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## Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip

*Mark Osler\**

### I. THE POINTLESS FOREST AND THE POINTLESS MAN

Around 1970, singer Harry Nilsson went on an acid trip. He later reported that during this experience, he “looked at the trees and . . . realized that they all came to points, and the little branches came to points, and the houses came to a point. [He] thought ‘Oh! Everything has a point, and if it doesn’t, then there’s a point to it.’”<sup>1</sup>

Nilsson put these insights to good use, later producing an album and an animated film, both entitled *The Point!*.<sup>2</sup> In either format, *The Point!* tells the story of Oblio, who along with his dog, Arrow, is thrown out of the land of Point because Oblio does not have a point on top of his head like everyone else. They are banished to the scary Pointless Forest, where they encounter the Pointless Man, another banished soul who welcomes them as they begin their journey. The Pointless Man, as drawn, has several pointy faces and actual arrows emanating from his torso, all pointing in different directions.

Once Oblio enters the Pointless Forest and actually meets the so-called Pointless Man, Oblio has a radical change in perspective: “You see the Pointless Man did have a point; in fact, he had hundreds of them, all pointing in different directions. But as he so quickly pointed out, ‘A point in every direction is the same as no point at all.’”<sup>3</sup>

Which (of course) brings us to Congress and federal sentencing. Congress has issued at least thirty-one separate directives setting

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1. HARRY NILSSON, *THE POINT!* (BMG Entm’t Jan. 1971), *available at* <http://www.harrynilsson.com/page-the-point.html>.

2. The animated version was televised by ABC on February 2, 1971, and was narrated by Dustin Hoffman. Later narrators on subsequent versions included Alan Thicke and Ringo Starr. *Id.*

3. HARRY NILSSON, *The Pointless Man*, *on THE POINT!* (BMG Entm’t Jan. 1971).

general policy goals in criminal sentencing.<sup>4</sup> While each of these policy goals has an individual purpose, when taken together they are

4. Those thirty-one directives mandate that each of the following be considered in creating guidelines, sentencing individuals, or both:

- 1) The nature of the offense. 18 U.S.C. § 3553(a)(1) (2004).
- 2) The circumstances of the offense. *Id.*
- 3) The history of the defendant. *Id.*
- 4) The characteristics of the defendant. *Id.*
- 5) The seriousness of the offense. *Id.* § 3553(a)(2)(A).
- 6) Promotion of respect for the law. *Id.*
- 7) Just punishment for the offense. *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 8) Deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B) (2004); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 9) Protection of the public from further crimes by the defendant. 18 U.S.C. § 3553(a)(2)(C) (2004).
- 10) To provide defendants with needed education or vocational training. *Id.* § 3553(a)(2)(D).
- 11) To provide defendants with needed medical care or other correctional treatment. *Id.*
- 12) The kinds of sentences available. *Id.* § 3553(a)(3).
- 13) Policy statements by the Sentencing Commission. *Id.* § 3553(a)(5).
- 14) The need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar conduct. *Id.* § 3553(a)(6); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 15) Provision of restitution. 18 U.S.C. § 3553(a)(7) (2004).
- 16) Incapacitating the offender. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, pt. A, ¶ 2, introductory cmt. (2007).
- 17) Rehabilitating the offender. *Id.*
- 18) Proportionality in sentencing for conduct of differing severity. *Id.*
- 19) Input from the Probation system, Judicial conference, DOJ, and Federal Defenders. 28 U.S.C. § 994(o) (2006).
- 20) Directions from Congress. Note following 28 U.S.C. § 994 (2006).
- 21) Maintaining sufficient flexibility to permit individualized sentences when warranted. 28 U.S.C. § 991(b)(1)(B) (2006).
- 22) Reflect advancements in knowledge of human behavior as it relates to the criminal justice process. *Id.* § 991(b)(1)(C).
- 23) Neutrality as to race, sex, national origin, creed, and socioeconomic status of offenders. 28 U.S.C. § 994(d) (2006).
- 24) Fairness in sentencing. *Id.* §§ 991(b)(1)(B), 994(f).
- 25) Sentences need to be near the statutory maximum for crimes of violence or certain drug offenses. *Id.* § 994(h).
- 26) Sentences need to allow for probation for certain first offenders. *Id.* § 994(j).
- 27) Average sentences prior to imposition of the Guidelines. *Id.* § 994(m).
- 28) Effect on prison populations. *Id.* § 994(q).
- 29) Certainty. *Id.* §§ 991(b)(1)(B), 994(f).
- 30) The community view of the gravity of an offense. *Id.* § 994(c)(4).
- 31) The current incidence of an offense in the community and nation as a whole. *Id.* § 994(c)(7).

as pointless as the Pointless Man. This Article contends that the federal sentence guidelines are directed in too many ways at the same time; as a result they reflect conflicting policies and have no moral center. The guidelines should be rewritten in accordance with a few well-articulated policy goals.

Part II considers some of these thirty-one policy directives, which all point in different directions with different degrees of specificity, clarity, and import. In setting out what some of these policy directives seek, it becomes clear that federal sentencing policy resembles nothing so much as Nilsson's Pointless Man.

Part III, in turn, describes some of the underlying conflicts between these principles. It then describes the effect of combining a thirty-one-point policy directive together with a strong mandate for uniformity. This project—putting a pointless mish-mash of policy directives together with a demand for uniform punishments—does not make much sense. Without a clear policy goal, uniformity is as likely to be uniformly *wrong* as it is to be uniformly *right* relative to any understandable principle or set of principles. What is the sense in having consistent and uniform sentencing if it is consistently and uniformly wrong? To insist on uniformity without principled directives to create those uniform results does nothing less than rob sentencing of any sense of real authority by making it morally indeterminate.<sup>5</sup>

Finally, Part IV suggests a do-over for federal sentencing, in which a new Sentencing Commission would start with a small number of reasonable policy goals and then re-make the guidelines in a way that meets those goals. Opponents to re-making the guidelines would no doubt (justifiably) fear the specter of greater discretion for judges being a feature of any new system. This “fear of judging,” as Stith and Cabranes called it,<sup>6</sup> is our modern equivalent of the Pointless Forest—we (through our legislators) are scared to

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5. An analogy to denominational religion may help an understanding of the oddity of this combination. Those faiths most judgmental of moral behavior tend to be those with a defined set of core beliefs that are maintained by a magisterium. On the other hand, those faiths that embrace a wide variety of beliefs (such as the Bahá'í or Unitarian/Universalists) tend to be more tolerant of a wide variety of behavior and belief. The current federal sentencing system turns this on its head—it is as if the Unitarian/Universalists, despite tolerating a wide array of moral principles, were suddenly harshly judgmental of those who violated the tenets of any faith.

6. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

enter a world where judges exercise independent discretion because we do not know everything that may lie in wait for us there. After all, individuals, even individual judges chosen expressly for their superior discretion and judgment, can be unpredictable. Given the pointlessness of current “policy,” however, the prospect of reformed guidelines with individual judges more actively evaluating cases becomes more appealing. With a new system and more empowered judges exercising a greater degree of judicial discretion, there would be a much better chance that policy and outcome would match.

## II. A POINT IN EVERY DIRECTION IS THE SAME AS NO POINT AT ALL

### A. *It Used to be Simple*

The policy goals of federal sentencing used to be simple. As continues to be true in many other nations,<sup>7</sup> four simple goals structured United States sentencing.<sup>8</sup> These four goals shifted in importance over time relative to one another, but as a whole remained constant. One advantage to this framework was that the goals of sentencing were easily understood. They simply sought to (1) punish offenders (*retribution*), (2) deter both the offender and others from committing further crimes (*deterrence*), (3) incapacitate dangerous individuals so they could not cause more harm (*incapacitation*), and (4) rehabilitate some offenders for both their benefit and that of the larger society (*rehabilitation*).

Certainly, these four traditional goals were often in tension.<sup>9</sup> For example, some might insist that incapacitation of the defendant through imprisonment is necessary in a given case to protect the community; meanwhile, others might insist that rehabilitation is possible. These goals would be served by different means: prison for the former and treatment for the latter. Despite such tensions, these

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7. See Andrew Dubinsky, Note, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure*, 33 NEW ENG. J. CRIM. & CIV. CONFINEMENT 609, 618–19 (2007) (discussing the goals of punishment considered by the International Criminal Court).

8. See Patricia M. Wald, *Why Focus on Women Offenders?*, 16 CRIM. JUST. 10, 11 (2001); Dubinsky, *supra* note 7, at 618–19..

9. STITH & CABRANES, *supra* note 6, at 9–22 (describing the conflicts between and changing roles of these sentencing goals in American history).

limited goals allowed judges to weigh them relative to one another and evaluate each defendant by the same standards.

On a macro level, the simplicity of these traditional goals also allowed for a national debate over which goal should predominate, and the goals shifted in importance over time. For example, beginning in the late nineteenth century the goal of rehabilitation was ascendant.<sup>10</sup> As Doug Berman has noted, this rehabilitative ideal was framed in medical terms, with the criminal viewed as “sick” and in need of a “cure.”<sup>11</sup> The traditional goals, then, provided not only reasonable guideposts for the use of discretion, but framed the national debate on sentencing in an understandable way, with a known and limited number of trade-offs available.

These goals of retribution, deterrence, incapacitation, and rehabilitation still remain in the federal scheme, at least in the sense they are listed in the statute book. Specifically, 18 U.S.C. § 3553 directs a judge to consider the need for a sentence to reflect “just punishment,”<sup>12</sup> to provide “adequate deterrence to criminal conduct,”<sup>13</sup> “to protect the public from further crimes of the defendant,”<sup>14</sup> and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”<sup>15</sup>

Unfortunately, Congress did not stop there. While the policy goals encompassed within retribution, deterrence, incapacitation, and rehabilitation remain in the books, they have been buried beneath an avalanche of other goals, including (perhaps most importantly) uniformity. While I have previously addressed the sad fact that the federal sentencing guidelines wholly ignore these goals in the machinery it establishes to calculate a sentence,<sup>16</sup> this Article addresses a related but different question: Has the wide variety of

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10. See Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 3 (2005).

11. *Id.* at 4.

12. 18 U.S.C. § 3553(a)(2)(A) (2004).

13. *Id.* § 3553(a)(2)(B).

14. *Id.* § 3553(a)(2)(C).

15. *Id.* § 3553(a)(2)(D).

16. See Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 654–56 (2003); Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 FED. SENT'G REP. 253, 253–54 (2004), quoted in *United States v. Booker*, 543 U.S. 220, 296 n.15 (Stevens, J., dissenting).

diverse policy goals packed into the federal sentencing system made that system morally indeterminate?

*B. The Non-Traditional Policy Goals*

In addition to the traditional policy goals that are buried in federal sentencing policy, Congress has articulated several other policy directives. These are directed to the Sentencing Commission and judges, both of which have roles in turning policy into action—the Sentencing Commission through creation and revision of the sentencing guidelines and judges through the act of sentencing itself.

Even though the directives were largely enacted together through the Sentencing Reform Act of 1984, these directives for sentencing, sadly, are not grouped together in the federal code.<sup>17</sup> Rather, they are lumped together in three separate places, leading to frequent redundancies and confusion, all of which adds to the controversy attached to the guidelines. One of those places is 18 U.S.C. § 3553, which has been at the center of nearly every federal sentencing controversy since *United States v. Booker*.<sup>18</sup> In *Booker*, the Supreme Court declared that the sentencing guidelines were no longer strictly mandatory and that § 3553 was to be the guiding statute of sentencing judges and courts of appeals.<sup>19</sup> Though § 3553 itself seems clearly directed to sentencing judges and not to the Sentencing Commission,<sup>20</sup> 28 U.S.C. § 991(b) in turn directs the Sentencing Commission to consider some of those same objectives.<sup>21</sup> As Justice Breyer somewhat famously stated in *Rita v. United States*,<sup>22</sup> “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”<sup>23</sup> That is, while the judge applies these standards to individual defendants, the

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17. For a worthwhile history of the Sentencing Reform Act of 1984, see Kristin J. Balding, Comment, *It Is a 'War On Drugs' and It Is Time to Reload Our Weapons: An Interpretation of 21 U.S.C. § 841*, 43 ST. LOUIS U. L.J. 1449 (1999).

18. 543 U.S. 220 (2005).

19. *Id.* at 259–60.

20. For example, the key provisions included at 18 U.S.C. § 3553(a) are prefaced with “The court, in determining the particular sentence to be imposed, shall consider.”

21. Specifically, 28 U.S.C. § 991(b)(1)(A) directs the Sentencing Commission to “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).”

22. 127 S. Ct. 2456 (2007).

23. *Id.* at 2463.

Sentencing Commission applies them broadly in directing the judges.

Though 18 U.S.C. § 3553 contains the best-known set of sentencing policy goals, it by no means contains the only set. The statute that established the Sentencing Commission itself, 28 U.S.C. § 991, contains not only specific sentencing policy goals,<sup>24</sup> but also a sweeping description of how the guidelines as a whole should look:

The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted . . .<sup>25</sup>

The real mother lode of policy goals, though, is found in 28 U.S.C. § 994, which is directed at the Sentencing Commission and sets out with both great specificity<sup>26</sup> and stunning breadth<sup>27</sup> that which should be contained in the guidelines.

Split into three distinct statutes, the policy goals taken as a whole suffer from redundancy and overlap in several places. To avoid replicating those problems and to provide a clearer analysis, I have grouped some of the sentencing policy goals of 18 U.S.C. § 3553, 28 U.S.C. § 991, and 28 U.S.C. § 994 into three categories. First, there are the broad dictates, which focus sentencing in a general way on interests other than the traditional goals, and which on their face should be considered in all federal sentencings. Second, there are specific provisions that require the consideration of certain discrete factors in sentencing defined types of cases. Third, federal law contains at least two statutes that might be called “trap-door” provisions, directing judges and the Commission to obey unnamed existing and yet-uncreated policy dictates.

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24. For example, that statute’s requirement that sentencing guidelines “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. § 991(b)(1)(C) (2006).

25. *Id.* § 991(b), (b)(1)(B).

26. *E.g.*, that consecutive sentences for both an offense and conspiracy to commit that offense should be avoided. 28 U.S.C. § 994(l)(1)(B), 994(I)(2) (2006).

27. For example, these directives echo the others in seeking “fairness.” *Id.* at § 994(f).



*1. Broad dictates*

The broad-dictate provisions of federal law direct sentencing towards general goals rather than specific objectives. This group includes several broader goals that in many cases undercut the four traditional goals including: uniformity; parsimony; following advancements in the science of human behavior, neutrality as to race, sex, national origin, creed, and socio-economic status; fairness; consistency with prior practices; certainty; the need to reflect community beliefs; consideration of the commonality of offenses; and the effect of the guidelines on prison populations.<sup>28</sup>

*a. Uniformity.* Perhaps the most commonly recognized non-traditional goal of sentencing is uniformity, which is codified as part of the long list found at 18 U.S.C. § 3553(a).<sup>29</sup> In mandating sentencing guidelines, Congress sought, above all else, uniformity among judges and within a judge's own docket in sentencing similar cases.<sup>30</sup> As discussed in Part III at some length, the Department of Justice and some members of Congress straightforwardly declared uniformity as the paramount goal of the sentencing system. Indeed, it is fair to say that it is the pursuit of this goal of uniformity that has driven the restructuring of the federal sentencing system<sup>31</sup> through guidelines, mandatory minimum sentences, and courts of appeals' opinions on what is "reasonable" under *United States v. Booker*.<sup>32</sup>

*b. Parsimony.*<sup>33</sup> What is commonly called the "parsimony clause" of 18 U.S.C. § 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in . . . this subsection . . . ." This directive sets out a clear principle: a sentence should not exceed what is necessary

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28. For a more complete list, see *supra* note 4. This list omits for the sake of efficiency some important codified principles that also create conflict, such as the principle of proportionality.

29. 18 U.S.C. § 3553(a)(6) (2004).

30. As Stith and Cabranes described it, "Congress's concern with reducing perceived or assumed disparities in federal sentencing is reflected in the debates leading up to the Act's passage, in the Senate report accompanying it, and in the text of the Act itself." STITH & CABRANES, *supra* note 6, at 104.

31. See Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 756-91 (2006).

32. 543 U.S. 220 (2005).

33. 18 U.S.C. § 3553(a) (2004).

to fulfill codified factors, which include the traditional goals of retribution,<sup>34</sup> deterrence,<sup>35</sup> incapacitation,<sup>36</sup> and rehabilitation.<sup>37</sup>

Unfortunately, post-guideline courts have rarely tried to give the parsimony clause much meaning.<sup>38</sup> It is not surprising that these courts have tended to ignore the parsimony clause, as trial courts generally follow the sentencing guidelines, which serve a multitude of other goals (and sometimes, seemingly, no goal at all). The guidelines are simply not calibrated to follow the simple parsimony directive, as Justice Breyer seemed to acknowledge in *Rita v. United States*.<sup>39</sup> In that opinion, Justice Breyer noted that in the course of trying to use the four traditional goals and the parsimony provision to arrive at a foundational set of guidelines, a conflict arose among those drafting the guidelines “when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment.”<sup>40</sup> Rather than resolving this conflict, the Commission simply punted on the issue by codifying past practices and averaging out the results from thousands of prior cases.<sup>41</sup> Thus, the Commission tossed out any real consideration of the parsimony provision as one of the structuring mechanisms for the guidelines. Yet, at the same time, 18 U.S.C. § 3553(a) affirmatively directed that judges consider the parsimony provision in sentencing individual defendants.

Since the guidelines were developed without active reference to parsimony, the guidelines constantly conflicted with a sentencing judge’s attempt to use the parsimony provision as it applied to any specific case. Nevertheless, judges were both bound to the guidelines

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34. *Id.* § 3553(a)(2)(A).

35. *Id.* § 3553(a)(2)(B).

36. *Id.* (a)(2)(C).

37. *Id.* (a)(2)(D).

38. It is important to distinguish the principle of parsimony from the rule of lenity, which historically has little to do with sentencing. Rather, the rule of lenity is a rule of statutory construction which insists that application of a criminal statute be construed in favor of a defendant when it is unclear whether or not that law applies to the defendant’s actions at all. See Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 511–12 (2002).

39. 127 S. Ct. 2456 (2007).

40. *Id.* at 2464 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. 3 (2007)).

41. *Id.*

and charged with employing parsimony.<sup>42</sup> These conflicts have continued even after the ruling in *Booker* that the guidelines were no longer mandatory, and it is likely that these conflicts will be litigated in the future as courts resolve what type of application of the parsimony clause is “reasonable.”<sup>43</sup> While courts may have afforded little significance to the parsimony clause at some point in the past, more recent Supreme Court decisions point in the other direction.<sup>44</sup> In the future, parsimony will likely step up among the many other provisions competing for attention from the Sentencing Commission and judges.

*c. Following advancements in knowledge of human behavior.*<sup>45</sup> One of Congress’s principal directives to the Sentencing Commission was to establish policies that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”<sup>46</sup> On its face, this directive tells the Commission that it must monitor scientific progress such as the development of new therapies that may promote rehabilitation.

This has rarely occurred, which should not be surprising. Frank Bowman argues persuasively that the guidelines themselves are not only unscientific, but also constitute “a reaction *against* the notion that science has very much to say about criminal punishment.”<sup>47</sup> In a broad sense, this is absolutely correct. The available history of the development of the guidelines reflects no substantive reference by the framers of the guidelines to the social or biological sciences. However, in some instances the Sentencing Commission itself has developed policies that rely on specific scientific findings. One such instance involves crack cocaine sentencing, in which two decades after adopting an unscientific approach the Commission reversed course based on scientific data.<sup>48</sup>

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42. See *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007); *Gall v. United States*, 128 S. Ct. 586, 589–90 (2007) (arising out of this foundational conflict between, on the one hand, the traditional goals and the parsimony provision as applied by a judge and, on the other, the sentencing guidelines).

43. *Gall*, 128 S. Ct. at 590.

44. See *Kimbrough*, 128 S. Ct. at 564.

45. 28 U.S.C. § 991(b)(1)(C) (2006).

46. *Id.*

47. Frank O. Bowman, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 316 (2000).

48. Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28571–72 (May 21, 2007).

In developing the sentencing guidelines for crack cocaine, the Sentencing Commission adopted the one-hundred-to-one powder-to-crack cocaine ratio contained in 21 U.S.C. § 841(b),<sup>49</sup> even though that ratio had no scientific foundation.<sup>50</sup> In 2002<sup>51</sup> and in 2007,<sup>52</sup> the Commission issued lengthy reports that relied on current scientific studies to refute its own one-hundred-to-one ratio.<sup>53</sup> In 2007, the Commission ultimately adjusted that ratio in the guidelines based in part on the findings in its own report.<sup>54</sup> The Commission made the adjustment despite the fact that Congress had taken no action to change that ratio as contained in the corresponding set of mandatory minimum sentences.<sup>55</sup>

While some commentators and legal experts may dismiss the imperative of considering new science as toothless, in at least one high-profile sentencing realm (cocaine-related offenses), it has played a role in a major change.

*d. Neutrality as to race, sex, national origin, creed, and socioeconomic status.*<sup>56</sup> In one of the few absolutes among the directives by Congress, 28 U.S.C. § 994(d) mandates that “[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” In turn, the Commission placed equally strong language in the guidelines themselves, providing flatly that race, sex, national origin, creed, religion, and socioeconomic status of a defendant are all factors that “are not relevant in the determination of a sentence.”<sup>57</sup>

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49. 21 U.S.C. § 841(b) creates mandatory minimum sentences which treat trafficking in one hundred grams of powder cocaine the same as trafficking just one gram of crack cocaine.

50. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY app. at B-5 (2007) [hereinafter 2007 COMM’N REPORT], available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

51. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, 21-29 (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm).

52. 2007 COMM’N REPORT, *supra* note 50.

53. For example, the 2007 Report refutes the idea that crack cocaine affects fetal development disproportionately relative to powder cocaine. 2007 COMM’N REPORT, *supra* note 50, at 58-61.

54. Sentencing Guidelines, *supra* note 48.

55. 21 U.S.C. § 841(b) (2000).

56. 28 U.S.C. § 994(d) (2006).

57. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2007).

The breadth of this prohibition is striking. Though it is contained within the chapter of the guidelines that describes departures from a guideline range,<sup>58</sup> the language of this rule is distinct from surrounding guidelines, all of which limit their effects to departure considerations.<sup>59</sup> In contrast, the prohibition against consideration of race, sex, national origin, creed, religion, and socioeconomic status applies to all aspects of determining a sentence—including the establishment of a sentence within a guideline range. In other words, by the plain language of the guideline, it is improper for a sentencing judge to even consider the fact that the defendant is female when sentencing *within* a guideline range.

This absolutist nature of the rule of neutrality has brought the race/sex/national-origin/creed/religion/socioeconomic status ban into conflict with other policy directives. For example, the mandate to follow current science (discussed above) runs into a wall when it conflicts with the bar on consideration of these factors. Specifically, the idea of whether such science *mandates* consideration of a defendant's sex is an actively debated question. In relation to female offenders, for example, some have employed reams of data to oppose the ban on taking gender into account when sentencing, arguing that this masks important and relevant gender factors that pervade society as a whole.<sup>60</sup>

The strict bar on considering protected class status continues to have a strong impact on sentencing, even as it comes under harsher attack from those who would bend this rule to allow for certain factors (such as gender) to be taken into account.<sup>61</sup>

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58. *Id.* §5.

59. *E.g.*, *id.* § 5H1.5 (“Employment record is not ordinarily relevant in determining whether a departure is warranted.”).

60. *See e.g.*, Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 908 (1993). Using criminological data to back up her point, Raeder argues that “[t]reating men and women fungibly for sentencing purposes overlooks the role played by gender in criminality.” *Id.*; *see also* Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 286 (2007) (“[T]his approach has virtually ignored the disparate impact of the sentencing statutes on arguably the most vulnerable members of society—poor women of color and their children.”).

61. Despite the ban on considering gender, there does seem to be gender effects in sentencing, with women getting lighter sentences than similarly situated men. Anne Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences*

*e. Fairness.*<sup>62</sup> Fairness, mandated as a part of the guideline scheme at both 28 U.S.C. §§ 991 and 994, seems so vague a concept that we might imagine it has not been a substantive policy issue in the grand debates over sentencing. However, as the Federal Sentencing Commission formed the guidelines, the Commission gave “fairness” two contradictory but precise meanings, and each plays a role in how the guidelines are constructed.

In recounting the creation of the sentencing guidelines’ structure, now-Justice Stephen Breyer spoke quite clearly about some of the compromises made by the first Sentencing Commission.<sup>63</sup> In that discussion, Breyer described fairness in two clear but opposing ways—first, in terms of procedural fairness and second, as substantive fairness.<sup>64</sup>

To Breyer, procedural unfairness results when a judge determines facts that enhance a sentence in an informal way. For example, without jury determinations, the rules of evidence, or the requirement of proof beyond a reasonable doubt.<sup>65</sup> As Breyer puts it, “the more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be.”<sup>66</sup> Intriguingly, each of these shortcomings became a feature of the sentencing system, and they are at the core of the issues raised in *Booker* and its progeny.

On the other hand, Breyer appears to believe that allowing the judge to adjust the range to account for “real” offense conduct (that is, acts beyond those charged in an indictment or information), almost always with a higher sentence, provides “substantive” fairness by allowing the punishment to fit the real crime.<sup>67</sup> By including this principle in the sentencing scheme, the courts have given rise to

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*Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 48–49, 73–76 (2006).

62. 28 U.S.C. §§ 991(b)(1)(B), 994(f) (2006).

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

64. *Id.* at 8–12.

65. *Id.* at 10–11.

66. *Id.* at 11.

67. *Id.* at 11–12.

controversial features such as sentencing a defendant under the guidelines for crimes for which the defendant has been acquitted.<sup>68</sup>

In the end, according to Breyer, the Commission compromised between these two types of fairness, essentially by allowing a limited version of both to play a role.<sup>69</sup> The Commission's compromise resulted in a number of troubling features in the guidelines, including the lack of jury findings, which brought us to *Booker*, and the crucial effect of relevant conduct in calculating a sentence.<sup>70</sup> Far from being meaningless, the principle of "fairness" played a major role in shaping federal sentencing. In fact, it can be safely said that the Commission's failure to give the idea of "fairness" a single and unique meaning within the mandated sentencing goals at the time the guidelines were framed (and thus requiring a "compromise") was a major causal factor of the disruption within federal sentencing that we have experienced through *Booker* and its progeny.

*f. Consistency with prior practices.*<sup>71</sup> Congress directed the Commission to first survey the then-current sentences being given, and then to create guidelines that reject those averages and instead establish guideline ranges that "accurately reflect the seriousness of the offense."<sup>72</sup> In 28 U.S.C. § 994(m), Congress described this very specific mandate to the Sentencing Commission:

The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission . . . .<sup>73</sup>

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68. See *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (per curiam) ("The Supreme Court has held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge.").

69. Breyer, *supra* note 63, at 11–12.

70. The guidelines expressly direct a court to consider uncharged "relevant conduct" in calculating a guideline sentence, which means that acts never charged will be the basis of sentencing if they are found to have been committed by the judge under a mere preponderance standard. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2007).

71. 28 U.S.C. § 994(m) (2006).

72. *Id.*

73. *Id.*

Indeed, Congress directly told the Sentencing Commission to ascertain the collective judgment of hundreds of experienced judges and to substitute it with their own.

It is beyond dispute that the Commission did exactly that, in an imprecise, contentious, and hurried way.<sup>74</sup> First, the Commission gathered data on past practices. Experts in statistical analysis, however, have criticized the Commission's methods. These experts contend that these methods did not meet social science standards, focused on a small number of relevant variables, and were shrouded in mystery even to those with an expertise in such analysis.<sup>75</sup>

Having gathered and analyzed this data, the Commission followed Congress's mandate to reject the content of that data. Among other adjustments from prior practice, the Commission significantly raised sentences under the guidelines for violent crimes, white-collar crimes, and narcotics crimes.<sup>76</sup>

It is hard to underestimate the profound impact or bizarre nature of the task given the Sentencing Commission: to assess then reject accumulated wisdom. The first step, a comprehensive study of existing practices, certainly makes sense. The second step, however, seems inexplicable—not to consider those prior practices, or hold them up against an objective standard, but rather to reject them. A single obscure command from Congress told the Commission both to gather data for the first time, draw a specific conclusion about that data (that it represents under-punishment of some crimes), and to take action on that fore-drawn conclusion (raise sentences for those crimes). This process is bizarre not only in that it is devoid of respect for social science, but it also negates any consideration of the many other sentencing goals Congress mandated at the same time. The directive to assess current practice and crank it up a notch does not take into account parsimony, has nothing to do with science, probably incorporates sexist and racist assumptions, and reflects neither procedural nor substantive fairness. It was, however, relatively easy to do.

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74. See Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 122–23 (2003) (“The final draft was written at a late date in some haste to meet the submission deadline.”), *quoted in* MICHAEL TONRY, SENTENCING MATTERS 88 (1996).

75. Harcourt, *supra* note 74, at 99, 123.

76. *Id.* at 125–26.



*g. Certainty.*<sup>77</sup> In the sense the guidelines made sentencing more predictable and “certain” from the perspective of a defendant being sentenced, the very act of creating guidelines in part fulfilled the mandate of 28 U.S.C. § 991(b)(1)(B), which required the Sentencing Commission to establish policies and practices that provide “certainty” in meeting the purposes of sentencing. Justice Breyer called this factor “honesty,” and described it as one in which “the sentence the judge gives is the sentence the offender will serve . . . .”<sup>78</sup> It is noteworthy, however, that the elimination of parole and drastic reductions in “good time” credit to those who had already been sentenced have been even more significant to the achievement of certainty than the sentencing guidelines.

This project as a whole is perhaps best understood through the guidelines’ own description of “The Basic Approach.”<sup>79</sup> There, the Commission explained its understanding of such certainty, relative to the regime it replaced:

Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by “good time” credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve.<sup>80</sup>

Eliminating parole<sup>81</sup> and limiting “good time” credit to fifteen percent of the total sentence,<sup>82</sup> while not directly related to the guidelines, nonetheless had an impact on the operation of the guidelines and the problems that resulted. By determining the term of imprisonment in whole at the time of sentencing (rather than being subject to later revision by parole boards and the Bureau of Prisons), the sentence issued in the judgment became more important. Thus a sentence’s distortions and anomalies, including those caused by the confusion cloud of policy goals discussed in this Article, were amplified.

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77. 28 U.S.C. §§ 991(b)(1)(B), 994(f) (2006).

78. Breyer, *supra* note 63, at 4.

79. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1(A)(3) (2007).

80. *Id.*

81. 18 U.S.C. § 3624(a) (2006).

82. *Id.* § 3624(b).

Where there were previously multiple opportunities to achieve the goals of sentencing, the elimination of parole and “good time” meant that now there was only one—the sentencing itself. Without the possible mitigating effects of parole and good time, only the courtroom judge (and the Sentencing Commission directing the judge via the guidelines) was left to directly effectuate the many and conflicting goals of sentencing articulated by Congress.

*b. Reflecting community beliefs.*<sup>83</sup> Among the many sentencing goals that promote national standards and uniformity, there is a striking anomaly: 28 U.S.C. § 994(c)(4) directs that the guidelines shall take into account to the extent it is relevant “the community view of the gravity of the offense.”<sup>84</sup> While this goal is not explicitly reflected in the guidelines themselves, the guidelines’ structure and related statutes provide a great deal of discretion to localized federal prosecutors. Stephanos Bibas has chronicled the significance of these local variations through prosecutorial discretion,<sup>85</sup> which the Sentencing Commission has continued to allow. For example, Bibas specifically describes significant variations in the way that different federal prosecutors employ substantial assistance departures.<sup>86</sup> Such localized variations, of course, undermine many of the other goals described here. Most obviously, they cut against uniformity, the goal some legal experts and scholars see as first among many.<sup>87</sup>

*i. Commonality of the offense.*<sup>88</sup> The Commission is charged in 28 U.S.C. § 994(c)(7) with crafting guidelines that take into account (where relevant) “the current incidence of the offense in the community and in the Nation as a whole.” Admittedly, the Commission has certainly followed this instruction, at least when the Commission reacts to the emergence of a new narcotic. Often, this has been in response to a direct Congressional directive. This dynamic is exemplified by the Commission’s recent treatment of anabolic steroids.

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83. 28 U.S.C. § 994(c)(4) (2006).

84. *Id.*

85. Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005).

86. *Id.* at 148–53.

87. STITH & CABRANES, *supra* note 6, at 104 (“Reduction of ‘unwarranted sentencing disparities’ was a—probably *the*—goal of the Sentencing Reform Act of 1984.”).

88. 28 U.S.C. § 994(c)(7) (2006).

In February 2004, Attorney General John Ashcroft personally announced the indictment of several men connected with the BALCO lab in San Francisco who were charged with making and selling steroids.<sup>89</sup> President Bush even denounced steroid use in his State of the Union address that year,<sup>90</sup> and subsequently Senator John McCain and others promoted bills in Congress that would require mandatory uniform testing of professional athletes for the use of anabolic steroids.<sup>91</sup> Clearly, the nation's politicians perceived a growing epidemic of steroid use.

Consistent with 28 U.S.C. § 994(c)(7), Congress then directed the United States Sentencing Commission to consider an increase to the amount of prison time required under the steroid guidelines.<sup>92</sup> The Sentencing Commission took this advice and acted by bumping up the guidelines' sentence for a given amount of steroids.<sup>93</sup> Whether or not there was an upsurge of steroid use around 2004, the guidelines reacted to the *perception* that there was such a relevant change in the commonality of that particular type of drug abuse. Indeed, the Commission's actions in increasing prison time for steroid offenses reflect yet another Congressional directive to sentencing.

*j. Effect on prison populations.*<sup>94</sup> When the Sentencing Commission first created the guidelines, Congress ordered that the Commission, in conjunction with the Bureau of Prisons, report to Congress on the "maximum utilization of resources to deal effectively with the Federal prison population."<sup>95</sup> This implies, at least, that the Commission is directed to impose guidelines with an eye to the effect that the guidelines will have on prison populations—that is, to avoid the need for a prison-building binge due to the impact of sentencing guidelines.

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89. See Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30 CHAMPION 22 (2006).

90. See *id.*

91. Lindsay J. Taylor, *Congressional Attempts to "Strike Out" Steroids: Constitutional Concerns About the Clean Sports Act*, 49 ARIZ. L. REV. 961, 961–62 (2007).

92. Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 118 Stat. 1661, § 3 (2004) (codified at 21 U.S.C. §§ 801, 802, 811 (2004)).

93. The Commission achieved this increase by adjusting the dosage amount for steroids. Collins, *supra* note 89, at 23.

94. 28 U.S.C. § 994(q) (2006).

95. *Id.*

It is unclear that this implication has had much effect. Prior to the guidelines, about four in ten federal offenders went to prison.<sup>96</sup> By 2006, that number was 9.5 out of 10.<sup>97</sup> Twenty-some years down the guideline path, nearly all defendants are going to prison. Predictably, the federal prison population shot up. In 1984, there were 32,317 people in federal prisons.<sup>98</sup> By 1992, that figure had doubled, and in 2007 the federal prison population stood at a shocking 198,656<sup>99</sup>—six times the population at the time the Commission created the guidelines.

Unlike the other broad directives discussed above, it appears that the mandate to consider prison populations had little direct effect on the guidelines themselves. However, while there has been no significant effect on the guidelines,<sup>100</sup> the directive to consider prison populations may have been influential in other ways. Indeed, it is possible that the Commission's reports have deterred Congress from passing some laws that might have had a drastic effect on prison populations. For example, in analyzing the proposed Gang Deterrence and Community Protection Act of 2007, the Commission reported that the act would create the need for nine billion dollars to construct about 23,600 additional prison beds.<sup>101</sup> It is easy to imagine that during tough economic times, the Commission's reports dampened the chances for the passage of that bill.

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96. See Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, 71 FED. PROBATION 10, 13 (2007).

97. *Id.*

98. *Id.*

99. *Id.*

100. Guideline changes have increased sentences relentlessly, despite the directive to keep prison populations stable. From 1988 (the beginning of the guideline era) until 1999, for example, the percentage of federal defendants sent to prison pursuant to the guidelines increased from 54% to 72%. By 2003, this rate was up to 83.3%. Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 340 & n.4 (2005).

101. Tiffany Sykes, Note, *Much Ado About Something: Reconciling Roper v. Simmons with the Gang Deterrence and Community Protection Act of 2007 and the Possibility of Inconsistent Jurisprudence*, 34 NEW ENG. J. CRIM. & CIV. CONFINEMENT 163, 171 (2008) (citing Jeffery A. Kidder, *Gang Deterrence and the Community Protection Act of 2005: Why the Federal Response to MS-13 is Flawed and How it Will Have an Adverse Impact on Your State*, 33 NEW ENG. J. CRIM. & CIV. CONFINEMENT 639, 648 n.85 (2007)).

## 2. *Specific provisions*

Unlike the broad dictates (group one) and the trap-door provisions (group three), the second group of policy goals contains specific provisions, which require the consideration of discrete factors under certain circumstances. This section addresses some of Congress's policy goals that apply only to certain types of cases. Accordingly, this section discusses only a fraction of the total number of these specific sentencing goals, namely, restitution, harsh punishments for certain crimes, and rewarding cooperators.

*a. Restitution.* In concert with the creation of the guidelines, Congress directed that a court in a case involving robbery, for example, consider the need for the defendant to "provide restitution to any victims of the offense."<sup>102</sup> The guidelines, consistent with the statute,<sup>103</sup> direct that the payment of restitution be required for the full amount of the victim's loss,<sup>104</sup> even if restitution would reduce the amount of a fine.<sup>105</sup>

Conceivably, this commitment to restitution would cut against the need for a sentence of imprisonment, so that the defendant would be free to work and earn money in order to pay off the restitution amount. This tradeoff—disfavoring prison for probation where restitution is possible—seems to be in tension with some of the other principles articulated above, including the call to uniformity<sup>106</sup> and the ban on considering socioeconomic status.<sup>107</sup>

*b. Harsh punishment for certain crimes.*<sup>108</sup> 18 U.S.C. § 994(h) created what we now know as the career-offender provisions of the guidelines.<sup>109</sup> These provisions advise harsh punishments for defendants charged with drug crimes or crimes of violence and who have at least two such prior convictions.<sup>110</sup> These offenders receive a

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102. 18 U.S.C. § 3553(a)(7) (2006).

103. 18 U.S.C. § 3572(b) (2006).

104. U.S. SENTENCING GUIDELINES MANUAL § 5E1.1(a) (2007).

105. *Id.* § 5E1.1(c).

106. There would be conflict because in otherwise similar cases, defendants with the ability to pay would receive probation, while those with lesser job skills might end up in prison.

107. Presumably, socioeconomic status relates to earning power, which will equate to a greater ability to pay restitution if the defendant receives a sentence of probation.

108. 28 U.S.C. § 994(h) (2006).

109. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2007).

110. *Id.* § 4B1.1(a).

stiff upward adjustment not only in their offense level score,<sup>111</sup> but in the other axis of the sentencing grid, the criminal history category, regardless of their actual criminal history.<sup>112</sup> Thus, an offender with three minor drug trafficking offenses spread over two decades may end up with a more severe sentence than some drug kingpins, such as those who arrange for large amounts of narcotics to be brought into the United States. As set out in the next section, this creates a direct conflict with the competing principle of parsimony.<sup>113</sup>

*c. Rewarding cooperators.*<sup>114</sup> Congress further mandated that the guidelines encourage cooperation with the government through the promise of lower sentences and the waiver of mandatory minimum sentence provisions for those who provide the government with “substantial assistance.”<sup>115</sup> This mandate was fulfilled in the guidelines through the provisions at section 5K1.1, which allow downward departures for cooperators. These authorized departures are now particularly important in federal criminal law, as they not only are an essential tool for prosecutors, but the departures also hold out for many defendants the only hope to escape harsh mandatory minimum sentencing provisions.<sup>116</sup>

By making the breaks given to cooperators so important within federal sentencing, Congress and the Commission sacrifice the hope of fulfilling certain of the other principles they have set out. Uniformity, of course, loses out, as does neutrality as to race and socioeconomic class.<sup>117</sup>

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111. *Id.* § 4B1.1(b). The sentencing guidelines arrive at a range of possible terms of incarceration through a matrix which reflects on one axis the severity of the offense (the “offense score”) and on the other axis the prior criminal convictions of the defendant (the “criminal history category”).

112. *Id.*

113. *See infra* Part III.A.1.

114. 28 U.S.C. § 994(n) (2006).

115. *Id.*

116. *See* 21 U.S.C. § 841 (2006).

117. Those defendants with access to other defendants, often through bonds of race and class, have the best chance of successfully getting a break for cooperating with federal investigators. Many, though not all, conspiracies, for example, consist of members of one ethnic group, meaning that only members of that group will have access to information and the chance to cooperate.

### 3. *Trap-door provisions*

A final category of congressional requirement would be trap-door provisions. These provisions allow for an unlimited number of additional policy provisions to enter into the calculations that supposedly determine a federal sentence. Federal law contains two primary trap doors: (1) allowing Congress to introduce unforeseen principles into the sentencing scheme through further directives<sup>118</sup> and (2) allowing the Sentencing Commission to introduce new directions.<sup>119</sup> This allows both bodies to develop even more guiding principles on the fly, as though the welter of provisions we already have is insufficient.<sup>120</sup>

In a sense, the trap-door provisions may tell us more about the problems with the federal sentencing project than anything else. Not content with having created numerous distinct and competing policy principles, Congress reserved the right to create even more policy principles and inject them into an already confused and effectively random system of sentencing.

### III. THE PROBLEMS OF POINTLESSNESS AND UNIFORMITY

The listings above only describe less than half of the policies embedded in federal sentencing statutes, but those described here illustrate the flawed policy dynamic at work—one where so many policy strands are knit together that the resulting fabric resembles none of them. This Part first explores just a few of the resulting conflicts within this mess, and then describes the effect of combining this project with a consistent and unyielding desire (on the part of Congress) for uniformity.

#### *A. The Conflicts Within the Policy Swamp*

While describing some of the policies involved in federal sentencing and the guidelines, I have mentioned a few of the conflicts created when these policy goals conflict. I would like now to evaluate a few more in order to exemplify the workings of these conflicts at ground level. I am able to describe only a small fraction of the total conflicts; at some level, of course, each of the policy

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118. 28 U.S.C. § 994(m) (2006); 18 U.S.C. § 3553(a)(5) (2006).

119. 18 U.S.C. § 3553(a)(5) (2006).

120. *See supra* Part II.B.1.i.

goals opposes all the others for primacy in affecting the sentence of any given defendant.<sup>121</sup>

*1. Parsimony v. harsh punishment for certain offenders*

The principle of parsimony, as described above,<sup>122</sup> requires that a sentence should be “sufficient, but not greater than necessary,” to comply with the traditional sentencing goals.<sup>123</sup> Congress chose to place this principle at the heart of its description of the sentencing process.<sup>124</sup>

At the same time, however, Congress created the career-offender provisions<sup>125</sup> to help direct especially harsh sentences for those convicted of a narcotics offense or violent crimes who also have two prior convictions for drug trafficking or violent crimes.<sup>126</sup> The career-offender provision serves as a particularly blunt instrument since it covers both drug kingpins and those who have three relatively minor convictions for selling small amounts of narcotics.<sup>127</sup>

It is not hard to see how these two policies conflict.<sup>128</sup> If the career offender provision is followed, in many cases it will run contrary to the parsimony provision, which requires more individualized consideration. A good example of this conflict was described in *United States v. Fernandez*,<sup>129</sup> in which the district judge considered a defendant who qualified as a career offender, based on two relatively minor prior convictions.<sup>130</sup> The judge in *Fernandez* noted that the career-offender provisions applied but would double the sentence.<sup>131</sup> The judge then rejected the application of those

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121. Tensions exist, of course, even within the original four goals of sentencing. However, with a much more limited number of goals, those tensions can be much more easily evaluated than with the huge number we wrestle with in the current system.

122. *See supra* Part II.B.1.b.

123. 18 U.S.C. § 3553(a) (2006).

124. *Id.*

125. *See supra* Section II.B.2.b.

126. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2007).

127. *Id.*

128. The parsimony provision, of course, conflicts with a number of other policies as well. For example, it conflicts with the directive to base the guidelines on prior experience, which may not reflect parsimony. Parsimony also conflicts with the desire for guidelines to reflect community beliefs, which may exaggerate the threat posed by a given category of crime based on sensationalistic media reports.

129. 436 F. Supp. 2d 983 (E.D. Wis. 2006).

130. *Id.* at 987.

131. *Id.* at 990.



provisions, as “the advisory guideline range was greater than necessary to satisfy the purposes of sentencing.”<sup>132</sup> Other judges seem to be reaching the same conclusion,<sup>133</sup> a result which, over time, will erode the uniformity sought by the career-offender provision.<sup>134</sup>

### 2. *Neutrality v. consistency with prior sentencing practices*

If the guidelines clearly state anything, it is that both the guidelines themselves and sentencing judges are to be strictly neutral as to race, sex, national origin, creed, and socioeconomic status.<sup>135</sup> Nonetheless, Congress decreed that the starting point for creating the new guidelines be a survey of existing practices (which would then be adjusted upward).<sup>136</sup>

In basing the guidelines on prior practices, the Commission actually filtered those practices for racial, gender, and other disparities. In other words, the guidelines, while expressing strict neutrality, began with the simple step of building into the guidelines’ structure any bias and prejudice that may have existed in the sentencing practices of the judges who were surveyed.<sup>137</sup>

### 3. *Certainty v. rewarding cooperators*

The federal sentencing scheme changed drastically at the time the guidelines were first employed. This change was due in part to the initial emphasis on certainty of sentencing at the time sentence is announced, achieved in large part by eliminating parole and diminishing the effect of “good time” credit.<sup>138</sup> At the same time,

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132. *Id.*

133. *E.g.*, United States v. Ortiz, 502 F. Supp. 2d 712, 714 (N.D. Ohio 2007); United States v. Vigorito, No. 4:04-CR-00011, 2007 WL 4125914, at \*7 (N.D. Ohio Nov. 20, 2007).

134. One could argue that the erosion of one congressional mandate by judicial action is not an inherent conflict, but rather a dialogue. Remember, however, that the provisions of 18 U.S.C. § 3553(a) (including the parsimony provision) are meant as well to direct the Sentencing Commission in formulating the guidelines. 28 U.S.C. § 991(b) (2006).

135. 28 U.S.C. § 994(d) (2006).

136. 28 U.S.C. § 994(m) (2006).

137. One exception to this general observation is that the directive to adjust under-punished crimes (18 U.S.C. § 994(m)) was employed to raise sentences for white-collar criminals and, as a result, may have countered a pre-existing bias in favor of the wealthy as a socioeconomic group. *See* Breyer, *supra* note 63, at 20–23.

138. 28 U.S.C. § 991(b)(1)(B) (2006).

Congress insisted that defendants who assist the prosecution be rewarded for their efforts with a break in their sentences.<sup>139</sup>

The tension between these two directives comes from the fact that many cooperators are rewarded with a break on their term of incarceration *after* they are sentenced, as is authorized by Federal Rule of Criminal Procedure 35(b). Thus, certainty at the time of sentencing is undone. In fact, the amount of uncertainty created by the resentencing of cooperators is exacerbated by the fact that the guidelines do not restrict the size of a departure once the court has found that the defendant provided “substantial assistance.”<sup>140</sup> Thus, the complete freedom of judges to alter the sentence as much as they want gives them as much power as the parole board had before parole was abolished.<sup>141</sup>

Needless to say, this Article has discussed just a thimbleful from the swamp of conflicts created by the fact that at least thirty-one policy goals fight for attention in the realm of federal sentencing. The failure to articulate a reasonable set of goals robs the guideline system of any hope of moral authority. There is no way to measure success when so many factors are in play and in tension. By its nature, a system with so many goals has the moral trajectory of a toy boat in a baby pool being splashed by a group of toddlers. At the heart of one of our most important governmental functions, we have nothing less than moral relativism, where a virtually limitless set of principles are at play with no sorting mechanism at hand.

*B. The Dangerous Combination: Uniformity and Pointlessness*

Federal sentencing policy is not a policy at all; it is a grab-bag of too many ideas and priorities. On its own, this could be seen as typical of congressional action in many areas where it creates an administrative agency and then hands off power to that agency. Congress is free in those circumstances to decree what is important by laying out guiding principles, and then leave the messy work of implementation to others—such is the structure of our government. What is perhaps unusual about sentencing, though, is that in

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139. 28 U.S.C. § 994(n) (2006).

140. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007).

141. The analogy to a parole board is not a tight fit, of course, since the judge reviewing a defendant's assistance after sentencing will often be the same person who issued the initial sentence, and looks to different criteria than a parole board would. The analogy is apposite only in that certainty at the point in time of judgment is undermined.

creating the guidelines and the Sentencing Commission, there was also an overarching goal at work—the desire to achieve uniform sentences from case to case and from judge to judge.<sup>142</sup> To anyone paying attention, it is perfectly clear that Congress’s primary sentencing goal has been the same for the past twenty years: eliminate disparities and create uniform sentences across the nation.<sup>143</sup>

Congress has attempted to achieve this goal through the imposition of sentencing guidelines, the passage of mandatory minimum sentences,<sup>144</sup> and the reporting of individual judges’ sentences to the United States Sentencing Commission for evaluation.<sup>145</sup> Intriguingly, within the debate over sentencing, uniformity is consistently discussed as an end in itself rather than as a tool to best fulfill other policies.<sup>146</sup> The result, even after *Booker*, has been the most restrictive sentencing system in the nation—one that imposes more uniformity and restricts judicial discretion more severely than any of the fifty state systems that overlap with federal courts in their common project of regulating crime.<sup>147</sup>

Certainly, one can make the argument (and Albert Altschuler has made it quite convincingly)<sup>148</sup> that despite these efforts, uniformity has not been achieved. Altschuler points out that regional disparities tripled after the guidelines went into effect, rather than decreasing as intended.<sup>149</sup> He further argues that disparities as a whole increased in the first fifteen years of the guidelines’ existence.<sup>150</sup> In explaining this unexpected result, Altschuler credibly points to the use of

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142. STITH & CABRANES, *supra* note 6, at 104.

143. *Id.*

144. See 21 U.S.C. § 841(b) (2006).

145. These reports are made within thirty days of the entry of judgment in every federal case, and are mandated by 28 U.S.C. § 994(w)(1).

146. For example, in the *Kimbrough* opinion on crack cocaine sentencing, even while acknowledging that *Booker* marked a departure from strict uniformity, the Supreme Court simply stated without elaboration that “it is unquestioned that uniformity remains an important goal of sentencing.” *Kimbrough v. United States*, 128 S. Ct. 558, 573 (2007).

147. See Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005).

148. Albert W. Altschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005).

149. *Id.* at 101.

150. *Id.*

prosecutorial discretion in far different ways in different parts of the country.<sup>151</sup>

Whether the desire for uniformity has been achieved, uniformity would never have made sense in the first place unless those uniform results were consistent with understandable, limited, and discrete goals. The failure to articulate a *simple* set of goals before imposing the machinery of uniformity (mandatory minimums and the current federal guidelines) had two major effects. First, this failure robbed the guidelines of a clear-cut measuring tool for success. Second, this failure amplified the problems associated with the lack of a moral compass described in the preceding section<sup>152</sup> by prescribing bright normative lines that are unmoored from a simple, understandable moral anchor. In other words, the guidelines lack any understandable purpose, yet are strongly directive.

### *1. The unmeasurable goals*

Like a sports league for six-year-olds where the score is not kept because it might make one of the teams feel bad, Congress has created a system in which cause and effect cannot be measured, which results in unaccountability. Having a huge number of conflicting policy goals makes it almost impossible to measure the success of progress towards any one of those goals.<sup>153</sup> Even the goal of uniformity, which should be simple to measure, seems not to have worked out the way people hoped, or to be easy to measure.<sup>154</sup> As Amy Baron-Evans points out, fifteen years after the guidelines were imposed, it was still unclear whether the increased severity of the guidelines<sup>155</sup> had accomplished any sentencing purpose.<sup>156</sup> Thus we

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151. *Id.* at 100–02. Stephanos Bibas describes in some detail the way in which this works as to two components of judicial discretion—the use of fast-track programs and employment of substantial assistance departures. Bibas, *supra* note 85, at 137–39.

152. *See supra* Part III.A.

153. William Stuntz has compellingly described the natural tendency to constantly increase the number of crimes on the books to the point where the criminal code is so broad that it covers an astonishing array of activities, to the point where the penal code becomes almost indeterminate. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534, 542–43, 547–58 (2001). What I critique here is distinct but parallel to that analysis; I am making the same argument as to Congress's policy goals as articulated in statute. The two intersect, of course; those policy goals at times will serve as justification for expanding the penal code as well as increasing guideline ranges.

154. *See* Altschuler, *supra* note 148, at 100–03.

155. *See supra* Part II.B.1.f.

are left with a guideline structure created with no clear relationship to its founding principles (other, perhaps, than uniformity), and which continues to function without an ability to measure a relationship to those founding principles.

The sentencing guidelines are not a success. The goals they aim to meet are so numerous that they defy any effort to analyze data that may measure failure or success.<sup>157</sup> Much like a bizarre game of Chinese checkers that thirty-one people can play at the same time, it is extremely difficult to figure out what is going on.

## 2. *Harshness in the service of nothing*

Because the guidelines are pointless, they cannot be rational in relationship to any discrete sentencing goal. Yet, in striving for uniformity, Congress has made them uniformly harsh. On a playground, the combination of irrationality combined with harshness is a bully looking to pick on those with less power. The same combination in our federal sentencing scheme produces a system, a machine really, that resembles that playground bully—unreasoning, uncompassionate, and unprincipled.

This moral relativism born of too many goals is especially sad in an era where very often criminal law is said to be about “sending messages.”<sup>158</sup> Those signals are, or should be, moral signals about the bounds of socially acceptable behavior, and the price to be paid for differentiated acts (which is what the guidelines are about—normative price-setting for specific wrongful acts). Included in these signals are messages about *why* an act is especially reprehensible. Without a set of clear policy goals behind it, sentencing practice loses the value of this important function. In fact, it seems that if there is one message conveyed to the public under the contemporary scheme, it is one of simple retribution for any type of crime, a

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156. Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply With § 3553(a)*, CHAMPION, Sept.–Oct. 2006, at 32, 34–35.

157. The problem is not a simple lack of data relative to sentencing—the Sentencing Commission has produced thousands of pages of data relative to sentencing in the federal courts. See United States Sentencing Commission, Federal Sentencing Statistics by State, District, and Circuit, <http://www.ussc.gov/linktojp.htm> (last visited Feb. 18, 2009). Rather, the problem is that it is impossible to analyze that data so that it can reveal how any one of the tens of policy goals are being fulfilled.

158. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 480 (1999); ERIC A. POSNER, LAW AND SOCIAL NORMS 18–27 (2000).

message inconsistent with much (though certainly not all) of what Congress has articulated as the policy goals<sup>159</sup> of the guidelines.<sup>160</sup>

In particular, this perceived message of widespread, consistent, and harsh retribution is at odds with the parsimony principle that Congress has established as the fulcrum of a trial court's sentencing mechanism.<sup>161</sup> This provision specifically demands that a sentencing judge impose a sentence "not greater than necessary" to accomplish the aims of the four traditional sentencing goals.<sup>162</sup> Beyond the necessary balancing between sentencing goals and parsimony, the claim that retribution is the primary goal ignores the other goals that can often be seen pulling the other way—including the findings of social science,<sup>163</sup> the idea of fairness (either procedural or substantive),<sup>164</sup> the effect of mass incarceration on prison populations,<sup>165</sup> the need to encourage restitution,<sup>166</sup> and the benefits given to often highly culpable cooperators under guideline § 5K1.1.<sup>167</sup>

This cry of retribution, while not supported by Congress's articulated sentencing goals as a whole, does accurately reflect the general harshness of the federal scheme.<sup>168</sup> Were the guidelines to be underpinned by a reasonable and understandable principle or set of principles, harshness (or surprising lenience) might be a cost worth paying. However, when we cannot say that uniformity or any other goal is being achieved, it may be time to seek change.

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159. *See supra* Part II.

160. In addition, this message is inconsistent with what highly selective federal prosecutors actually do. Federal prosecutors handle less than 5% of the nation's felonies, with the rest going to the state systems. The great majority of these could have been tried at either the state or federal level. *See* Stuntz, *supra* note 153, at 542–43 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988, at 387–88 tbl.5.6 (Kathleen Maguire & Ann L. Pastore eds., 1999)).

161. 18 U.S.C. § 3553(a) (2006).

162. *Id.*

163. *See supra* Part II.B.1.c.

164. *See supra* Part II.B.1.e.

165. *See supra* Part II.B.1.j.

166. *See supra* Part II.B.2.a.

167. *See supra* Part II.B.2.c.

168. For a good description of the mechanisms that lead to harsher sentences in the federal system, see Frank O. Bowman III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 387–91 (2004).

## IV. INTO THE POINTLESS FOREST

If the guideline system is pointless and amoral, should it matter that it is no longer mandatory?<sup>169</sup> Certainly, the effects of *Booker* may, over time, mitigate some of the harms created by the guidelines by allowing sentencing judges more discretion. However, the sentencing guidelines are still at the center of the process of sentencing in federal court. As *Booker* made clear, the mechanisms of sentencing are the same—including revision of the guidelines and calculation of a guideline range in nearly every case.<sup>170</sup> Therefore, it is fair to say that the guidelines have less authority but still play a major role in federal sentencing. The critique above<sup>171</sup> applies regardless of whether the guidelines are mandatory, advisory, or somewhere in between. Do we want an irrational and pointless construct at the center of our sentencing structure, even if it is not strictly mandatory? I would hope not. So long as the guidelines remain at the center of the mechanism for sentencing, they should be tethered to a few understandable and easily articulated principles.

If there is to be change (and there should), it seems there are three options: (1) abolish the guidelines and return to the system that existed before they were created; (2) keep the guidelines as they are but change the underlying policy statements; or (3) start over and build new guidelines on top of a few, well-articulated policy goals.

First, Congress could scrap the guidelines altogether and go back to a system in which judges have unguided discretion within broad statutory limits. While this might solve some of the problems associated with the system as it exists, it seems politically unlikely given the sentiment in Congress for retaining some measure of uniformity in federal sentencing.

A second option would be for Congress to restrict the statutory goals of sentencing to the traditional goals (deterrence, retribution, rehabilitation, and incapacitation) while leaving the guidelines in place, hoping that they evolve into something better over time. One could read this Article (at least up to this point) as an argument for doing exactly that—limiting the sentencing policy goals to a few understandable points. However, while the need for fewer and

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

170. *Id.* at 264–65.

171. *See supra* Parts II & III.

simpler goals is certainly a part of my argument, redefining the goals of sentencing would not make much sense unless the guidelines themselves were either revised or removed from federal sentencing. Unfortunately, the guidelines are now filled with the numerical results of thousands of actions taken on behalf of one or another of the goals described above. It would be impossible to undo the moral relativism of the guidelines system without taking them apart and remaking them in a better and more understandable fashion.

Finally, Congress could start the process over again with fewer goals and advisory guidelines written from scratch. If we are to have principled, understandable sentencing in the federal courts, this might be the single best politically palatable option.

*A. A Project for Principles: Rewrite the Guidelines*

Unless we are comfortable with the amoral strictness of the guidelines we have, they must be remade. But, is it possible to take apart the guidelines and remake them? To do so would require a massive effort involving a new guideline commission charged with coming up with federal sentencing guidelines from scratch. Yet still, this undertaking might be worthwhile. A second-generation sentencing commission starting with a clean sheet of paper would have significant advantages over the group that came up with the first edition.

For one, a new founding commission would have the advantage of learning from the problems with the current guidelines. For example, it would allow for the thorough rethinking of charge versus real-offense conduct as the basis for sentencing. The original Sentencing Commission's compromise on this issue allowing a judge to consider relevant conduct, including acquitted conduct,<sup>172</sup> has been (properly) subjected to withering criticism for importing into the current system, without context, a single feature of a bygone era in which rehabilitation was a primary goal of sentencing.<sup>173</sup> In relation to this, a new commission would have the benefit of the reams of data gathered by the Sentencing Commission staff over the

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172. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 1B1.3 (2007).

173. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1712–13 (1992); Osler, *Must Have Got Lost*, *supra* note 16, at 669–70.



past two decades. This, combined with other social science data, would broaden the perspective of these second-generation framers.

Second, the new commission would be positioned to learn from the examples provided by several states with advisory guidelines in place. The first Commission looked only at the example of Minnesota and Washington, both of whom had fairly new guideline regimes at that time and seemed to summarily reject them as too simplistic.<sup>174</sup> Now, however, there have been two decades of guideline experiments in a number of states, all of which provide trial-and-error lessons for a new federal system.

Third, starting from scratch at this point would allow the new commission to draw from the body of scholarship that has developed since the mid-1980s by writers such as Douglas Berman, Michael O'Hear, Frank Bowman, Steven Chanenson, and Stephanos Bibas, each of whom has had a significant impact on the development of this field.<sup>175</sup>

Finally, a new commission would have the advantage of a limited and understandable group of directive principles. Part of the legislation creating a new guideline Commission could start by phasing out 18 U.S.C. § 3553(a), 28 U.S.C. § 991 and 28 U.S.C. § 994 in favor of a much briefer articulation of goals. It might be that the parsimony provision of 18 U.S.C. § 3553(a), plus the four traditional sentencing goals, would serve this purpose<sup>176</sup> if Congress expressly made these policies the basis for guidelines in an active way, freed from the command to place sharp limits on judges and increase sentences.

### *B. Change as the Pointless Forest*

Predictably, there are those who would oppose any change in the essential structure of the sentencing guidelines, especially given the strong likelihood that the revision would result in greater judicial discretion. Those who gain the most from the current regime (that is, the Department of Justice) would raise the strongest objections. The present system gives tremendous power in the form of discretion

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174. Breyer, *supra* note 63, at 3.

175. See, e.g., Berman, *supra* note 10; Bibas, *supra* note 85; Bowman, *supra* note 47; Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175 (2005); O'Hear, *supra* note 31.

176. Like the parsimony provision, the four traditional goals are currently contained in 18 U.S.C. § 3553(a) (2006).

to federal prosecutors,<sup>177</sup> who can manipulate sentences by their charging decisions, their choices regarding cooperation, and their ability to control information going to the probation officer who prepares the presentence investigation report. The risk of losing that power might cause the Department of Justice to employ its significant lobbying abilities<sup>178</sup> to stop any such change.

If Congress seriously considered rewriting the guidelines, it is likely that the Department of Justice would argue, in part, that changing the current system in a way that might give judges more discretion would bring back disparities and destroy uniformity. There are many counter-arguments to this, of course, including some already articulated in this Article: the guidelines have increased, not decreased, disparity,<sup>179</sup> and prosecutors themselves create great disparities under the current system.<sup>180</sup> The best counter-argument to the Department of Justice would be, however, that the guidelines must be reformed if they are to give us hope for principled justice through federal criminal law.

#### V. CONCLUSION

Predicting this fight over uniformity and judicial discretion, of course, brings us back to the Land of Point and Harry Nilsson's acid trip. Remember that Oblio and Arrow were banished to the pointless forest, a place greatly feared by the pointy-headed types in the Land of Point. Once there, though, Oblio realized that the Land of Point was not what he expected:

[O]ne of the first things Oblio and Arrow noticed about the Pointless Forest was that all the leaves on all the trees had points, and all the trees had points. In fact, even the branches of all the trees pointed in different directions, which seemed a little strange for a pointless forest.<sup>181</sup>

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177. Albert Altschuler has described the employment of this discretion as being in the nature of the "good cop" to Congress's mean "bad cop." Altschuler, *supra* note 148, at 112-13.

178. Stuntz, *supra* note 153, at 534.

179. Altschuler, *supra* note 148, at 101-02.

180. *Id.* at 100-02; Bibas, *supra* note 85, at 137-45.

181. HARRY NILSSON, THE POINT! (BMG Entm't 1970), available at <http://www.bluegrass.kctcs.edu/LCC/ENG/101nil.html>.

The critics of increasing judicial discretion are correct in saying that it creates disparities—that the branches (judges) do tend to point in different directions. Judges differ, and they do so in substantive and occasionally troubling ways. Nonetheless, they tend to sentence on principles that *do* directly bear on the question at hand—that is, they have a concrete reason for doing what they have chosen with a given defendant. There will be, in other words, at least one principle at play that directly underlies the crafting of the sentence, a principle that is going to be articulated, explained, and connected expressly to the result by that judge.<sup>182</sup> In short, the sentence that results from the discretion of a judge has a *point*, even if it is not the same point another judge might make in similar circumstances. While this does risk endangering the (perhaps false) perception of uniformity under the guidelines, it at least is better than our current guideline-driven system, which is so awash in conflicting policy goals that a principled point is not even possible.

The present guidelines, even in advisory form, are hopelessly amoral because they are not informed by understandable, simple policy goals. If legislative will requires that we have guidelines, the guidelines we have now need to be scrapped and reformed from the ground up. Doing so will likely create greater judicial discretion, but for most Americans, I suspect that some disparity is an acceptable cost for the hope of a sentencing system with actual principles at play.

It may seem harsh to describe Congress's actions as an "acid trip," but the analogy is not entirely inapt. For instance, one symptom of LSD<sup>183</sup> use is the "fear of losing control."<sup>184</sup> It is indisputable that if a new guideline system was put into place, it might lessen Congress's control relative to sentencing judges. However, this shift is necessary if we are to regain moral credibility in sentencing.

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182. As Judge Cabranes put it, when a judge has discretion "[j]udgment proceeds from principles. These principles can and should be stated, rationally discussed, attacked, and defended." STITH & CABRANES, *supra* note 6, at 82.

183. Lysergic acid diethylamide.

184. NATIONAL INSTITUTE ON DRUG ABUSE, NIDA INFOFACTS: HALLUCINOGENS: LSD, PEYOTE, PSILOCYBIN, AND PCP 3 (2008), <http://www.nida.nih.gov/pdf/infofacts/Hallucinogens08.pdf>.