sup>170</sup> Thus, the Commission characterized the guidelines as an effort to “balance” certainty with proportionality.<sup>171</sup>

It is striking, though, that, in the discussion of its overarching objectives, the Commission made no explicit reference to protecting defendants from biased or otherwise unjustifiably long sentences, an oft-repeated concern of sentencing reformers right through passage of the SRA. To be sure, proportionality might, in theory, have protective effects, but it is hard to view the guidelines system as meaningfully protective when it starts with a presumption in favor of incarceration<sup>172</sup> and includes so many more aggravating than mitigating factors to adjust sentence length.<sup>173</sup> The Commission’s understanding of “proportionality” seems less about protecting defendants than enhancing public respect for the law, which is precisely how the term was used in

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these crimes . . .”). Part 1A of the Guidelines Manual has been revised several times since the original version went into effect on November 1, 1987. The original version of Part 1A is reprinted as part of commentary in U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2003).

166. See U.S. SENTENCING GUIDELINES MANUAL, § 1A3 (1987) (“Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.”).

167. See *id.* (referring to relevant factors in proportionality analysis of bank robbery as use of a gun, type and degree of injury, identity of victim, time of day, motive, accomplices, number of robberies, and intoxication, but not identifying history and personal characteristics of defendant).

168. For a discussion of the guidelines’ implicit purposes, see *infra* text accompanying notes 250–52.

169. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (1987).

170. *Id.*

171. *Id.*

172. See STITH & CABRANES, *supra* note 10, at 60–65 (discussing Commission decisions designed to increase sentence lengths).

173. For instance, the drug guideline contains five aggravating circumstances and one mitigating, while the theft guideline contains fourteen aggravating circumstances and not even one mitigating. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 2B1.1 (2003). Chapter Three of the Guidelines Manual, which contains additional sentence adjustments that apply across offense types, includes ten categories of upward adjustment and only two of downward.



the Senate Committee Report accompanying the SRA.<sup>174</sup>

The Commission also took a surprising position with respect to purposes of sentencing. From Frankel on, reformers had emphasized a need to sort out the purposes of sentencing, deciding which purposes were paramount in which categories of cases. When it came time to make the hard decisions, however, the Commission reached an impasse: it could not resolve the threshold dispute between the just deserts approach (represented by Commissioner Robinson) and the utilitarian crime control approach (represented by Commissioner Block).<sup>175</sup> The Commission thus expressly abandoned the effort to develop purpose-driven guidelines in favor of an "empirical approach that uses data estimating the existing sentencing system as a starting point."<sup>176</sup> In so doing, the Commission seemingly violated the SRA's mandate that it "independently develop a sentencing range that is consistent with the purposes of sentencing."<sup>177</sup>

The Commission did consciously deviate from past practices in some respects, perhaps most notably in its decision to minimize the role of offender characteristics.<sup>178</sup> While the SRA reflected some skepticism of offender characteristics, the guidelines actually promulgated by the first Commission went far beyond what the SRA required. For instance, as described above, the SRA directed the Commission to consider the relevance of a host of offender characteristics, including age, mental and emotional condition, physical condition, and drug dependence. All were found by the Commission to be "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."<sup>179</sup> Within five years of promulgation of the original guidelines, the Commission made similar pronouncements with respect to military, civic, charitable, or public service; employment-related contributions; record of prior good works; lack of guidance as a youth; and other

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174. S. REP. NO. 98-225, at 46 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3229. Chairman Wilkins also emphasized this objective during public hearings on the guidelines. U.S. SENTENCING COMM'N, UNPUBLISHED PUBLIC HEARINGS 3 (1988) (reprinting statements from hearing of April 15, 1986: "Unwarranted sentencing disparity undermines public confidence in our system, and breeds disrespect for the rule of law.").

175. STITH & CABRANES, *supra* note 10, at 53-55.

176. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (1987).

177. 28 U.S.C. § 994(m). For a similar argument, see Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1045 (2003).

178. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19 (1988).

179. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4 (1995).

circumstances indicating a disadvantaged upbringing.<sup>180</sup> The guidelines also incorporated the additional constraints on offender characteristics expressly mandated by the SRA.<sup>181</sup> In sum, while the Commission did not entirely prohibit the consideration of offender characteristics, it did strongly discourage the use of just about every traditionally important offender characteristic other than criminal history.

While the Commission adopted a much more parsimonious approach to *offender* characteristics than was required, the Commission chose a very different path as to *offense* characteristics, mandating consideration of a vast array of variables. Indeed, the federal guidelines go much farther down the path of real-offense sentencing than any state guidelines system.<sup>182</sup> Consider, for instance, the robbery guideline, which distinguishes among defendants based on: (1) the identity of the victim; (2) the use of a firearm; (3) the use of another “dangerous weapon”; (4) the making of a death threat; (5) the severity of any bodily injury suffered; (6) the occurrence of any “physical restraint” or abduction; (7) the nature of any nonmonetary items that were targeted by the robber; and (8) the amount of money lost.<sup>183</sup> Nothing in the SRA mandates the many distinctions drawn under just this one guideline.

At the same time, the guidelines largely neglect some potentially relevant offense characteristics, particularly such subjective characteristics as mens rea, motive, mistake, and mental impairment.<sup>184</sup> Did the robber intentionally cause injury, or was it an accident? Was the robbery an act of desperation by a person in dire financial circumstances? Was the robbery provoked in some manner by the victim? The guidelines pay little heed to such subjective variables, in favor of assessing the nature and degree of the harm risked or caused by the defendant’s conduct.<sup>185</sup>

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180. *Id.* §§ 5H1.11, 5H1.12.

181. *See id.* §§ 5H1.10, 5H1.2, 5H1.5, 5H1.6 (prohibiting consideration of race, sex, national origin, creed, religion, and socio-economic status, and stating that education, vocational skills, employment record, family ties and responsibilities, and community ties are “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”). The Commission’s language prohibiting or discouraging use of these offender characteristics may be stronger than was strictly required by the SRA. For an argument to this effect, see STITH & CABRANES, *supra* note 10, at 74–75.

182. TONRY, *supra* note 10, at 78.

183. U.S. SENTENCING GUIDELINES MANUAL §§ 2B3.1 (1995).

184. Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENT’G REP. 112, 113, (1994); Michael M. O’Hear, *Sentencing The Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 220–22, 266–67 (2004).

185. *See* Lynch, *supra* note 184, at \*3 (“To a much greater degree than any state penal law, the guidelines have turned gradations of culpability on rather crude quantifiable factors.”). Hofer and Allenbaugh describe a variety of guidelines provisions that do take offense considerations other than

The emphasis on objective offense characteristics relates to another important structural decision by the Commission: the adoption of a rules-based approach. Had the guidelines required a routine assessment of mental states, more would have been left to the subjective judgment of the sentencing court. By contrast, questions like “Was there a gun?” and “How much money was stolen?” entail a more limited, less discretionary form of fact-finding.<sup>186</sup> The SRA did not, strictly speaking, mandate the rules-based approach, but the bill’s proponents likely contemplated just such an approach.<sup>187</sup> It is not as clear, however, whether they desired the Commission to go quite so far as it did in writing hundreds of pages of bright-line rules to make thousands of fine-grained distinctions among defendants.<sup>188</sup>

Of course, a sentencing judge might evade the effect of all of these bright-line rules by departing. However, the Commission expected that judges would not depart very often, and made clear that departures were limited to “atypical” or “unusual” cases.<sup>189</sup> Moreover, through its treatment of offender characteristics, the Commission carefully restricted the ability of sentencing judges to depart on the basis of just those factors that judges might be most inclined to view as making a case suitable for lenience.<sup>190</sup>

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harm into account, perhaps most notably the role-in-the-offense adjustment. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 66–67 (2003). They recognize, however, the greater weight accorded harm, *id.* at 64–66, 69, and note criticisms of this tendency, *id.* at 69–71.

186. See STITH & CABRANES, *supra* note 10, at 69 (“Quantification of harm was an attractive approach for the Commission, at least initially, because it permitted the agency to distinguish among defendants on the basis of apparently objective and precisely measured criteria. Tying sentence severity to quantity of harm would thus reduce the scope of judicial discretion . . .”).

187. By virtue of its numerous directives that the Commission “consider” this or that specific factor or “assure” a particular type of sentence in particular circumstances, 28 U.S.C. §§ 994(c)–(e), (h)–(j) (2000), the SRA at least implied that the Commission should structure the guidelines around a menu of objective offense characteristics and criminal history categories. The Committee Report lends support to this view: “[The SRA] contemplates a *detailed set* of sentencing guidelines . . . . The Committee expects that there will be *numerous* guidelines ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances.” S. REP. NO. 98-225, at 168 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3351 (emphasis added).

188. See *id.* at 168 n.405 (expressing expectation that Commission would conduct an evaluation “to assure that the guidelines are not so complex as to detract from their effective use”).

189. U.S. SENTENCING GUIDELINES MANUAL § 1A4(a) (1987). Departures are further discouraged by the SRA’s rules of appellate review, which permit review of decisions to depart, but not of decisions refusing to depart. 18 U.S.C. § 3742(a)–(b). Professor Berman has forcefully argued that Congress intended a less rule-like system than the Commission and the appellate courts actually developed, and that the SRA contemplated more discretion to depart based on judicial consideration of the purposes of punishment. See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000).

190. To be sure, judges were given discretion to take offender characteristics, or just about

As for severity, the Commission made explicit the implicit leveling-up agenda of the SRA.<sup>191</sup> The Commission estimated that its own policy decisions, as distinct from Congressional mandates, would increase prison populations by about ten percent over ten years.<sup>192</sup> This may be surprising, given the Commission's professed reliance on past practices as its baseline, but the Commission deviated from past practices in several respects, and these deviations collectively worked to the great disadvantage of defendants. For instance, the Commission systematically chose to increase sentences for white-collar offenses,<sup>193</sup> as well as other categories of offenses and offenders for whom Congress had mandated a "substantial term of imprisonment."<sup>194</sup> Additionally, where recently enacted statutory minimums required longer sentences, the guidelines exaggerated the effect by requiring sentences above the new minimums in most cases.<sup>195</sup>

With respect to prosecutorial discretion, the real-offense aspects of the guidelines imposed some limitations on the sentencing significance of the formal offense of conviction.<sup>196</sup> On the other hand, the Commission did not take advantage of its authority under the SRA to regulate plea acceptance practices.<sup>197</sup> Nor did the Commission suggest any sort of mechanism by which sentencing judges might take into account disparities in initial charging decisions. Moreover, the guidelines enhanced prosecutorial discretion by making the substantial assistance departure dependent on a prosecutor's motion.

In addition to the substantial assistance departure, the guidelines also

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anything else, into account when selecting a sentence *within* a specified guidelines range. However, because the guidelines ranges are narrow—they are limited to the greater of six months or a twenty-five percent difference between the top and bottom of range, U.S. SENTENCING GUIDELINES MANUAL § 1A4(h) (1987)—this locus of discretion is of minimal significance.

191. "Conspiracy theorists" have suggested that the harshness of the first Commission may have resulted from the interest of some commissioners in higher judicial office; "the guidelines were an effort to show that the commission's policies were consonant with the views of influential congressional conservatives." TONRY, *supra* note 10, at 12.

192. U.S. SENTENCING GUIDELINES MANUAL § 1A4(g) (1987).

193. Breyer, *supra* note 178, at 20–21; U.S. SENTENCING GUIDELINES MANUAL § 1A4(d) (1987).

194. STITH & CABRANES, *supra* note 10, at 60.

195. *Id.*

196. The relevant provisions include complex rules for handling multiple counts, *see* U.S. SENTENCING GUIDELINES MANUAL § 3D (1988), which were designed "with an eye toward eliminating unfair treatment that might flow from count manipulation." *Id.* § 1A4(a).

197. *Id.* § 1A4(c) (1988). As William Wilkins, the first Commission's first Chair, explained it, the failure to tackle plea-bargaining more aggressively resulted from the Commission's concern over creating "unanticipated problems" in a process that was "fundamental to the operation of the justice system." William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 188 (1988).

included other inducements for cooperation, including a penalty for obstruction of justice<sup>198</sup> and the “acceptance of responsibility” benefit for guilty pleas.<sup>199</sup> The Commission thus decisively embraced cooperation as an appropriate basis on which to distinguish defendants—an important policy decision on which many reform advocates, including Frankel and the Yale group, had reserved judgment.

#### *H. The Feeney Amendment: Reducing Departures*

The guidelines embody a particular vision of uniformity: short terms of imprisonment are a baseline norm, with a complicated, real-offense, harm-based set of rules increasing sentence length from the norm, and some limited opportunities for judges to consider offender characteristics and the purposes of sentencing on a case-by-case basis, principally through the departure mechanism. If not strictly mandated by the SRA, this approach was at least arguably consistent with the expectations of the statute’s proponents in Congress. However, while the basic structure of the guidelines remained static, the mindset of both Congress and the judiciary evolved considerably, and in quite different directions, in the two decades following the enactment of the SRA. Conflict between the two branches of government became inevitable, with the Commission and the guidelines caught in the middle.

On the one hand, Congress increasingly sought greater certainty and severity in punishment, particularly through the enactment of mandatory minimums.<sup>200</sup> Notable examples include the federal “three strikes and you are out” law<sup>201</sup> and the notorious mandatory sentences for crack cocaine offenses.<sup>202</sup>

The judiciary, on the other hand, followed a different and more complicated path. After an initial period of uncertainty in which the constitutionality of the Sentencing Commission was in doubt,<sup>203</sup> courts seemingly settled into a pattern of compliance with the Commission’s mandates. Over time, however, downward departure rates gradually

198. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (1987).

199. *Id.* § 3E1.1.

200. TONRY, *supra* note 10, at 134. These mandatory minimums represented an implicit vote of no confidence in the guidelines, and they were consistently opposed by the Commission. William W. Wilkins, Jr., *Mandatory Minimum Penalties*, 5 FED. SENT’G REP. 201, 201 (1993).

201. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 4 (2001).

202. Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 800–01 (2004).

203. TONRY, *supra* note 10, at 73–74.

grew to more than one-third of all cases.<sup>204</sup> The Supreme Court may have contributed to this trend through its 1996 decision in *Koon v. United States*, which held that departures should be reviewed by appellate courts using the deferential abuse of discretion standard.<sup>205</sup> Other factors, however, were also involved. Indeed, rising departure rates were arguably more the responsibility of prosecutors than of judges: by 2001, about two-thirds of downward departures were made at the behest of prosecutors,<sup>206</sup> and downward departures were almost never appealed by the government.<sup>207</sup> Still, while prosecutors may encourage or acquiesce, the decision to depart ultimately lies with the judge. Rising departure rates can thus fairly be characterized as an indication that many judges lack a strong commitment to the guidelines' vision of uniformity.<sup>208</sup>

Such views are also expressed through what Professors Schulhofer and Nagel have referred to as "guidelines circumvention."<sup>209</sup> Circumvention differs from departing: where departing is an open and explained deviation from an otherwise applicable guidelines range, circumvention is a form of covert manipulation of the guidelines sentencing process. Judges and prosecutors, working independently or in concert, can circumvent through a number of strategies. These include dismissing selected charges so as to reduce the statutory maximum sentence below the otherwise applicable guidelines range, or finding or stipulating to a set of sentencing facts or factors that is incomplete or untrue. For instance, a prosecutor might stipulate for sentencing purposes that a bank robber had no gun, even though there is reliable evidence that a gun was carried. The judge might never learn of the evidence, or might collude with the parties in ignoring the evidence.

Circumvention of this nature might be motivated by a good-faith

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204. For a striking graphic representation of these trends, see Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1228 (2004). If we control for the nature of the offense and the district of sentencing, however, departure trends appear far less dramatic. Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. EMPIRICAL L. STUDIES 1, 28–29 (2005).

205. 518 U.S. 81, 98 (1996). Because departure rates were increasing even before *Koon*, however, it is not clear that the decision actually had an important effect. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 54 (2003).

206. *Id.* at 60.

207. *Id.* at 56.

208. See also Miller, *supra* note 204, at 1237–38 (discussing empirical evidence of judicial dislike of the guidelines).

209. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1289 (1997).

desire to reach a “just” sentence notwithstanding the guidelines. Or circumvention might represent an effort to “sweeten the pot” in plea negotiations, thereby better inducing defendant cooperation. Either way, leading studies suggest that circumvention occurs in a third or more of cases resolved through a guilty plea.<sup>210</sup>

By 2003, both the formal content of the guidelines and, to an even greater extent, the real-world implementation of the guidelines were out of step with the preferences of congressional Republicans and John Ashcroft’s Department of Justice (DOJ). Their response was embodied in the so-called Feeney Amendment to the PROTECT Act.<sup>211</sup> Sponsored by Republican Congressman Tom Feeney, and vigorously supported by DOJ, the Amendment resulted in the most important changes to federal sentencing law since the promulgation of the guidelines.<sup>212</sup>

Proponents of the Feeney Amendment made no secret of their single, overriding objective: a reduction in rates of *downward* departure.<sup>213</sup> (*Upward* departures were not of any apparent concern. Circumvention was addressed only obliquely through mild efforts to control prosecutorial discretion.) This objective, in turn, was motivated chiefly by considerations of crime control. In particular, it was argued that downward departures threatened to undermine the deterrent functions of the guidelines. As Feeney put it on the floor of the House:

I would just say that equality in sentencing is important for a number of reasons. Number one, we want to send a message to criminals and would-be criminals . . . .

I think that is what this amendment does. I think it provides certainty. I think it provides a very important deterrent effect. We will have a lot less child abuse, a lot less child pornography, and perhaps less kidnapping if we adopt this amendment.<sup>214</sup>

DOJ echoed these views: “The consistency, predictability, and toughness that Congress sought to achieve in the Sentencing Reform Act . . . is being undermined by steadily increasing downward

210. See, e.g., *id.* at 1290. In one survey of probation officers, forty percent indicated that, in a majority of cases, the guideline calculations set forth in plea agreements do not “accurately and completely reflect all aspects of the case.” David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT’G REP. 339, 339 (1996).

211. “PROTECT” stands for Prosecutorial Remedies and Tools Against the Exploitation of Children Today. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

212. Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT’G REP. 310, 310–11 (2003).

213. See Congressman Tom Feeney, *Reaffirming the 1984 Sentencing Reforms*, 27 HAMLINE L. REV. 383, 383 (2004) (“I sponsored the Feeney Amendment to address the increasing occurrence of downward departures from the Federal Sentencing Guidelines . . .”).

214. 149 CONG. REC. H2424 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

departures.”<sup>215</sup>

[T]he real and immediate prospect of significant periods of incarceration is necessary to give force to law. Nothing erodes the deterrent power of our laws—and breeds contempt for obeying the law—more quickly than if certain criminals appear to receive punishment not according to the gravity of the offense, but according to their social or economic stature.<sup>216</sup>

Consistent with its objectives of predictability and deterrence, the Feeney Amendment reflected a deep skepticism of offender characteristics. Indeed, as first introduced, the Amendment would have converted several *discouraged* grounds for departure (“not ordinarily relevant”) into *prohibited* grounds (“not relevant”), including such notable offender characteristics as family ties and responsibilities; community ties; and military, civic, charitable, or public service.<sup>217</sup> As finally enacted, the new restrictions on offender characteristics were limited to child crimes and sex offenses.<sup>218</sup> While Congress did not *directly* impose further limitations on the consideration of offender characteristics, the Feeney Amendment’s attempts to discourage downward departures more broadly must be understood, at least in part, as an effort to accomplish the same ends by *indirect* means.

These general departure-discouraging features mark the Feeney’s Amendment’s vision of uniformity as even more rules-based than that of the original Commission. After all, the departure mechanism—the regular use of which was discouraged, but not clearly prohibited, by the Commission—offered judges their most important opportunity in the guidelines regime to exercise discretion and consider the purposes of sentencing.

The Feeney Amendment attempted to reduce downward departure rates through several different provisions. First, Congress essentially prohibited downward departures in cases involving particular child crimes or sex offenses (other than on the ground of substantial assistance).<sup>219</sup> Second, Congress gave the Commission 180 days to

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215. Letter from Jamie E. Brown, Acting Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legislative Affairs to Orrin G. Hatch, Chairman, U.S. Senate Committee on the Judiciary (April 4, 2003), *reprinted in* 15 FED. SENT’G REP. 355, 356 (2003).

216. Statement of U.S. Attorney James B. Comey Before the Senate Judiciary Subcommittee on Crime and Drugs (June 19, 2002), *in* 15 FED. SENT’G REP. 323, 323 (2003).

217. Vinegrad, *supra* note 212, at 310.

218. *Id.* at 313. See 18 U.S.C. § 3553(b)(2) (2000); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(b) (2004) (reflecting changes made by Feeney Amendment as enacted).

219. Under 18 U.S.C. § 3553(b)(2)(A), which codifies relevant provisions of the Feeney Amendment, downward departures are not permitted in cases involving particular child crimes or sex offenses except on the basis of mitigating circumstances that have been “affirmatively and specifically identified” as permissible grounds for departure. In implementing this provision, the Commission has



promulgate “appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced,”<sup>220</sup> and prohibited the Commission from approving any new grounds for downward departure for two years.<sup>221</sup> Third, Congress directed the Attorney General “to ensure that DOJ attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law”; to ensure that line prosecutors would report “adverse sentencing decisions” to DOJ superiors in Washington; and “to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.”<sup>222</sup> Fourth, Congress overturned the Supreme Court’s decision in *Koon* by replacing the abuse-of-discretion standard with de novo appellate review of departure decisions.<sup>223</sup> The message was clear: Congress expected the Commission, DOJ, and the appellate courts to police downward departures much more aggressively.

There can be no doubt that the Feeney Amendment reflected a leveling-up agenda: Congress’s target was *downward* departures, not upward. For instance, while eliminating most downward departure authority in child and sex crime cases, Congress did not modify upward departure authority in such cases.<sup>224</sup> Moreover, even provisions that did not formally distinguish between upward and downward departures, such as those concerning enhanced appellate review, must be understood as truly targeting downward departures in light of the reality that upward departures are quite rare.<sup>225</sup>

In addition to reducing judicial discretion, the Feeney Amendment also sought to regulate prosecutorial discretion, albeit in a much more

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indicated that only the very few grounds identified in Part 5K of the guidelines satisfy the “affirmatively and specifically identified” test. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(b) (2004).

220. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650 (2003). In response to this mandate, the Commission prohibited departures on the basis of extraordinary acceptance of responsibility, mitigating role in the offense, guilty plea, or fulfillment of restitution obligations. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(d) (2004).

221. PROTECT Act § 4(j)(2).

222. *Id.* § 401(l)(1). Technically, the Feeney Amendment gave DOJ a choice between undertaking these measures or reporting all non-substantial-assistance departures to Congress within fifteen days. *Id.* § 401(l)(3). DOJ chose the former option. See Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (July 28, 2003), reprinted in 15 FED. SENT’G REP. 375 (2003) (outlining DOJ policies regarding sentencing in response to PROTECT Act mandate).

223. PROTECT Act § 401(d)(2). Congress also added new grounds for reversal of a departure, including the failure of a departure to advance the statutory purposes of sentencing. *Id.* § 401(d)(1). Additionally, Congress restricted the ability of a district court judge to depart after a remand for resentencing. *Id.* § 401(e)(2).

224. *Id.* § 401(b)(1)(B).

225. U.S. SENTENCING COMM’N, *supra* note 205, at 32 (showing upward departure rate below one percent each year from 1995 through 2001).

modest fashion. As noted above, the Amendment required DOJ to take a more aggressive role in policing guidelines compliance and resisting downward departures “not supported by the facts and the law.”<sup>226</sup> Moreover, Congress sought to regulate for the first time a particularly controversial exercise of prosecutorial discretion: the creation of so-called “early disposition” programs by individual United States Attorney’s Offices (USAOs). These programs offered certain categories of defendants favorable deals in return for particularly quick guilty pleas, resulting in sentence reductions that were not contemplated by the guidelines.<sup>227</sup> The Feeney Amendment required that such programs receive the Attorney General’s authorization, bringing them under some centralized control, and limited the maximum sentence benefit for the “early disposition departure” to four offense levels.<sup>228</sup>

The Feeney Amendment should nonetheless be viewed as an affirmation of cooperation benefits and, to a lesser extent, prosecutorial discretion. At the same time that the Amendment adopted the first explicit regulations for early disposition programs, it also accorded such programs a statutory legitimacy that had previously been lacking. Moreover, the regulations left considerable implementation discretion in the hands of DOJ and line prosecutors, for instance, by requiring a prosecutor’s motion for any early disposition departure.<sup>229</sup> Additionally, under the Feeney Amendment, substantial assistance departures were carved out of, or otherwise effectively insulated from, the new departure-discouraging provisions.<sup>230</sup> Finally, Congress also endorsed

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226. PROTECT Act § 401(l)(1). DOJ implemented these requirements of the Feeney Amendment through memoranda from Attorney General Ashcroft dated July 28, 2003, and September 22, 2003. Benson B. Weintraub & Benedict P. Kuehne, *The Feeney Frenzy: A Case Study in Actions and Reactions in the Politics of Sentencing*, 16 FED. SENT’G REP. 114, 116 (2003). Under these memoranda, “federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003), *reprinted in* 16 FED. SENT’G REP. 129, 130 (2003). The memoranda also prohibit fact-bargaining for sentencing purposes. *Id.* at 131–32. For a discussion of the limitations of the Ashcroft Memoranda as effective checks on prosecutorial discretion, see *infra* text accompanying notes 306–09.

227. O’Hear, *supra* note 13, at 372.

228. PROTECT Act § 401(m)(2)(B). These provisions suggest that the real story of the Feeney Amendment may be less a matter of Congress versus the courts, as the legislation is conventionally characterized, than the center (Congress and Main Justice) versus the periphery (district court judges and line prosecutors).

229. O’Hear, *supra* note 13, at 378–80.

230. For instance, the limitations on downward departures in child and sex crime cases did not apply to substantial assistance departures. PROTECT Act § 401(b). Likewise, the new appellate review provisions have little relevance for substantial assistance departures; because such departures require a prosecutor’s motion, it would be highly unusual for a prosecutor to appeal a substantial assistance departure.

the acceptance of responsibility adjustment, but actually *increased* prosecutorial discretion by make the full three-point discount (“super-acceptance”) contingent for the first time on a prosecutor’s motion.<sup>231</sup>

### *I. Summary*

This Part has described seven different models of uniformity, each of which has an important place in the lineage connecting the important pre-legislative reform proposals of the 1970s to the post-Feeney legal regime overturned by *Booker*. Despite the lines of influence linking these seven models, they represent seven quite distinct ways of structuring and justifying uniformity. There is a world of difference, for instance, between the Yale group’s proposal (expressly and inclusively purpose-driven, standards-based, leveling-down, and encouraging consideration of offender characteristics) and Feeney’s version of uniformity (emphasizing predictability and deterrence, rules-based, leveling-up, and discouraging consideration of offender characteristics). In many respects, the differences between the Yale group and Feeney reflect the general arc of development of the uniformity ideal, with the chronologically in-between models generally embodying in-between views on, say, judicial discretion, severity, and offender characteristics.

Because of its association with the unpopular Federal Sentencing Guidelines, uniformity has acquired a bad name in some circles. Excavating its history, however, demonstrates that uniformity does not need to mean what it later came to mean. Uniformity need not be viewed principally as a crime control measure, but might instead be viewed as protective of defendants, with an explicit leveling down agenda. Uniformity need not implement desert, deterrence, or any other particular purpose of sentencing. Uniformity need not elevate offense characteristics over offender characteristics. Indeed, some reformers in the 1970s asserted that this practice was precisely the problem to be addressed: the “major source of disparity,” in their view, was “sentencing according to the particular offense” instead of “the character of the defendant and the needs of rehabilitative treatment.”<sup>232</sup>

Uniformity need not be implemented through a complex set of rules: it might be implemented through a system of purposes and standards, as in the Yale model, or through a set of relatively simple rules, as in the TCF Task Force model. Finally, while other features of the pre-*Booker* uniformity scheme (broad prosecutorial discretion and significant

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231. *Id.* § 401(g)(2).

232. NAT’L COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT 2 (2d ed. 1972).

cooperation benefits) were not so clearly contrary to early reform models, they were at least called into question by early reformers.

None of these features, in short, can fairly be called essential to the uniformity ideal, understood as an organic, historical concept. As Professor Allen said of the rehabilitative ideal, the uniformity ideal “embraces great complexity and, indeed, encompasses widely different and even conflicting kinds of social policies.”<sup>233</sup> The next Part explores one particularly important, but previously underappreciated, area of tension within the uniformity ideal.

### III. THE PURPOSES AND PREDICTABILITY PARADIGMS

This Part describes two competing frameworks for making distinctions between warranted and unwarranted disparity. These two paradigms, which I label purposes and predictability, are certainly not the only ways of thinking about uniformity; indeed, Part IV below will describe another, the dignity paradigm. But purposes and predictability are worthy of particular attention because they have been particularly influential in the development of federal sentencing policy.

#### *A. Uniformity As Purpose-Driven Sentencing*

Under the purposes paradigm, uniformity requires that all defendants be sentenced so as to advance an explicitly identified purpose or set of purposes of punishment. All factors that serve to distinguish defendants should relate to the approved purpose or purposes. The vision here is of rational, principled sentencing.<sup>234</sup> This need not entail the adoption of any one particular purpose of sentencing or of tight constraints on judicial discretion. For instance, among the uniformity models discussed in the previous Part, that of the Yale group most clearly embodies this paradigm, even though it would have permitted considerable judicial discretion in weighing several competing purposes.<sup>235</sup> What is important is that there is a uniform, principled

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233. ALLEN, *supra* note 11, at 2.

234. Chairman Wilkins seems to have something of this ideal in mind in early Commission hearings on the guidelines. “[W]e must . . . formulate sentences which are rational and explainable,” he asserted. U.S.SENTENCING COMM’N, *supra* note 174, at 4. “The resulting system will be open and understandable, and it must articulate—the judges who impose sentences—to victims who suffer crimes, to defendants who are punished, and to the American public in general why a particular sentence is appropriate. It is not enough for us to come up with just sentencing guidelines that give a sentence; we must also say why this sentence is being given and, most importantly, why is this the appropriate sentence in this particular case.” *Id.*

235. For a more recent articulation of the purposes paradigm, which emphasizes the role of the

analytical process that produces the sentencing outcome. The lion's share of the analytical work might be done by an expert commission considering different types of offenses and offenders on a categorical basis, or the analysis might be done entirely by judges on a case-by-case basis.<sup>236</sup>

What is the appeal of this paradigm? Most obviously, it helps to ensure that the sentencing process is sensitive to particular substantive ends of the criminal law, such as deterrence and incapacitation. The problem with this answer, though, is that we lack consensus as to what the substantive ends ought to be and how they are most effectively implemented.<sup>237</sup> Even if we lack confidence in our answers to these questions, however, the purposes paradigm may still hold appeal for a variety of reasons. For instance, following the purposes paradigm might promote dialogue and experimentation that would help us to better understand and evaluate different approaches to sentencing over time.

Uniformity advocates, however, have emphasized a different value to this paradigm: legitimization. As we have seen, for instance, Frankel was quite concerned that the "splatter of varied sentences, with the unexplained variations left to be seen as random or worse, nourishes the view that there is no justice in the law."<sup>238</sup> The purposes paradigm reassures offenders and the public that sentences are principled, which may enhance respect for, and adherence to, the law among both groups.<sup>239</sup>

### *B. Uniformity as Predictable Sentencing*

In the predictability paradigm, uniformity focuses not on the analytical process, but on the outcome: the final sentence imposed should match pre-sentencing expectations. There are two particularly important variants on this paradigm. In the first, pre-offense (or deterrence-type) predictability, the sentence should be determinable at the time the crime is planned or perpetrated. In principle, the offender

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Commission, rather than individual judges, in evaluating and applying competing purposes, see Rappaport, *supra* note 177, at 1046, 1059, 1068.

236. See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 415–16 (1992) (discussing different procedures by which "[s]entences can be linked to purposes").

237. For a concise summary of the difficulties with leading approaches, see Kenworthy Bilz & John M. Darley, *What's Wrong With Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1222–23 (2004).

238. FRANKEL, *supra* note 9, at 42–44.

239. *Id.*; O'DONNELL ET AL., *supra* note 63, at 38, 58. For a discussion of empirical support for the proposition that perceptions of injustice in the law contribute to diminished compliance with the law, see Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005).

should be able to calculate in advance his or her legal exposure, that is, the sentence that will be imposed for his or her conduct (e.g., carrying a loaded firearm to the drug deal) and any foreseeable consequences of that conduct (e.g., someone is shot during the course of the drug deal). Frankel defended this form of predictability as a matter of fair notice.<sup>240</sup> Later reformers (such as the TCF Task Force and Kennedy) have demanded this form of predictability as a matter of deterring harmful conduct.<sup>241</sup>

In the second variant, in-system (or cooperation-type) predictability, the sentence need not necessarily be predictable at the time the offense is committed, but should be determinable at some point before the formal sentencing proceeding, probably no later than the time of conviction or guilty plea. The real focus here is on helping defendants to make well-informed decisions regarding plea-bargaining and other forms of cooperation. Defendants should be able to calculate the sentencing consequences of pleading guilty to particular charges, stipulating to particular facts, and providing or withholding other forms of cooperation. Once again, Frankel conceived of this type of predictability as a matter of fairness to defendants, although it could also be justified as way to encourage cooperative behavior by making the benefits clearer and more dependable.<sup>242</sup>

### *C. Tensions Between Purposes and Predictability*

The purposes and predictability paradigms are not strictly inconsistent with one another, but they may sometimes point in quite different directions. Consider first how a uniformity system would be structured under the predictability paradigm. First, predictability would prefer bright-line rules to standards. Second, predictability would prefer to minimize the number of sentencing factors.<sup>243</sup> Third, predictability

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240. FRANKEL, *supra* note 9, at 6. Beccaria shared this view. BECCARIA, *supra* note 57, at 17, 55.

241. This form of predictability is objectionable to some. Predetermined sentences for specific acts may look less like punishments than prices—"an invitation to commit crimes offered to all who are willing to pay." JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 73 (2003). Moreover, recent social scientific research suggests that, because of risk aversion, uncertainty may unexpectedly have greater deterrent value than certainty. Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 446-47 (2004).

242. O'Hear, *supra* note 18, at 1564. Judge Wilkins, who chaired the first Commission, emphasized this form of predictability as a significant achievement of the guidelines. William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 584 (1992).

243. Increasing the number of factors increases outcome-uncertainty, even if each individual factor can be determined in a reasonably reliable fashion; as Professors Ruback and Wroblewski have

would disfavor the use of subjective offense characteristics (mens rea, motive, and the like), as well as other sorts of factors that would require the sentencer to draw inferences or make value judgments (disadvantaged upbringing, prior good works, and the like).<sup>244</sup> Fourth, the pre-offense version of predictability would disfavor the consideration of unforeseeable consequences, cooperation, and other post-offense occurrences.

These preferences may be reconciled with the purposes paradigm, but only if the authorized purposes are narrowly circumscribed. For instance, under conventional models of general deterrence, sentencing would focus on a quite limited number of more-or-less objective variables: the expected benefit of the crime, the risk of detection, and the harm caused or threatened.<sup>245</sup> Likewise, some versions of the just deserts model focus on harm as the chief measure of blameworthiness.<sup>246</sup> Incapacitation models typically rely heavily on criminal history, which may also satisfy the requirements of predictability.<sup>247</sup>

Tensions arise under different or more expansive views of purposes. Desert models, for instance, typically place considerable emphasis on subjective offense characteristics.<sup>248</sup> Broader utilitarian approaches

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shown, small reliability problems can have substantial cumulative effects in the context of a complex, multifactor guidelines system. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 764–65 (2001).

244. Thus, Beccaria, a great proponent of predictable sentencing, argued that “the true measure of crimes is . . . the harm done to society.” BECCARIA, *supra* note 57, at 64 (emphasis in original). Intention, he asserted, “depends on the impression objects actually make and on the precedent disposition of the mind; these vary in all men and in each man, according to the swift succession of ideas, of passions, and of circumstances. It would be necessary, therefore, to form not only a particular code for each citizen, but a new law for every crime.” *Id.* at 65. Predictability would likewise disfavor what Professor Tonry has referred to as “situationally relevant” factors, which must be considered in highly context-specific ways. For instance, “[m]ental abnormality may be a mitigating circumstance when it makes the defendant susceptible to manipulation by others, but an aggravating circumstance when it reduces a defendant’s ability to control aggressive impulses.” TONRY, *supra* note 10, at 23.

245. Block, *supra* note 164, at 397–98; Robinson, *supra* note 15, at 7. Whether benefit or harm should be the principle measure has been a matter of debate. Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 220–21 (1993). Determining likelihood of detection has also posed a considerable challenge for this approach. *Id.* at 219–20.

246. See, e.g., Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1076 (1997) (contrasting “harm-based” with “culpability-based” retributivists).

247. Sentencing Commission data, for instance, indicate that the formula for criminal history scores in the guidelines has considerable predictive power for recidivism. Linda Drazga Maxfield, *Measuring Recidivism Under the Federal Sentencing Guidelines*, 17 FED. SENT’G REP. 166, 169 (2005).

248. See Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 818 (2002) (“The existence of discretion, somewhere in the system, to make a context-sensitive evaluation of the offender’s conduct and character is intrinsic to criminal law because context-specific,

support the consideration of a host of factors, including cooperation benefits and the effects of a sentence on third parties, such as children and spouses.<sup>249</sup> Restorative justice approaches, which are becoming more influential, emphasize interactions between offenders and victims after the crime, particularly the offender's expressions of remorse and efforts to make amends.<sup>250</sup> All of these sorts of approaches, especially in combination with one another, seem to point in the direction of unpredictability: large numbers of case-specific factors, subjective determinations by the sentencer, prudential balancing of purposes, important post-offense contingencies, and so forth.<sup>251</sup>

In short, assuming an inclusive view of purposes, a strong commitment to purpose-driven sentencing is apt to conflict with a strong commitment to predictability. Indeed, the Commission itself has made a similar observation.<sup>252</sup> Table 1 below compares and contrasts the two paradigms in more detail by reference to the essential questions discussed in Part I.

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retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment.”); Albert W. Alshuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 909 (1991) (“A system grounded on ‘just deserts’ need not-indeed should not-focus primarily upon harm.”).

249. See Brown, *supra* note 13, at 1383 (arguing in favor of taking third-party effects into account, but observing that none of “dominant theories” of criminal punishment permit doing so).

250. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 11–12 (2002).

251. Some of these tendencies may conflict with monitoring and enforcement objectives. Thus, a regime of purpose-driven sentencing may seek to constrain judicial discretion in order to minimize the likelihood that judges will use (or be perceived as using) broadly defined standards as a cover for imposing biased or otherwise poorly reasoned sentences. If the monitoring and enforcement concerns are strong enough, a purpose-driven system may end up looking a lot like a predictability-driven system, albeit for very different underlying reasons. I am grateful to Professor Richman for drawing my attention to this point.

252. See *supra* text accompanying notes 169–71.



*Table 1*  
*Comparison of Purposes and Predictability Paradigms.*

<b>Uniformity Questions</b>	<b>Purposes</b>	<b>Predictability</b>
Why do we care about uniformity?	Advance desired purposes of punishment  Promote dialogue and experimentation  Persuade public and/or offenders of justness of sentences	Pre-offense: Fair notice / deterrent message to public of penal consequences of particular conduct  In-System: Fair notice of consequences of plea-bargaining and other conduct in system; reliable incentives for cooperation
What is the role of purposes?	Must be systematically linked to sentencing outcomes on case-by-case or categorical basis	Need not play a central role (e.g., nothing wrong with empirical approach)
What is the role of offender characteristics?	Must be considered to extent necessary to advance purposes of punishment	Disfavored, particularly subjective characteristics
What is the role of real-offense characteristics?	Same as offender characteristics	Same as offender characteristics
To what extent will uniformity be implemented through rules?	Need not play a central role	Should be norm
How will uniformity affect severity?	No necessary relationship	No necessary relationship
Does uniformity encompass prosecutorial decisions?	Yes	Pre-Offense: Yes  In-System: Need not
What is the role of cooperation?	Must be considered to extent necessary to advance purposes of punishment	Pre-Offense: Disfavored In-System: May be considered

*D. Sentencing Reform Reconsidered*

This Section describes how the tensions between the two paradigms have played out in federal sentencing law, demonstrating an important shift over time from purposes to predictability. I have already suggested that the Yale group's proposal nicely captures the spirit of the purposes paradigm, while the TCF Task Force's rules-based proposal offers an equally neat illustration of the predictability model. As discussed in Part II above, the earliest Kennedy bills were structured more along the lines of the Yale proposal. By the time of the SRA's passage, however, sentencing reform had taken important steps in the direction of predictability. Under the SRA, the guidelines would be mandatory, not advisory, and the use of many offender characteristics was cast into doubt.<sup>253</sup>

On the other hand, the SRA was by no means hostile to the purposes paradigm.<sup>254</sup> While the guidelines were to be binding, the guidelines were to be drafted with purposes in mind, principally desert, deterrence, and incapacitation. Moreover, under 18 U.S.C. § 1332(a)—the holdover provision from early Kennedy bills—judges were instructed to consider these same purposes on a case-by-case basis (albeit to uncertain effect, in light of the mandatory nature of the guidelines). It is conceivable that the SRA might have been implemented by the Commission and the courts in ways that manifested real sensitivity to both the purposes and predictability paradigms.

The Commission, however, managed to create guidelines that suffered serious deficiencies under both points of view, a veritable “worst of both worlds.” From the predictability standpoint, the guidelines were guilty of the sin of complexity, with thousands of sentencing factors spread over hundreds of pages in the Guidelines Manual, many employing brand-new terms of art (e.g., acceptance of responsibility, minimal role, substantial assistance, heartland) whose meaning would have to be painstakingly litigated in case after case.<sup>255</sup>

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253. See *supra* text accompanying notes 133–36.

254. Nor did it contemplate absolute predictability. See S. REP. NO. 98-225, at 150 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3333 (“Even the fullest consideration and the most subtle appreciation of the pertinent factors . . . cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.”).

255. For a critique of the guidelines focusing on this point, see Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1272–74 (1997). In this vein, according to Chairman Wilkins, the Commission specifically chose not to provide an automatic discount for guilty pleas, which would have concededly enhanced predictability, because the Commission did not believe that such a discount was justified in all cases. Wilkins, *supra* note 197, at 191. This was an important decision by the Commission, marking a clear preference in this one context for purposes over predictability.

The departure mechanism was especially troubling, leaving much to the discretion of the courts in deciding both whether to depart (e.g., what are the boundaries of “not ordinarily relevant”) and by how much to depart (essentially a reasonableness standard<sup>256</sup>). Finally, contravening the preferences of pre-offense predictability, the guidelines gave great weight to cooperation and left prosecutorial discretion largely untouched.

From the purposes standpoint, the whole guidelines project was fundamentally compromised by the explicit adoption of the empirical approach.<sup>257</sup> This decision greatly diminished the value of the judicial discretion that was potentially available in the departure mechanism and elsewhere. The Commission offered no normative framework for making discretionary decisions. This was in sharp contrast, for instance, to the Yale proposal, which not only described three acceptable sentencing purposes at some length, but also provided a system for resolving inconsistencies between those purposes. The Commission might have incorporated this sort of framework into the departure mechanism without any significant loss of predictability in comparison to the vague provision that was adopted.

While the guidelines include no explicit purpose, one may see implicit purposes in the guidelines’ emphasis on harm and criminal history. More specifically, one might view much of the Guidelines Manual as an effort to implement deterrent, incapacitative, and harm-based desert approaches to sentencing.<sup>258</sup> However, while implicit purposes may be better than no purposes at all, they may not satisfactorily advance the legitimizing and dialogue-promoting objectives of the purposes paradigm.<sup>259</sup> Moreover, it is not entirely clear how the implicit purposes are to be squared with the substantial cooperation benefits of the guidelines and the broad discretion retained

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256. The guidelines themselves do not speak much to the magnitude of departures, but a reasonableness standard is suggested by the SRA. 18 U.S.C. § 3742(e)(3)(C) (2000).

257. Miller, *supra* note 236, at 442.

258. See Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1018 (2004); Hofer & Allenbaugh, *supra* note 185, at 24 (arguing that guidelines reflect “modified just desert” approach, which emphasizes desert, with the possibility of enhanced sentences based on dangerousness). Not all commentators, however, would be willing to concede this point. See, e.g., Block, *supra* note 164, at 395–96 (criticizing Commission for failing to adopt deterrence-based “optimal penalty theory” in favor of more political approach); Rappaport, *supra* note 177, at 1088 (“[T]he Commission pursued political objectives rather than undertaking a principled effort to promote the purposes of punishment.”); Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1 (2004) (arguing that guidelines perversely impose longer sentences in many contexts for indirect threat of harm than for actual harm).

259. For a similar argument, see Rappaport, *supra* note 177, at 1092–95.

by prosecutors. Indeed, if the Commission had tackled these matters—say, through rigorous, principled regulation of the substantial assistance departure—then it might have simultaneously advanced the goals of both the purposes and predictability paradigms. Without such efforts, however, it is difficult to take the guidelines seriously as a purpose-driven sentencing regime.<sup>260</sup>

To be fair, Congress gave the first Commission an enormous task to accomplish in a limited period of time. Particularly in light of the ideological divisions within the Commission, the gaps and ambiguities of the original guidelines may have been a practical necessity in order to generate consensus. Moreover, once the guidelines were promulgated, the get-tough politics of the day left the Commission with limited room to undertake fundamental reforms. It is hard to imagine that Congress would have tolerated significant increases in judicial discretion or decreases in prosecutorial discretion, or a significant reduction in aggravating factors or increase in mitigating factors.

At the same time, this analysis of purposes and predictability may help to explain why the federal guidelines system proved so unpopular in so many quarters.<sup>261</sup> On the one hand, the guidelines did not provide the predictability that was of increasing interest to Congress. On the other, the guidelines did not offer the sort of principled, analytical

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260. My criticisms of prosecutorial discretion under the guidelines are elaborated below in Part IV.B. To be sure, there are principled ways of squaring substantial assistance and other cooperation benefits with recognized purposes of sentencing. For instance, based on his analysis of the substantial assistance departure and other features of the guidelines, Professor Rappaport has argued that utilitarianism is the “best rational reconstruction” of the “implicit logic” of the guidelines. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 561 (2003). He thus disagrees with the conclusion of Hofer and Allenbaugh that “modified just deserts” provides the best account of the guidelines. *Id.* at 609–14; *see supra* note 258 (discussing Hofer and Allenbaugh article). Rappaport further argues that utilitarianism can, in theory, provide adequate legitimacy as a basis for the guidelines system. *Id.* at 635–37. I do not disagree that guidelines with cooperation benefits may, in theory, constitute a principled, legitimate sentencing system. I *do* question whether the guidelines we have can be viewed in this way. Rappaport himself convincingly argues that there are real differences between explicit purposes, which the guidelines do not have, and implicit purposes, which he argues they do. *Id.* at 559. Moreover, while I do not take a position on the Rappaport-Hofer-Allenbaugh debate, the mere fact that such thoughtful commentators have taken such different positions in their “rational reconstructions” of the guidelines’ philosophy suggests that the guidelines do not embody either philosophy in an especially clear and compelling fashion. Rappaport himself appropriately couches his argument as a question of which philosophy is “plausible,” *id.* at 561; elsewhere, he, like many other commentators, has argued that the guidelines may, as a matter of historical fact, be better viewed as political than principled. *See supra* note 258.

261. *See, e.g.*, TONRY, *supra* note 10, at 11 (“Few outside the federal commission would disagree that the federal guidelines have been a disaster.”). This unpopularity seems not to be an intrinsic characteristic of sentencing commissions and guidelines, as many states have had much happier experiences with such reforms. *Id.* at 10–11.

approach to sentencing that was favored by many academics and judges.<sup>262</sup>

The Feeney Amendment represented a more decisive embrace of predictability. The attack on departures and judicial discretion addressed a notable source of unpredictability in the guidelines system. Indeed, the rhetoric surrounding the Amendment made clear that these measures were specifically intended to increase deterrence by enhancing pre-offense predictability: “[T]he real and immediate prospect of significant periods of incarceration is necessary to give force to law.”<sup>263</sup> Though unacknowledged by proponents, of course, this rhetoric was at odds with the Amendment’s simultaneous endorsement of cooperation benefits. On the other hand, these aspects of the Amendment may be seen as furthering in-system (cooperation-type) predictability.

Moreover, despite proponents’ frequent invocation of deterrence, the Feeney Amendment is most appropriately viewed as a rejection of the purposes paradigm. This paradigm contemplates a deliberative, analytical process that makes principled distinctions among offenses and offenders, either on a case-by-case basis (as in the Yale group’s proposal) or on a category-by-category basis (as the SRA contemplated). The Feeney Amendment’s attempt at crude, across-the-board sentence increases does not fit the paradigm’s vision.<sup>264</sup> The Amendment, in short, serves to confirm the rise of predictability and the decline of purposes from the time of Kennedy’s early bills.

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262. See, e.g., Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 279 (2005); Rappaport, *supra* note 177, at 1088. In evaluating its own work, the Commission has employed what might be called a *negative, minimalist* model of uniformity. More specifically, in its recent “fifteen-year report,” the Commission assessed the extent to which the guidelines system has reduced or controlled the significance of six variables: (1) prosecutorial charging and plea-bargaining decisions; (2) identity of judge; (3) district of prosecution; (4) race; (5) ethnicity; and (6) gender. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 140–42 (2004). While reporting progress in diminishing the effect of some of these variables, *id.*, the Commission did not consider whether the guidelines system was operating in either a purposeful or a predictable manner. To be sure, a system that minimizes the significance of, say, the identity of the judge is perhaps more likely to be purposeful and predictable than one in which the identity of the judge plays an important role. Yet, such a system need not necessarily advance the ends of purpose-driven or predictable sentencing. For instance, a system with draconian mandatory minimums would leave the individual judge with little ability to determine the final sentence, but such a system would be far from purposeful.

263. *Comey, supra* note 216.

264. To be sure, if the guidelines are viewed as a coherent purpose-driven scheme, and if departures are viewed as unprincipled exercises of discretion, then Feeney’s assault on departures might plausibly advance the purposes paradigm. The assumptions, however, are dubious. The guidelines do not purport to be purpose-driven, and their lack of clear principles has been an enduring source of criticism. Meanwhile, there is a body of departure case law that does represent genuinely thoughtful, purpose-driven sentencing. See *Berman, supra* note 189, at 105. In the end, there is no good reason to believe that departure cases systematically deviate from the purposes paradigm more than within-range cases.

*E. Booker: A Step Back from Predictability*

We can now return to the conundrum noted at the start of this Article: How is it that both the majority and the dissenters in *Booker* could claim to be advancing the cause of uniformity? Some background to the “remedy” question may be helpful. Prior to *Booker*, the guidelines system was generally understood to rest on fact-finding by the sentencing judge, not by a jury. Thus, all of the real-offense and other factors that would go to determine the sentence (other than the elements of the offense of conviction) would be found by a judge using the preponderance of the evidence standard.

This system was cast into doubt by the Supreme Court’s decision in *Apprendi v. New Jersey*, in which the Court held, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>265</sup> *Apprendi*, however, concerned a state law that was at least arguably distinguishable from the federal guidelines. In *Booker*, decided nearly five years later, the Court finally held that *Apprendi* applied to the guidelines, and that the Sixth Amendment right to a jury trial thus prohibited judges from increasing sentences based on guidelines factors not found by a jury.<sup>266</sup>

This “merits” holding set up the remedy problem.<sup>267</sup> The four dissenters would have implemented the merits holding by requiring that juries find aggravating factors under the guidelines.<sup>268</sup> The “remedy” majority (distinguished from the “merits” majority because it comprised a quite different set of Justices) rejected this approach as inconsistent with the intent of the SRA. In order to implement *its* view of congressional intent, the remedy majority excised from the statute 18 U.S.C. § 3553(b)(1), which made the guidelines mandatory.<sup>269</sup> Left behind was Section 3553(a), the provision descended from the Yale proposal that required judges to “consider” each of the purposes of sentencing (incapacitation, deterrence, desert, and rehabilitation) right along with the guidelines on a case-by-case basis. Thus, in the interest of curing a constitutional defect in a way that respected congressional intent, *Booker* ended up making the guidelines advisory in precisely the

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265. 530 U.S. 466, 490 (2000).

266. *United States v. Booker*, 543 U.S. 220, 237–38 (2005).

267. The remedy problem required the Court to determine which provisions of the SRA, if any, had to be excised in light of the constitutional analysis. This is a question of legislative intent: “We seek to determine what ‘Congress would have intended’ in light of the Court’s constitutional holding.” *Id.* at 246.

268. *Id.* at 272 (Stevens, J., dissenting in part); *id.* at 313 (Thomas, J., dissenting in part).

269. *Id.* at 244 (majority opinion).

manner contemplated by the early Kennedy bills.

How exactly would the dissenters' remedy violate the SRA's intent? The majority, in an opinion authored by Justice Breyer, equated that intent with uniformity, and equated uniformity with "bas[ing] punishment upon, the *real conduct* that underlies the crime of conviction."<sup>270</sup> The majority then determined that "to engraft" jury fact-finding onto the guidelines would "destroy" the real-offense sentencing system preferred by Congress.<sup>271</sup> For one thing, "[i]t would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial."<sup>272</sup> More generally, no real-offense characteristics could be taken into account "unless prosecutors decide to charge more than the elements of the crime."<sup>273</sup> Thus, "any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely."<sup>274</sup> The majority found this to be an unacceptable limitation on the ability of the judge to craft an appropriate sentence. "Prosecutors would . . . exercise a power the [SRA] vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment."<sup>275</sup>

The majority's version of uniformity hews much more closely to the purposes paradigm than to predictability. The majority's preference (or, to be more precise, the preference imputed by the majority to Congress) for a broad consideration of real-offense characteristics is hard to square with predictability, especially the majority's emphasis on information acquired *after conviction* during the presentence investigation. Indeed, the use of such information, and the concomitant rejection of the sentencing factors agreed to by prosecutors and defendants pursuant to plea bargains, would profoundly undermine what I have referred to as in-system (or cooperation-type) predictability.

Instead of predictability, the majority had in mind a thorough, case-by-case, judicial determination of which defendants "merit heavier punishment." Section 3553(a), which becomes the linchpin of the sentencing analysis under *Booker*, provides a purpose-driven framework for making the determination. In short, the *Booker* remedy turns back the clock to the sort of strong-purpose, weak-predictability version of uniformity that we saw in the 1970s. In light of the contrary position

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270. *Id.* at 250.

271. *Id.* at 252.

272. *Id.*

273. *Id.*

274. *Id.* at 257.

275. *Id.*

(weak-purpose, strong-predictability) of the Feeney Amendment (enacted less than two years before *Booker* was decided), it is ironic to reach this outcome in the name—of all things—congressional intent!

By contrast, Justice Stevens, author of the principal remedy dissent, seemed untroubled by the impairment of real-offense sentencing. Stevens conceded that his remedy “would undoubtedly affect ‘real conduct’ sentencing in certain cases,” but, he argued, “such sentencing . . . is contrary to the very core of *Apprendi*.”<sup>276</sup> Moreover, Stevens asserted, to whatever extent real-offense sentencing would be furthered by the majority’s remedy, this would come at the expense of predictability: “The majority . . . has eliminated the certainty of expectations in the plea process.”<sup>277</sup> Stevens felt that this certainty was more consistent with congressional intent than real-offense sentencing.<sup>278</sup> Indeed, underscoring his sense that Congress had rejected the purposes approach, Stevens argued that “traditional sentencing goals have always played a minor role in the Guidelines system.”<sup>279</sup>

In short, the Breyer-Stevens dispute is really a dispute about whether the SRA embodied the purposes paradigm or the predictability paradigm.<sup>280</sup> The majority’s remedy makes little sense from the standpoint of predictability, while the dissenters’ remedy (essentially a charge-offense system) seems equally at odds with the ideal of purpose-driven sentencing. In any event, it should not be surprising that the Court splintered on this question of the SRA’s intent, for, as we have seen, the SRA represented the culmination of nearly a decade of legislative evolution and compromise, and contained considerable ambiguity and contradiction. Indeed, the SRA can be said to have embraced *both* paradigms, without really addressing the tensions between them.

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276. *Id.* at 288 (Stevens, J., dissenting in part).

277. *Id.* at 289.

278. *Id.* at 296 n.15 (“[T]he Court’s contention that real conduct sentencing was the principal aim of the SRA finds no support in the legislative history.”).

279. *Id.* at 297.

280. Nor was *Booker* the first time that the Court confronted the tension between predictability and purposes in the federal guidelines system. In *Koon*, the Court noted that the guidelines “provide uniformity, predictability, and a degree of detachment lacking in our earlier system,” but held that Congress had nonetheless intended to preserve some discretion in the system so that every convicted person could be considered “as an individual.” 518 U.S. 81, 113 (1996) (emphasis added). Justice Souter, concurring in part and dissenting in part, particularly emphasized the purposes perspective: “[B]oth Congress and the Commission envisioned that departures would require some unusual factual circumstance, but would be justified only if the factual difference ‘should’ result in a different sentence. Departures, in other words, must be consistent with rational normative order.” *Id.* at 115 (Souter, J., concurring in part and dissenting in part). I am grateful to Professor Berman for drawing my attention to this point.



In a sense, then, Breyer and Stevens were *both* correct (and both incomplete) in their characterizations of the SRA's intent. To decide between the Breyer and Stevens remedies on the basis of Congress's understanding of uniformity in 1984 was bound to result in an analytically unsatisfying opinion. As I have suggested elsewhere, *Booker* might have been more satisfactorily resolved on the basis of a deeper analysis of the constitutional values at stake.<sup>281</sup>

#### IV. UNIFORMITY AND DIGNITY

The tension between predictability and purposes has become a major, if poorly appreciated, source of controversy in the making of federal sentencing policy. Both paradigms can legitimately claim roots in the work of Frankel and his contemporaries, and both were ultimately embedded in the structure of the SRA. Our review of the development of the uniformity ideal casts the tension between the paradigms in sharp relief, and helps to demonstrate the significance of the competing values. A comparison between the proposals of the Yale group and the TCF Task Force, for instance, offers a nice illustration of how the paradigms may lead to quite different means of structuring uniformity.

An examination of uniformity's "original intent," however, also suggests that something important has been lost as that intent has been translated into law: a concern with the dignity of criminal defendants. Treating defendants respectfully was of central importance to Frankel's thinking, in particular. He viewed predictability and purposes as a means to that end. The two paradigms, however, have come unmoored from this original intent, and, aside from occasional, oblique references to "fairness," uniformity is rarely discussed in Congress or the courts in terms of respect for defendants. Instead, uniformity has come to be viewed almost wholly as a matter of crime control and respect for *public* views of just punishment.

This Part assesses the guidelines system through the lens of the dignity paradigm, that is, the view that sentencing procedures ought to embody respect for the defendant as a member of a national community that is committed to ideals of individual liberty and status-equality. More specifically, to borrow terminology suggested by Professor Cole, my concern is with the "anti-subjugation principle": due respect for the dignity of defendants requires that they not be subjected to the "unfettered will of another."<sup>282</sup> While not using this precise

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281. O'Hear, *supra* note 7, at 253.

282. Cole, *supra* note 8, at 1339-40. The dignity paradigm may embrace additional procedural

terminology, Frankel and his contemporaries were acutely sensitive to the anti-subjugation concept, with their concerns focusing on the power of judges and parole boards. Sentencing reform effectively “fettered” the will of these actors, but greatly exacerbated a different source of subjugation: prosecutorial power. *Booker* may help to ameliorate this problem, but, as legislative responses to *Booker* are weighed, experience suggests that we should leaven our thinking about uniformity with more self-conscious attention to dignitary concerns.

#### A. Dignity as Checks and Balances

As we have seen, Frankel presented uniformity as a matter of fairness to defendants. In part, his concern was with unduly long sentences, that is, with the *outcomes* of the indeterminate system. His greater concern, however, was with the *process*.<sup>283</sup> The system subjected defendants to the unchecked power of another individual, the judge, who might exercise that power in malicious or capricious ways. Frankel characterized this power as an affront to the dignity of defendants,<sup>284</sup> and suggested that it violated fundamental rights of due process and equal protection.<sup>285</sup> He argued that this degrading process created bitterness and anxiety among defendants, and that these feelings impeded rehabilitation and exacerbated prison discipline problems.<sup>286</sup> These themes were consistently echoed by reformers following in Frankel’s footsteps, right through the Senate Committee Report that accompanied the SRA.<sup>287</sup>

It is not surprising that Frankel would emphasize dignity and anti-subjugation. As we have seen, the emerging left-liberal critique of the rehabilitative ideal centered on concerns over individual liberty and the abuse of discretionary power.<sup>288</sup> Indeed, these concerns were commonplace among informed commentators in the 1960s and 1970s. For instance, a 1967 task force of the President’s Commission on Law Enforcement and Administration of Justice put it this way:

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principles, but anti-subjugation is most pertinent for present purposes. I will leave further elaboration of the dignity paradigm for another day.

283. Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 655 (1993) (“The idea of a sentencing commission and guidelines was not . . . expected in itself to alter our status as the world’s cruelest nation—cruelest in terms of incarcerating more people for longer periods than any other country.”).

284. FRANKEL, *supra* note 9, at 11.

285. *Id.* at 103–04.

286. *Id.* at 17, 44.

287. S. REP. NO. 98-225, at 46 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3229.

288. *See supra* text accompanying notes 32–36.

A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from that tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power . . . .<sup>289</sup>

Such views also played an influential role in the constitutional due process revolution that occurred alongside the emergence of the uniformity ideal in sentencing.<sup>290</sup>

Anti-subjugation, of course, has even deeper roots in our national legal and political traditions: the concept of checks and balances on power plays a central role in our system of government.<sup>291</sup> Indeed, the act of exposing one person to the arbitrary exercise of power by another calls to mind nothing so clearly as slavery.<sup>292</sup> Whether or not the power is actually exercised in a malevolent fashion, the mere fact that the power exists denigrates the personhood of the defendant.<sup>293</sup> Even an

289. The President's Commission on Law Enforcement and Administration of Justice, Task Force on Corrections, Task Force Report: Corrections 83 (1967) (quoting Sanford H. Kadish, *Legal Norms and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 923 (1962)).

290. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) ("[S]ociety has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (citing President's Commission on Law Enforcement and Administration of Justice, *supra* note 289)).

291. See Miller, *supra* note 204, at 1259 ("The concept of diffusing power in the interests of individual liberty and justice is deeply rooted in Anglo-American history.").

292. Antislavery literature before the Civil War commonly criticized the power dynamics of the master-slave relationship as intrinsically corrosive of human dignity. See, e.g., FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS* 52 (Signet Books 1968) (1845) ("My mistress was . . . a kind and tender-hearted woman; and in the simplicity of her soul she commenced, when I first went to live with her, to treat me as she supposed one human being ought to treat another."; "It was at least necessary for her to have some training in the exercise of irresponsible power, to make her equal to the task of treating me as though I were a brute."); DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* 263 (1986) (describing argument that slaveholding inevitably corrupted "morals and manners").

293. One may argue that this degradation of criminals is a good, or at least appropriate, response to crime. See WHITMAN, *supra* note 241, at 21–22 (discussing authors who take this position). On the other hand, there is the risk of what Whitman calls "the intoxication that comes with treating people as inferiors," *id.* at 23, which may lead to unjustifiable excesses. Allen similarly criticizes the assumptions underlying the view that offenders are properly degraded: "The offender is one outside the pale, and members of the in-group . . . are relieved of the ethical restraints governing human relations within society." ALLEN, *supra* note 11, at 62–63. Thus, prominent theorists concerned with the communicative content of criminal sanctions have argued against degrading offenders. See, e.g., R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1186 n.58 (2005). Likewise, restorative justice theorists have argued, on both ethical and crime-control grounds, that society should seek "to convey censure without stigma." See, e.g., Jim Dignan, *Towards a Systematic Model of Restorative Justice: Reflections on the Concept, its Context, and the Need for Clear Constraints*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 135, 144 (Andrew von Hirsch et al. eds., 2003). For present purposes, I will assume the correctness of this position.

exercise of mercy has its pernicious side: mercy expresses status and power relationships that do not seem entirely consistent with our ideals of democracy and status-equality.<sup>294</sup>

Accounts of the sentencing reform movement that neglect dignity and anti-subjugation thus miss crucial animating principles. Perhaps neglect stems from the fact that Congress and the Commission have themselves paid little attention to these values since 1984.<sup>295</sup> This neglect, in turn, doubtlessly relates to the more general trend towards harsh punitiveness in the American criminal justice system.<sup>296</sup> In recent years, “[a]rguments pertaining to the inherent dignity or human rights of individual offenders have fallen on deaf ears.”<sup>297</sup> Perhaps, though, there is also an assumption that the subjugation problem has been solved by eliminating parole and reducing judicial discretion. If so, this would be a mistaken assumption.

### *B. The Problem of Prosecutorial Power*

Requirements for predictable and/or purpose-driven sentencing may, as Frankel envisioned, prove an effective strategy for protecting defendants from exposure to the arbitrary exercise of power. On the other hand, a sentencing system designed with predictability and purposes in mind need not *necessarily* advance this protective goal. In particular, the pre-*Booker* guidelines system illustrates an important

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One may also argue there is a certain futility to having a dignified sentencing process, when the prison system is so notoriously degrading. See WHITMAN, *supra* note 241, at 64–66 (describing harshness of American prisons). After all, the entire judicial process in a criminal case is likely to take no more than a few months, while a prison term may last years, or even decades. Yet, if one truly wishes more dignified treatment of criminal offenders, there may nonetheless be good reasons to focus on sentencing. Sentencing is a public process, while serving a term of imprisonment is not; the circumstances of sentencing may therefore do more to reshape the relations of the defendant with the community than the circumstances of imprisonment. Additionally, a sentencing *process* that emphasizes the humanity and fundamental worth of the defendant may result in more humane *outcomes*, including shorter terms of imprisonment. Finally, a self-consciously humane and dignified judicial process may better highlight the unnecessary degradations of imprisonment, and thereby contribute to public attention and reform.

294. See WHITMAN, *supra* note 241, at 12–13 (noting that mercy is traditionally granted by superiors to inferiors). Complementing this view, Professor Markel has also recently argued that mercy violates the principle of “equal liberty under law”: “It does this by allowing me (the offender) to brandish my unanswered crime as evidence of superiority . . . [t]he unattractive messages about human status attach as long as I receive a penalty less severe than what I would otherwise receive if I were from a disfavored group.” Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1461 (2004).

295. See text accompanying notes 172–74.

296. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 305, 308 (1993).

297. Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1257 (2005).

pitfall: the effort to bring about greater uniformity may (intentionally or otherwise) result not in the reduction of unchecked power, but in the simple transfer of such power from judges to prosecutors.

In the pre-*Booker* system, particularly as modified by the Feeney Amendment, prosecutorial power over sentencing flowed from the interplay of three critical policy decisions: the preference for rules over standards, the preference for a leveling-up approach to severity, and the establishment of substantial, explicit cooperation benefits. The rules-based approach diminishes judicial discretion, thereby limiting the ability of judges to serve as a counterweight to prosecutors. The rules-based approach also creates opportunities for prosecutors to manipulate sentences by entering into fact stipulations with defendants and otherwise choosing what information to present to the court. The leveling-up approach increases defendants' sentencing exposure and thereby increases prosecutorial plea-bargaining leverage. Cooperation benefits further enhance that leverage.

Indeed, because sentence severity has grown so great, defendants generally have little practical alternative to plea-bargaining: it is only the prosecutor who can reliably release the defendant from the harsh rules of the guidelines, through substantial assistance, early disposition, and super-acceptance motions, as well as generous fact stipulations and support for, or at least acquiescence in, non-substantial-assistance departures.<sup>298</sup> There should be little wonder that the vast majority of federal criminal cases in recent years have been resolved by guilty pleas.<sup>299</sup> In the pre-*Booker* system, the plea bargain controlled the sentence, and the prosecutor controlled the plea bargain.<sup>300</sup>

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298. See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 359–69 (2005) (describing various mechanisms used by prosecutors under guidelines to induce guilty pleas). Professor Bibas has recently described more subtle “psychological pitfalls” under the guidelines that serve to enhance prosecutorial plea-bargaining leverage. For instance, certainty in prison terms under the guidelines may cause a defendant to “reframe” a plea bargain containing a short prison term as a gain rather than a loss, and hence view the bargain in more favorable terms. Bibas, *supra* note 160, at 2514–15.

299. In 2002, for instance, eighty-nine percent of federal defendants were convicted, and ninety-six percent of these convictions were obtained by plea. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2002, at 1 (2005).

300. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548, 2558–60 (2004) (arguing that prosecutors can usually “dictate the terms of plea bargains”). The question of how prosecutors have been able to accumulate such power has generated a provocative body of literature. See, e.g., Huigens, *supra* note 248, at 818 (arguing that expanded prosecutorial discretion arises from need for someone in system designed around consequentialist principles to have ability to make context-specific moral judgments); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001) (arguing that prosecutorial discretion arises from public choice pathologies favoring harsh, symbolic criminal legislation).

Can prosecutors be trusted with this power? It is certainly not the case that prosecutors inevitably use their power to seek the harshest punishment available. Indeed, prosecutors have frequently colluded with district court judges to mitigate sentences where the guidelines would otherwise require what they believe to be unreasonably severe outcomes.<sup>301</sup> On the other hand, there is no reason to believe that prosecutors are systematically any more rational, principled, or selfless than judges or other public servants.<sup>302</sup> The Sentencing Commission itself identifies prosecutors as a notable source of unwarranted disparity under the guidelines.<sup>303</sup> Of even greater concern are indications that prosecutors have been using their extraordinary power to extract guilty pleas from defendants who likely would have been acquitted had they gone to trial.<sup>304</sup> Moreover, as suggested in the previous section, the mere fact that prosecutors have such profound discretionary power over defendants, without regard to the wisdom or mercy with which that power is exercised, places defendants in a degrading position.<sup>305</sup>

To be sure, the pre-*Booker* system contemplated some limitations on prosecutorial power. The guidelines themselves call for real-offense sentencing, which diminishes the importance of the prosecutor's charging decisions; judicial review of plea bargains; and judicial determination of the magnitude of departures. Moreover, pursuant to the Feeney Amendment, DOJ adopted new policies that purported to diminish the discretion of line prosecutors, particularly with respect to plea-bargaining.

None of these features, however, provide effective checks on prosecutorial power. Judges face powerful institutional incentives

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301. TONRY, *supra* note 10, at 83.

302. See, e.g., Bibas, *supra* note 160, at 2470–75 (describing effects of self-interest on prosecutorial plea-bargaining strategies). There is an extensive body of literature, much of it critical, exploring the motives of prosecutors. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. (forthcoming 2006) (discussing literature). Professor Burke suggests an alternative view of “irrational” prosecutorial decisions, finding their roots in basic cognitive biases that are common to all human decisionmaking. *Id.*

303. U.S. SENTENCING COMM’N, *supra* note 262, at 141.

304. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) (suggesting link between long-term trends of rising guilty plea rates and declining acquittal rates); GARY T. LOWENTHAL, *DOWN AND DIRTY JUSTICE* 105–06 (2003) (describing pressures on defendants to plea bargain even when they believe they have a good chance of acquittal at trial).

305. The position is perhaps most vividly illustrated by the unseemly “race to cooperate” in multidefendant cases, in which prosecutors often announce that they will give substantial assistance benefits only to the first one or two defendants in the group who “flip.” Bibas, *supra* note 160, at 2485. “Rats,” of course, suffer ostracization and stigmatization, Simons, *supra* note 18, at 26–27, but defendants may feel they have little choice but to try to win the race. Prosecutors reserve for themselves the right to decide who gets cooperation benefits and how much. *Id.* at 18–19.

against overriding plea bargains, such as crowded trial dockets, and they have proven quite reluctant to do so.<sup>306</sup> Formal DOJ policies are not externally enforceable, while internal controls are uncertain in a system in which the ninety-four individual USAOs have traditionally operated as “autonomous fiefdoms.”<sup>307</sup> Thus, a recent empirical study concluded that “the prosecutorial discretion of individual [line prosecutors] is quite broad and appears to operate largely independent of any formal review mechanisms.”<sup>308</sup> Moreover, even if taken at face value, the post-Feeney DOJ policies leave in place broad prosecutorial discretion as to cooperation benefits.<sup>309</sup>

To be sure, prosecutors occupy a different position in our constitutional system than judges, and one might argue that political accountability compensates for the lack of legal control over prosecutorial discretion. Political control, however, is more theoretical than real. The vast majority of routine exercises of federal prosecutorial discretion occur well below the public’s radar screen.<sup>310</sup> Federal prosecutors have a strong tradition of viewing themselves as independent professionals,<sup>311</sup> a cultural norm that is complemented by the highly decentralized structure of DOJ. Political pressures, in short,

306. Schulhofer & Nagel, *supra* note 209, at 1301; Gardina, *supra* note 298, at 369.

307. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION’S CRIMINAL LAWS AND GUARD ITS LIBERTIES 14 (1996). See also Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Article on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613 (2005) (“Field offices preserve their independence by leveraging their connections to local officials and by playing off supervision by Main Justice against oversight by Congress.”). For a discussion of a case in which line prosecutors apparently disregarded the Ashcroft Memoranda, see Dan Christensen, *Florida Judge Complains U.S. Prosecutor Is ‘Weak-Kneed’*, MIAMI DAILY BUS. REV., Mar. 18, 2004, available at <http://www.law.com/jsp/article.jsp?id=1079144426509>.

308. Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1497 (2004). See also Schulhofer & Nagel, *supra* note 209, at 1295 (discussing lack of supervisory review in most USAOs studied).

309. The Ashcroft Memoranda specifically exempt early disposition programs and substantial assistance departures from the mandate to pursue all readily provable charges. Ashcroft, *supra* note 226, at 130–31. Of course, there is also discretion inherent in the determination of what is “readily provable.” See Miller, *supra* note 204, at 1257 (“[T]he tough-sounding 2003 policies include exceptions that any wise prosecutor . . . could drive a truck through.”).

310. In 2002, federal prosecutors investigated nearly 125,000 suspects, charged more than 85,000, and convicted more than 70,000. FEDERAL CRIMINAL CASE PROCESSING, *supra* note 299, at 1. In a sense, these numbers are both too high and too low to provide for meaningful accountability. They are too high to permit case-by-case monitoring in any but a tiny fraction of highly publicized prosecutions, such as the Martha Stewart case. They are too low for the public to hold federal prosecutors broadly accountable for crime control. That sort of accountability is reserved for the local police and prosecutors who handle the vast majority of criminal cases. Richman & Stuntz, *supra* note 307, at 609, 611. Richman and Stuntz observe that federal prosecutors face no “meaningful performance measures.” *Id.* at 613.

311. Schulhofer & Nagel, *supra* note 209, at 1297–98. See Christensen, *supra* note 307 (quoting U.S. Attorney as claiming, “We do what is right in every case, regardless of the opinion of others.”).

are unlikely to offer a robust check on prosecutorial power.<sup>312</sup> In the end, there seems little to choose between the prospect of arbitrary judicial action decried by Frankel and the prospect of arbitrary prosecutorial action under the pre-*Booker* system.<sup>313</sup>

### C. *Booker and Dignity*

*Booker* has strengthened the ability of the judge to function as a check on prosecutorial power.<sup>314</sup> By reinvigorating the purpose-based mandates to judges contained in 18 U.S.C. § 3553(a), *Booker* has made the federal sentencing system a bit less rules-based. With greater judicial discretion, prosecutors are no longer the only game in town for defendants seeking lenience. Indeed, judges now arguably have the authority to adjust sentences specifically in order to address charging and plea-bargaining disparities.<sup>315</sup>

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312. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2001). See also Richman & Stuntz, *supra* note 307, at 587 (“[P]olitical constraints that rein in local prosecutors are much weaker in the federal system.”).

313. Recall, for instance, that the parole board functioned as a check on judicial discretion in the indeterminate era, with the ability to release inmates after they had served as little as one-third of their sentences. Notably, many years after the Guidelines had been put into place, Frankel characterized the original intent this way: “The genesis of the commission and the guidelines was a basic aversion to placing arbitrary power in the hands of *any* officials, including judges.” Frankel & Orland, *supra* note 283, at 655 (emphasis added). See also *id.* at 671 (noting that “the goal of eliminating arbitrary disparity remains worthwhile and that undue prosecutorial discretion subverts the goal”). Other influential critics of judicial discretion writing about the time as Frankel equally emphasized their concern with prosecutorial discretion. See, e.g., DAVIS, *supra* note 58, at 211–12 (“*The reasons for a judicial check of prosecutors’ discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable.*” (emphasis in original)); BACON ET AL., *supra* note 26, at 138 (“Prosecutors have immense discretionary power to coerce guilty pleas.”). Indeed, as part of a broader program to reduce discretionary power in the criminal justice system, the AFSC Report advocated the abolition of plea-bargaining. *Id.* at 143–44.

While the critique of unchecked prosecutorial power suggested here does not depend on the power actually being abused, it should be noted that formal complaints of prosecutorial misconduct have increased substantially in recent years. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 46 (2005).

314. This is not to suggest that the *Booker* remedy is the only or the best solution to the problem of prosecutorial power. There is a rich literature, for instance, discussing the strengths and weaknesses of formal prosecutorial guidelines, which might or might not be made judicially enforceable. See, e.g., Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005); O’Neill, *supra* note 308, at 1494–97. For an argument that judicial discretion is the best way to counterbalance prosecutorial discretion, see Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1476 (1993).

315. See Michael M. O’Hear, *Booker and the Duty to Minimize Unwarranted Disparity*, 36 MCGEORGE L. REV. (2006) (forthcoming) (discussing post-*Booker* use of 18 U.S.C. § 3553(a) (6) as a basis for mitigating both interdistrict disparities in plea-bargaining practices and the sentencing effects of a decision to bring federal charges as to conduct that also constitutes a state crime). Under 18 U.S.C.



To the extent that the *Booker* remedy seems to advance dignitary interests of criminal defendants, this is something of a coincidence, for, as we have seen, such interests do not weigh prominently in Justice Breyer's opinion for the remedy majority. On the other hand, the opinion of the *merits* majority (without which there would have been no remedy) resonates in powerful and unexpected ways with the work of Frankel and his contemporaries.

Writing for this majority, Justice Stevens emphasized the protection of individuals from arbitrary exercises of power. His professed aim was to "guarantee[] that the jury would still stand between the individual and the power of government."<sup>316</sup> "The Framers of the Constitution," he argued, "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."<sup>317</sup> Thus, he concluded, the Sixth Amendment demanded that government accusations against a defendant be submitted "to the unanimous suffrage of twelve of his equals and neighbors, rather than a lone employee of the State."<sup>318</sup> The merits opinion is thus couched as a blow against the despotism of the "lone employee" (the judge) and in favor of the values of equality and democracy represented by the jury.<sup>319</sup>

The irony is that most commentators saw the prosecutor, not the judge, as the "lone employee" most capable of despotism in the pre-*Booker* system.<sup>320</sup> Indeed, the remedy majority displayed considerably more concern over unchecked prosecutorial power than did the merits majority—albeit not as a matter of defendants' rights, but as a matter of preserving real-offense sentencing.<sup>321</sup> Thus, one of the few points on which all of the justices agreed was that unchecked power in the sentencing system should be avoided; the justices divided on the question of *whose* power was most troublesome and *why* that power

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§ 3553(a)(6) (2000), judges are required to consider "the need to avoid unwarranted sentence disparities" when determining a sentence.

316. 543 U.S. 220, 237 (2005).

317. *Id.* at 238–39 (citation omitted).

318. *Id.* at 239 (internal quotation marks and citation omitted).

319. For similar views of jury sentencing as a democratic check on other government institutions, see Gardina, *supra* note 298, at 347; Jenia Iontcheva Turner, *Implementing Blakely*, 17 FED. SENT'G REP. 106, 111 (2004).

320. See, e.g., MCGEE & DUFFY, *supra* note 307, at 9 ("The nation's founders had vivid memories of life under a tyrannical monarch . . . [T]he framers of the Constitution could not have imagined—or allowed for—an institution as powerful as today's Department of Justice."); Miller, *supra* note 204, at 1268 (arguing that guidelines system gave prosecutors power "more absolute than [judges had in] the indeterminate system that came before").

321. See, e.g., 543 U.S. at 256 ("[The dissenters'] system would have particularly troubling consequences with respect to prosecutorial power.").

should be regarded as a problem.

*D. Responses to Booker*

While the analysis in *Booker* seems oddly misdirected in a number of respects, we ought to welcome the Court's implicit invitation that we refocus our attention on power relationships in the sentencing system.<sup>322</sup> This marks a return to where the sentencing reform movement began three decades ago. The concerns raised by Frankel and his contemporaries then seem no less relevant today. Thus, as Congress, the Commission, and the lower courts formulate responses to *Booker*, they would do well to bear in mind *Booker*'s critique of unchecked power. Predictability and purpose-driven sentencing, while worthy ends, should not be the sole preoccupations of the federal sentencing system.

Indeed, in a world in which there is a strong rhetorical commitment to uniformity, but with unresolved and unacknowledged points of tension between the purposes and predictability paradigms, there is a risk that policy-makers may engage in a sort of triangulation between the paradigms in order to advance agendas that are not fully revealed or well-considered. This risk is exacerbated by what Professor Allen referred to as the tendency towards debasement in the criminal justice system, that is, the tendency towards the misuse of high ideals as camouflage for practices that are arbitrary, self-serving, or cruel.<sup>323</sup> While Allen illustrated the debasement concept specifically by reference to abuses committed by prison officials in the name of the rehabilitative ideal, there seems no reason why the uniformity ideal could not be similarly debased, for instance, through the abuse of prosecutorial power.<sup>324</sup>

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322. Professor Gardina, however, finds *Booker* less heartening in this regard; she argues that "the Court simply transferred unchecked power from the hands of the prosecutor to the hands of the federal bench." Gardina, *supra* note 298, at 349. I think she overstates this point. Only time will tell, of course, what the judiciary will make of its enhanced discretion, but there are persuasive reasons for viewing the *Booker* remedy as potentially quite different from the truly unchecked system that Frankel criticized. See 543 U.S. at 264 (arguing that requirement that guidelines be taken into account under *Booker*, as well as ongoing availability of appellate review of sentences, "continue to move sentencing in Congress' preferred direction").

323. ALLEN, *supra* note 11, at 51–54.

324. Echoing some of Allen's observations, Professor Whitman has recently written much about the tendency of punishment practices to unleash punitive emotions that "spin out of control" into vengefulness and degradation. See, e.g., James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2701, 2716–17 (2005). In light of such concerns, a sentencing system, like the pre-*Booker* system, that effectively turns prosecutors into punishers demands especially close scrutiny of the prosecutorial role and consideration of whether that role can be structured so as to ensure "a dispassionate professional attitude." *Id.* at 2723–24.

The triangulation problem is nicely demonstrated by recent, much-publicized remarks of Attorney General Gonzales in support of new legislation that would largely undo *Booker*.<sup>325</sup> Gonzales specifically argued that the mandatory nature of the guidelines should be restored with respect to the *bottom* of guidelines ranges, while judges should be allowed to retain their broadened post-*Booker* authority to sentence above the top of such ranges.<sup>326</sup> This would shift the balance of sentencing power back in the direction of prosecutors. In defense of this position, Gonzales discussed both judicial and prosecutorial discretion, but in remarkably asymmetric ways.

As to judicial discretion, Gonzales expressed concern with its effects on the “careful balancing” embodied by the guidelines.<sup>327</sup> Gonzales depicted the guidelines in glowing terms as a purpose-driven system designed to achieve just deserts, incapacitation, and deterrence.<sup>328</sup> In particular, the guidelines were lauded because they “require[d] serious sentences for serious offenders.”<sup>329</sup> Moreover, the guidelines had “evolved over time to adapt to changing circumstances and a better understanding of societal problems and the criminal justice system. Judges, legislators, the Sentencing Commission, prosecutors, defense lawyers, and others have worked hard to develop a system of sentencing guidelines that has protected Americans and improved American justice.”<sup>330</sup> The guidelines ranges were, in short, “carefully considered;”<sup>331</sup> rendering them merely advisory threatened to undermine “decades of wisdom and experience.”<sup>332</sup> Indeed, since *Booker*, Gonzales claimed, defendants have been “receiving sentences dramatically lower than the guidelines range *without any explanation*.”<sup>333</sup> Judicial

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325. Alberto Gonzales, Attorney Gen., Remarks at the National Center for Victims of Crime, Washington, D.C., June 21, 2005.

326. *Id.* at 8–9. Such a reform would at least arguably be consistent with *Apprendi* and its progeny because the Court has approved of the use of judicial fact-finding in determining mandatory minimum sentences. *Harris v. United States*, 536 U.S. 545 (2002). For a discussion of other proposals intended to reconcile mandatory guidelines with the *Apprendi* rule, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 408–32 (2005).

327. Gonzales, *supra* note 325, at 2.

328. *Id.* at 4.

329. *Id.* at 3.

330. *Id.* at 5.

331. *Id.* at 3.

332. *Id.* at 9.

333. *Id.* at 7 (emphasis added). Sentencing Commission data indicate that the rate of within-range sentences has fallen post-*Booker*: in the first half-year after the decision, 61.7% of sentences were within-range, as opposed to 65.0% in FY 2002 and 69.4% in FY 2003. U.S. Sentencing Commission, Special Post-*Booker* Coding Project 8 (July 14, 2005). However, the rate of *above*-range sentences more than doubled, representing a much larger increase than below-range sentences. *Id.* Overall,

discretion must be curtailed, Gonzalez argued, in the name of coherent, purpose-driven sentencing.

With respect to prosecutorial discretion, however, Gonzales shifted emphasis from the purposes paradigm to the predictability paradigm, specifically cooperation-type predictability. He complained:

[O]ur U.S. Attorneys consistently report that a critical law enforcement tool has been taken from them. Under the sentencing guidelines, defendants were only eligible to receive reductions in sentences in exchange for cooperation when the government petitioned the court. Under the advisory guidelines system, judges are free to reduce sentences when they believe the defendant has sufficiently cooperated. And since defendants no longer face penalties that are serious and certain, key witnesses are increasingly less inclined to cooperate with prosecutors.<sup>334</sup>

He thus treats as wholly unproblematic a necessary consequence of cooperation benefits: a disruption of the purpose-driven system he elsewhere praised for ensuring “serious sentences for serious offenders.”<sup>335</sup> When the subject is judicial discretion, the guidelines ranges embody “decades of wisdom and experience”; when the subject is prosecutorial discretion, the guidelines are only significant as a baseline from which prosecutors and defendants can negotiate.

There is something of a shell game here, which is made possible by fuzzy thinking about the significance of the guidelines and the nature of uniformity. The Gonzales proposal reflects an unacknowledged set of trade-offs—incapacitation, deterrence, and harm-based desert ought to control sentences, he is saying, except when a prosecutor decides otherwise in order to induce cooperation—and these trade-offs have the effect (also unacknowledged) of endowing prosecutors with a tremendous amount of discretionary authority over defendants. This may or may not be good policy, but debate over the proposal can and should be enriched with a Frankel-like attention to the risks of the abuse of power and the degradation of defendants.

## V. CONCLUSION

In important early formulations, the uniformity ideal combined both rationalizing and humanizing objectives. By bringing an expert commission to bear, reformers sought to introduce a new analytical rigor to the sentencing process. They hoped that outcomes would thereby

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average sentence length *increased* from fifty-two months to fifty-five months. *Id.* at 44.

334. Gonzales, *supra* note 325, at 6.

335. *Id.* at 3.

better reflect traditional purposes of punishment. But they also hoped that sentences would simultaneously become more meaningful, and hence more tolerable, for defendants. Reformers expected that greater predictability in outcomes would also make the process more humane.

Over time, however, predictability was seen less as a benefit for defendants, and more as a big stick to deter crime and encourage cooperation. Indeed, by the time of the Feeney Amendment, this became the dominant account of uniformity in the political system. *Booker*, however, has forced a reexamination of the uniformity ideal and offered a new opportunity for purpose-driven sentencing. *Booker* has also suggested a new framework for thinking about the dignitary interests of defendants, one that is grounded in constitutional jury trial rights. Thus, we stand at a moment in time from which the uniformity ideal might continue its thirty-year evolution in a number of different directions.

Instead of reconstituting the uniformity ideal, though, perhaps we ought to reject it altogether. Has uniformity run its course? Is it time to seek out new organizing principles for the federal sentencing system? I leave answers for these questions to a forthcoming project, but I will close with two pertinent observations arising from the historical analysis in Part II above. First, while rhetorical commitment to uniformity remains strong at the federal level, state criminal justice systems—which are collectively far more important than federal, at least measured by size<sup>336</sup>—have increasingly turned away from uniform sentencing in recent years and towards experiments with radically individualized responses to crime, represented by restorative justice programs and therapeutic courts.<sup>337</sup> This trend is particularly notable in light of the fact that, in the 1970s, the *states*, not the federal government, led the way in rejecting the rehabilitative ideal and experimenting with uniformity schemes like sentencing guidelines.<sup>338</sup>

Second, some of the same criticisms that were made of the rehabilitative ideal in the 1970s might be made of the uniformity ideal today. In particular, a central tenet of the left-liberal critique of

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336. For instance, in 2002, state courts convicted more than one million adults of a felony, while federal courts convicted about 63,000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004).

337. For a discussion of the therapeutic jurisprudence movement, see O'Hear, *supra* note 202, at 823–25. For an overview and evaluation of restorative justice programs in the United States and abroad, see Mark S. Umbreit et al., *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2006). For a discussion of the tension between uniformity and restorative justice, see Michael M. O'Hear, *Is Restorative Justice Compatible With Sentencing Uniformity?*, 89 MARQ. L. REV. 305 (2006) (forthcoming).

338. See *supra* note 124.

rehabilitation was its indeterminacy—no one could really say what rehabilitation meant or how to accomplish it—and its resulting susceptibility to debasement, particularly misuse as cover for crude punitiveness.<sup>339</sup> Likewise, the uniformity ideal lacks determinacy; there has not been a stable consensus over what types of disparity are truly unwarranted (other than racial disparity and a small number of similar categories) or how best to root out the disparities we want to get rid of (e.g., how strong should the “rule-ness” of guidelines be?). As for debasement, it is hard not to see crude punitiveness in the dramatic, unprecedented growth in national incarceration rates that has occurred in the uniformity era.<sup>340</sup>

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339. *See supra* text accompanying notes 33–36.

340. As of the end of 2003, one in every 140 residents of the United States was incarcerated. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, PRISONERS IN 2003, at 2 (2004). In the federal system, annual increases in the incarcerated population averaged nearly eight percent between 1995 and 2003. *Id.*