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# GRIDLAND: AN ALLEGORICAL CRITIQUE OF FEDERAL SENTENCING

ERIK LUNA\*

Only in Wonderland.

– Scalia, J.<sup>1</sup>

The world is broad and wide.

– A. Square<sup>2</sup>

## INTRODUCTION

It is no overstatement to say that the Supreme Court's recent decision in *United States v. Booker* was one of the most widely anticipated cases in years.<sup>3</sup> Six months earlier,<sup>4</sup> the Court had struck down a state sentencing scheme that appeared virtually identical to the approach used in federal courts, the U.S. Sentencing Guidelines—a highly complex set of rules promulgated by an administrative agency pursuant to congressional legislation. The Guidelines dictate narrow ranges of punishment (e.g., forty-six to fifty-seven months imprisonment) based on the underlying crime, the defendant's criminal history, and various factors considered by the trial judge after conviction. With the specter that the federal regime was now unconstitutional, cries of panic could be heard in the halls of Congress and courthouses across the nation. Lawmakers claimed that “the criminal

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<sup>1</sup> *United States v. Booker*, 125 S. Ct. 738, 793 (2005) (Scalia, J., dissenting in part).

<sup>2</sup> EDWIN A. ABBOTT, *FLATLAND: A ROMANCE OF MANY DIMENSIONS* 1 (HarperCollins 2001) (1884).

<sup>3</sup> 125 S. Ct. 738 (2005).

<sup>4</sup> See *Blakely v. Washington*, 542 U.S. 296 (2004).

justice system has begun to run amok,”<sup>5</sup> “crumbl[ing] the very foundation of the Federal system of sentencing guidelines”<sup>6</sup> and “threaten[ing] to clog our Federal courts with procedural and constitutional nightmares.”<sup>7</sup> Not to be outdone, one government brief likened the situation to “Godzilla rampaging through Tokyo during a level 10 earthquake,”<sup>8</sup> while at oral argument the U.S. Solicitor General referred to the “carnage and wreckage” in the federal system.<sup>9</sup> Needless to say, much of the bench and bar held its collective breath as the Justices deliberated.

On January 12, 2005, the Supreme Court issued a deeply divided decision, producing two separate majority opinions, one on the merits and the other on an appropriate remedy. In the first opinion, the *Booker* Court held that the Guidelines violated the Sixth Amendment by requiring post-conviction judicial factfinding that could increase the potential punishment for federal offenders.<sup>10</sup> To solve this constitutional infirmity, the second opinion excised a pair of statutory provisions, rendering the Guidelines advisory rather than mandatory in a trial court’s sentencing determinations.<sup>11</sup> The public response to the decision was nearly instantaneous, with some pundits and politicians expressing doom and gloom,<sup>12</sup> but many scholars taking a more tempered approach, recognizing that the case “creates more questions than it answers.”<sup>13</sup> Most notably, the federal courts must now decide on the level of deference to accord the Guidelines at sentencing, from near-perfect compliance to total disregard, as well as an assortment of appellate issues raised by the Supreme Court’s ruling. In turn, the first wave of *Booker*-related scholarship has delved into the minutiae of the evolving Sixth Amendment jurisprudence, from the

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<sup>5</sup> Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 2 (2004) (statement of Sen. Orrin Hatch) [hereinafter *Hearing on Federal Sentencing Guidelines*].

<sup>6</sup> *Id.* at 4 (statement of Sen. Patrick Leahy).

<sup>7</sup> *Id.* at 6.

<sup>8</sup> Douglas A. Berman, *The Roots and Realities of Blakely*, 19 CRIM. JUST. 5, 5 (2005) (quoting government brief).

<sup>9</sup> See Linda Greenhouse, *Justices Show Inclination to Scrap Sentencing Rules*, N.Y. TIMES, Oct. 4, 2004, at A14 (quoting Solicitor General Paul Clement during oral argument in *Booker*).

<sup>10</sup> *Booker v. Washington*, 125 S. Ct. 738, 748-56 (2005). *But see infra* note 179 (discussing “as-applied” versus “facial” challenge).

<sup>11</sup> *Booker*, 125 S. Ct. at 757-69.

<sup>12</sup> See, e.g., Jerry Seper, *High Court Voids ‘Mandatory’ Sentencing*, WASH. TIMES, Jan. 13, 2005, at A1 (quoting a former prosecutor as saying “chaos will reign in federal courthouses”).

<sup>13</sup> Gina Holland, *Supreme Court Orders Change in Federal Sentencing System*, ASSOCIATED PRESS, Jan. 12, 2005 (quoting Prof. Douglas Berman).

history and importance of the jury trial right to the doctrinal validity of the Court's decision and its implications for the future, particularly how the Guidelines regime might be saved and/or improved.<sup>14</sup>

All of this is important and commendable, but I have a somewhat different perspective. Since their adoption, the Guidelines have undermined the legitimacy of federal sentencing, largely preventing the exercise of moral judgment by trial courts. The punishment process dehumanizes the offense and offender by permitting consideration of only a few factors and banning all others, mechanically inserting these variables into a sentencing formula and then scoring punishment on a two-dimensional grid. Moreover, the Guidelines' complexity can bewilder both professionals and ordinary citizens, especially those concerned about a particular crime or criminal, and the hypertechnical quality of the system generates punishment discrepancies that are neither explicitly justified nor obviously justifiable. Worse yet, the inflexibility of this regime has shifted sentencing authority from trial courts to prosecutors through their exclusive power over charging and plea decisions, while also inspiring judges and practitioners to collude in a massive scheme to evade the Guidelines' rigid strictures. All told, federal lawmakers and "a sort of junior-varsity Congress"<sup>15</sup> created a massive sentencing machine, cranking out a mechanical body of law precluding the kind of moral judgment required of any legitimate system deciding the fate of human beings. To me, at least, the Supreme Court's most recent decision may provide an indirect opportunity to reconsider the virtues of such an approach to punishment.

In his dissent in *Booker*, Justice Scalia lambasted part of the decision as possible "[o]nly in Wonderland"<sup>16</sup>—a literary analogy that, in fact, has been used many times over the years in reference to federal sentencing, with one judge arguing that "these guidelines go far too far" in creating a surreal world "like Alice in Wonderland,"<sup>17</sup> and another blasting a particular sentence as conceivable "[o]nly in the world of Alice in Wonderland, in which up is down and down is up, and words lose their real

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<sup>14</sup> See, e.g., Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005); Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005); David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely, and Booker*, 50 VILL. L. REV. 163 (2005).

<sup>15</sup> *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (describing the U.S. Sentencing Commission).

<sup>16</sup> *Booker*, 125 S. Ct. at 793 (Scalia, J., dissenting in part) (attacking implied standard of review adopted by remedial majority).

<sup>17</sup> Joan Biskupic & Mary Pat Flaherty, *Loss of Discretion Fuels Frustration on Federal Bench; Most District Judges Want Shift in Sentencing Rules*, WASH. POST, Oct. 8, 1996, at A1 (quoting Judge Jon Newman) [hereinafter Biskupic & Flaherty, *Loss of Discretion*].

meaning.”<sup>18</sup> I would like to offer another literary comparison, one that will be less familiar to the legal profession but in the end, I believe, better fits the problems inherent in the U.S. Sentencing Guidelines. It is the allegory of *Flatland*, a witty depiction of a two-dimensional world that has some striking similarities to the limited dimensionality of punishment in federal courts.

Part I provides a brief synopsis of *Flatland*, its inhabitants, and its rules. The article then suggests some troubling parallels between this fictional realm and the very real domain of federal sentencing, a world that I will call “Gridland.” Part II analyzes the Supreme Court’s opinions in *Booker* and the lower court’s recent interpretations, offering the possibility that this landmark case and its progeny may indirectly challenge the two-dimensional approach to punishment embodied in the Guidelines. Part III argues, however, that the Guidelines’ many problems may have been moderated but not eliminated by *Booker*, as the language and practice of formulaic sentencing still reign in U.S. district courts. Moreover, Part IV suggests that it is yet to be seen whether *Booker* alleviates the fundamental flaw in the Guidelines, the purging of moral judgment in punishment. Finally, Part V provides some thoughts for the future of federal sentencing in a world beyond Gridland.

#### I. FLATLAND AND GRIDLAND

Written anonymously in 1884, *Flatland: A Romance of Many Dimensions* has never gone out of print, with more than a dozen editions currently in circulation. To this day, the book is “piled in heaps at the front of the Harvard Coop”<sup>19</sup> and continues to inspire countless “sequels, elaborations and imitations.”<sup>20</sup> The originally unnamed author, Edwin A. Abbott, was a serious scholar and theologian of the Victorian Age, the headmaster of various British schools and an authority on Shakespeare, Pope, and Bacon, as well as a popular nineteenth-century preacher and

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<sup>18</sup> United States v. Galloway, 976 F.2d 414, 438 (1992) (Bright, J., dissenting).

<sup>19</sup> Peter Renz, *The World Is Broad and Wide: A Modern Mathematician Annotates a Classic and Gives It Yet Another Dimension*, SCI. AM., Apr. 30, 2002, at 89.

<sup>20</sup> Edward Rothstein, *Discovering Dimensions Beyond Imagining*, N.Y. TIMES, Apr. 21, 2001, at B9. Later works that were premised or would draw upon *Flatland* include: DIONYS BURGER, SPHERELAND: A FANTASY ABOUT CURVED SPACES AND AN EXPANDING UNIVERSE (Thomas Y. Crowell 1965); A. K. DEWDNEY, THE PLANIVERSE (Poseidon Press 1984); C. H. HINTON, AN EPISODE OF FLATLAND: OR, HOW A PLANE FOLK DISCOVERED THE THIRD DIMENSION (Swan Sonnenschein & Co. Limited 1907); RUDY RUCKER, SPACELAND: A NOVEL OF THE FOURTH DIMENSION (2002); RUDY RUCKER, THE FOURTH DIMENSION: A GUIDED TOUR OF THE HIGHER UNIVERSES (1985); IAN STEWART, FLATTERLAND: LIKE FLATLAND, ONLY MORE SO (Perseus Publishing 2001); and JEFFREY R. WEEKS, THE SHAPE OF SPACE (1985).

advocate for social reform.<sup>21</sup> Although he penned *Flatland* as a literary *jeu d'esprit* for his own amusement and that of his readers, Abbott presented an engaging primer on geometry and a nearly painless initiation to the concepts of dimensionality.<sup>22</sup> Isaac Asimov notes that “it is probably the best introduction one can find into the manner of perceiving dimensions,”<sup>23</sup> while *New York Times* critic Edward Rothstein suggests that “it may be no exaggeration to say [*Flatland*] has been read by every self-respecting physicist, mathematician and science-fiction writer.”<sup>24</sup>

Yet few attorneys, jurists, and law professors have ever heard of the monograph-length work (and until relatively recently, yours truly would rank among the otherwise oblivious). This is a shame, not because there is a need for legal professionals to bone up on their mathematics (which may well be true<sup>25</sup>), but because *Flatland* offers an evocative Swiftian commentary on class hierarchy, orthodoxy, and hypocrisy, and implicitly calls upon the reader to challenge accepted ideologies and mechanical processes that have been handed down from generation to generation. “Abbott’s original intention was to give a portrait of transcendence, to show how, through our imagination, we might be ‘lifted’ out of narrow conceptions,”<sup>26</sup> providing “a social satire that carries readers beyond conventional ideas and surface appearances to an appreciation of new worlds—those of higher-dimensional space.”<sup>27</sup> Approached with an open legal mind, this sardonic allegory seems particularly pointed and fitting when juxtaposed against any mechanistic, dehumanizing process, including the U.S. Sentencing Guidelines.

#### A. FLATLAND

Abbott’s story begins with a description of “Flatland,” a world that is, quite literally, *flat*—a two-dimensional plane in the style of “a vast sheet of paper”<sup>28</sup>—populated by similarly flat but anthropomorphized geometric figures.<sup>29</sup> The thin dimensions of existence limit the inhabitant’s perception

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<sup>21</sup> See, e.g., ABBOTT, *supra* note 2, at 121; Isaac Asimov, *Foreword: Limitations to ABBOTT*, *supra* note 2; Renz, *supra* note 19, at 89; Rothstein, *supra* note 20, at vii.

<sup>22</sup> See, e.g., Asimov, *supra* note 21, at vii.

<sup>23</sup> *Id.*

<sup>24</sup> Rothstein, *supra* note 20.

<sup>25</sup> See, e.g., Stephen R. Sady, *Misinterpretation of the Federal Good Time Statute Costs Prisoners Seven Days Every Year*, CHAMPION, Sept.-Oct. 2002, at 12 (analyzing systematic miscalculation of “good time” credits for federal inmates).

<sup>26</sup> Rothstein, *supra* note 20.

<sup>27</sup> Renz, *supra* note 19, at 89.

<sup>28</sup> ABBOTT, *supra* note 2, at 1.

<sup>29</sup> *Id.*

and mobility; there is no rising above or sinking below this planar world but only observation and movement within the confines of its surface. As a socio-political matter, the standing of each character is determined by the number and regularity of his sides and angles. Isosceles triangles constitute the lowest class of workers and soldiers, while equilateral triangles belong to the slightly superior middle class. Professionals and gentlemen are, respectively, squares and pentagons (for instance, the story's narrator—"A. Square"<sup>30</sup>—is a square and, appropriately enough, a lawyer). Flatland's nobility begins with hexagons, "and from thence rising in the number of their sides till they receive the honourable title of Polygonal, or many-sided."<sup>31</sup> The ruling class is composed of figures whose myriad sides have become virtually indistinguishable from a circle, the ultimate geometric figure in Flatland. The privileges of the circular class, who are held in the highest esteem and deemed a "Priestly order"<sup>32</sup> infallible in word and deed, can be contrasted to the lowly and precarious position of straight lines, the women of this overtly misogynistic, Victorian-esque society. The life of the feminine line is "truly deplorable," full of "miseries and humiliations,"<sup>33</sup> all the while "they are both regarded and spoken of . . . as being little better than 'mindless organisms.'"<sup>34</sup>

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<sup>30</sup> The name of *Flatland's* fictive narrator is a play on the author's own iterative last name, Abbott Abbott. See Renz, *supra* note 19, at 89.

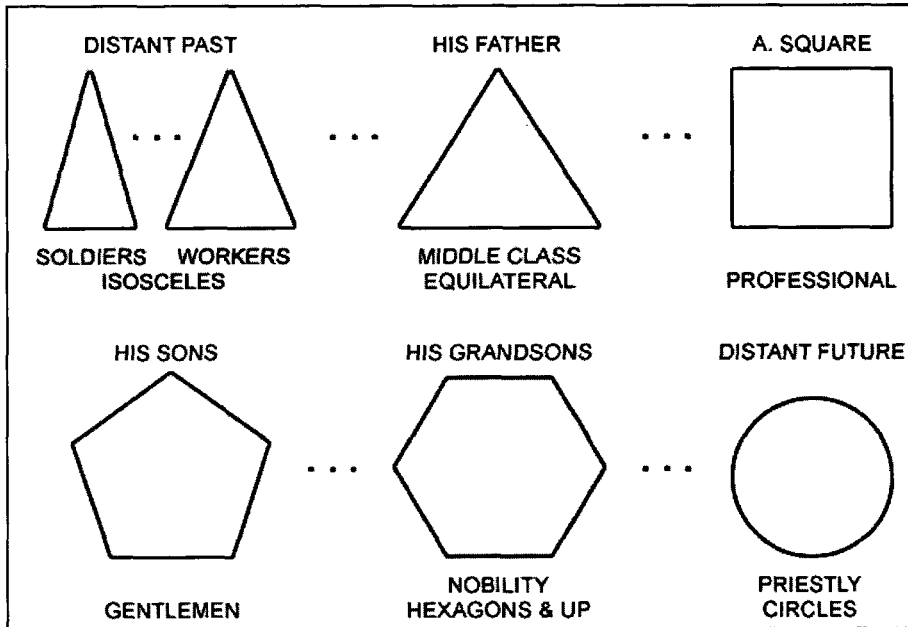
<sup>31</sup> ABBOTT, *supra* note 2, at 8.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 59.

**Figure 1**  
*Flatland's Male Class Structure*<sup>35</sup>



Pursuant to Flatland's Constitution and the "Law of Nature," the circles ruled society through the enactment and enforcement of strict and often draconian dictates combined with cunning manipulation of the geometric masses. For instance, ruthless restrictions on women arose from claims of social necessity—namely, the danger posed by the lines' sharp ends but allegedly dull wits—and even trivial violations could be punished by death.<sup>36</sup> "There is peace, in so far as the absence of slaughter may be called by that name," although "the cautious wisdom of the Circles has ensured safety at the cost of domestic comfort."<sup>37</sup> Harsh penalties also could befall those who questioned the very nature of Flatland or the possibility of life beyond the two-dimensional. Investigations into the origin of light (presumably from another dimension) were absolutely prohibited,<sup>38</sup> while individuals who "profess[ed] to have received revelations from another World" would be arrested and liable for imprisonment or even execution.<sup>39</sup> Despite the harshness of the circular

<sup>35</sup> Design by Gregory Cahoon, based on Renz, *supra* note 19, at 89.

<sup>36</sup> ABBOTT, *supra* note 2, at 13.

<sup>37</sup> *Id.* at 16-17.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *See id.* at 96-97, 112.



rulers and their rules, upheaval is kept to a minimum by the potential that even a lowly isosceles or his offspring can achieve a better position, and in some distant future attain polygonal nobility or priestly circularity.<sup>40</sup> “[A]ll the higher classes are well aware that these rare phenomena, while they do little or nothing to vulgarize their own privileges, serve as a most useful barrier against revolution from below.”<sup>41</sup> In this way, “the Polygons and Circles are almost always able to stifle sedition in its very cradle, taking advantage of the irrepressible and boundless hopefulness of the human mind.”<sup>42</sup>

The ultimate value is uniformity, as decreed by the ruling class and duly accepted by all else, “that every human being in Flatland is a Regular Figure, that is to say of regular construction.”<sup>43</sup> Women must be *straight* lines, the working and middle classes must have two and three *equal* sides, respectively, each side of a polygon must be of the *same* length, and so on. Likewise, Flatland’s “whole social system is based upon Regularity, or Equality of Angles.”<sup>44</sup> In contrast, geometric variation is considered “a combination of moral obliquity and criminality”<sup>45</sup> warranting social reprobation and punishment. According to the leadership of the priestly circles, any and all ills plaguing Flatland can be traced to “some deviation from perfect Regularity.”<sup>46</sup> As one heralded circle claimed, it is the departure from the uniform, uneven sides and unequal angles, which should be deplored rather than the character and deeds of the offending figure: “[W]hy blame a lying, thievish Isosceles when you ought rather to deplore the incurable inequality of his sides?”<sup>47</sup> Treatment of divergence is admittedly harsh, but apologists for the status quo suggest law and logic demand that it be so. Regardless of the figure’s plea of non-uniformity in court, “the Magistrate cannot help sentencing him to be consumed—and there’s an end of the matter.”<sup>48</sup> The circular hegemony supporting the “Irregular Penal Laws” is even parroted by the story’s ostensibly progressive narrator: “I for my part have never known an Irregular who was not also what Nature evidently intended him to be—a hypocrite, a

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<sup>40</sup> See Figure 1 (“Flatland’s Male Class Structure”).

<sup>41</sup> ABBOTT, *supra* note 2, at 10.

<sup>42</sup> *Id.* at 10-11. See generally *id.* at 8-11.

<sup>43</sup> *Id.* at 32.

<sup>44</sup> *Id.* at 33.

<sup>45</sup> *Id.* at 34; see also *id.* at 23.

<sup>46</sup> *Id.* at 54.

<sup>47</sup> *Id.* at 55.

<sup>48</sup> *Id.*

misanthropist, and, up to the limits of his power, a perpetrator of all manner of mischief.”<sup>49</sup>

As it turns out, however, recognition of individuals and thus the assessment of regularity prove difficult in a two-dimensional world. Those who live “in the happy region of the Three Dimensions . . . are blessed with shade as well as light [and] endowed with a knowledge of perspective”—but all Flatlanders, “no matter what their form, present to our view the same, or nearly the same, appearance, viz. that of a straight Line.”<sup>50</sup> For women and the lower classes, “feeling” is the primary means of recognition, touching others to understand their configuration.<sup>51</sup> This manner seems to comport with the values and sentiments of the feminine lines—“love,” “duty,” “right,” “wrong,” “pity,” “hope,” et cetera—all of which are considered to be “irrational and emotional conceptions, which have no existence.”<sup>52</sup> The higher classes readily dismiss such notions, while “feeling” is strongly disapproved or altogether prohibited.<sup>53</sup> Instead, the endorsed method of recognition is by “sight” or, more accurately, the ability to infer another’s figure, a capacity that requires years of training and experience.<sup>54</sup>

Circular dogma to the contrary, the stringent demands of regularity coupled with the limits of visual recognition make the process hard to master, let alone justify. At times, the slightest differences in degree of angle or length of side have life-changing consequences for the average Flatlanders. A. Square relates the story of his 59°30’ ancestor, aspiring to the equilateral, whose “family brain was registered at only 58°, and not till the lapse of five generations was the lost ground recovered, the full 60° attained, and the Ascent from the Isosceles finally achieved.”<sup>55</sup> This rigidity of rules seems particularly troubling given the imprecision of assessment. For instance, the narrator is “a Mathematician of no mean standing,” yet he admits difficulty in discriminating among “a crowd of rotating Polygons,” and such a sight would be “unintelligible . . . to a common Tradesman, or Serf.”<sup>56</sup> In turn, members of the highest classes have been known to carouse with or even marry non-uniform lines,<sup>57</sup> while

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<sup>49</sup> *Id.* at 35.

<sup>50</sup> *Id.* at 18; *see also id.* at 1-3.

<sup>51</sup> *Id.* at 19-20.

<sup>52</sup> *Id.* at 58.

<sup>53</sup> *See id.* at 30, 58-59.

<sup>54</sup> *Id.* at 30.

<sup>55</sup> *Id.* at 22.

<sup>56</sup> *Id.* at 28-29.

<sup>57</sup> *See id.* at 56-58.

“many of the highest Circles, sitting as Judges in law courts, use praise and blame towards Regular and Irregular Figures” and “speak about ‘right’ or ‘wrong’ as vehemently and passionately as if they believed that these names represented real existence.”<sup>58</sup> What is more, there are those who argue that rehabilitation is possible and that context matters, especially for the irregular figure “scorned and suspected by society . . . excluded from all posts of responsibility, trust, and useful activity [and h]is every movement . . . jealously watched by the police.”<sup>59</sup>

In fact, there was a time in Flatland without rules demanding uniformity, when differences were respected rather than punished. During “the space of half a dozen centuries or more,” when the “Ancient Practice of Painting” flourished, individuals decorated themselves with various colors as a matter of distinction and personal recognition.<sup>60</sup>

Immoral, licentious, anarchical, unscientific—call them by what names you will—yet, from an aesthetic point of view, those ancient days of the Colour Revolt were the glorious childhood of Art in Flatland—a childhood, alas, that never ripened into manhood, nor even reached the blossom of youth. To live was then in itself a delight, because living implied seeing.

. . . The commonest utterances of the commonest citizens in the time of the Colour Revolt seem to have been suffused with a richer tinge of word or thought; and to that era we are even now indebted for our finest poetry and for whatever rhythm still remains in the more scientific utterance of these modern days.<sup>61</sup>

But appreciating the danger to the higher classes—with color allegedly leading “the common people into endless mistakes” and posing the “total destruction of all Aristocratic Legislature and . . . the subversion of our Privileged Classes”<sup>62</sup>—the Chief Circle delivered a rabbleroousing speech against the practice of painting. “With the universal adoption of Colour,” he declared, “all distinctions would cease; Regularity would be confused with Irregularity; development would give place to retrogression . . . [;] fraud, deception, hypocrisy would pervade every household; domestic bliss would share the fate of the Constitution and pass to speedy perdition.”<sup>63</sup> From that day forward, color was abolished, its possession banned, and even words alluding to color subject to punishment.<sup>64</sup> Through the power of political histrionics, colorization and non-uniformity of configuration are

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<sup>58</sup> *Id.* at 55-56.

<sup>59</sup> *Id.* at 34-35.

<sup>60</sup> *See id.* at 36.

<sup>61</sup> *Id.* at 38-39.

<sup>62</sup> *Id.* at 43-44.

<sup>63</sup> *Id.* at 47-48.

<sup>64</sup> *Id.* at 49.

thus prohibited in Flatland, for if they were allowed, “civilization would relapse into barbarism”<sup>65</sup>—or so the official rhetoric suggests.

## B. GRIDLAND

The world of federal sentencing is not altogether different from Flatland, and thus when referring to the realm of punishment in federal courts, I will call it “Gridland,” not because defendants and criminal justice actors refer to it as such, “but to make its nature clearer to you, my happy readers, who are privileged to live”<sup>66</sup> outside of its boundaries. The laws of Gridland, the U.S. Sentencing Guidelines, provide the rules for punishing convicted federal offenders. Once a defendant has been found guilty at trial (or by plea agreement), the U.S. district court must determine punishment under the Guidelines, a determination that is often predetermined or overdetermined but certainly not undetermined, as the federal sentencing scheme is “determinate” (i.e., mandatory). For those who know nothing of Gridland, it might seem Orwellian to label the regime *guidelines*—“recommendations or principles for determining a course of action”<sup>67</sup>—since trial courts were required to follow these dictates or be reversed on appeal.<sup>68</sup> But in Gridland, the Guidelines need not be “guidelines,” at least as that term is understood throughout the rest of the known universe.

The Guidelines supposedly set down a sentence for every case through exhaustive rules contained in the “Guidelines Manual,” a document that has ballooned to some 1,500 pages of regulations marked as “Guidelines,” “Policy Statements,” and “Commentary,” and packed with examples, cross-references, and amendments. Using the rules of this tome, the trial judge must first establish which of forty-three categories applies to the crime in question, setting the “base offense level” for sentencing a particular defendant. The judge then determines which of six “criminal history” categories governs the defendant given his prior record of offending. With these details, the judge will refer to the “Sentencing Table,” a two-dimensional grid of offense levels and criminal history scores, forming 258 boxes of punishment for all possible offenses and offenders.<sup>69</sup> The

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<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> MERRIAM-WEBSTER COLLEGIATE DICTIONARY 555 (11th ed. 2003).

<sup>68</sup> As Michael Tonry quipped, the U.S. Sentencing Commission made a “Freudian slip” of sorts by calling the Guidelines “mandatory.” MICHAEL TONRY, SENTENCING MATTERS 83 (1996) [hereinafter TONRY, SENTENCING MATTERS]; see also U.S. SENTENCING COMM’N, ANN. REP. 1 (1990); cf. Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission’s “Mandatory Guidelines,”* 4 FED. SENT’G REP. 129 (1991) [hereinafter Tonry, *Mandatory Minimum Penalties*].

<sup>69</sup> See Figure 2 (“The Grid”).

appropriate range might be adjusted by aggravating circumstances, such as the defendant's brandishing of a weapon, or mitigating circumstances, such as the defendant's accepting responsibility for his criminal misconduct.<sup>70</sup> Nonetheless, each range is capped at 25 percent of the maximum sentence,<sup>71</sup> with some ranges cutting tighter than this outer limit.<sup>72</sup> So in sum: score the crime and the criminal record, find them on the all-encompassing matrix of Gridland, make any permitted adjustments, pull the handle, and there's your punishment.

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<sup>70</sup> The process can be quite complex and generates both confusion and error. *See* text accompanying notes 86-92. For an excellent primer on federal sentencing procedures under the Guidelines, see LUCIEN B. CAMPBELL & HENRY J. BEMPORAD, *FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AN INTRODUCTION TO FEDERAL GUIDELINES SENTENCING* (5th ed. 2001).

<sup>71</sup> 28 U.S.C. § 994(b)(2) (1993).

<sup>72</sup> For instance, a first-time criminal who commits a level 18 offense (e.g., extortion by force) must be sentenced to between twenty-seven and thirty-three months in federal prison, a range of a mere 18 percent. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.2 (2004).

**Figure 2**  
*"The Grid"*

**SENTENCING TABLE (in months of imprisonment)**

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Similar to the idiom of Flatland's ruling class, punishment in federal courts is largely bereft of words such as "right," "wrong," "pity," and "hope," and instead is marked by a technical language—"base levels," "categories," "points," "scores," and so on—that resonates like the jargon of actuaries or tax accountants, or maybe players in a parlor game.<sup>73</sup> A sentence will thus sound something like this:

For a violation of 18 U.S.C. § 1344, USSG § 2F1.1(a) calls for a base offense level of six (6). Pursuant to USSG § 2F1.1(b)(1)(I)-(J), eight (8) levels are added because the loss amount was more than \$200,000 but less than \$350,000. Pursuant to USSG § 2F1.1(b)(2)(A), two (2) levels are added because the offense involved more than minimal planning. Pursuant to USSG § 3B1.3, two (2) levels are added because Stevenson abused a position of trust (bookkeeper) that involved minimal supervision and sole responsibility for the daily finances of her employer. . . . Stevenson's adjusted offense level (subtotal) is eighteen (18). With the Government's consent to the application of USSG § 3E1.1(a), the offense level is reduced by two (2) for acceptance of responsibility. Accordingly, Stevenson's total offense level is sixteen (16). Stevenson's criminal history score is ten (10). At the time of the instant offense, Stevenson was on probation for arrests of October 17, 1992 and April 5, 1993. Thus, pursuant to USSG § 4A1.1(d), two (2) points are added, bringing her total criminal history score to twelve (12). For criminal history points of 10, 11 or 12, the sentencing table at USSG Chapter 5, Part A, establishes a criminal history category of V. With an offense level of 16 and criminal history score of 10, the sentencing table provides a Guideline range for imprisonment of forty-one (41) to fifty-one (51) months.<sup>74</sup>

Voila! A human being has been transformed from a multidimensional being into a string of letters and numbers, cast onto the grid of Gridland for internment in a federal penitentiary. The defendant is now a two-dimensional character—as flat as any in Flatland—his vertical axis an

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<sup>73</sup> See, e.g., Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, WASH. POST, Oct. 6, 1996, at A1 (quoting judge that "[p]eople think of it as a game, like Parcheesi") [hereinafter Flaherty & Biskupic, *Despite Overhaul*]; Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 588 n.4. (1992) ("The table looks like the board for the game of 'GO.'").

<sup>74</sup> *United States v. Stevenson*, 325 F. Supp. 2d 543, 545-46 (E.D. Pa. 2004); see also Flaherty & Biskupic, *Despite Overhaul*, *supra* note 73 (quoting federal sentencing colloquy):

The court finds that the base offense level is 20 . . . Pursuant to Guideline 2K2.1(B)(4), the offense level is increased by two levels [to 22] . . . The court notes that the criminal convictions . . . result in a total criminal history category score of 18. At the time of the instant offense . . . the defendant was serving a parole sentence in two causes of action. And pursuant to Sentencing Guidelines 4A1.1(D), 2 points are therefore added. The total criminal history points are 20. And according to the sentencing guidelines Chapter 5, Part A, 20 criminal history points establish a criminal history category of 6. . . . [As a result] the guideline range for imprisonment is 84 to 105 months.

See, e.g., *United States v. Guerrero*, No. IP 03-122-CR H/F, 2003 WL 23220736, at \*5-6 (S.D. Ind. 2003).

offense level and his horizontal axis a criminal history category. There is no depth or detail, no shading or perspective, only an initial movement within the grid pursuant to points or levels duly added or subtracted, placing him within a narrow range of punishment. The Guidelines are “neutral” with regard to the offender’s race, sex, national origin, and creed,<sup>75</sup> a restriction that seems eminently reasonable in both Gridland and worlds of higher dimensionality. But federal judges cannot consider an assortment of issues deemed significant in lands not wholly defined by the x-y axes, including the defendant’s: age, education, vocational skills, mental and emotional condition, physical condition, drug or alcohol dependence, lack of guidance as a youth, employment history, family ties and responsibilities, community ties, military and public service, and charitable works.<sup>76</sup>

Under the Guidelines, judges thus confront defendants as numbers rather than as human beings. The Guidelines sought “a fully rationalized algebra of criminology and penology” that eliminates discretion in sentencing,<sup>77</sup> a sort of “sentencing machine,” where the court inserts the necessary figures to calculate a set punishment.<sup>78</sup> The result is “sentencing by the numbers,” converting a trial judge into an “automaton,” “rubber-stamp bureaucrat,” “notary public,” or “accountant,”<sup>79</sup> whose role is reduced to “filling in the blanks and applying a rigid, mechanical formula.”<sup>80</sup> As such, federal sentencing purges much of the human element

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<sup>75</sup> 28 U.S.C. § 994(d) (1993).

<sup>76</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, §§ 5H1.1-6, 5H1.11-12. But see, e.g., *United States v. Blarek*, 7 F. Supp. 2d 192 (E.D.N.Y. 1998) (noting that although “[t]he Guidelines purport to prohibit sex from being taken into account in the determination of a sentence” “[n]o mention is made of sexual orientation” and then granting downward departure to homosexual defendants because they would be “especially vulnerable to abuse in prison given their sexual orientation”); cf. *infra* notes 141-43 and accompanying text (discussing covert evasion of the Guidelines).

<sup>77</sup> Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 366 (1992).

<sup>78</sup> TONRY, SENTENCING MATTERS, *supra* note 68, at 98 (quoting ALFRED BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 159 (1983)); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 84 (1998) (arguing that “the Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater”).

<sup>79</sup> See STITH & CABRANES, *supra* note 78, at 169; *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2054 (1992) (comments of Judge Edward Becker); Frank Gilbert, *The Probation Officer’s Perception of the Allocation of Discretion*, 4 FED. SENT’G REP. 109, 109 (1991); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986); Weinstein, *supra* note 77, at 364; José A. Cabranes, *A Failed Utopian Experiment*, NAT’L L.J., July 27, 1992, at 17.

<sup>80</sup> *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988); see also *United States v. Justice*, 877 F.2d 664, 666 (8th Cir. 1989) (“[S]entencing has been relegated to a



in order to make defendants fit within the limited dimensions of Gridland. The cookie-cutter approach of the Guidelines creates all-purpose categories of crimes and criminals, privileging certain factors and ignoring all others, thereby transforming specific cases involving unique individuals into uniform patterns amenable to the grid.

It is hard not to sense a “certain Kafkaesque aura”<sup>81</sup> about the entire process, lopping off the defendant’s individuating traits and mechanically evaluating the remainder—clumps of data, plugged into the sentencing equation and then charted on a two-dimensional matrix. In Gridland, you might expect that one federal inmate would say to another, “I’m an offense level 17, criminal history category 3, with a range of 30-37 months—what are you?” Or maybe you might overhear a federal judge lamenting to a colleague, “It was one § 5K1.1 after another,<sup>82</sup> then hearings filled with § 1B1.3 evidence,<sup>83</sup> plus an irate category VI in the afternoon. But at least a couple showed heartfelt § 3E1.1,<sup>84</sup> and there were no § 2A1’s today.”<sup>85</sup>

Such exchanges do not occur (as far as I know), although possibly due to the inscrutable nature of the Guidelines rather than the stilted character of this dialogue alone. The rules are at best puzzling in their hypertechnical variations and at worst a foreign dialect to lay participants, particularly the individual most directly affected by this cryptic language—Gridland’s newest resident, the defendant at sentencing. Court hearings on punishment are “nearly unintelligible to victims, defendants, and observers, and even to the very lawyers and judges involved in the proceeding.”<sup>86</sup> Widespread difficulties were encountered in implementing the hypertechnical sentencing system—one that is under constant amendment and subject to a vast body of jurisprudence—spurring publications, conferences, courses, and the like, all to steer otherwise perfectly competent people through the

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somewhat mechanical process.”); *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring) (describing federal sentencing as a “mechanistic administrative formula”).

<sup>81</sup> G. Thomas Esole, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16, 20.

<sup>82</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, § 5K1.1 (sentence departures based on substantial assistance of defendant).

<sup>83</sup> *Id.* § 1B1.3 (relevant conduct of defendant).

<sup>84</sup> *Id.* § 3E1.1 (acceptance of responsibility).

<sup>85</sup> *Id.* § 2A1 (homicide).

<sup>86</sup> STITH & CABRANES, *supra* note 78, at 5; see, e.g., Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, WASH. POST, Oct. 6, 1996, at A21 (quoting Judge John Rhodes).

puzzling rules of federal sentencing.<sup>87</sup> Among other things, the Commission established an “Office of Education and Sentencing Practice” to tutor the many baffled professionals, and it even created a series of punishment calculation worksheets (bearing a vague resemblance to an I.R.S. form).<sup>88</sup>

At the outset, Gridland’s maniacal rules virtually guaranteed errors in sentencing, from simple mathematical mistakes to using incorrect editions of the Guidelines Manual, at times producing multi-year punishment blunders.<sup>89</sup> But even when a sentence was arithmetically correct, the people immediately impacted by the punishment—particularly the newly gridded defendant—would exit the hearing mystified by the process and rationale for the ultimate judgment. Guidelines sentences can vary widely based on seemingly trivial distinctions with marginal cognitive impact, distinguishing between “minor” and “minimal” participation in the offense, for instance, and between “leadership” and “managerial” roles.<sup>90</sup> Likewise, relatively small variations in the amount of money in question or the quantity (and even form) of a given contraband can produce astounding discrepancies in punishment.<sup>91</sup> As is now infamous, convert cocaine for sniffing (powder) to cocaine for smoking (crack) and the punishment increases 100 fold, despite the lack of any significant pharmacological or penological distinction.<sup>92</sup> But in Gridland, at least, differences need not be intellectually meaningful to have enormous significance.

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<sup>87</sup> See, e.g., Flaherty, *supra* note 86 (mentioning telephone hotlines to guide attorneys and probation officers through the Guidelines); United States Sentencing Commission, About Guideline Training & Education, <http://www.ussc.gov/> (last visited Nov. 27, 2005).

<sup>88</sup> See United States Sentencing Commission, Federal Sentencing Guideline Worksheets, available at <http://www.ussc.gov/training/workshhee.htm> (last visited Nov. 27, 2005).

<sup>89</sup> See, e.g., TONRY, SENTENCING MATTERS, *supra* note 68, at 98-99; Flaherty, *supra* note 86.

<sup>90</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, §§ 3B1.1-.2.

<sup>91</sup> Such discrepancies are well-documented, beginning with Paul H. Robinson, *Dissent from the United States Sentencing Commission’s Proposed Guidelines*, 77 J. CRIM. L. & CRIMINOLOGY 1112 (1986).

<sup>92</sup> See, e.g., United States v. Dumas, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring); United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994); United States v. Walls, 841 F. Supp. 24 (D.D.C. 1994); United States v. Maske, 840 F. Supp. 151, 155 (D.D.C. 1993); United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993); Douglas A. Berman, *Rethinking the Crack Cocaine Ratio*, 10 FED. SENT’G REP. 179 (1998); Frank O. Bowman, III, *The Geology of Drug Policy in 2002*, 14 FED. SENT’G REP. 123 (2002); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249 (1996); see *infra* note 237 (discussing post-Booker crack cocaine cases).

So unlike judges drawn from the highest class of circles in Flatland, those who work in the grid seem comparable to the middle class equilateral or possibly a professional square, but certainly not the polygonal nobility. Criminal defendants, in turn, would rank no higher than the lowly isosceles or even the (presumably) mindless lines, although flat fodder for the sentencing machine might be more fitting. But like the centuries of color in Flatland, there was a time when federal sentencing was an art, not a pseudo-science, when the specifics of an offense and offender mattered, when context and perspective were taken into account rather than expressly ignored. Throughout most of American history, punishment was “indeterminate” in nature, with lawmakers broadly defining criminal offenses and potential punishments while judges deliberated on the comparative seriousness of a specific crime and an appropriate sentence for the offender. “Traditionally,” noted the U.S. Supreme Court in 1993, “sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.”<sup>93</sup> This eclectic approach attempted to accommodate the diverse rationales for punishment, from retributive principles of “just deserts” to consequential considerations of deterrence, rehabilitation, and incapacitation, thus allowing trial judges to craft a proper sentence based on an array of factors and legitimate conceptions of justice.<sup>94</sup>

In fact, federal sentencing was indeterminate through most of the previous century, supposedly in accordance with the rehabilitative ideal—shaping the sentence to the offender in order to “cure” his “disease” of criminality (or effectively quarantine him from lawful society), thereby thwarting future crimes. Various officials played a role in this model: Federal probation officers gathered details about the defendant’s personal history and criminal record, presenting some insight into his capacity to reform and remain law-abiding, while the official release date would be set by parole authorities based on their own judgment of the inmate’s likely behavior in society. But as always, trial court judges retained primary control over punishment, as Congress had established only maximum prison terms for most federal offenses, thus giving district courts the discretion to impose sentences below that limit.<sup>95</sup> Such an approach is not without its problems, however. Trial judges did not have to offer reasons

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<sup>93</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

<sup>94</sup> See *infra* notes 294-95 and accompanying text.

<sup>95</sup> See, e.g., 18 U.S.C. § 4205(b) (1982) (repealed by Pub. L. 98-473, § 218(a)(5), 98 Stat. 2027); see also Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U.L. REV. 419, 422 (1999). But see *infra* notes 240-44 and accompanying text (discussing history of mandatory minimums sentences).

for any particular sentence, their decisions were largely immune from appeal, and there was no formal means to consider the distribution and fairness of punishment among cases. Across the ideological spectrum,<sup>96</sup> professionals and politicians began to view the system as “lawless,”<sup>97</sup> producing unacceptable sentencing disparities among defendants.

Judicial arbitrariness was so widespread, conventional wisdom scoffed, that punishment in any given case depended upon a sort of “breakfast” rule—“what the judge had for breakfast.”<sup>98</sup> As lampooned by former U.S. Sentencing Commissioner Michael Goldsmith:

Certain culinary items suggested light sentences geared towards rehabilitation (eggs over easy, instant oatmeal, Sweet ‘N Low, Lucky Charms, and Cheerios). However, others evoked harsher images of retribution, deterrence, and incapacitation (hard boiled eggs, bacon extra crisp, and especially Total, Life, or any type of toast). Of course, if the judge had dined on waffles or Fruit Loops (as often seemed to be the case), all bets were off.<sup>99</sup>

Although the historical accuracy of vastly discrepant sentences can be debated,<sup>100</sup> the powerful imagery of arbitrary decisionmaking dominated most discussion about sentencing in the 1970s and early 1980s.<sup>101</sup> One of the leading advocates for reform, Judge Marvin Frankel, pilloried the federal system for its “unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory.”<sup>102</sup> To deal with this “terrifying and intolerable” condition,<sup>103</sup> Judge Frankel proposed “a commission on sentencing”<sup>104</sup> to design rules that would guide

<sup>96</sup> See, e.g., Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, CATO POL’Y ANALYSIS, Nov. 1, 2002, at 4-5 [hereinafter Luna, *Misguided Guidelines*] (discussing convergence of opinion against indeterminate punishment and odd political coalition that produced the Sentencing Reform Act).

<sup>97</sup> See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

<sup>98</sup> MICHAEL GOLDSMITH & JAMES GIBSON, NYU LAW SCH. CTR. FOR RESEARCH IN CRIME & JUSTICE, *THE U.S. SENTENCING GUIDELINES: A SURPRISING SUCCESS?* 1 (1999).

<sup>99</sup> *Id.*; see also William T. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 379 (1995) (discussing image of judges as either “turn ‘em loose Bruce” or “hang ‘em high Harry”).

<sup>100</sup> See, e.g., STITH & CABRANES, *supra* note 78, at 105-42.

<sup>101</sup> See, e.g., *United States v. Dyck*, 287 F. Supp. 2d 1016, 1018 (D.N.D. 2003) (“Before the Guidelines, district courts enjoyed almost unbridled discretion in sentencing. This unbridled discretion led to a wide disparity in sentencing whereas similarly situated defendants received wildly different sentences depending on the temperament of the sentencing judge.”).

<sup>102</sup> See FRANKEL, *supra* note 97, at 49.

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.* at 118-24.

trial judges in their punishment decisions, such as a “detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading.”<sup>105</sup> A “chart or calculus” would then be employed “by the sentencing judge in weighing the many elements that go into a sentence.”<sup>106</sup> Frankel’s fantasy was of a mechanical jurisprudence that reduced judicial discretion through an efficient and comprehensive set of rules that could eliminate most individualized decisionmaking.<sup>107</sup> Whether he knew it or not, Frankel was dreaming of Gridland.

Some two decades ago, this vision became a reality with the passage of the Sentencing Reform Act of 1984.<sup>108</sup> Echoing the statements of Frankel and others, Congress demonstrated a supreme suspicion and even fear of judges. “The present problem with disparity in sentencing,” argued one senator, “stems precisely from the failure of federal judges . . . . There is little reason to believe that judges will now begin to do what they have failed to do in the past.”<sup>109</sup> A dissenting senator paraphrased the debate as “judges cannot be trusted. You cannot trust a judge . . . you must not trust a judge.”<sup>110</sup> The legislative history materialized in parts as a calumnious rant against the courts, that judges were *the* problem and needed to be severely disciplined.<sup>111</sup> (All that seemed to be missing was a floor tirade from Rep. Elmer Fudd about those “wascawwy wabbits.”) Given the dubious premise of the Sentencing Reform Act, it is not altogether surprising that the legislation introduced a lengthy, potentially conflicting list of targets and constraints,<sup>112</sup> with the “first and foremost goal” of eliminating disparity by

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<sup>105</sup> *Id.* at 113.

<sup>106</sup> *Id.* at 115.

<sup>107</sup> See *infra* Part V.A (discussing mechanical jurisprudence).

<sup>108</sup> Pub. L. No. 98-473, 98 Stat. 1987 (1984).

<sup>109</sup> 130 CONG. REC. 976 (1984) (remarks of Sen. Laxalt).

<sup>110</sup> *Id.* at 973 (remarks of Sen. Mathias paraphrasing position of Act’s supporters). See generally S. Rep. No. 225, 98th Cong. (1983), reprinted in 1984 U.S.C.C.A.N. 3182.

<sup>111</sup> See, e.g., Jonathan Chiu, *United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1345 (2005); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 278-80 (1993).

<sup>112</sup> The system was supposed to: promote respect for the law; provide a clear statement of the purposes of punishment and the types/lengths of sentences; ensure that the defendant, officials, and the public “are certain about the sentence and the reasons for it”; meet the demands of retribution, deterrence, incapacitation, and rehabilitation; offer trial judges “a full range of sentencing options from which to select the most appropriate sentence in a particular case”; and end “unwarranted sentence disparities” between otherwise similarly situated criminals. See 18 U.S.C. § 3553(a) (2000); S. Rep. No. 225, 98th Cong. 39 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3222.

requiring uniformity in punishment.<sup>113</sup> Toward this objective, indeterminate sentencing in the federal system was brought to an end, eliminating parole and compelling judges to fix an exact sentence (less a small discount for good behavior in prison) that could be reviewed on appeal. The Act also fulfilled Judge Frankel's dream of an agency on punishment, launching an "independent commission in the judicial branch," the U.S. Sentencing Commission, to create and disseminate guidelines that reined in judicial discretion through relatively tight ranges of punishment.<sup>114</sup>

The Commission had only eighteen months to complete its assignment, one that was hindered by the sometimes muddled legislative directives, as well as internal disagreement over the importance and function of punishment theory—all while outside detractors were berating the project as foolhardy and unconstitutional. The resulting work product, the U.S. Sentencing Guidelines, could not help but be warped by the time limit, uncertainties of language, disagreement over philosophy, and an ill-conceived institutional process. For instance, the commissioners clashed over the appropriate model—one focused on utilitarian "crime control" or another linked to retributive assessments of harm—and with time running out, the Commission decided not to decide, resolving that the Guidelines would not adopt any theory of punishment but instead would rely upon a statistical review of past sentences. Yet for whatever reason,<sup>115</sup> the Guidelines adopted a hyperdeterministic, incremental-harm approach that no sane theory demands—generating significant swings in punishment with seemingly trivial changes in fact<sup>116</sup>—and in so doing, the system discarded the historical wisdom of theoretically eclectic, context-sensitive punishment. As for the empirically guided assessment of punishment, the Guidelines simply increased the average sentences across-the-board, with a sizeable escalation for white-collar and drug crimes.<sup>117</sup> Likewise, violent

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<sup>113</sup> Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295-96 (1993); see also 133 CONG. REC. 33109 (1987) (remarks of Sen. Hatch); *id.* at 33110 (remarks of Sen. Biden); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 187 (1993).

<sup>114</sup> 28 U.S.C. § 991 (2000). By statute, the Commission included two *ex officio* members and seven voting members, with three sitting federal judges and no more than four individuals from the same party. *Id.* § 991(a).

<sup>115</sup> See Luna, *Misguided Guidelines*, *supra* note 96, at 25 n.50 (mentioning a potential explanation for the Guidelines methodology).

<sup>116</sup> See Robinson, *supra* note 91.

<sup>117</sup> Under the Guidelines, nominal sentences increased on average by nearly 80% (from twenty-eight months to fifty months), and actual time served rose by 230% (from thirteen months to forty-three months). STITH & CABRANES, *supra* note 78, at 63. A large amount of

offenses received boosts in punishment “where the Commission was convinced that they were inadequate,” although it failed to detail exactly what made a sentence “inadequate” and why the Commission was “convinced” of such deficiency for a given crime.<sup>118</sup>

All of this was possible because the Commission was uninhibited by the usual restrictions imposed on administrative agencies: it was not bound by standardized procedures for evaluating new rules; it was not required to deliberate in an open forum or provide rationales for any new rules; and its work product was not subject to appellate review.<sup>119</sup> The Commission could just issue a set of “diktats”<sup>120</sup> that command specific consequences in sentencing and, as mentioned earlier, prohibit trial judges from considering facts about the offender that may appear highly relevant in fixing punishment.<sup>121</sup> In the language of Flatland, the Commissioners are infallible priestly circles that reign over the grid and the wily judges of federal sentencing. Over the years, only the will of Congress has received deference in structuring the laws of Gridland. For example, legislators would occasionally send the Commission “directives” for new rules, which were inevitably adopted<sup>122</sup>—after all, federal lawmakers deserve the respect due fellow members of the circular class. Congress has also passed

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the increase stems from the elimination of parole, limits on probation, and the creation of new mandatory minimum sentences, especially for drug and gun offenses. *See, e.g., infra* notes 237-74 and accompanying text.

<sup>118</sup> U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 19 (1987).

<sup>119</sup> *See* S. Rep. No. 225, 98th Cong. 149, 180-81 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332, 3363-64; *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); STITH & CABRANES, *supra* note 78, at 40, 56-57, 95.

<sup>120</sup> *United States v. Jaber*, 362 F. Supp. 2d 365, 368 (D. Mass. 2005); STITH & CABRANES, *supra* note 78, at 95.

<sup>121</sup> So-called “downward departures” provided the official (and in most cases, the only) mechanism for reducing a sentence from the otherwise predetermined Guidelines range. Other than cooperating with the government and obtaining a “substantial assistance” departure at the prosecutor’s request, the only basis for lowering a sentence was a trial judge finding a factor “not adequately taken into consideration” by the Commission and thus requiring a different sentence than imposed by the Guidelines. 18 U.S.C. § 3553(b) (2000). Unfortunately, this “heartland” concept was not warmly received by the Commission or the appellate courts, and as a result, the idea of departures on this basis has been all but foreclosed. *United States v. Booker*, 125 S. Ct. 738, 750 (2005); *see, e.g., United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996) (“Given the comprehensive sentencing structure embodied in the guidelines, [o]nly rarely will we conclude that a factor was not adequately taken into consideration by the Commission.”) (citation omitted); *see also* Luna, *Misguided Guidelines*, *supra* note 96, at 28 n.92.

<sup>122</sup> *See, e.g., Jeffrey S. Parker & Michael K. Block, The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1022-25 (2001); *see also Jaber*, 362 F. Supp. 2d at 375.

mandatory minimum sentences that compel increases in the applicable ranges of punishment.<sup>123</sup>

Of late, however, federal lawmakers have intensified their campaign against the judiciary, including the passage of the so-called Feeney Amendment, a gratuitous legislative rider log-rolled within the otherwise laudable “Amber Alert” bill.<sup>124</sup> The relevant provisions all but eliminated judicial discretion to craft an appropriate sentence below the guidelines range; the Amendment abolished appellate court deference to the sentencing decisions of trial judges, expressly overruling the U.S. Supreme Court’s one sensible decision in this area;<sup>125</sup> and it created a congressional “blacklist”<sup>126</sup> of those judges who make downward departures without the approval of federal prosecutors. According to the sponsor, Rep. Tom Feeney, the rationale for these and other changes was the “long-standing and increasing problems of downward departures [i.e., sentence reductions]” by district court judges.<sup>127</sup> On the law enforcement side, then-U.S. Attorney General John Ashcroft praised Congress for “clos[ing] the loopholes on sentencing criminals,” as “too many have found their way back on the streets because some federal judges have exploited loopholes in the sentencing guidelines.”<sup>128</sup> Although the facts could not bear out these

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<sup>123</sup> Some respected commentators have attempted to differentiate the Guidelines from mandatory minimum. See, e.g., Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN L. REV. 1017 (2004). But each device prescribes strict parameters for punishment—and when Congress creates a new mandatory minimum, the applicable sentencing range just shifts upward in accord with the legislation. As such, both the Guidelines and mandatory minimum sentences are examples of the same phenomenon: mandatory, hyper-determinate punishment.

<sup>124</sup> PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>125</sup> *Koon v. United States*, 518 U.S. 81 (1996).

<sup>126</sup> See, e.g., Editorial, *Blacklisting Judges*, N.Y. TIMES, Aug. 10, 2003, § 4, at 10; Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1; see also *United States v. Green*, 346 F. Supp. 2d 259, 262 (D. Mass. 2004); *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1167 (D. Or. 2004). But see *United States v. VanLeer*, 270 F. Supp. 2d 1318 (D. Utah 2003) (Cassell, J.) (concluding, *inter alia*, that the Feeney Amendment did not eliminate judicial discretion and that the so-called “black list” provision was legally irrelevant).

<sup>127</sup> 149 CONG. REC. H2422 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

<sup>128</sup> Remarks of Attorney General John Ashcroft, Milwaukee, Wis., Sept. 22, 2003, quoted in Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN L. REV. 1211, 1254 (2004); see also Tom Perrotta, *Foes of Limits on Sentence Departures Make Headway*, N.Y. L.J., Apr. 10, 2003, at 4 (quoting D.O.J. spokesperson) (“The Feeney amendment enacts long-overdue reforms to address the longstanding, and still-growing, problem of downward departures from the Sentencing Commission’s Federal Sentencing Guidelines.”).



claims,<sup>129</sup> trifling things like accuracy do not worry infallible politicians, particularly when scolding federal judges. “They are a child of Congress, whether they like it or not,” Feeney chided. “If we wanted to, we could give judges no discretion whatsoever in sentencing.”<sup>130</sup> So there!

Of course, it doesn’t really matter whether lawmakers or commissioners ultimately rule the grid. To the extent that punishment is predetermined by Congress or the Commission, a remote entity is judging an individual without sufficient knowledge of the people or events in question. Distant bodies can only deliver cookie-cutter justice based on generalities, creating uniformity without humanity. But that is all that can be seen in a two-dimensional world like Gridland.

## II. “OTHER WORLDS”<sup>131</sup>: *UNITED STATES V. BOOKER*

Despite all efforts by those in power, it proved impossible to hermetically seal the borders of either Flatland or Gridland from contact with outside affairs, benevolent, malevolent, or something in between. As previously noted, the ruling class of Flatland recognized the “mysterious problem” of the origin of light and the recurring claims of “revelations from another World,” but the consistent response was to reject the existence of any crisis and punish those who dared question the circular resolution of flat denial.<sup>132</sup> The rulers “are not only incapable of understanding the limitations of their view but are enraged by any attempt to enforce them to transcend those limitations.”<sup>133</sup> This obstinacy and the supporting hegemonic structure presented the greatest challenge for those who wished to see the bigger picture extending past the two-dimensional, including narrator A. Square.

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<sup>129</sup> See, e.g., U.S. SENTENCING COMM’N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (2003); U.S. GEN. ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 (2003); Gary Fields & Jess Bravin, *Federal Judges Aren’t as Lenient as Lawmakers Say, Studies Show*, WALL ST. J., Oct. 30, 2003, at A4; see also Letter from Alfred P. Carlton, Jr., President of the Am. Bar Ass’n, to Sen. Orrin G. Hatch, Apr. 1, 2003, reprinted at 15 FED. SENT’G REP. 346, 347 (2003); Letter from Law Professors to Sen. Orrin G. Hatch & Sen. Patrick Leahy, Apr. 2, 2003, reprinted at 15 FED. SENT’G REP. 346, 351 (2003).

<sup>130</sup> John Gibeaut, *Opening Sentences: While the Feeney Amendment’s Tightening of Federal Guidelines Has Judges Steaming, States Are Moving to Loosen Up Strict Regimes*, A.B.A. J., Mar. 2004, at 55, 56 (quoting Rep. Feeney); see also *Judges in the Cultural Wars Crossfire*, A.B.A. J., Oct. 2005, at 48 (comment by Rep. Feeney on regulating federal court jurisdiction).

<sup>131</sup> ABBOTT, *supra* note 2, at 61.

<sup>132</sup> *Id.* at 5, 96-98, 112.

<sup>133</sup> Asimov, *supra* note 21, at vii.

In the final part of his chronicle of Flatland, which opens at the dawn of the third millennium, A. Square recounts his visitation by a sphere preaching “the Gospel of the Three Dimensions.”<sup>134</sup> This globe-like character lifts the humble narrator out of Flatland to reveal other worlds beyond the two-dimensional. Although initially frightened that what he sees is either “madness or it is hell,” A. Square is calmly informed that “[i]t is neither . . . it is Knowledge; it is Three Dimensions.”<sup>135</sup> Through explanation and experiences, the sphere’s flat pupil is taught about a higher dimension and its inhabitants, as well as the meaning of concepts totally foreign to Flatlanders, such as “shade” and “perspective.”<sup>136</sup> And when A. Square balks at a favorable reference to ideals such as justice and mercy, decrying them as “the qualities of women,” the sphere responds that “many of the best and wisest” residing in three dimensions greatly value such “human faculties” and thus think “more of your despised Straight Lines than of your belauded Circles.”<sup>137</sup> In this way, the otherwise flat narrator comes to appreciate worlds of higher dimensionality.

As it turns out, the ongoing story of Gridland has noticeable similarities to A. Square’s account. Not unlike their other-world denying counterparts in Flatland, Congress and the Commission sought to suppress thoughts and deeds that undermined the laws of the grid, with acute anxiety over the practice of plea bargaining, for instance, and the attendant possibility that a sentence might defy the rules of Gridland.<sup>138</sup> In response, trial courts were bound to sentence a defendant, not only for the crimes of conviction, but also for conduct beyond the jury verdict or plea agreement.<sup>139</sup> Under the Guidelines’ “real offense” provisions, prosecutors could allege all reasonably foreseeable behavior and other crimes connected to “the same course of conduct or common scheme or plan”—even if never confronted by the jury or pleading defendant nor implicit within the conviction—and such “relevant conduct” need only be proven more likely than not.<sup>140</sup> In this way, criminal justice practitioners were supposedly bound by the Guidelines and all defendants trapped in two-dimensions, thus allowing Gridland’s rulers to deny that anything existed outside their domain.

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<sup>134</sup> ABBOTT, *supra* note 2, at 89, 91.

<sup>135</sup> *Id.* at 92.

<sup>136</sup> *Id.* at 99-101.

<sup>137</sup> *Id.* at 95-96.

<sup>138</sup> See, e.g., S. Rep. No. 225, 98th Cong. 63, 167 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3246, 3350.

<sup>139</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, § 1B1.3.

<sup>140</sup> *Id.* § 1B1.3(a)(2).

But given the mechanical, emotionless evaluation of human beings under the Guidelines, it was little wonder that some criminal justice actors would attempt to evade the formulaic dictates to obtain just resolutions in specific cases.<sup>141</sup> District courts faced with an especially heavy punishment might massage the facts to drive down the sentencing range, and some even directed probation officers to modify their pre-sentencing reports accordingly.<sup>142</sup> But more often than not, it was the attorneys who plotted against the Guidelines, usually by a covert deal on the facts to present in open court. The amount of drugs or monetary loss, the dates of crime, the existence of a firearm, and all other crucial details were negotiable in this process.<sup>143</sup> Although the end may appear noble—obtaining a fair punishment in the shadow of the Guidelines—surreptitious deals are inherently suspicious, and the idea of negotiating facts can only undermine the legitimacy of a criminal justice system and its truth-seeking function.<sup>144</sup> So in spite of contrary intentions, the severity and inflexibility of Gridland inspired strategic deceit among judges and practitioners as the only perceived means to achieve justice in individual cases.<sup>145</sup>

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<sup>141</sup> See, e.g., Mary Pat Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck; Sentencing Powers Shift From Judges*, WASH. POST, Oct. 7, 1996 at A1 [hereinafter Flaherty & Biskupic, *Prosecutors Can Stack the Deck*] (“There’s a certain fiction we all engage in if we want a certain result.”) (quoting defense attorney).

<sup>142</sup> See, e.g., Catherine M. Goodwin, *The Independent Role of the Probation Officer at Sentencing and in Applying Koon v. United States*, FED. PROBATION, Sept. 1996, at 71.

<sup>143</sup> See, e.g., Flaherty & Biskupic, *Prosecutors Can Stack the Deck*, *supra* note 141; Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Hath Wrought*, 10 BNA CRIMINAL PRACTICE MANUAL 405 (1996); Eugene D. Natali, *The Probation Officer, Bean Counting and Truth in Sentencing*, 4 FED. SENT’G REP. 103 (1991). In a 1996 survey, less than one-fifth of probation officers reported that Guidelines calculations were factually accurate in most of the cases they had seen, while two-fifths of the respondents reported that calculations were more likely than not to be incorrect. *Probation Officers Advisory Group Survey*, 8 FED. SENT’G REP. 303 (1996) (surveying of probation officers regarding fact bargaining); see also Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); 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 (1997) (analyzing circumvention of Guidelines).

<sup>144</sup> Flaherty & Biskupic, *Prosecutors Can Stack the Deck*, *supra* note 141 (“That’s what makes it a sham.”) (quoting defense attorney); see also *infra* notes 422-24 and accompanying text (mentioning consequences of systematic deception).

<sup>145</sup> See, e.g., Weinstein, *supra* note 77, at 365 (“The Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result. All under the banner of ‘truth in sentencing!’” (quoting anonymous federal judge)).

In practice, the relevant conduct provisions only amplified the already awe-inspiring prosecutorial power and helped transform U.S. Attorneys into the real sentencers in the federal system.<sup>146</sup> As just mentioned, relevant conduct was evaluated by a preponderance standard and was freed of some evidentiary rules, providing a powerful inducement for prosecutors to hold back allegations and evidence for sentencing.<sup>147</sup> Defendants thus could be punished for offenses that were never charged and even crimes for which they were acquitted,<sup>148</sup> suggesting to some that verdicts were now irrelevant in the federal system.<sup>149</sup> But such was the tortured logic of Gridland, with much of the circular class simply denying that the rules of their two-

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<sup>146</sup> The Guidelines have also enhanced the authority of probation officers. *See, e.g.,* United States v. O'Meara, 895 F.2d 1216, 1222-23 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part) ("[U]nder the Guidelines . . . many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers . . ."); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1256-63 (1997) (discussing increased power of probation officers). *See generally* Leslie A. Cory, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379 (2002) (discussing how individual probation officers influence sentencing in federal courts).

<sup>147</sup> *See, e.g.,* STITH & CABRANES, *supra* note 78, at 140 (discussing robbery prosecution that culminated in a prosecutorial sentencing allegation of murder); *see* United States v. Fulton, 173 F.3d 847 (2d Cir. 1999) (upholding upward departure based on proof of murder); United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992) (case involving prosecutorial dismissal of weapons charge at trial that was reintroduced at sentencing phase to increase punishment). In particular, relevant conduct was a nearly foolproof government weapon against drug offenders, with prosecutors offering post-conviction evidence increasing the amount of drugs attributable to the defendant, thus manufacturing a sentence far greater than possible under the indictment. *See, e.g.,* United States v. Ebbole, 917 F.2d 1495, 1495-96 (7th Cir. 1990) (increase from one gram to 1.7 kilograms of cocaine).

<sup>148</sup> *See, e.g.,* United States v. Watts, 519 U.S. 148 (1997). In this case, police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts's house. A jury convicted Watts of possessing cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1), but acquitted him of using a firearm in relation to a drug offense in violation of 18 U.S.C. § 924(c). Despite the acquittal on the firearms count, the district court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. *See Watts*, 519 U.S. at 149-50. Although "[t]he notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to . . . longstanding procedural requirements enshrined in our constitutional jurisprudence," *id.* at 169-70 (Stevens, J., dissenting), the Supreme Court held that a defendant could serve additional imprisonment for acquitted conduct. *But see* note 216 and accompanying text (noting that *Watts* was undermined by *Booker*).

<sup>149</sup> *See, e.g.,* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993); *see also* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993); David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

dimensional world were anything but hard, fast, and utterly perfect, despite appearances to the contrary.

Ironically, in the same year as A. Square's contact with a higher dimension—the year 2000—Gridland received the first hint that concerns from another world could openly challenge the Guidelines' strictures. This higher dimension was the federal Constitution, inhabited by the oracles of its interpretation, the Justices of the U.S. Supreme Court. In *Apprendi v. New Jersey*,<sup>150</sup> the Court invalidated an enhanced sentence for a defendant who had pled guilty to unlawful possession of a firearm. The underlying offense carried a state prison term of five to ten years, but the prosecutor argued at sentencing that a "hate crime" had been committed under New Jersey law calling for increased punishment—and pursuant to a preponderance standard, the trial judge agreed, doling out a twelve-year sentence. In striking down the enhanced punishment as violating the Sixth Amendment, the Supreme Court concluded: "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>151</sup> Among other things, the *Apprendi* majority rejected any notion that the hate crime provision was just an enhancement rather than a separate offense, arguing that "[m]erely using the label 'sentence enhancement' . . . does not provide a principled basis for treating them differently."<sup>152</sup> Panicked by this holding, however, the dissenting Justices saw the case as directly affecting the world of Gridland and foreboding disaster for the Guidelines, possibly invalidating those provisions that would allow increased punishment in the absence of jury determinations beyond a reasonable doubt.<sup>153</sup> But the majority opinion calmly closed with something akin to the police mantra, *move-along-there's-nothing-to-see-here*: "The Guidelines are, of course, not before the Court. We therefore express no view on the subject . . ."<sup>154</sup>

Two years later in *Ring v. Arizona*,<sup>155</sup> the Supreme Court extended *Apprendi* to the penalty phase of capital cases, holding that the Sixth Amendment precludes "a sentencing judge, sitting without a jury, to find an

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<sup>150</sup> 530 U.S. 466 (2000).

<sup>151</sup> *Id.* at 490.

<sup>152</sup> *Id.* at 476.

<sup>153</sup> See, e.g., *id.* at 549 (O'Connor, J., dissenting); see also *id.* at 523 n.11 (Scalia, J., concurring) (suggesting consequences for the Guidelines although ultimately refusing to address the issue).

<sup>154</sup> *Id.* at 497 n.21 (opinion of the Court).

<sup>155</sup> 536 U.S. 584 (2002).

aggravating circumstance necessary for imposition of the death penalty.”<sup>156</sup> Dissenting as she had in *Apprendi*, Justice O’Connor rehashed her prediction that these rulings “would ‘unleash a flood’” upon the courts, arguing that countless cases were being thrown into doubt and an enormous burden placed on the judiciary<sup>157</sup>—although the *Ring* decision itself seemed to have no additional consequences for the two-dimensional realm of the grid, which did not list the death penalty among its potential punishments.<sup>158</sup>

In 2004, however, the otherworldly reverberations for Gridland could no longer be ignored. In *Blakely v. Washington*,<sup>159</sup> the Court struck a blow to a state sentencing scheme that appeared virtually indistinguishable from the federal Guidelines. The defendant had pled guilty to kidnapping, a crime subject to a sentence of forty-nine to fifty-three months—but as required by law, the trial judge found additional facts meriting an enhancement of “deliberate cruelty” and thus a total prison term of ninety months. The Supreme Court reversed this sentence, concluding that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment,”<sup>160</sup> meaning that the most punishment he could receive is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”<sup>161</sup> As before, the *Blakely* majority maintained that “[t]he Federal Guidelines are not before us, and we express no opinion on them,”<sup>162</sup> although this time most folks saw the writing on the wall, err, grid. Yet again, Justice O’Connor fretted that “the practical consequences of today’s decision may be disastrous,”<sup>163</sup> assailing the Court for ignoring “the havoc it is about to wreak on trial courts across the nation”<sup>164</sup>—including the federal courts, as she saw no grounds for distinction.<sup>165</sup>

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<sup>156</sup> *Id.* at 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Of course, a defendant can waive his Sixth Amendment rights, including jury determinations in capital cases.

<sup>157</sup> *Id.* at 619-20 (O’Connor, J., dissenting).

<sup>158</sup> This does not mean that capital punishment is unavailable to U.S. Attorneys but instead that “the federal death penalty exists wholly outside the Sentencing Guidelines.” *United States v. Pava-Buelba*, No. 98-1389, 1999 WL 1338357, at \*3 n.5 (1st Cir. July 22, 1999).

<sup>159</sup> 542 U.S. 296 (2004).

<sup>160</sup> *Id.* at 313.

<sup>161</sup> *Id.* at 303 (emphasis omitted).

<sup>162</sup> *Id.* at 305 n.9.

<sup>163</sup> *Id.* at 314 (O’Connor, J., dissenting).

<sup>164</sup> *Id.* at 324.

<sup>165</sup> *Id.* at 324-25.

In a subsequent speech, Justice O'Connor characterized the decision as "a No. 10 earthquake" and said she was "disgusted with how we dealt with it."<sup>166</sup> In turn, congressmen and commentators alike described the state of federal sentencing in apocalyptic terms—"chaos," "crisis," "siege," and so on.<sup>167</sup> Listening to these lamentations, one might assume that the collapse of western civilization was at hand, although I had a slightly different take: Like the refrain from a 1980s rock song, it's the end of the sentencing world as we know it, and I feel fine.<sup>168</sup> Punishment in U.S. courts had been ruled by the formulas of the oxymoronic mandatory Guidelines, and if the Supreme Court's ruling provided the impetus to overthrow this regime, who was I to complain? *¡Viva la revolución!* The Court appeared to be on the verge of a sphere-like revelation in Gridland, indirectly challenging the mechanistic approach to punishment and possibly releasing the federal criminal justice system from the two-dimensional world of the grid.

On January 12, 2005, the Court visited Gridland and, for the first time, found the Guidelines to be unconstitutional, at least in part—indeed, a very major part.<sup>169</sup> The work product was an oddly splintered decision, involving two separate cases collectively styled as *United States v. Booker*,<sup>170</sup> producing two separate majority opinions written by two separate Justices, each of whom dissented from the opinion of the other. In the lead case, Freddie Booker was charged with distributing at least 50 grams of crack cocaine and convicted by a jury that received evidence that he had possessed 92.5 grams, which, given the offense level and Booker's criminal history score, produced a Guidelines range of 210-262 months in prison. At sentencing, however, the judge concluded by a preponderance of the evidence that the defendant had both obstructed justice and possessed an additional 566 grams of crack, calling for a sentence of 360 months-to-life. The judge then sentenced Booker to the minimum—thirty years imprisonment—an eight-year increase over what could have been imposed based solely on the facts proved to the jury beyond a reasonable doubt.<sup>171</sup>

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<sup>166</sup> See, e.g., David Kravets, *O'Connor Likens Federal Sentencing Case to 'No. 10 Earthquake'*, ASSOCIATED PRESS, July 22, 2004.

<sup>167</sup> See, e.g., Ellis Cose, *Reading Between the Sentences*, NEWSWEEK, July 26, 2004, at 35; Lyle Denniston, *Justice Department Seeks Decision on Sentencing*, N.Y. TIMES, July 20, 2004, at A14.

<sup>168</sup> Erik Luna, *Reprieve on Sentencing Guidelines?*, WASH. TIMES, Aug. 8, 2004 (quoting R.E.M., *It's the End of the World as We Know It (and I Feel Fine)*, on DOCUMENT (IRS 1987)).

<sup>169</sup> See *infra* note 179 (discussing "as-applied" versus "facial" challenge).

<sup>170</sup> 125 S. Ct. 738 (2005).

<sup>171</sup> *Id.* at 746. The second case involved Ducan Fanfan, who was convicted by a jury that found he possessed at least 500 grams of cocaine, a verdict that permitted a maximum

In the first opinion, Justice Stevens (joined by Justices Ginsburg, Scalia, Souter, and Thomas) offered a review of the Court's recent Sixth Amendment jurisprudence, concluding that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines" and the state punishment scheme at issue in *Blakely*, as both regimes' "sentencing rules are mandatory and impose binding requirements on all sentencing judges."<sup>172</sup> The opinion then proceeded to reject a series of claims intended to maintain the status quo of *Gridland*, the first being that trial judges are permitted to depart from a prescribed range if they find some circumstance "not adequately taken into consideration by the Sentencing Commission."<sup>173</sup> But as the majority opinion noted,

[D]epartures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.<sup>174</sup>

Justice Stevens likewise rejected the government's assertions regarding the source of the Guidelines, the force of *stare decisis*, and the separation of powers doctrine.<sup>175</sup> The fact that the rules of *Gridland* came from the Commission rather than Congress was irrelevant to the jury trial right, while no prior case seemingly at odds with the Court's Sixth Amendment jurisprudence had ever raised the issue of trial by jury.<sup>176</sup> The final contention boiled down to the idea that if sentencing factors must now be proven to a jury beyond a reasonable doubt, the Commission has been accorded the power to define elements of a crime in violation of the separation of powers doctrine. But Stevens denied that the label of "element" versus "factor" matters one whit, and, more importantly, the Court had "always recognized" that the Commission was vested with policymaking authority and that this delegation by Congress was entirely constitutional.<sup>177</sup> With all contrary arguments duly dismissed, the *Apprendi* line of cases applied with full force to the Guidelines: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury

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sentence of seventy-eight months. Although the trial judge found that Fanfan was actually culpable for 2.5 kilograms of powder cocaine and 261.6 grams of crack, as well as being a criminal "organizer, leader, manager, or supervisor," he refused to impose an enhanced sentence based on the Supreme Court's decision in *Blakely*. *Id.* at 747.

<sup>172</sup> *Id.* at 749-50.

<sup>173</sup> 18 U.S.C. § 3553(b)(1) (2000).

<sup>174</sup> *Booker*, 125 S. Ct. at 750; *see supra* note 121.

<sup>175</sup> 125 S. Ct. at 752.

<sup>176</sup> *Id.* at 752-54.

<sup>177</sup> *Id.* at 754-55.



verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>178</sup>

It was the second *Booker* opinion, however, that provided the underpinnings for a potential coup d'état in Gridland and the overthrow of two-dimensional sentencing. Justice Breyer (writing on behalf of Chief Justice Rehnquist and Justices Ginsburg, Kennedy, and O'Connor) was faced with a complex question that nevertheless can be summed up in two words: *Now what?* The Court had to craft a suitable remedy given its conclusion that the Guidelines real offense scheme violated the Sixth Amendment—and with some exceptionally fancy judicial footwork, the majority “severed and excised” two provisions of the Sentencing Reform Act, one that made the Guidelines mandatory in federal court and the other establishing the standard of appellate review.<sup>179</sup>

Breyer argued that this solution was most consistent with Congress's intent, given that lawmakers would have preferred a total invalidation of the Act to engrafting a jury trial requirement at sentencing, but they also would have favored the deletion of some provisions to striking down the Act in its entirety.<sup>180</sup> As for the former, the Court's remedial majority contended that: (1) Congress wanted judges, not juries, to be making sentencing decisions; (2) such decisions must be based on real conduct in order to prevent unjust disparities in punishment, which demands a variety of information (e.g., a probation officer's presentencing report) that would not be available until *after* the trial was ended and the jury dismissed; and (3) a requirement of jury factfinding would not only make sentencing excessively complex but would also (4) inject improper factors (e.g., an attorney's talents) into the decisionmaking process as well as (5) make upward sentencing adjustments

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<sup>178</sup> *Id.* at 756.

<sup>179</sup> *Id.* at 756-57 (excising 18 U.S.C. §§ 3553(b)(1), 3742(e) (2000 & Supp. 2005)). Among the objections raised by the dissenters was the remedial majority's treatment of the Sixth Amendment issue as though it were a “facial” rather than “as-applied” challenge to the Guidelines. *See id.* at 771-82 (Stevens, J., dissenting in part); *id.* at 795-99 (Thomas, J., dissenting in part).

[I]t is indisputable that the vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court's extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional.

*Id.* at 776 (Stevens, J., dissenting in part). “Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in *Booker's* case, but not in *Fanfan's*,” Justice Thomas opined. “Thus *Booker's* sentence is unconstitutional, but *Fanfan's* is not.” *Id.* at 795 (Thomas, J., dissenting in part).

<sup>180</sup> *Id.* at 758-69 (majority opinion).

more difficult than downward departures, none of which Congress could have intended.<sup>181</sup>

Having rebuffed the alternative of jury sentencing, Justice Breyer turned to the issue of partial excision versus total invalidation. “Most of the statute is perfectly valid,” Breyer contended, “[a]nd we must ‘refrain from invalidating more of the statute than is necessary.’”<sup>182</sup> By ditching the language that makes the Guidelines obligatory on trial courts and the section that calls for de novo appellate review of departures from the requisite sentencing ranges, “[t]he remainder of the Act ‘function[s] independently.’”<sup>183</sup>

Without the “mandatory” provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals . . . . [It] requires judges to consider the Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And the Act . . . requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.<sup>184</sup>

All that was left for the Court to do was offer a new standard of appellate review and reconsideration. For this, the opinion implied a test of *reasonableness*—“whether a sentence is unreasonable”—for future appeals and cases currently on direct review,<sup>185</sup> but then suggested that traditional prudential doctrines, such as waiver, “plain error,” and “harmless error,” should limit the number of cases that will require resentencing.<sup>186</sup>

As might be expected from a deeply fractured decision, the dissents in *Booker* covered more pages than the majority opinions combined. Justice Breyer, joined by Chief Justice Rehnquist and Justices Kennedy and O’Connor, dissented from the majority opinion applying *Apprendi* and *Blakely* to the Guidelines, arguing that the Sixth Amendment does not preclude a judge from considering “the *manner* or *way* in which the offender carried out the crime of which he was convicted.”<sup>187</sup> In turn, Justices Scalia, Stevens, and Thomas each issued dissents from the remedial majority, with, among other things, Stevens contending that “the Court’s

<sup>181</sup> *Id.* at 759-64.

<sup>182</sup> *Id.* at 764 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

<sup>183</sup> *Id.* (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

<sup>184</sup> *Id.* at 764-65 (internal citations omitted).

<sup>185</sup> *Id.* at 765-67.

<sup>186</sup> *Id.* at 769.

<sup>187</sup> *Id.* at 802 (Breyer, J., dissenting in part).

creative remedy is an exercise of legislative, rather than judicial power,”<sup>188</sup> and Scalia describing the implied standard of appellate review as conceivable “[o]nly in Wonderland.”<sup>189</sup> But in passing, the always sharp-tongued Justice Scalia noted that “cookie-cutter standards of the mandatory Guidelines” would now give way to individualized sentences and review<sup>190</sup>—in other words, punishment beyond the confines of Gridland.

The question remained, however, as to how the lower courts would interpret *Booker* and thus whether two-dimensional sentencing would actually come to an end. A small cadre of federal trial judges took the lead on this matter, beginning with Judge Paul Cassell of the District of Utah. Literally a day after *Booker* was handed down, Judge Cassell wrote in *United States v. Wilson* that he “will give heavy weight to the Guidelines in determining an appropriate sentence” and “will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons.”<sup>191</sup> He reached this conclusion based not only on a reading of the Supreme Court’s decision, but also on an independent evaluation of the Guidelines regime. After listing the purposes of punishment set forth in the Sentencing Reform Act, Judge Cassell argued that the Guidelines generally fulfill these goals.

Congress’ creation of the Commission and subsequent approval of the Commission’s Guidelines provide strong reason for believing that Guidelines sentences satisfy the congressionally-mandated purposes of punishment. It would be startling to discover that while Congress had created an expert agency, approved the agency’s members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the underlying congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes.<sup>192</sup>

Judge Cassell then mustered a series of arguments in support of this conclusion, beginning with a detailed review of a study finding considerable agreement between sentences under the Guidelines and those deemed appropriate by the public.<sup>193</sup> “This general convergence between public opinion and Guidelines sentences creates a strong reason for generally following Guidelines,” Cassell opined, given that “criminal sentencing is the way in which society expresses its views on the

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<sup>188</sup> *Id.* at 772 (Stevens, J., dissenting in part).

<sup>189</sup> *Id.* at 793 (Scalia, J., dissenting in part).

<sup>190</sup> *Id.* at 794.

<sup>191</sup> *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005).

<sup>192</sup> *Id.* at 915.

<sup>193</sup> *Id.* at 916-18 (discussing PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)).

seriousness of criminal conduct.”<sup>194</sup> He also suggested that the Guidelines serve utilitarian objectives, finding support in a number of empirical studies on crime rates while reiterating that Congress and the Commission are best suited to make policy decisions regarding deterrence, for instance.<sup>195</sup> In turn, Judge Cassell rejected the idea that either rehabilitation or the Guidelines’ so-called “parsimony provision”—which states that punishment should not be “greater than necessary”<sup>196</sup>—could play anything more than a secondary role in sentencing decisions.<sup>197</sup> Finally, he argued that placing heavy reliance on the existing regime was the sole way to prevent needless sentencing disparities, given “that the Guidelines are the *only* standard available to all judges around the country today.”<sup>198</sup> Judge Cassell then described the sentencing procedures he would follow—more or less, the pre-*Booker* process and outcomes absent “unusual” circumstances.<sup>199</sup>

Judge Cassell’s opinion was the first but certainly not the last interpretation of *Booker* by the lower federal judiciary. Less than a week later, Judge Lynn Adelman of the Eastern District of Wisconsin explicitly rejected Cassell’s reasoning: “The approach espoused in *Wilson* is inconsistent with the holdings of the merits majority in *Booker*, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in *Booker*, directing courts to consider all of the [Sentencing Reform Act] factors, many of which the guidelines either reject or ignore.”<sup>200</sup> In this case, *United States v. Ranum*, Judge Adelman noted that the Guidelines disallowed a variety of relevant aspects concerning the offense and offender, such as a defendant’s age and employment record—a prohibition that seemed to contradict the Act’s requirement that a sentencing judge evaluate the “history and characteristics of the defendant.”<sup>201</sup> Likewise, the Guidelines may conflict with the statutory goals of providing for the defendant’s education, training, or treatment and affording restitution for the victim, all the while ensuring that the sentence is “not greater than necessary to comply with the purposes” of punishment.<sup>202</sup>

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<sup>194</sup> *Id.* at 918.

<sup>195</sup> *Id.* at 918-21.

<sup>196</sup> 18 U.S.C. § 3553(a) (2000 & Supp. 2005).

<sup>197</sup> *Wilson*, 350 F. Supp. 2d at 922-24.

<sup>198</sup> *Id.* at 924-25.

<sup>199</sup> *Id.* at 925-26.

<sup>200</sup> *United States v. Ranum*, 353 F. Supp. 2d 984, 985-86 (E.D. Wis. 2005).

<sup>201</sup> *Id.* at 986 (quoting 18 U.S.C. § 3553(a)(1)).

<sup>202</sup> *Id.* (quoting 18 U.S.C. §§ 3553(a), (a)(1), (a)(2)(D), (a)(7)).

Although Adelman agreed that the Guidelines must still be considered and that sentences outside of the prescribed ranges need explanation,<sup>203</sup>

courts should not follow the old “departure” methodology. The guidelines are not binding, and courts . . . are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonable and carefully supported . . . . Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual.<sup>204</sup>

As such, “*Booker* is not as an invitation to do business as usual,” Judge Adelman emphasized. In this and subsequent cases, he would evaluate the factors laid out in the Sentencing Reform Act by grouping them into three categories: “the nature of the offense, the history and character of the defendant, and the needs of the public and the victims of the offense.”<sup>205</sup> After this analysis, giving “serious consideration to the advisory guidelines,”<sup>206</sup> Adelman would then “determine whether to impose a guideline or non-guideline sentence.”<sup>207</sup>

### III. *BOOKER*’S LIMITS

It would be quite easy to nitpick the opinions of Judges Adelman and Cassell, as well as any other lower court decision interpreting *Booker* and attempting to apply its precepts to the new system of advisory Guidelines.<sup>208</sup> Judge Cassell’s methodology does seem awfully similar to

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<sup>203</sup> *Id.* at 986-87.

<sup>204</sup> *Id.* at 987.

<sup>205</sup> *Id.* at 989; *see also* United States v. Smith, 359 F. Supp. 2d 771, 776 (E.D. Wis. 2005); United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 960 (E.D. Wis. 2005).

<sup>206</sup> *Galvez-Barrios*, 355 F. Supp. 2d at 961.

<sup>207</sup> *Smith*, 359 F. Supp. 2d at 776. Judge Cassell responded to Judge Adelman’s *Ranum* opinion in a rehearing of *Wilson*. *See* United States v. Wilson, 355 F. Supp. 2d 1269, 1271-72, 1275-88 (D. Utah 2005).

<sup>208</sup> *See, e.g.*, United States v. Pacheco-Soto, 386 F. Supp. 2d 1198, 1203 (D.N.M. 2005) (adopting *Ranum* approach); United States v. West, 383 F. Supp. 2d 517, 520 (S.D.N.Y. 2005) (adopting *Ranum* approach); United States v. Peach, 356 F. Supp. 2d 1018, 1021-22 (D.N.D. 2005) (adopting *Wilson* approach); United States v. Wanning, 354 F. Supp. 2d 1056, 1058 (D. Neb. 2005) (adopting *Wilson* approach); United States v. Myers, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005) (adopting *Ranum* approach). Moreover, the lower federal courts have had to respond to an abundance of post-*Booker* questions, such as the standards of proof and review, the meaning of “reasonableness,” the issue of waiver, and the status of relevant conduct. Although many of these concerns are critical, I will leave the analysis to others and instead focus on the methodology used by a sentencing judge in determining punishment. For exceptionally helpful and timely discussion of most (if not all)

the pre-*Booker* procedures, close enough to wonder whether anything has changed.<sup>209</sup> Conversely, it can be argued that Judge Adelman may have paid insufficient heed to the consequences of adopting approaches that Congress might (incorrectly) perceive as *ad hoc* or spiteful of its legislation.<sup>210</sup> Moreover, both judicial approaches may prove inappropriate in the long run, Professor David Yellen notes, as the Guidelines are “neither as binding as Cassell suggests or as avoidable as Judge Adelman suggests.”<sup>211</sup>

But stepping back for a moment, it seems to me that Professor Douglas Berman may have had it just about right when comparing *Wilson* and *Ranum* in a posting on his “Sentencing Law and Policy” web log, the daily bible for anyone concerned about federal sentencing.<sup>212</sup>

After a careful read of Judge Adelman’s *Ranum* opinion, I am struck not only by how distinctly the opinion interprets and applies *Booker* as compared to Judge Cassell’s *Wilson* ruling, but also by how uniformly brilliant the analysis is in both opinions . . . . Congress should be very impressed and proud of the work being done by district courts in the wake of *Booker* and pleased with the first small bits of advisory guidelines [data]. Indeed, I hope Representative Tom Feeney and every other member of Congress will read both *Wilson* and *Ranum* carefully before making any broad statements about whether federal judges can be trusted to sentence wisely and in good faith in the post-*Booker* environment.<sup>213</sup>

Like Professor Berman, I find it hard to fault these jurists for their work product. One can debate whether the approach embraced in *Wilson* is superior to that of *Ranum*, or vice versa—whether it is preferable to hold fast to the Guidelines as a type of judicial anchor or instead to view them as a sentencing rudder that requires steering by the trial judge. Something might even be said for reasonable variations among methodologies and/or outcomes by *federalizing* federalism, viewing individual circuits and even districts as pseudo-states within the federal system. Given the alleged benefits of dividing power among local, state, and national governments—*creating laboratories of experimentation, letting a thousand flowers bloom, et cetera*—some intra-jurisdictional but constitutionally benign differences

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*Booker* issues, see Professor Berman’s web log, Sentencing Law and Policy, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy](http://sentencing.typepad.com/sentencing_law_and_policy) (last visited Nov. 28, 2005).

<sup>209</sup> See, e.g., *United States v. Jaber*, 362 F. Supp. 2d 365, 371 (D. Mass. 2005).

<sup>210</sup> See, e.g., *Wilson*, 355 F. Supp. 2d at 1287-88.

<sup>211</sup> Pamela A. MacLean, *Circuits Wrestle With Fallout from ‘Booker,’* NAT’L L.J., Feb. 14, 2005 at 22 (quoting Prof. Yellen).

<sup>212</sup> See, e.g., Laurie P. Cohen, *Law Professor’s Web Log is Jurists’ Must-Read*, WALL ST. J., July 19, 2004, at B1.

<sup>213</sup> Douglas A. Berman, *Distinct Views, But Uniform Brilliance (and Results?)*, SENT’G L. & POL’Y, Jan. 19, 2005, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/01/distinct\\_views\\_.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/distinct_views_.html).

of a given federal jurisdiction (district or circuit) might be deemed proper responses to cultural and political diversity across America. Moreover, it can be argued that too much attention has been paid to case disparity within the federal system but not enough to disproportional punishment between the federal and state systems. In general, any sentencing discrepancy among U.S. district courts will pale in comparison to the differential in punishment between federal and state cases.<sup>214</sup> As such, variances in federal sentencing may not only be one of the “happy incidents”<sup>215</sup> of federalism, but also a protection against prosecutorial forum shopping.

In addition, *Booker* could have some indirect yet very real significance for some of the most troubling sentencing practices under the Guidelines. “Relevant conduct” is now subject to advisory consideration rather than mandatory inclusion in punishment, empowering the trial judge to avoid appalling prison terms that stem from, *inter alia*, prosecutors piling on evidence at sentencing. “[B]oth by its logic and by its words,” *Booker* also “substantially undermines the continued vitality of *United States v. Watts*,”<sup>216</sup> the notorious 1997 ruling that allowed an increase in punishment based on acquitted conduct.<sup>217</sup> More generally, *Booker* could stir a revival of the American criminal jury—not just as a factfinder but also as a check on legislative and prosecutorial overreaching.<sup>218</sup> Nonetheless, injecting juries into the Guidelines is not a cure-all for the underlying dysfunction: the dehumanization of federal sentencing through a formulaic, sometimes incomprehensible process. Here are but two of my lingering concerns.

#### A. GRIDLAND-LITE

Whether adopting an approach consistent with *Ranum*, *Wilson*, or something in between, all district court judges in the post-*Booker* world

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<sup>214</sup> See, e.g., *United States v. Wilkerson*, 411 F.3d 1, 10 (1st Cir. 2005) (noting that the district court judge “repeatedly expressed his concern about disparate treatment between federal and state court sentences in similar cases, but stated that the Guidelines did not permit him to take that disparity into account”); see also *United States v. Angelos*, 345 F. Supp. 2d 1227, 1243, 1249 (D. Utah 2004) (discussing disparity between federal and state punishment).

<sup>215</sup> See, e.g., *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>216</sup> *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005). *But see* *United States v. Price*, 418 F.3d 771, 788 (7th Cir. 2005) (“We join all the other courts that have confronted the issue in holding that the Supreme Court’s holding in *Watts* remains the law after *Booker*.”).

<sup>217</sup> 519 U.S. 148 (1997); see also *supra* note 148 and accompanying text.

<sup>218</sup> See *infra* note 418 and accompanying text; see also Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003).

have continued to use the Guidelines' mechanical language and rules (with a few small changes),<sup>219</sup> based either on a belief in some underlying validity of the Commission's substantive conclusions or a recognition that the Guidelines remain the only game in town, so to speak. The result is something we might call "Gridland-lite"—less binding, tastes grid-like.

Consider, for instance, the thoughtful opinion in *United States v. Jaber* penned by Judge Nancy Gertner of the District of Massachusetts.<sup>220</sup> Similar to Judge Adelman, she also rejected the *Wilson* approach, although providing a more exhaustive critique of Judge Cassell's decision and a detailed exposition of her own sentencing process.<sup>221</sup> In *Jaber*, Judge Gertner noted that "the *Wilson* method comes perilously close to the mandatory regime found to be constitutionally infirm in *Booker*."<sup>222</sup> She then analyzed each of the legal underpinnings for *Wilson*, which "overstates the case for deference to the Commission, particularly in individual cases."<sup>223</sup>

Among other things, Judge Gertner maintained that: the Sentencing Commission "supplanted" rather than "supplemented" the justice of individualized punishment with pre-ordained consequences from afar,<sup>224</sup> "[t]he Guidelines were rules, even 'diktats,' mechanistically applied"; and this formulaic sentencing meant that "if the judge finds 'x' fact (quantity, the amount of the fraud, for example), 'y' sentence is essentially compelled."<sup>225</sup> These conclusions coincide with my own objections to the federal system's two-dimensional, mechanical approach to punishment. As for her post-*Booker* sentencing methodology, Gertner begins by identifying unacceptable approaches. At one extreme is the mandatory Guidelines system foreclosed by *Booker*; at the other extreme is what she calls the "free at last" approach, whereby judges sentence based on their own

<sup>219</sup> See, e.g., *United States v. Wilson*, 355 F. Supp. 2d 1269, 1272 (D. Utah 2005):

Terminology can get a bit tricky here; to avoid confusion, it seems best to use the term "departure" as reflecting its settled meaning of a difference from an otherwise-specified Guidelines sentence approved by the Guidelines themselves, and a new term—perhaps "variance"—as meaning a difference from the Guidelines system that is not called for by the Guidelines themselves. The Second Circuit has suggested the term "non-Guidelines sentence" might serve as the distinguishing term from "departure." However, that still leaves a void in that no verb is available to describe a court's action in such circumstances—"variance" has the advantage of including the verb form "vary."

<sup>220</sup> See, e.g., *United States v. Jaber*, 362 F. Supp. 2d 365, 371 (D. Mass. 2005).

<sup>221</sup> See *id.* at 370-76.

<sup>222</sup> *Id.* at 371.

<sup>223</sup> *Id.* at 372.

<sup>224</sup> *Id.* at 368 n.7.

<sup>225</sup> *Id.* at 368-69.



personal proclivities.<sup>226</sup> “Advisory guidelines should fall somewhere in-between these poles,”<sup>227</sup> Judge Gertner argued, although “[t]he devil . . . is in the details.”<sup>228</sup>

And therein lies the problem: As long as the details of a particular sentence will flow from the Guidelines—supplying the baselines and rules for sentencing pursuant to some level of judicial deference—the mechanical approach of Gridland will still infect federal punishment despite its many flaws, a point that Gertner readily admits:

[The Guidelines] have shaped the vocabulary we use to describe sentences, and the standards we use to evaluate and compare cases. Since there were no alternative rules prior to the Sentencing Guidelines—no empirical studies linking particular sentences to particular crime control objectives, no common law of sentencing—and there have been none since, the Guidelines will continue to have a critical impact.<sup>229</sup>

In other words, district court judges will continue to use game-like terms such as “points,” “levels,” “scores,” and so on, turning an individual defendant into a series of numbers to be charted on the two-dimensional world of the grid. Take, for instance, Judge Gertner’s sentencing calculations for the defendants in *Jaber*:

The government and the defendant agreed that a base offense level of 30 reflected the amount of pseudoephedrine in Jaber’s possession. In addition, the money laundering charge yielded a base offense level of 29. The parties also agreed that the defendant was entitled to a three-level adjustment for “acceptance of responsibility” under U.S.S.G. § 3E1.1(a) and (b). The parties differed on: a) whether the grouping provisions (which would reduce the sentence) of the Guidelines applied; b) the extent of the enhancement Jaber was subject to under U.S.S.G. § 3B1.1(c) for his “role in the offense”—two points, as the defendant suggested, or four points as the government urged; and, c) whether Jaber was subject to the two-point enhancement proposed by probation pursuant to U.S.S.G. § 3C1.1 (obstruction of justice) for concealing material evidence and lying to the DEA.<sup>230</sup>

[Momoh’s] base offense level was 30, minus two for his minor role, and minus three for acceptance of responsibility. Grouping the offenses as probation had done leads to 25 as the final offense level. His Guideline range is 57 to 71 months.<sup>231</sup>

*Huh?* This formulaic jargon remains as incomprehensible as ever for the affected parties, lacking any cognizable, explanatory value in terms of a

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<sup>226</sup> *Id.* at 370.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 376.

<sup>229</sup> *Id.* at 375-76.

<sup>230</sup> *Id.* at 378-79.

<sup>231</sup> *Id.* at 382; see also *United States v. Maali*, No. 6:02-CR-171ORL28KRS, 2005 WL 2204982, at \*2-3 (M.D. Fla. Sept. 8, 2005).

moral judgment of the crime and the criminal.<sup>232</sup> Even today, errors continue to be made in trying to administer the hypertechnical rules of federal punishment,<sup>233</sup> a reminder of the silliness intrinsic in the whole Guidelines process.<sup>234</sup> And given that the sentencing ranges persist without any underlying connection to valid theoretical or empirical arguments, the baseline provided by a Guidelines' punishment still lacks legitimacy beyond whatever institutional authority exists in the naked commands of the U.S. Sentencing Commission.

But as was true of the decisions by Judges Cassell and Adelman, it is impossible for me to fault Judge Gertner for her *Jaber* opinion. Until Congress readdresses federal sentencing, district court judges have no other option but to play the game of Gridland-lite: apply the Commission's formula, place the defendant on the grid, and then use your considered judgment to determine a just punishment. Certainly, conscientious judges will do their best in a post-*Booker* world to explain a sentence and its justification in terms that are comprehensible to the defendant, victims and other concerned parties, and the public<sup>235</sup>—but any success in this endeavor

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<sup>232</sup> To be fair, Judge Gertner's *Jaber* opinion provided a lucid, context-specific discussion of the reasons for imposing particular sentences. See *Jaber*, 362 F. Supp. 2d at 367-83.

<sup>233</sup> See *United States v. Cruzado-Laureano*, 404 F.3d 470, 488 (1st Cir. 2005) (reversing sentence because judge and pre-sentence report relied upon the wrong edition of the Guidelines); *United States v. Hazelwood*, 398 F.3d 792, 800 (6th Cir. 2005) (reversing sentence because judge miscalculated the Guidelines range); see also *United States v. Davila*, 418 F.3d 906, 909-10 (8th Cir. 2005) (reversing sentence for judge's failure to consult Guidelines).

<sup>234</sup> Judge José Cabranes aptly described the Guidelines as

a kind of Rube Goldberg-like system . . . in which no one who participates in it can reasonably know what is going on during a sentencing hearing—least of all a criminal defendant, who you would have imagined should come out of a sentencing hearing with a very clear idea of what has gone on.

*Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit and Criminal Procedure, and Rules Governing Section 2255*, 134 F.R.D. 321, 475 (1991) (comments of Judge Cabranes).

Nothing is more disconcerting to me as a District Judge than to watch a defendant and his family and others sitting in a courtroom, literally bewildered by 30 to 60 minutes of conversations about matrices, computations, adding, deducting, excluding, including, departing, not departing. This is not justice and the federal district judges in this country know that and no amount of pseudo-science, no amount of technology introduced into this process, is going to alter this fact.

*Id.*; see also STITH & CABRANES, *supra* note 78, at 84.

<sup>235</sup> See, e.g., *supra* note 232.

will be due to the acumen of the jurist, not the sensibility of the Guidelines.<sup>236</sup>

## B. MANDATORY MINIMUMS

Unfortunately, the incremental benefits of *Booker* will likely have no impact on the most oppressive dictates of Gridland: mandatory minimum sentencing laws.<sup>237</sup> These statutes demand a high baseline of punishment for those who commit certain offenses and were incorporated into the Guidelines by simply shifting up the relevant sentencing range to correspond with the obligatory punishment. Because mandatory minimums do not involve any post-conviction judicial factfinding, the Supreme Court's evolving Sixth Amendment jurisprudence would seem to pose no obstacle to the imposition of sometimes excessive punishment; so long as the jury found to be true the facts triggering a mandatory sentence, the defendant may find no relief under *Booker*, its antecedents, or its progeny.

Frequently wielded in drug- or gun-related crimes, mandatory minimums take the mechanical methodology of the Guidelines to an extreme form of syllogistic punishment. For instance, if one is found guilty of possessing more than five grams of crack cocaine, then he must be sentenced to at least five years imprisonment; Defendant X was found guilty of possessing more than five grams of crack cocaine; thus, Defendant

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<sup>236</sup> See, e.g., *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (“[T]he sentencing judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge’s reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant.”); *United States v. George*, 403 F.3d 470, 472-73 (7th Cir. 2005) (“Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.”).

<sup>237</sup> It should be noted that in one recent case Judge Adelman refused to impose an obligatory sentence on a crack cocaine offender, arguing that the 100:1 crack-powder ratio was unjustifiable and issuing a sentence pursuant to the federal system’s governing law (18 U.S.C. § 3553(a) (Supp. 2005)) rather than the mandatory minimum statute (21 U.S.C. § 841(b)(1)(A) (1999 & Supp. 2005)). See *United States v. Smith*, 359 F. Supp. 2d 771 (E.D. Wis. 2005); see also *Simon v. United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005); *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005). Unfortunately, this type of *Booker*-based sentence reduction below a statutory mandatory minimum term of incarceration seems unlikely to survive appeal. Cf. *United States v. Gibson*, No. 05-10251, 2005 WL 2249891, at \*2 (11th Cir. Sept. 16, 2005) (concluding that *Booker* “does not undermine the validity of minimum mandatory sentences, at least not where the enhanced minimum does not exceed the non-enhanced maximum”) (quoting *Spero v. United States*, 375 F.3d 1285, 1286 (11th Cir. 2004)).

X must be sentenced to at least five years imprisonment.<sup>238</sup> The offender's personal background, the facts of his case, and all other details become irrelevant under mandatory minimums. Indeed, much of the world created by these heavy-handed sentences is not composed of two dimensions but only one—the presence or absence of some fact—and thus resembles the linear realm of “Lineland” that appeared to A. Square in a dream.<sup>239</sup>

Admittedly, there is a certain pedigree to federal mandatory minimum sentences, having existed throughout the nation's history. Congress enacted the first batch of mandatory minimums in 1790, requiring life sentences for first-degree murder and piracy and ten years imprisonment for causing a ship to run aground by using a false light.<sup>240</sup> New obligatory punishments have been added over the ensuing two centuries, from a minimum one-month sentence for refusal to testify before Congress, to at least twenty years imprisonment for selling a child into sexual slavery.<sup>241</sup> According to a highly respected federal report issued in 1991,<sup>242</sup> there were approximately 100 mandatory minimum provisions spread throughout sixty statutes in the U.S. Code.<sup>243</sup> But the report was quick to note that both the sheer quantity and history of such statutes could be deceptive. Until the final few decades of the twentieth century, mandatory minimums were rarely enacted and only addressed discrete issues rather than entire classes of crime.<sup>244</sup>

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<sup>238</sup> 21 U.S.C. § 844 (2000); *see, e.g.*, Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37, 38 (1999).

<sup>239</sup> *See* ABBOTT, *supra* note 2, at 61-74. In his vision of Lineland, A. Square confronted a one-dimensional realm where “the small Lines were men and the Points women,” all of them “confined in motion and eye-sight to that single Straight Line, which was their World,” and “the whole of their horizon . . . limited to a Point.” *Id.* at 63. It should be noted, however, that some mandatory minimum sentences are triggered by the conjunction of current and prior convictions.

<sup>240</sup> *See* 18 U.S.C. § 1111 (2000) (first-degree murder); *id.* §§ 1651-53, 1655 (piracy); *id.* § 1658 (causing vessel to run aground by using false light); *see also* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM app. A (1991) [hereinafter SPECIAL REPORT] (listing statutory provision requiring mandatory minimum terms of imprisonment).

<sup>241</sup> 2 U.S.C. § 192 (2000) (refusal to testify before Congress); 18 U.S.C. § 2251A (knowingly selling or transferring custody of a minor for sexual exploitation). *See generally* SPECIAL REPORT, *supra* note 240, at app. A.

<sup>242</sup> *See, e.g.*, Miller, *supra* note 128, at 1265 (calling the report “superb”); Tonry, *Mandatory Minimum Penalties*, *supra* note 68, at 129 (lauding report). It should be noted, however, that the report made the “Freudian slip” of also referring to the Guidelines as “mandatory.” *See* SPECIAL REPORT, *supra* note 240, at ii.

<sup>243</sup> SPECIAL REPORT, *supra* note 240, at 11.

<sup>244</sup> *Id.* at 6.

Moreover, only a handful of such statutes have been used with any degree of frequency, with four laws accounting for ninety-four percent of all mandatory minimum cases—and as any federal practitioner or researcher would surely know, these regularly used mandatory minimums involve a pair of topics, drugs and guns.<sup>245</sup> To be clear, however, the seemingly limited scope of mandatory minimum statutes in no way reduces their influence on criminal justice. Drug crime dominates the federal docket, while nearly half of all federal offenses involve drugs, guns, or both.<sup>246</sup> Of the 26,023 drug offenders sentenced in 2003, sixty percent (15,504) received mandatory minimum terms of imprisonment.<sup>247</sup> Today, well more than fifty percent of the federal inmate population is incarcerated for drug crime—a statistic that has remained true for a decade and a half<sup>248</sup>—while both drug and firearms offenders serve an average prison sentence of about 6 ½ years.<sup>249</sup>

The advent of harsh punishment for drug and gun violations can be traced to a series of federal statutes that, with each new bill, increased the attached sentence and/or applicability of mandatory minimums. In 1986, for instance, Congress created a regime of mandatory minimum sentences of five or ten years imprisonment based on the type and amount of drug involved,<sup>250</sup> and two years later it expanded the framework by, *inter alia*, making inchoate drug crimes subject to mandatory minimums and adding a twenty-year sentence for drug-related “continuing criminal enterprises.”<sup>251</sup> The former legislation produced the previously mentioned 100:1 ratio of powder to crack cocaine penalties, with a defendant convicted of trafficking 500 grams of powder receiving the same punishment as someone sentenced for trafficking just five grams of crack, while the 1988 statute made simple possession of this small quantity of crack cocaine subject to a five-year mandatory sentence. Since then, Congress has passed other stiff penalties

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<sup>245</sup> *Id.* at 11. The four statutes were 18 U.S.C. § 924(c) (2000) (firearm possession during drug offense or crime of violence); 21 U.S.C. § 841 (2000) (manufacture and distribution of controlled substances); *id.* § 844 (possession of controlled substances); and *id.* § 960 (importation of controlled substances).

<sup>246</sup> See U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2005) [hereinafter FEDERAL SENTENCING STATISTICS]; U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: 2002 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2004) [hereinafter 2002 SOURCEBOOK]; see also SPECIAL REPORT, *supra* note 240, at 12 (noting that “nearly 60,000 cases have been sentenced under federal statutes with mandatory minimum provisions” between 1984 and 1991).

<sup>247</sup> FEDERAL SENTENCING STATISTICS, *supra* 246, at 88 tbl.43.

<sup>248</sup> 2002 SOURCEBOOK, *supra* 246, at 516 tbl.6.54.

<sup>249</sup> See FEDERAL SENTENCING STATISTICS, *supra* note 246, at 32 tbl.14, 34 fig.E.

<sup>250</sup> Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).

<sup>251</sup> Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988).

for drug crimes, such as mandatory minimums for trafficking in methamphetamine.<sup>252</sup> A similar ratcheting up of punishment can be seen in federal firearms offenses—in particular, the mandatory sentences required by 18 U.S.C. § 924(c), a commonly employed gun provision. The punishment for using a firearm during a drug offense or crime of violence has expanded from no mandatory sentence, to an obligatory one-year term of imprisonment, to a five-year mandatory minimum sentence.<sup>253</sup> Subsequent violations now result in twenty-five year sentences,<sup>254</sup> with each violation to be served consecutively, and legislation passed in 1998 amended the statute to require five years incarceration for possessing (as compared to “brandishing” or “discharging”) a firearm during a predicate offense.<sup>255</sup> Moreover, it appears that the congressional passion for mandatory minimums in this area has yet to wane, as a number of pending bills would further increase the reach and concomitant punishment for federal crime.<sup>256</sup>

Since their advent, mandatory minimums have been assailed by members of the judiciary as thoroughly unjust and unwise,<sup>257</sup> including Justices of the U.S. Supreme Court.<sup>258</sup> At various times in their careers, the

<sup>252</sup> See Methamphetamine Trafficking Enhancement Act of 1998, Pub. L. 105-277, 112 Stat. 2671 (1998).

<sup>253</sup> See SPECIAL REPORT, *supra* note 240, at 12. Higher mandatory minimums apply to more dangerous weapons, such as a thirty-year sentence for using or carrying a machinegun. 18 U.S.C. § 924(c)(1)(B)(ii) (2000).

<sup>254</sup> 18 U.S.C. § 924(c)(1)(C)(i).

<sup>255</sup> Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998). Brandishing a firearm during the predicate offense results in a seven-year mandatory prison term, while discharging the weapon produces a ten-year minimum sentence. 18 U.S.C. § 924(c)(1)(C)(ii),(iii).

<sup>256</sup> See, e.g., Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005); Gang Deterrence and Community Protection Act of 2005, H.R. 1279, 109th Cong. (2005); Gang Prevention and Effective Deterrence Act of 2005, S. 155, 109th Cong. (2005). For a critique of H.R. 1528, the so-called “Sensenbrenner Bill,” see Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 742-45 (2005) [hereinafter Luna, *Overcriminalization*]. For criticism of the so-called “Gangbuster Bills,” H.R. 1279 and S. 155, see Nat’l Ass’n of Criminal Defense Lawyers, Gangs, <http://www.nacdl.org/Gangs> (last visited Nov. 27, 2005).

<sup>257</sup> Cf. Erik Luna, *Drug Exceptionalism*, 47 VILLANOVA L. REV. 753, 799-802 nn.218-29 (2002) (providing citations to judicial criticisms of drug-related sentences); John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (op-ed by federal judge who resigned his position due to “the distress I feel at being part of a sentencing system that is unnecessarily cruel and rigid”).

<sup>258</sup> See David B. Kopel, *Prison Blues: How America’s Foolish Sentencing Policies Endanger Public Policy*, CATO POL’Y ANALYSIS, May 17, 1994, at 18 (quoting address by Chief Justice William H. Rehnquist), available at <https://www.cato.org/pubs/pas/pa-208.html>; Justice Stephen Breyer, Speech Before the University of Nebraska College of Law

past three U.S. Presidents have also doubted the wisdom of long mandatory sentences,<sup>259</sup> while prominent federal lawmakers and even a former U.S. Drug Czar and a former U.S. Attorney General have disputed the efficacy and justice of mandatory minimums.<sup>260</sup> Likewise, numerous organizations have expressed opposition to mandatory minimums, with, for instance, a 2004 American Bar Association report calling for the repeal of mandatory minimum sentencing laws.<sup>261</sup> Among other things, the critics have pointed out that the mechanical nature of mandatory minimums can produce “cliff” effects in punishment, whereby an individual who possesses 5.01 grams of crack cocaine must serve the five-year mandatory prison term, for instance, but someone who has, say, 4.99 grams of the same drug can be incarcerated for no more than one year.<sup>262</sup> In addition, mandatory minimums (sometimes coupled with liability expanding doctrines like attempt and conspiracy) permit low-level offenders to receive the same (or disturbingly similar) punishment as drug kingpins and violent criminals.<sup>263</sup> Worse yet, because the bit players in a criminal scheme may have no one to “rat out,” they may be subject to severe punishment while major operators avoid hard

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(Nov. 18, 1998), available at <http://www.ussguide.com/members/memos/Breyer.html>; Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html).

<sup>259</sup> See Frank Davies, *Drug Czar Vacancy Exposes Policy Divide in GOP*, MIAMI HERALD, Feb. 23, 2001, at A29 (quoting CNN interview of President-elect George W. Bush); Press Release, Clinton Foundation, Interview of the President by Rolling Stone Magazine (Dec. 7, 2000) (comments of President William J. Clinton), available at <http://www.clintonfoundation.org/legacy/120700-president-interviewed-by-rolling-stone-magazine-a.htm>; 116 CONG. REC. H33314 (1970), reprinted in 3 FED. SENT’G. REP. 108 (1990) (comments of then-Congressman George H.W. Bush).

<sup>260</sup> See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192-95 (1993); Timothy Egan, *The Nation: Hard Time; Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, § 4, at 16 (quoting former U.S. Attorney General Edwin Meese); Christopher S. Wren, *Public Lives: A Drug Warrior Who Would Rather Treat Than Fight*, N.Y. TIMES, Jan. 8, 2001, at A12 (quoting former U.S. Drug Czar Barry McCaffrey).

<sup>261</sup> See AM. BAR ASS’N JUSTICE KENNEDY COMM’N, REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 26 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

<sup>262</sup> See, e.g., SPECIAL REPORT, *supra* note 240, at 29-30; *Statement of Vice-Chair John R. Steer on Drug Sentencing Policy and Trends before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources*, 12 FED. SENT’G. REP. 347, 354 (2000).

<sup>263</sup> See, e.g., Mary Price, *Mandatory Minimums in the Federal System*, HUM. RTS., Winter 2004, at 8, 9 (discussing “tariff effect” of mandatory minimums); SPECIAL REPORT, *supra* note 240, at 26-29.

time by providing information to federal prosecutors.<sup>264</sup> Given these and other flaws, former U.S. District Court Judge John Martin offered this terse but accurate assessment of mandatory minimums: “They are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea.”<sup>265</sup>

Yet mandatory minimum sentences remain on the books, due in large part to the “pathological politics”<sup>266</sup> of federal sentencing law. Lawmakers in Congress have every motivation to support ruthless punishment in the form of new mandatory minimums, which have a “tough on crime,” bumper-sticker quality that makes them easy to understand by the voting public, thus providing terrific campaign material for the next election cycle.<sup>267</sup> Federal law enforcement also has every incentive to support draconian sentencing laws; by raising the potential punishment to astronomical levels, prosecutors are provided a sledgehammer that often leaves the accused little choice but to accept a plea bargain, thereby leading to more and easier convictions.<sup>268</sup> “This is the essential key to an understanding of federal sentencing policy today,” one district court opined with brilliant honesty,

the Department [of Justice] is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.<sup>269</sup>

When individuals demand their day in court or plea negotiations fail, “the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury.”<sup>270</sup> The end result can be the mechanical imposition of a long obligatory sentence on an individual whose crime and personal history call for more lenient treatment.

<sup>264</sup> See, e.g., Celesta A. Albonetti, *The Effects of the “Safety Valve” Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender’s Ethnicity*, 87 IOWA L. REV. 401, 408 (2002).

<sup>265</sup> John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311, 317 (2004).

<sup>266</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2002).

<sup>267</sup> See, e.g., Luna, *Overcriminalization*, *supra* note 256, at 719-20; Stuntz, *supra* note 266, at 530; see also Kopel, *supra* note 258 (quoting address by Chief Justice William H. Rehnquist).

<sup>268</sup> See, e.g., Luna, *Overcriminalization*, *supra* note 256, at 723-24; Stuntz, *supra* note 266, at 533-39.

<sup>269</sup> *United States v. Green*, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

<sup>270</sup> *Id.* at 264.



Some lawmakers have claimed that truly shocking sentences are the exception, with mandatory minimums producing only a few “horror stories.”<sup>271</sup> But those with real experience in federal courthouses know otherwise; in responding to such congressional pooh-poohs, Judge Vincent Broderick “respectfully submit[ted] that the mandatory minimum system in place is itself the ‘horror’ story . . . . [M]andatory minimums are the major obstacle to the development of a fair, rational, honest, and proportional federal criminal justice sentencing system.”<sup>272</sup> In fact, instances of excessive punishment via federal mandatory minimums abound, from low-level street dealers lacking information or more serious offenders to snitch on, to girlfriends tangentially involved in their significant others’ drug schemes, to defendants hammered with brutal sentence enhancements because they possessed a firearm somewhere in their home.<sup>273</sup> In the words of one U.S. Attorney, cooperating with law enforcement is “the only ticket to freedom”<sup>274</sup> in a mandatory minimum case. If a defendant refuses to play ball with prosecutors and asks for his day at trial, or if he simply has no information to provide federal agents, his fate is all but sealed by a predetermined statutory formula—a five-year, ten-year, or even longer term of imprisonment—irrespective of all else, including the best judgment of the sentencing court. So whatever the benefits of *Booker*, the very worst rules of Gridland remain in effect.

#### IV. MORAL JUDGMENT IN SENTENCING

With the foregoing in mind, I fully appreciate the concerns that animated Judge Cassell’s thoughtful decision in *Wilson*. “Should the courts fail to carry out congressional will, there should be little doubt what will follow,” Cassell wrote. “Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences.”<sup>275</sup> Such threats have already been leveled,<sup>276</sup> and in recent times judges who disputed the efficacy and

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<sup>271</sup> See, e.g., Kopel, *supra* note 258, at 22 (discussing opinions of then-Rep. Charles Schumer).

<sup>272</sup> See, e.g., *id.* (quoting Judge Broderick).

<sup>273</sup> See, e.g., Families Against Mandatory Minimums, Profiles of Injustice, [http://www.famm.org/si\\_poi\\_main.htm](http://www.famm.org/si_poi_main.htm) (providing case examples); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001) (district court judge discussing one case example and providing citations to others).

<sup>274</sup> Robert F. Howe, *Drug Sentencing Faulted; Benefits for Snitches Leave Some Out in Cold*, WASH. POST, Feb. 25, 1991, at D4.

<sup>275</sup> See, e.g., *United States v. Wilson*, 355 F. Supp. 2d 1269, 1287-88 (D. Utah 2005).

<sup>276</sup> See, e.g., *Hearing on Federal Sentencing Guidelines*, *supra* note 5, at 3 (comments of Sen. Hatch) (“[I]t is possible that some here in Congress may respond by creating new

justice of federal sentencing have been threatened with removal.<sup>277</sup> “The judges need to be intimidated,” Rep. Tom DeLay once said, “If they don’t behave, ‘we’re going to go after them in a big way.’”<sup>278</sup> A House taskforce was even set up to examine legal opinions for examples of “judicial abuse.” According to Rep. DeLay, Congress was “putting America’s judges on alert: We are watching you.”<sup>279</sup> With the likes of DeLay, Feeney, and others on the prowl, a broad swath of Congress stands ready to protect the American people from those sneaky judges. After all, what does the judiciary think it is—an *independent branch of government or something*? H.L. Mencken once quipped that the goal of the political class is “to keep the populace alarmed (and hence clamorous to be led to safety) by menacing it with an endless series of hobgoblins, all of them imaginary.”<sup>280</sup> Along these lines, we can rest assured that certain officials will never cower from an opportunity to score easy points against a group lacking access to the bully pulpit like the federal judiciary. Such diatribes only damage the reputation of the “least dangerous”<sup>281</sup> branch—least dangerous, that is, to the politician, whose harangue is unlikely to be countered by the typical media-reticent jurist.

Sadly, it appears that the persistent attacks on the judiciary have made an impression on the public. According to a recent A.B.A. survey, around half of the respondents agreed with comments by congressmen disparaging the courts.<sup>282</sup> But as a scholar without political pretensions or Article III

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mandatory minimum penalties to compensate for the unfettered discretion. The House already has legislation pending that would do exactly that.”)

<sup>277</sup> See, e.g., Marc O. DeGirolami, *Congressional Threats of Removal Against Federal Judges*, 10 TEX. J. C.L. & C.R. 111 (2005).

<sup>278</sup> Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1 (quoting Rep. DeLay); cf. Martha Neil, *Cases & Controversies: Some Decisions Are All the Rage—Literally*, A.B.A. J., Oct. 2005, at 38; *Judges in the Cultural Wars Crossfire*, supra note 130, at 48.

<sup>279</sup> Todd J. Gillman, *GOP Group Plans to Turn up Scrutiny on Federal Judges*, DALLAS MORNING NEWS, July 27, 2003, at 9A.

<sup>280</sup> See BARTLEBY.COM, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS (1989), available at <http://www.bartleby.com/73/1421.html>.

<sup>281</sup> See THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

<sup>282</sup> One representative claimed that judicial activism had “reached a crisis” where “[j]udges routinely overrule the will of the people, invent new rights and ignore traditional morality,” and the other lawmaker described judges as “arrogant, unaccountable, and out-of-control.” See Martha Neil, *Half of U.S. Sees ‘Judicial Activism Crisis’*, A.B.A. J., Sept. 30, 2005, available at <http://www.abanet.org/journal/redesign/s30survey.html>. It should be kept in mind, however, that the same week that the A.B.A. study was released, a poll found that only 40% of Americans approve of the performance by the President and a mere 32%

reservations, I can ignore the blather of demagogues and ethically challenged lawmakers<sup>283</sup> and utter what few federal judges would dare say: The Guidelines are at best nonsensical and at worst an affront to real justice (as compared to its formalistic counterfeit). The mechanical methodology anesthetizes the system, its participants, and even the public to the inherently moral judgment involved in punishing another human being with the imprimatur of the state.

To be sure, the notion and import of *moral judgment* is highly contested, implicating difficult questions of both substance and procedure, many of which have beleaguered history's great philosophers. For example, theories of distributive justice attempt to address the justification for imposing a criminal sanction in the first place, as well as the type and amount of punishment for various forms of harmful wrongdoing. In turn, procedural justice theories focus on the process by which a sentence is reached, incorporating concerns like notice, representation, opportunity to be heard, and so on. Other theories tackle specific issues and sometimes transcend the substance-procedure divide; restorative justice, for instance, contains distributive aspects regarding the substantive outcomes for particular participants (e.g., crime victims) and procedural elements relating to the means by which ultimate judgments are reached.<sup>284</sup> The potential conflicts among punishment theories are limited only by the imagination, while any agreement on the outcome of a specific case will still flow from very distinct premises. Over time, "much of the dispute over punishment has to do with what factors related to punishment theorists find to be important," Professor Herbert Morris suggested, "and with respect to importance there is no decision procedure that can, I believe, generally resolve the matter."<sup>285</sup> For Morris and others, it can be equally unsettling that "among individuals apprised of all the relevant facts, apparently intractable differences arise over what can and cannot serve as a justification."<sup>286</sup>

Given the long, intense debate over punishment philosophy, a broad consensus on any one theory proves unlikely.<sup>287</sup> Consider a just-deserts

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approve of Congress's performance. Marcus Mabry, *Finding His Floor*, NEWSWEEK ONLINE, Oct. 2, 2005, available at <http://www.msnbc.msn.com/id/9553533/site/newsweek/>.

<sup>283</sup> See, e.g., Philip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. TIMES, Sept. 29, 2005, at A1.

<sup>284</sup> See *infra* text accompanying note 419 (discussing restorative justice).

<sup>285</sup> Herbert Morris, *Concluding Remarks: The Future of Punishment*, 46 UCLA L. REV. 1927, 1930 (1999).

<sup>286</sup> *Id.*

<sup>287</sup> See, e.g., *id.* at 1931 ("Whatever the explanation for this familiar and unresolved dispute over punishment and its justification, it would be unduly optimistic to predict

retributivist who begins by listing behaviors and attached mental states that deserve punishment, ranking each ordinally, with, for example, homicide invariably deemed more serious than petty theft. He might then assign an absolute punishment for each crime—the cardinal desert—assisted by the ordinal ranking of offenses.<sup>288</sup> Easy enough, right? Professor David Dolinko offers a straightforward challenge to the very idea of ordinal desert: “Try, for instance, to rank the following crimes in order of their ‘seriousness’: attempted residential burglary, trading stock on inside information, negligent vehicular homicide, bribing a mine-safety inspector, possessing an ounce of cocaine, and burning a cross on the lawn of black newcomers to a previously all-white neighborhood.”<sup>289</sup> Any resulting list will suffer serious objections, and it may not be “a credible assumption”<sup>290</sup> that anyone could possibly construct a precise, universally accepted rank-ordering of crimes.

The problem of cardinal desert, the absolute punishment for a given crime, can be just as contentious and unrealistic as the notion of a relative ranking of crimes. Take, for instance, the crime of rape. Is five years a proper sentence? Fifteen years? Life imprisonment? Death?<sup>291</sup> What about the sentence for arson, bank robbery, kidnapping, or larceny? The questions presuppose the existence of a metaphysical conversion chart of crime to punishment—a device that does not exist and never will, given the incommensurability of the objects being compared as well as the subjectivity and fallibility of the system’s architects. Some variables in a crime-punishment “exchange rate” might be guesstimated; for example, a thief might be required (at a minimum) to disgorge the property or its

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anything like theoretical consensus.”). Of course, consensus may not be the point for philosophers.

<sup>288</sup> See, e.g., ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 38-46 (1985).

<sup>289</sup> David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1639 (1992).

<sup>290</sup> *Id.* at 1638; cf. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 151 (1982) (noting, for example, that “[s]ome rapes are less serious than some aggravated batteries which are not rapes”). *But see infra* Part V.C (sketching possible post-Guidelines methodology).

<sup>291</sup> In 1977, the U.S. Supreme Court held that capital punishment is unconstitutional for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584 (1977). In 1995, however, Louisiana made the crime of aggravated child rape punishable by death. LA. REV. STAT. ANN. 14:42(D)(2)(a) (2005), *upheld in State v. Wilson*, 685 So. 2d 1063 (La. 1996). The Supreme Court refused to intervene in the first instance, *Bethley v. Louisiana*, 520 U.S. 1259 (1997), so it remains to be seen whether the Justices would ever permit the death penalty for non-homicidal crimes.

equivalent value.<sup>292</sup> But any attempt to translate fear and emotional trauma, physical pain and debilitation, and similar considerations into a length of imprisonment will appear (or be) fanciful. I frankly don't know what rape deserves in terms of incarceration, but this issue and others like it seem irresolvable when considered in the abstract alone.

Similar criticisms have been leveled against all other punishment theories, including retribution's chief rival, utilitarianism. Whatever form it takes (e.g., "act" or "rule" utilitarianism), this consequentialist theory demands an assessment of all sorts of information, much of it difficult or impossible to accurately gather and analyze, with the ultimate goal of forecasting the future to maximize the good of society. Needless to say, this style of prediction can be extremely precarious,<sup>293</sup> requiring speculation on the punishment necessary to sufficiently deter, rehabilitate, and/or incapacitate an offender and thus protect others, all the while recognizing that incarceration involves large social costs in addition to a supreme deprivation of human liberty. The enterprise becomes even more complex if it includes the offender's past conduct and current condition—from criminal convictions and other prior bad acts, to pro-social activities and meritorious service, to employment history and familial obligations—all of which might be relevant to the individual's culpability, his chance for reform, and the effects of his punishment on others. The only reliable prediction is that the whole idea of a punishment calculus will strike many as preposterous.

As a matter of history and good sense, then, punishment has been viewed as an eclectic enterprise, where all suitable resources are brought to bear in court and diverse theories weigh on the legal mind. To morally judge a defendant requires an evaluation of the gravity of that person's crime, the costs and consequences of the offense, and the punishment required to vindicate victims' rights and interests, safeguard others from a similar fate, communicate social reprobation and the reasons for it—in a general, vernacular sense, the punishment necessary to set things right and protect society. Consistent with this understanding, the Supreme Court has opined that sentencing issues may draw upon more than "one penological theory,"<sup>294</sup> as well as recognizing the "judicial tradition for the sentencing

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<sup>292</sup> Perhaps the perceived fairness of exchanging one life for another helps explain the popular appeal of capital punishment (which is, of course, beyond the scope of this article).

<sup>293</sup> See, e.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

<sup>294</sup> *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.<sup>295</sup>

As such, moral judgment in the form of punishment may call upon a variety of considerations, and the ultimate decision should be individualized. One of the great legacies of the Enlightenment is the imperative that each person must be treated as an end in himself, addressed as a unique, rights-bearing entity and accorded the respect and dignity inherent in all human beings.<sup>296</sup> Even a convicted criminal must be dealt with as an individual, worthy of respect and the possessor of basic human dignity. The idea of individualized sentencing not only has deep philosophical roots, but for some it represents a right or interest within the meaning of liberty.<sup>297</sup> In a criminal justice system that takes seriously the values of moral philosophy and modern conceptions of liberty, the defendant is not an inanimate object, a widget on the conveyor belt of sentencing, but instead a unique individual who must be regarded as such. This point should not be confused with the claims of penal abolitionists, who decry incarceration no matter the offense. In most cases, convicted criminals warrant punishment, and the rapist, for instance, undoubtedly merits a harsh sentence. But a fitting punishment in a given case demands that the offender and his offense be judged individually, not formulaically.

Moral judgment necessarily implicates theoretical ideals of justice, such as the rights and duties of all members of a just society. But it also involves a context-sensitive evaluation of a real individual, his personal background and, most importantly, the specific conduct at issue as well as a true-life assessment of the larger community which has shaped the individual and, in turn, is concretely affected by his behavior. Although modern liberal philosophy stipulates that each individual is inherently unique, this theoretical imperative also corresponds with the material world, as two-dimensional space cannot capture the past, present, and future of an individual and the surrounding community. Punishment theory may frame or even guide a judge's exercise of moral judgment, but it cannot answer in advance the untold number and variety of questions that might be raised when considering the precise fate of a real human being.

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<sup>295</sup> *Koon v. United States*, 518 U.S. 81, 113 (1996).

<sup>296</sup> *See, e.g.*, IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 96 (H.J. Paton trans., 1964) (1797); *cf.* JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press of Harvard University Press 1971).

<sup>297</sup> *See, e.g.*, *United States v. Dyck*, 287 F. Supp. 2d 1016, 1021 (D.N.D. 2003) (arguing that the "concept of individualized sentencing is deeply rooted in our legal tradition and is a fundamental liberty interest").

This kind of inquiry requires, in the words of Judge Guido Calabresi, a “sense of balance which allows one to weigh what cannot be measured.”<sup>298</sup> The moral judgment of an individual, instigated by his participation in a particular event, involves an appreciation of the broader story of his life—the defendant’s upbringing, opportunities, and hardships; his personal characteristics, whether virtuous or villainous; the defendant’s past dealings with others, both positive and negative; his expressions of remorse, if any, and prospects for reform; and so on. The resulting image cannot be expressed on a flat grid, lacking as it does the capacity to accurately portray a person with the necessary depth and detail. There are no formulas that can convert the entirety of a person’s life into discrete variables for plugging and chugging in a grand sentencing equation; there are no objective scales that measure the character and capabilities of a defendant, his ability to behave with beneficence or malevolence, to feel empathy and regret, to take responsibility for his actions and make amends, and to contribute to the well-being of others and society at large.

Only a fellow human being can assess the myriad facts and factors involved in morally judging another human being; and only an adequately trained and duly experienced jurist, vested with legal independence and fact-finding abilities, can balance the totality of the circumstances and then impose a sentence that fits both the offense and the offender. As one district court maintained a few years ago: “The fair method of sentencing is for an impartial judge, who is fully cognizant of an individual defendant’s personal character, family responsibilities, medical and mental condition, criminal record, and the particular circumstances surrounding the crime, to impose sentence after deep reflection, informed by the judge’s experience in life and in the law.”<sup>299</sup> The formal and practical legal education of a trial judge, coupled with case-specific knowledge of a given individual, allows him to discern the similarities and differences among crimes and criminals. Just as importantly, the personal disposition of a defendant’s case—considerate of all relevant evidence and arguments, and delivered through a comprehensive and comprehensible statement of reasons—can legitimize punishment in the minds of the defendant, other affected parties, and the general public.

The Guidelines of Gridland make the task of morally judging an individual virtually impossible, however, a predicament made clear by Judge Gertner in her *Jaber* opinion. Although the U.S. Sentencing Commission admitted “the difficulty of foreseeing and capturing a single

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<sup>298</sup> Guido Calabresi, *What Makes A Judge Great: To A. Leon Higginbotham, Jr.*, 142 U. PA. L. REV. 513, 513 (1993).

<sup>299</sup> *United States v. Sidhom*, 144 F. Supp. 2d 41, 41-42 (D. Mass. 2001).

set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision,<sup>300</sup> it made no attempt to implement *any* purpose of punishment and failed to serve as an expert agency as envisioned by Congress.<sup>301</sup> Most notably, the Commission abandoned the idea of “field testing” the Guidelines or any other form of scientific study. Instead, it “simply took the average national sentences for a given offense, and then increased them, without explanation.”<sup>302</sup> Dubious empiricism thus combined with dictatorial rule-imposition, offering only formalistic rationales for deferring to the Commission.<sup>303</sup> The rules of the Guidelines exist as a matter of fiat alone, not due to their correlation with any valid conception of justice in sentencing. Worse yet, Judge Gertner notes, “the assumption that the Commission must have thought about purposes—when it did not—is responsible in part for the overly rigid enforcement of the Guidelines.”<sup>304</sup>

Nor does the federal regime *inadvertently* foster any of the theories of punishment just discussed and listed in the Guidelines’ enabling act.<sup>305</sup> Although the system might track to some degree the public’s opinion of proper punishment—one potential measure of “just deserts”—the Guidelines have only a modest correlation to the appropriate punishment in a specific case. In fact, it is not self-evident that the citizenry would approve “mechanistically-derived” sentences if it had the wealth of information available to the judge rather than “just sound bytes or incendiary headlines.”<sup>306</sup> Likewise, any suggestion that the federal regime has substantial utilitarian benefits would be highly debatable at best. Claims about Guidelines-based crime reduction tend to ignore the difficulties of statistical attribution, nationwide variances in sentencing policy, and the limited contribution, if any, of the federal system.<sup>307</sup> Most studies of crime-rate fluctuations ascribe little weight to the deterrent or incapacitative effect of incarceration, pointing instead to socio-economic factors, population changes, and other criteria bearing little relationship to imprisonment.<sup>308</sup> Moreover, it seems highly unlikely that national crime

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<sup>300</sup> *United States v. Jaber*, 362 F. Supp. 2d 365, 372 (D. Mass. 2005) (quoting U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, § 1A1.1, intro. cmt. 4(b)).

<sup>301</sup> *Id.* at 373-74.

<sup>302</sup> *Id.* at 374.

<sup>303</sup> *See id.*

<sup>304</sup> *Id.* at 374 n.18.

<sup>305</sup> *See* 18 U.S.C. § 3553(a)(2)(A-D) (2000).

<sup>306</sup> *Jaber*, 362 F. Supp. 2d at 374.

<sup>307</sup> *Id.* at 375-76.

<sup>308</sup> *See, e.g., id.* at 375 (citing HENRY S. RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 5, 15-18 (2003)); *see also* John J. Donohue III & Steven



rates have been impacted by the federal regime, dwarfed as it is by the state criminal justice systems. Equally far-fetched is the notion that the Guidelines have furthered the utilitarian goal of rehabilitation; to be blunt, I'm not sure anyone could plausibly argue that the Guidelines have provided defendants "with needed educational or vocational training, medical care, or other correctional treatment."<sup>309</sup>

But even if the Commission had attempted to address the standard objectives of punishment in a meaningful sense, the mechanical contraption it formulated could not be *perceived* as fulfilling any of these goals. As discussed earlier, the Guidelines are inscrutable, with judges and practitioners experiencing great difficulties with the federal system's unwieldy sentencing regime. It is safe to say that an average citizen walking into a Guidelines colloquy would have no clue as to the justifications for punishment in general or in the specific case at bar. In fact, one need only spend a brief period of time in U.S. district court to appreciate the surreal nature of the process and the intellectual disconnect between those most intimately affected by any punishment and the actual words of a sentencing hearing, demonstrated by the perplexed stare of the defendant and those in the gallery.

Despite Congress's intent to ensure "certain[ty] about the sentence and the reasons for it,"<sup>310</sup> the excessive complexity of the federal scheme virtually guarantees confusion among defendants, ordinary citizens, and even legal professionals. And although the Guidelines were supposed to encourage "respect for the law,"<sup>311</sup> it is almost laughable to argue that the tortuous dictates of Gridland inspire popular support for the criminal justice system and its actors or promote lawful behavior among the citizenry. Instead, after poring over "page after page of amendments, examples, and references to other sections" in the Guidelines, "one will be left with the distinct impression that confusions reign and further amendments are on the way."<sup>312</sup> Most importantly, the sentencing methodology was fatally flawed from the start, as human conduct cannot be reduced to a neat set of figures chartable on a master sentencing table.<sup>313</sup> "[T]he idea of restraining

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D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379 (2001) (empirical study suggesting that legalized abortion had a time-delayed effect on crime rates); Mark Sherman, *Crime Rate Remains at 2003 Level, Study Says*, WASH. POST, Sep. 26, 2005, at A2.

<sup>309</sup> 18 U.S.C. § 3553(a)(2)(D).

<sup>310</sup> S. Rep. No. 98-225, at 39 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3222.

<sup>311</sup> 18 U.S.C. § 3553(a)(2)(A).

<sup>312</sup> *United States v. Kuhl*, 816 F. Supp. 623, 627 n.4 (S.D. Cal. 1993).

<sup>313</sup> See, e.g., Biskupic & Flaherty, *Loss of Discretion*, supra note 17 (quoting Judge Judith Keep) ("Human conduct just doesn't fit into a grid . . .").

discretion through grids, columns, and various scores belittles the gravity of the social statement that attends the imposition of a criminal sentence," one district court argued. "The formulae and the grid distance the offender from the sentencer—and from the reasons for punishment—by lending the process a false aura of scientific certainty."<sup>314</sup>

The political branches' concern over sentencing disparities cannot be dismissed as frivolous, however. Even though the Guidelines may be nonsensical, at least the rules apply equally to every defendant and provide, if nothing else, "equal nonsense for all."<sup>315</sup> Over time, equality has become a fundamental command of liberal democracy, protected in the United States by the Fourteenth Amendment and the Supreme Court's constitutional jurisprudence. No considerate individual supports penalizing or forgiving an individual due to race, gender, creed, or national origin. But beyond eliminating distinctions based on unconstitutional classifications, the restrictions on a judge's sentencing discretion become highly questionable, premised as they are on a myth of identical defendants—people indistinguishable in all respects deemed relevant under the Guidelines. These defendants receive the same sentences for embezzling the same amount of money, for instance, or committing comparable assaults.<sup>316</sup>

If truly identical defendants did exist, of course, it would be fundamentally unjust to dole out disparate punishments between crimes and criminals that are impossible to tell apart. Along these lines, moral judgment necessarily incorporates the concept of *moral equality*, a constituent attribute of any legitimate theory of justice.<sup>317</sup> In its Aristotelian formulation, judges should treat like cases alike—and conversely, dissimilar cases should be treated differently.<sup>318</sup> A just sentencing system must thus distinguish between defendants who are not, in fact, similarly situated, ensuring that individuals who differ in relevant respects do not receive the same sentence. The real challenge is determining those factors that are morally relevant, including: the gravity of the crime in question; the defendant's history (whether filled with integrity or depravity); the impact of both the crime and the punishment on the victim, other interested parties,

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<sup>314</sup> *United States v. Reich*, 661 F. Supp. 371, 378 (S.D.N.Y. 1987).

<sup>315</sup> See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908 (1991).

<sup>316</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, §§ 2A2.2, 2B1.1.

<sup>317</sup> See, e.g., WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 5 (1990) (suggesting that moral equality establishes an "egalitarian plateau" for all modern political theories).

<sup>318</sup> Cf. ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., Oxford University Press 1998) (1925).

and the community; the defendant's potential for reform or recidivism; and so on. At the outset, people will differ on exactly how each factor should be analyzed and weighed in a sentencing decision.<sup>319</sup> But the incommensurability of facts and values coupled with the uniqueness of each case counsels against the institution of rigid formulas and the mandatory inclusion or exclusion of information about the crime and the criminal (other than constitutionally banned factors like race). The historical solution, as just discussed, was to permit a trial judge to consider all reliable evidence bearing on the crime and its context, the defendant's culpability, and the consequences for concerned parties and society at large.<sup>320</sup> Genuine legislative, administrative, or appellate guidance might assist in this important task, but hard-and-fast rules tend to impede moral judgment in the form of punishment.

The Guidelines, however, diverge from the historical and philosophical perspective, providing only a thin conception of equality, privileging a few criteria—most notably, the offense of conviction and the defendant's criminal history—to be inserted into the sentencing equation and charted on the grid. The federal scheme treats equally defendants convicted of a particular offense with a particular criminal history score, presuming that these individuals and crimes are morally alike, more or less, and that equal punishment means equal justice. The Guidelines thus rely on a feat of abstraction,<sup>321</sup> with defendants purged of all individuating traits (except a few historical facts, such as prior convictions), allowing the mannequin-like figures to be grouped and sentenced alike. Someone who commits a level-X offense with a criminal history score of Y should receive the same punishment as another level-X offender with a Y criminal history score, or so the Guidelines assume.

But claims of justice through uniformity can be disputed by both abstract and concrete comparisons of the sentences for different crimes and criminals. For instance, while second-degree murder is a base level 33 offense under the Guidelines, possessing 150 grams of crack cocaine with intent to sell is a level 34 offense. Given the large disparity of injury

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<sup>319</sup> See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 207-27 [hereinafter Luna, *Punishment Theory*]; cf. PRINCIPLED SENTENCING (Andrew von Hirsch & Andrew Ashworth eds., 1992) (collecting essays on punishment goals that discuss, *inter alia*, the relevant factors for sentencing).

<sup>320</sup> Modern death penalty jurisprudence on aggravating and mitigating factors has produced similar conclusions. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>321</sup> See, e.g., Luna, *Punishment Theory*, *supra* note 319, at 266-67.

caused by these two crimes, it seems hard to fathom an equitable system of sentencing where a drug offender is deemed similar, let alone worse, than a murderer.<sup>322</sup> As for the workings of the grid, scholars, practitioners, and average citizens are left wondering how the Commission came up with its rubric. For instance, what makes a level 10 crime worse than a level 9 crime? Why does a level 15 crime receive about twice the sentence of a level 10 crime? Why is a level 20 offender with a criminal history score of 1 subject to the same punishment as a level 14 offender who has a criminal history score of 12? Why does the fact that the defendant's crime was committed less than two years after release from prison add two points to his criminal history score, rather than one point or three points (or five points, for that matter)? Likewise, why does the fact that a defendant was a "minimal" participant in a crime reduce the base offense by four levels while being a "minor" participant only results in a two level reduction? The potential queries about the rules of Gridland are endless but the answers have not been readily forthcoming.

Moreover, it is a practical truism that no two offenders and no two offenses will be exactly alike.<sup>323</sup> Human existence is multidimensional by nature, producing a reality that constantly reaffirms the adage that the facts of life are richer than words.<sup>324</sup> "The complete elimination of sentencing disparity is . . . an impossible task due to the differing nature of every crime and every criminal," one district court contemplated a few years ago. "Sentencing is necessarily subjective and must be based on the individual and his or her crime."<sup>325</sup> To demonstrate the problem of uniformity by abstraction under the Guidelines, consider a relatively uncomplicated hypothetical of defendants who embezzle the same amount of money or commit an ostensibly similar assault:

Alan had 15 years of faithful, diligent employment at the bank. He is universally known by coworkers, family and friends as honest, hard-working, loving and

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<sup>322</sup> See, e.g., *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (rejecting death penalty for rape as compared to murder, as the latter but not the former involves "the unjustified taking of human life"). But see Erik Luna, *The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 485 (1997) (noting that a past drug czar, Bill Bennett, was undisturbed by the idea of beheading drug dealers, that Nancy Reagan once called casual drug users "accomplice[s] to murder," and that the former police chief of Los Angeles, Daryl Gates, suggested that even occasional drug users could be "taken out and shot"); cf. *supra* note 123 (discussing whether injustice in federal sentencing is due to mandatory minimums alone).

<sup>323</sup> See, e.g., Luna, *Punishment Theory*, *supra* note 319, at 266-67.

<sup>324</sup> See, e.g., J. L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 175, 195 (James Opie Urmson & Geoffrey James Warnock eds., 1979) (1961) ("[H]owever well-equipped our language, it can never be forearmed against all possible cases that may arise and call for description: fact is richer than diction.").

<sup>325</sup> *United States v. Dyck*, 287 F. Supp. 2d 1016, 1018 (D.N.D. 2003).

generous. Unfortunately, one of his four young children developed a life-threatening disease. Desperate to buy expensive medications that might save his child, he embezzled \$75,000. Alan remorsefully confessed his crime to the bank, without which he would never have been caught. He is prosecuted and pleads guilty.<sup>326</sup>

Bob led a life of abused and wasted privilege. He has cheated and deceived at every opportunity, abandoned his first wife and children after exhausting his wife's money, remarried bigamously (again for money) without revealing the earlier marriage, skipped town, and eventually landed a job with a bank where he embezzled \$75,000. After he is caught, Bob pleads guilty and accepts responsibility.<sup>327</sup>

Carl is a young man with a strong record of education and employment, stable ties to family and community, a wife and children, and a history of volunteerism. During a camping trip, he got into a serious but non-lethal altercation with a local outdoorsman after they squabbled over the boundary lines for hunting. Although Carl has a spotless record, so does the alleged victim, resulting in a short contest of dueling witnesses at trial. In the end, Carl's self-defense claim is discounted by the jury, which finds him guilty of aggravated assault.<sup>328</sup>

Dave is a criminal in his early forties with a spotty employment record, little education, and no vocational skills. He lacks any connection to family and community, and instead has a history of being a drug abuser, dead-beat dad, grifter and drifter, who provides virtually no positive contributions to society. During a brawl on the steps of a federal courthouse, he viciously attacked another man, resulting in Dave's prosecution for aggravated assault. He is convicted after a bench trial firmly rejected the defense theory of mutual combat.<sup>329</sup>

Regardless of all else, these four defendants will receive sentences of 15-21 months under the Guidelines,<sup>330</sup> a result which raises any number of questions. Standing alone, is a sentence of 15-21 months appropriate for aggravated assault? Or for embezzling \$75,000? Should these very distinct crimes receive similar punishment? Should the embezzlers, Alan and Bob, receive the same sentence? Or what about the aggravated assailants, Carl and Dave—should they receive the same punishment? Do any of these

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<sup>326</sup> See *United States v. Rodriguez*, 724 F. Supp. 1118, 1122 (S.D.N.Y. 1989) (offering basic hypothetical).

<sup>327</sup> See *id.*

<sup>328</sup> See Luna, *Misguided Guidelines*, *supra* note 96, at 14-15 (offering basic hypothetical).

<sup>329</sup> See *id.*

<sup>330</sup> For defendants Alan and Bob, the U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, § 2B1.1(a)(2) lists the base offense level for embezzlement as 6, which must be increased by 8 levels per § 2B1.1(b)(1) because the amount embezzled exceeded \$70,000. Assuming no prior convictions (and thus a criminal history score of 1), the resulting offense level (14) prescribes a sentence of 15-21 months. For defendants Carl and Dave, the U.S. SENTENCING GUIDELINES MANUAL, *supra* note 72, § 2A2.2(a) states that the base offense level for aggravated assault is 14, and assuming no prior convictions, the sentence also would be fifteen to twenty-one months.

sentences serve the traditional goals of retribution, deterrence, incapacitation, and rehabilitation? Although arguments can be marshaled in a variety of ways, one's moral intuition might push toward Alan receiving a lesser sentence than Bob, and Carl a lesser sentence than Dave. Some might find it strange, however, that aggravated assault and embezzlement can lead to the same Guidelines range, and that these disparate crimes committed by disparate criminals receive similar punishments. This confusion could be compounded by considering other offenses carrying the same base sentencing range as embezzlement and aggravated assault,<sup>331</sup> for instance, or by mixing in offenders with different criminal records. But putting initial reactions aside, the most thoughtful response might simply maintain that more information is needed to properly evaluate each defendant and his sentence. Nonetheless, the Commission and its Guidelines have already made the decision for the judge (at least pre-*Booker*):<sup>332</sup> Alan, Bob, Carl, and Dave would serve between fifteen and twenty-one months in federal prison. How this mechanical result achieves anything more than equality of raw numbers is beyond me.

So whatever the impact on *undue disparity* in sentencing, the Guidelines have created *undue uniformity* by demanding the same punishment for disparate crimes and criminals.<sup>333</sup> The federal system accentuates certain quantifiable variables (like monetary loss) in fixing punishment, offering the illusion of equality through numerical objectivity, while marginalizing or even banning other information about the defendant and his life. But although the Guidelines provide equal punishment when certain objects are statistically equal—the same number of guns, quantity of drugs, amount of money, what have you—this arithmetical grouping of defendants cannot ensure moral equality: the equal treatment of inherently unique individuals whose crimes, backgrounds, and potential are so analogous as to justify identical sentences and, conversely, the unequal (but judicious) treatment of unique individuals whose crimes, personal histories, and prospects are materially different. “The emphasis [of the Guidelines] was more on making sentences alike,” one former commissioner conceded, “and less on insuring the likeness of those grouped together for similar treatment.”<sup>334</sup> The Guidelines accordingly operate with *numerical equality*—not unlike the “majestic equality” of the criminal justice system

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<sup>331</sup> See, e.g., *id.* § 2J1.2 (obstruction of justice).

<sup>332</sup> See *supra* Part II (discussing *Booker* and its implications).

<sup>333</sup> Professor Albert Alschuler may have put it best: “Some things are worse than sentencing disparity, and we have found them.” Alschuler, *supra* note 315, at 902.

<sup>334</sup> Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 934 (1990).

described by Anatole France<sup>335</sup>—offering equal punishment for those who are not equal.

As remote entities, the Commission and Congress cannot morally judge a specific crime committed by a particular criminal. They know nothing about bank robberies in Ohio, the methamphetamines trafficked in Utah, a smuggler of illegal aliens convicted in the Southern District of California, or some first-time embezzler who pled out in New York's Eastern District. The Guidelines can only construct broad categories of offenses and offenders that emphasize certain criteria and dispense with others, converting unique cases into data for relatively rote sentencing calculations. While moral judgment in the form of a just sentence involves an open-minded assessment of all relevant information about the offense and offender as well as proper reflection on the valid goals of punishment—often requiring consideration of important details that cannot be absolutely measured or easily compared—the Guidelines “tend to deaden the sense that a judge must treat each defendant as a unique human being,”<sup>336</sup> thus sacrificing “comprehensibility and common sense on the altar of pseudo-scientific uniformity.”<sup>337</sup>

Judge Frankel's dream of “a commission on sentencing” and a mechanical punishment regime through “chart or calculus”<sup>338</sup>—fulfilling the Benthamite goal of a mathematical approach to punishment<sup>339</sup> and producing a Weberian sentencing machine<sup>340</sup>—has become nothing less than a Frankensteinian nightmare. In Gridland, there is no clear, thoughtful, and thorough judgment at sentencing, as the Commission has already decided what information may be considered and how the ultimate sentence is to be reached, erasing individuating characteristics and discarding most personal history in order to peg the defendant on a two-dimensional matrix. As such, the federal regime produces a “wholly mechanical sentence computation which desensitizes those associated with it, and converts a sentencing proceeding, which might otherwise have some salutary effect on

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<sup>335</sup> ANATOLE FRANCE, *THE RED LILY* 91 (1894), *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 550 (Justin Kaplan ed., 1992) (“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.”).

<sup>336</sup> Weinstein, *supra* note 77, at 366.

<sup>337</sup> STITH & CABRANES, *supra* note 78, at 5.

<sup>338</sup> *See supra* notes 102-07 and accompanying text.

<sup>339</sup> *See, e.g.*, Weinstein, *supra* note 77, at 365-66.

<sup>340</sup> *See supra* note 78 and accompanying text; *see also* STITH & CABRANES, *supra* note 78, at 6, 30.

the offender, to a mathematical and logistical exercise.”<sup>341</sup> This is the antithesis of the individualized sentencing demanded for moral judgment but standard fare in Gridland, at least prior to *Booker*. The question still remains, however, whether the Supreme Court’s decision will permit judges to rise above the two-dimensional world of Gridland, or whether instead it will be “business as usual.”<sup>342</sup>

#### V. BEYOND BOOKER

Even before *Booker*, leading punishment theorists and practitioners were offering various alternatives to improve the Guidelines scheme; and as could be expected, the past few months have seen a host of proposals for the future of federal sentencing. But for present purposes, four of the most frequently discussed options can be quickly summarized. The first would maintain the post-*Booker* status quo of advisory guidelines, permitting the federal trial and appellate courts to interact to create a “common law” of federal sentencing.<sup>343</sup> Over time, the propriety of departures (or “variances”<sup>344</sup>) from prescribed guideline ranges would reach a type of steady state based on the accumulation of written sentencing opinions and appellate review for reasonableness.

A second approach would call for the elimination of the top of all guideline ranges, with trial judges allowed to sentence anywhere from the bottom of the range to the statutory maximum. Depending on the advocate, the district court would either start at the statutory maximum and work down, or begin with the guidelines range and possibly work up to the legislative boundary as appropriate.<sup>345</sup> The third option would demand that all facts or factors underlying a particular sentence under the Guidelines be proven to a jury beyond a reasonable doubt. This so-called “Kansas plan” might well require a bifurcated process, with jurors determining guilt for the charged crime and then deliberating on aggravating factors in a

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<sup>341</sup> Remarks of Morris E. Lasker, U.S. District Judge for the Southern District of New York, Before the Symposium on Sentencing Guidelines (Sept. 9, 1997), available at <http://www.november.org/dissentingopinions/Lasker.html>.

<sup>342</sup> *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005).

<sup>343</sup> See, e.g., Chanenson, *supra* note 14, at 409-14 (describing and critiquing “fully voluntary approach”); Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, at 27. See generally Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN L. & POL’Y REV. 93 (1999).

<sup>344</sup> See *supra* note 219.

<sup>345</sup> See Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENT’G REP. 364, 367 (2004); Chanenson, *supra* note 14, at 414-21.



subsequent proceeding.<sup>346</sup> And as alluded to above, a final approach would have Congress enact *en masse* mandatory minimum sentences for all federal crimes.<sup>347</sup> Recently, U.S. Attorney General Alberto Gonzales made precisely this suggestion, arguing that mandatory minimums were necessary to prevent “a drift toward lesser sentences” in the federal system.<sup>348</sup>

Forced to choose among these options, I would select the status quo-common law approach (and I would certainly offer my strongest “Bronx cheer” for across-the-board mandatory minimums).<sup>349</sup> The common law model is currently underway, courtesy of Justice Breyer’s remedial opinion and the new advisory nature of the Guidelines. The early data suggest that the new methodology is not producing radical shifts in punishment,<sup>350</sup> but only time will tell whether this approach can be everything that its supporters claim.<sup>351</sup> Of course, it has to be an improvement over the old mandatory system—anything would be (except the silliness of universal mandatory minimums). In a perfect scenario, trial courts would now use their post-*Booker* discretion to prevent both undue disparity and undue uniformity in sentencing individual defendants, taking into consideration the host of factors relevant to moral judgment (including many of those previously banned under the Guidelines). Moreover, the conscientious judge would make sure that all parties—particularly the defendant, the

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<sup>346</sup> See KAN. STAT. ANN. § 21-4718 (2004); Statement of Professor Rachel Barkow, Constitutionality of Federal Sentencing Guidelines, Cong. Testimony, July 13, 2004, available at 2004 WL 84557859; Bowman, *supra* note 345; Chanenson, *supra* note 14, at 422-32.

<sup>347</sup> See Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. § 12 (2005) (converting federal sentencing into a complex system of mandatory minimums); Letter from Frank Bowman concerning H.R. 1528 (Apr. 11, 2005), reprinted in 17 FED. SENT’G REP. 311 (2005) (criticizing congressional proposal); see also *Hearing on Federal Sentencing Guidelines*, *supra* note 5, at 3 (statement of Sen. Orrin Hatch) (noting possible response of new mandatory minimums).

<sup>348</sup> See, e.g., Dan Eggen, *Minimum Sentences Urged: Gonzales Responds to Rulings Against Mandatory Guidelines*, WASH. POST, June 22, 2005, at A2; Eric Lichtblau, *Gonzales is Seeking to Stem Light Sentences*, N.Y. TIMES, June 22, 2005, at A15.

<sup>349</sup> See, e.g., Lynn Adelman & Jon Deitrich, *AG’s Misguided Proposals*, NAT’L L.J., Sept. 19, 2005, at 30; Editorial, *No Rush on Sentencing*, WASH. POST, Aug. 8, 2005, at A14; Debra J. Saunders, *The New Inquisitor*, S.F. CHRON., July 17, 2005, at B5.

<sup>350</sup> See, e.g., U.S. SENTENCING COMM’N, SPECIAL POST-BOOKER CODING PROJECT, DATA EXTRACTION DATE: SEPTEMBER 1, 2005 (2005), available at [http://www.uscc.gov/Blakely/PostBooker\\_091505.pdf](http://www.uscc.gov/Blakely/PostBooker_091505.pdf); U.S. SENTENCING COMM’N, MEMO OF APRIL 13, 2005 (2005), available at [http://www.uscc.gov/Blakely/booker\\_041305.pdf](http://www.uscc.gov/Blakely/booker_041305.pdf).

<sup>351</sup> See generally Douglas A. Berman, *Assessing Federal Sentencing After Booker*, 17 FED. SENT’G REP. 291 (2005).

victim, their families, and all other lay citizens affected by the relevant crime—understand the reasons for imposing a specific sentence.

Still, the highly suspect decisions of the Commission remain the default rule under the advisory Guidelines, and the bizarre, formulaic language of Gridland is likely to continue as the dominant idiom in U.S. district courts. My preference would be to scrap the Commission and its Guidelines, guaranteeing a fresh start without any lingering remnants of Gridland's two-dimensional world: end the madness of mechanical sentencing; do away with "points," "scores," "base levels," and all other baffling jargon; get rid of the ridiculous sentencing grid;<sup>352</sup> and in general, eliminate anything that hides or precludes the inherently moral aspects of punishment. This may all be wishful thinking on my part, however, as many of the most influential and eloquent critics seem to concede that the Commission and its Guidelines are here to stay. Prior to *Booker*, for instance, Professor Kate Stith and Judge José Cabranes noted "that the guidelines are likely to remain substantially intact for some time to come,"<sup>353</sup> and their comments may still be true in a post-*Booker* world.

But whatever the future may hold for federal sentencing, I would like to offer a few additional thoughts that potential reformers should keep in mind. The framers and elaborators of the Guidelines forgot (or ignored) the lessons of the past, namely, the deficiency of formalistic, mechanical law and its consequences for real human beings. To understand what law is or what it should be, Oliver Wendell Holmes wrote, "we must know what it has been, and what it tends to become."<sup>354</sup> Another old saw suggests that ignorance of history is a condemnation to repeat it,<sup>355</sup> and unfortunately, Gridland appears to be the product of collective amnesia.

#### A. MECHANICAL LEGISPRUDENCE

From roughly the turn of the previous century through the Second World War, an influential group of jurists and scholars led an assault against the mechanical view of law that had dominated Anglo-American jurisprudence. Holmes, Benjamin Cardozo, Jerome Frank, Karl Llewellyn,

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<sup>352</sup> See, e.g., Alschuler, *supra* note 315, at 950 ("[T]he 258-box federal sentencing grid . . . should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas.").

<sup>353</sup> See, e.g., STITH & CABRANES, *supra* note 78, at xi.

<sup>354</sup> O.W. HOLMES, *THE COMMON LAW* 1 (1881); see generally *THE ESSENTIAL HOLMES* (Richard A. Posner ed., 1992); see also ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000) (masterful biographical critique of Holmes).

<sup>355</sup> See GEORGE SANTAYANA, *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 284 (2d ed. 1936) (1905) ("Those who do not learn from history are doomed to repeat it.").

Roscoe Pound, and other “realists” challenged the then-prevailing notion of “formalism” in law—an almost ethereal belief in a small “number of fundamental legal doctrines” that, if properly “classified and arranged,”<sup>356</sup> could answer all questions presented in court through the power of logical deduction. To the formalist, law was immutable and existed apart from its makers, enforcers, and adjudicators, as though it had been handed down from the heavens rather than produced by mere mortals. The resulting legal principles were to be applied through rigid procedures that generated uniform outcomes irrespective of the facts and circumstances of a given case, the best interests of society, or even considerations of fundamental justice. Inflexibility and uniformity at the expense of individual fairness were simply the results of a “scientific” approach to law, or so it was argued. But to the legal realist, this was nothing less than nonsense. “The life of the law has not been logic,” Holmes famously declared, “and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>357</sup>

In his 1908 article critiquing the “mechanical jurisprudence” of formalism, Roscoe Pound rejected the idea that there was some necessary value in law assuming the character of a science.<sup>358</sup>

Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.<sup>359</sup>

It is easy to become enamored with the mechanical approach, as technicality and mathematical uniformity can be mistaken for ingenuity, compounded by the tendency of some “to regard artificiality in law as an end, to hold science as something to be pursued for its own sake . . . and to judge rules and doctrines by their conformity to a supposed science.”<sup>360</sup> But in espousing this type of mechanical jurisprudence, we forget that law in and of itself is not synonymous with justice, that the morality of any given law must be judged by the extent to which it achieves just outcomes pursuant to fair procedures, and that an unjust law with all the features of a science is not made legitimate by its technical form.<sup>361</sup> Legal cases are not

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<sup>356</sup> C. C. LANGDELL, *Preface to the First Edition* of SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed., Little, Brown & Co. 1879).

<sup>357</sup> HOLMES, *supra* note 354, at 1.

<sup>358</sup> See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-06 (1908).

<sup>359</sup> *Id.* at 605.

<sup>360</sup> *Id.* at 607-08.

<sup>361</sup> Pound pointed to a number of examples of mechanical jurisprudence that defeated justice in individual cases, from the inability of the law to hold liable human actors “who

about abstractions or a series of numbers, reducible to logical syllogisms or mathematical proofs; instead, they involve the lives of real people, who not only deserve substantive and procedural fairness under law, but also should see and feel that justice has, in fact, been done.

The costs of mechanical jurisprudence are not only borne by the parties whose justifiable claims are obstructed by formalism, but also are felt by the general public and the legal profession. “[L]aw must not become too scientific for the people to appreciate its workings,” Pound argued, and “[i]t must not become so completely artificial that the public is led to regard it as wholly arbitrary.”<sup>362</sup> Such a perception breeds a belief that the legal system is nothing more than a game, rigged in favor of those in power and against the common citizen, fostering a general disrespect for all laws, no matter how legitimate they may be, as well as distrust of the institutions and actors that give law its effect. In turn, the reduction of jurisprudence to a neat set of formulas has a tendency to petrify the legal profession—suppressing independent consideration of new issues or the casting of a fresh light on old ones; stifling the initiative of the attorney, the jurist, and the reformer in the pursuit of a more just system; and relegating the legal practitioner to a style of low-level technician.<sup>363</sup> Ironically, the mechanical jurisprudence of formalists can only be referred to “as scientific because those who administer it believe it as such,” when in all truth, “it is not science at all.”<sup>364</sup> The type of rigid, deductive methodology of formalism had already been rejected as archaic in the study of nature, Pound noted, “and the revolution which has taken place in the other sciences in this regard must take place and is taking place in jurisprudence also.”<sup>365</sup>

In the decades following Pound’s denouncement of mechanical jurisprudence, the standard-bearers of American legal realism would further expose the injustices perpetuated by formalism, debunking the alleged logic and scientific certainty of its approach to the adjudication of human

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hide behind [the] skirts” of corporations and other legal entities, to the procedural rules that bar otherwise meritorious claims through unyielding, hyper-technical requirements of pleading and case theory. *See, e.g., id.* at 608, 614-21. Also of concern were the interpretations of the Supreme Court that deduced, for instance, a “freedom of contract” under the Fourteenth Amendment. *Id.* at 616. By formalistically inferring some alleged individual “right” or basic constitutional principle, “[t]he court does not inquire what the effect of such a deduction will be, when applied to the actual situation.” *Id.*

<sup>362</sup> *Id.* at 606.

<sup>363</sup> *Id.* at 606-07.

<sup>364</sup> *Id.* at 608.

<sup>365</sup> *Id.*

problems.<sup>366</sup> For instance, Felix Cohen lambasted the courts for their “transcendental nonsense” of technical concepts and legal fictions that prevented just outcomes in real cases.<sup>367</sup> Terms like *corporate entity* were nothing more than “legal magic and word-jugglery”<sup>368</sup> that provided the façade of scientific, rational deduction through judicial logomachy, often with “prejudice masquerading in the cloak of legal logic,”<sup>369</sup> ignoring the actual consequences of court decisions.<sup>370</sup> “The law is not a science but a practical activity,”<sup>371</sup> Cohen argued, and jurisprudence is not “a part of pure mathematics” but “a study of human behavior . . . as it molds and is molded by judicial decisions.”<sup>372</sup>

It is difficult for those who still conceive of morality in other-worldly terms to recognize that every case presents a moral question to the court. But this notion has no terrors for those who think of morality in earthly terms . . . [The realistic judge] will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task . . . .<sup>373</sup>

To a great extent, the critical words uttered by Pound, Cohen, and all other realists of the previous century have been heard by modern judges, practitioners, and scholars. American legal realism has had a profound effect on both the study and development of jurisprudence, and it can be seen in the work of today’s law schools and courthouses. What was largely missing in the jurisprudential critiques of Pound *et al.*, however, was a similar appraisal of lawmakers and their legislation. For the most part, realists had focused their criticisms on judge-made law and not statutes or other politically devised rules. But eventually, some dyed-in-the-wool

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<sup>366</sup> See, e.g., JOHN H. SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1947).

<sup>367</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

<sup>368</sup> *Id.* at 821.

<sup>369</sup> *Id.* at 817.

<sup>370</sup> See *id.* at 809-21.

<sup>371</sup> *Id.* at 812.

<sup>372</sup> *Id.* at 845.

<sup>373</sup> *Id.* at 840-42. To be clear, I do not agree with the entire set of criticisms leveled by legal realists, such as Felix Cohen’s dismissal of the American Law Institute’s restatement projects. See *id.* at 833.

realists<sup>374</sup> and their descendents in the “law and” hybrids (i.e., law and economics)<sup>375</sup>—as well as the devotees of a new approach known as “legal process”<sup>376</sup>—turned their attention to the political branches and, in particular, the legislative function. Today, the term *legisprudence* has come to describe a still-developing legal discipline aimed at “the systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law.”<sup>377</sup> This field has highlighted, among other things, the importance of statutory interpretation, which has now become “some of the most heavily trodden ground for legal theorists and leading jurists.”<sup>378</sup>

Although understandable in the modern age of statutes, this concentration within legisprudence still concerns the judicial function, how courts should evaluate the work of legislatures with due respect for the duties and prerogatives of a coordinate branch of government. Equally important, however, is the legisprudential question coming from the other direction: What considerations should lawmakers keep in mind when enacting legislation, particularly when it affects the primary functions of the judicial branch?<sup>379</sup> Formalistic statutory law seems no better than its judge-made cousin, as mechanical legisprudence has all the potential for injustice inherent in mechanical jurisprudence, creating the pretense of scientific conviction by statutory formula while disregarding the unfairness perpetrated by technical rules ignorant to their human consequences.

Unfortunately, the world of federal sentencing has failed to heed these lessons, adopting a style of mechanical legisprudence that impedes some of the most crucial decisions facing any judge. The Guidelines are nothing less than a throwback to legal formalism, attempting to reduce punishment

<sup>374</sup> See, e.g., Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950); see also Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983).

<sup>375</sup> See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

<sup>376</sup> See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958).

<sup>377</sup> WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 559 (3d ed. 2001); see also *LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION* (Luc J. Wintgens ed., 2002).

<sup>378</sup> Jonathan Turley, *Through A Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 206 (2000); see, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

<sup>379</sup> See, e.g., HART & SACKS, *supra* note 376, at 341; see also Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895, 920-22 (2005).

to a mathematical exercise. Offenders are dehumanized into a series of numbers for easy plotting on a supposedly all-encompassing sentencing grid.<sup>380</sup> The process is rigid, the colloquy formulaic, the outcome preordained. Moreover, the language used by the court and practitioners sounds of transcendental nonsense (e.g., points, base levels, scores, etc.), offering the illusion of logical deduction and scientific precision but hiding the underlying value judgments—judgments which may have no sound basis beyond the fiat of the Commission. Ironically, this agency itself follows an administrative version of the “breakfast” rule that was so thoroughly vilified during the previous round of federal sentencing reforms,<sup>381</sup> and along the way, the Guidelines have extinguished the human element from a core function of the federal courts. There is, in fact, no graver judicial duty than imposing punishment on real individuals, taking away their most prized asset—personal liberty.<sup>382</sup>

A few years ago, District Court Judge Bruce Jenkins offered an apt comparison, suggesting that federal sentencing was like speaking with a computer:

We forget that the computer is just a tool. It is supposed to help—not substitute for thought. It is completely indifferent to compassion. It has no moral sense. It has no sense of fairness. It can add up figures, but can't evaluate the assumptions for which the figures stand. Its judgment is no judgment at all. There is no algorithm for human judgment . . . . Contexts are dynamic. Human beings are infinitely variable. Differences do make a difference. Categories are suspect . . . . [T]here are some things in the social realm that are of monumental importance that cannot be weighed or measured using conventional scales, sinful hearts or feathers of truth and justice, for example, and that the assignment of numbers to such is inherently inexact and ignores differences that exist.<sup>383</sup>

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<sup>380</sup> See Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, HUM. RTS., Spring 2002, at 6, 8 (“[D]efendants confront a judge who far too often, just ‘does the math,’ situates the defendant on the grid, and sentences, no matter how anomalous or harsh the results.”).

<sup>381</sup> See *supra* notes 98-99 and accompanying text.

<sup>382</sup> See, e.g., *United States v. Engler*, 422 F.3d 692, 697 (8th Cir. 2005) (“To a defendant, the sentencing proceeding is perhaps one of the most important and grave life moments. It is the time that a person is faced with the prospect of confinement for many years in a federal prison, often followed by an extended period of supervised release.”); see also Gertner, *supra* note 380, at 6 (“Sentencing a defendant is—or should be—one of the most important moments in the criminal justice system. After all, it is when state power confronts an individual. With my words of authorization, a citizen’s liberty is extinguished, often for extraordinary periods of time.”).

<sup>383</sup> Bruce S. Jenkins, *The Federal Court System: For Thinking Press 1, For Compassion Press 2, For Judgment Press 3*, 68 VITAL SPEECHES OF THE DAY 196, 198-99 (Jan. 15, 2002).

“Loud sounds the cry of ‘the prisoner,’” Judge Jenkins quotes, “‘I am not a number. I am a free man.’”<sup>384</sup> In a criminal justice system that takes seriously the moral questions it faces on a daily basis, the defendant is not a string of digits or an inanimate object, but instead a unique individual who must be treated as such.

In the end, the mechanization of punishment could not even serve the Guidelines’ ill-advised goal of eliminating discretion in sentencing. The Commission’s mechanical jurisprudence creates the false impression of a humanless process through the cold neutrality of a mathematical formula. But as was true of mechanical jurisprudence from the previous century, the formalistic nature of federal sentencing simply obscures the discretionary decisions of human actors.<sup>385</sup> As a general rule, constricting official authority of an actor at one point only increases the discretionary power of other actors, often at other stages in the process. The same holds true for the world of Gridland: By taking away much of the trial court’s authority to craft an appropriate punishment in the context of an individual case, the Guidelines effectively vest sentencing discretion in other criminal justice actors, most notably, prosecutors through their charging and plea bargaining decisions.<sup>386</sup> As such, mechanical jurisprudence in sentencing not only rejects the lessons of American legal realism, it also threatens a tradition that predates the realist-formalist battle but would never be called into doubt by thoughtful members of either camp: the independence of the judiciary.

## B. JUDICIAL INDEPENDENCE

The value of an autonomous court system, presided over by open-minded judges empowered to ensure just outcomes in individual cases, has

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<sup>384</sup> *Id.* at 199 (quoting the television show, “The Prisoner”).

<sup>385</sup> *See, e.g.,* *United States v. O’Meara*, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part) (rejecting claim that Guidelines have created a “neutral” system by restricting discretion of trial judges, given that sentencing is “not conducted by computers—much less by gods,” and the outcomes are thus “highly dependent on the judgment calls of fallible human actors”).

<sup>386</sup> *See, e.g.,* *United States v. Kalb*, 105 F.3d 426, 430 (8th Cir. 1997) (Bright, J., dissenting) (noting that the Guidelines “essentially take the discretionary power to determine the length of a defendant’s sentence away from Article III judges and place it in the hands of prosecutors who control the charges brought against a defendant”); *see also supra* note 146 (discussing increased authority of probation officers). As mentioned earlier, the Guidelines have also driven the decisionmaking process underground. *See supra* notes 141-45 and accompanying text (discussing artifices of judges and attorneys in order to reduce sentences); *see also infra* notes 422-24 and accompanying text (criticizing such covert decisionmaking).



been reiterated throughout American history.<sup>387</sup> An independent judiciary was intended to protect the individual against the weight of majoritarian prejudices and rash impulses carried out by the political branches, thus serving as a bulwark against unfair treatment of the dissenting or disempowered citizen.<sup>388</sup> The passage of time has only confirmed the vital importance of judicial independence in guaranteeing personal freedom and fairness before the state. An autonomous court system manned by politically detached, evenhanded, and open-minded jurists is the single most important attribute of American constitutional democracy. It is not bicameralism or a unitary executive or federalism or any other political device that has safeguarded individual liberty and prosperity in the United States. Instead, an independent judiciary has provided the counterbalance against the perceived exigencies of the day, preventing freedom from becoming a dispensable commodity in the political marketplace.<sup>389</sup>

No matter how hard they may try, contemporary court-bashers cannot deny this heritage, nor can they dismiss those who have championed judicial autonomy as power-hungry jurists or pointy-headed academics. For instance, Judge Learned Hand was known for his reluctance to intrude on the functions of the political branches, and balked at the idea of judges ruling society “as a bevy of Platonic Guardians.”<sup>390</sup> And yet Hand firmly believed in “the contributions of an independent judiciary to our kind of civilization,”<sup>391</sup> marked by a judicial temper “which can understand and will respect the other side, which feels a unity between all citizens—real and not the fallacious product of propaganda—which recognizes their common fate

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<sup>387</sup> The American Revolution was justified, in part, by the British Crown’s refusal to establish an independent judiciary for the colonies. See THE DECLARATION OF INDEPENDENCE para. 10-11 (U.S. 1776).

<sup>388</sup> Alexander Hamilton wrote in *The Federalist* 78:

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, *supra* note 281, at 405. The protection provided by an independent judiciary should be appreciated by all, Hamilton opined, “as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.” *Id.* at 406.

<sup>389</sup> Studies have even shown that judicial independence is an essential requirement for a successful liberal democracy. See, e.g., Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284 (2004).

<sup>390</sup> LEARNED HAND, THE BILL OF RIGHTS 73 (Harvard University Press 1958).

<sup>391</sup> LEARNED HAND, THE SPIRIT OF LIBERTY 155 (3d ed. Knopf 1974) (1960).

and their common aspirations—in a word, which has faith in the sacredness of the individual.”<sup>392</sup>

Consider also the more recent words of Judge Richard Posner, a Reagan appointee and one of the founders of the Chicago School of law and economics. Although his early scholarship was criticized as supplying a new mechanical jurisprudence with “geometric nymphomania,”<sup>393</sup> Posner would vigorously challenge the formalism of strict construction that rendered jurists little more than “potted plants,” reminding readers that “consent of the governed” was a fiction in most legislation.<sup>394</sup> Adjudication is “not a form of deduction,” Posner argued; “understanding requires a consideration of the consequences,” and “[t]o banish all discretion from the judicial process” would ultimately reduce the rights of everyone.<sup>395</sup> Likewise, my colleague John Flynn offered a vigorous response to the recent spate of anti-judge attacks by political opportunists.<sup>396</sup> “Judicial decision-making is not like a vending or slot machine where one puts fixed facts into a machine, pulls a lever and out comes the ‘right answer,’” Flynn noted.<sup>397</sup> Instead, “we entrust an independent judiciary, untainted by fear of political retribution or corruption, with the power to make such difficult decisions based on evidence heard in open court and the arguments of advocates representing opposing parties to the dispute.”<sup>398</sup>

All of these arguments have particular relevance when the issue is punishment. As a matter of history, institutional competence, and the protection of personal liberty, sentencing has been and should be a judicial

<sup>392</sup> *Id.* at 164.

<sup>393</sup> Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 481 (1974).

<sup>394</sup> Richard A. Posner, *What am I? A Potted Plant? The Case Against Strict Constructionism*, NEW REPUBLIC, Sept. 28, 1987, at 23.

<sup>395</sup> *Id.* It might also be noted that Judge Posner was the author of the lower court decision in *Booker* striking down the Guidelines, *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), and he had written other opinions that were highly skeptical of the constitutionality and justice of the federal scheme. *See, e.g.*, *United States v. Rodriguez*, 73 F.3d 161, 162 (7th Cir. 1996) (Posner, J., dissenting).

<sup>396</sup> Professor Flynn is not only one of the leading anti-trust scholars of the past half-century, *see, e.g.*, JOHN J. FLYNN ET AL., *ANTITRUST: STATUTES, TREATIES, REGULATIONS, GUIDELINES, AND POLICIES* (2001); JOHN J. FLYNN ET AL., *FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST* (6th ed. 1983); JOHN J. FLYNN ET AL., *FREE ENTERPRISE AND ECONOMIC ORGANIZATION: GOVERNMENT REGULATION* (6th ed. 1985), but also an astute jurisperite and Red Sox fan, *see, e.g.*, John J. Flynn, *A Comment on “The Common Law Origins of the Infield Fly Rule,”* 4 J. CONTEMP. L. 241 (1978). I am indebted to Professor Flynn for introducing me to *Flatland* and its possibilities.

<sup>397</sup> John J. Flynn, *“Making Law” and “Finding Facts”: Unavoidable Duties of an Independent Judiciary*, 18 UTAH B.J. 6, 9 (2005).

<sup>398</sup> *Id.* at 8.

function. “In the long tradition of the common law, it was the judge, the neutral arbiter, who possessed the authority to impose sentences which he deemed just within broad perimeters established by the legislature.”<sup>399</sup> This role is far from an anachronism, as today’s trial courts remain in the best position to make the context-sensitive assessments that go into an appropriate punishment. Unlike some distant entity, judges are attuned to the environment in which the crime occurred; they have participated in every stage of the case, from pre-trial hearings to sentencing; and they have seen all the evidence and had the opportunity to assess the credibility of each witness and the persuasiveness of each argument.<sup>400</sup> And unlike the prosecutor, who “often [is] not much older than the defendant,” trial judges tend to have an advantage of experience that can only come with time and the actual practice of imposing sentence.<sup>401</sup>

Most importantly, the trial judge is the one neutral party in the courtroom who benefits from neither harsh punishment nor lenient treatment; he has no vested interest in the outcome of a case other than that justice be done.<sup>402</sup> An independent judiciary thus stands as the last line of defense for the lone individual against popular hysteria over crime, political pandering in the form of merciless punishment, and prosecutorial overreaching and vindictiveness in charging.<sup>403</sup> But under the *pre-Booker*

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<sup>399</sup> *United States v. Sidhom*, 144 F. Supp. 2d 41, 41 (D. Mass. 2001); *see also* *Koon v. United States*, 518 U.S. 81, 113 (1996) (noting history of individualized sentencing in federal courts); *Williams v. New York*, 337 U.S. 241, 246 (1949) (similar).

<sup>400</sup> *See, e.g., United States v. Dyck*, 287 F. Supp. 2d 1016, 1020 (D.N.D. 2003):

The Court is located in an agricultural border state and regularly sentences defendants involved in immigration and drug crimes. The sentencing judge has over forty years experience in criminal law as a defense attorney, prosecutor, and judge; and as a judge, has sentenced hundreds of defendants under the direction of the Guidelines. The Court participated in all aspects of the case from pre-trial matters to trial to sentencing. The Court has met the defendant, conversed with the defendant, and peered into the whites of the defendant’s eyes. The district court is therefore in the better position to determine [the appropriate sentence].

<sup>401</sup> *Kennedy, supra* note 258 (“The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.”).

<sup>402</sup> *See, e.g., Sidhom*, 144 F. Supp. 2d at 41 (arguing that “the power to impose a sentence has been virtually transferred from the court to the government,” “constitut[ing] an erosion of judicial power and a breach in the wall of the doctrine of the separation of powers”). The practical transfer of sentencing authority to the prosecutor undermines the Supreme Court’s previous conclusion that the Guidelines do not violate the separation of powers doctrine. *See Mistretta v. United States*, 488 U.S. 361, 412 (1989). A full discussion of this issue must await another day, however.

<sup>403</sup> Justice Hugo Black once noted that “[t]yrannical governments had immemorially utilized dictatorial criminal procedure and punishment,” *Chambers v. Florida*, 309 U.S. 227, 236 (1940), and such concerns were not mere historical curiosities:

regime as well as extant mandatory minimums, the real sentencers in the federal system were the Commission from afar and the prosecutor in the case at bar. The judicial function at sentencing often was nothing more than ceremonial, with the court acting as a type of punishment accountant, plugging and chugging a mechanical formula with little if any discretion. The judge, in other words, had lost his independence and no longer ensured that justice was done in individual cases.<sup>404</sup>

For these reasons, “Learned Hand would have vehemently disagreed [with] the federal sentencing guidelines,” suggested a respected federal judge who knew the great jurist:

Hand was far too much a craftsman to countenance so rigid an intrusion on the discretion of a judge. “To him the writing of an opinion was a work of creation, individual to every judge and unique to every case.” For Hand, the element of craftsmanship was the reward of serving as a judge. He would not have agreed with the assertion that the quantity of drugs or money surrounding the circumstances of any given crime should determine the offender’s sentence. Moreover, I think that Hand would find the guidelines rather appalling for their insistence that judges sentence each individual defendant without reference to their individuality: their age, mental or emotional conditions, employment record, family responsibilities, community ties, military, civic, charitable or public service, prior good works, or childhood circumstances.<sup>405</sup>

Likewise, Judge Hand’s successors in the federal judiciary do not oppose the Guidelines out of longing for kritarchy. It is “not that they are power

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Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution . . . .

*Id.* at 241. Although written more than six decades ago, Black’s words appear no less true in the twenty-first century.

<sup>404</sup> See, e.g., *Sidhom*, 144 F. Supp. 2d at 41 (noting that the transfer of sentencing authority “to the government, which, as the prosecuting authority, is an interested party to the case,” violates the “maxim of the law that no party can be a judge in his own case”); cf. Erik Luna, *Overcriminalization*, *supra* note 256, at 723 (discussing incentive structure of law enforcement). As an aside, the disinterested nature of the judiciary is the precise reason why the exclusionary rule may not apply to errors by magistrates in issuing warrants. See *United States v. Leon*, 468 U.S. 897, 917 (1984) (“Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.”)

<sup>405</sup> James L. Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 391-92 (1995) (citation omitted).

hungry,” John Martin contends, “but rather that they see on a day-to-day basis the injustice that results from inflexibility in sentencing.”<sup>406</sup>

Moreover, the negative caricatures of today’s jurists painted by media hype and political opportunism—epitomized by the Feeney Amendment and cries for mandatory minimums—conflict with the reality in courtrooms across the nation, as well as the very nature of federal court appointments. The President carefully vets and selects judicial nominees, who are then dragged through the arduous, frequently contentious process of Senate approval.<sup>407</sup> Those confirmed receive constitutional protection in salary and tenure to guarantee the independence of the federal courts.<sup>408</sup> Given the high level of scrutiny placed on the nominees to ensure their bona fides, including the necessary legal qualifications and judicial temperament, the members of the federal judiciary are perhaps America’s most trustworthy and competent officials.<sup>409</sup> With its extensive training, collective experience, and case-specific knowledge, the federal judiciary is the exact body that should resolve crucial issues of criminal justice. If someone is to make the most difficult moral judgments involved in federal sentencing, it should be an Article III judge.<sup>410</sup>

### C. A FEW NOTES FOR A(NOTHER) SENTENCING REFORM MOVEMENT

Given the foregoing, any future sentencing reforms that reject mechanical legisprudence and respect the independence of the courts will recognize that judicial discretion at sentencing is not an evil in itself, but instead a means to ensure that a punishment fits both the offense and the offender. A system that sought to assist judges in the exercise of this

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<sup>406</sup> Martin, *supra* note 265, at 312.

<sup>407</sup> See, e.g., *United States v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990), *aff’d in part and rev’d in part*, 728 F.2d 1101 (9th Cir. 1991):

Regardless of which political party holds sway, the process for selecting federal judges is much the same. Nominees are hung out like fresh meat to be poked, prodded and examined in minute detail as to every aspect of their personal and professional lives. The first step is to gain the confidence of a nominating senator who will conduct such investigation as he deems appropriate. Then the FBI, Department of Justice, the American Bar Association, and the Judiciary Committee get into the act. Only after surviving scrutiny that far will the Senate consider granting its stamp of approval.

<sup>408</sup> See U.S. CONST. art. III, §1.

<sup>409</sup> Certainly, the American citizenry views judges as such, with, for instance, the U.S. Supreme Court consistently receiving higher degrees of public confidence than either Congress or the executive branch of the federal government. See, e.g., 2002 SOURCEBOOK, *supra* note 246, at 112-13 tbls.2.10-.11.

<sup>410</sup> *But see*, e.g., Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1533-38 (1989) (critiquing the vision of judicial decisionmaking as involving serious deliberation on moral issues).

discretion would not impose the perfunctory strictures of the Commission's misnamed "Guidelines," dictating outcomes rather than assisting judicial decisionmaking. Instead, it would craft genuine guidelines in the form of considered advice for the sentencing judge—and once again, insights from a previous generation of legal scholars can inform this effort. In his 1969 book, *Discretionary Justice*, Professor Kenneth Culp Davis underscored that discretion is an essential tool of government but unfettered discretionary authority can be hazardous to the individual and society at large.<sup>411</sup> Instead of calling for its abolition, Davis suggested at length that discretion can and should be confined, structured, and checked. In the federal system, this outlook might invite a set of benchmarks for legal reasoning by the district court, providing a starting line of sorts for the trial judge but without a predetermined finishing line. For example, Professor Albert Alschuler recommended a series of "recurring paradigmatic cases" that could provide points of reference for punishment, such as "the young man from a disadvantaged background who, yielding to the lure of easy money, engaged in small-scale drug dealing."<sup>412</sup> Likewise, authentic guidelines might present a presumptive sentence and justification for a paradigmatic case while allowing federal judges to impose greater or lesser punishment due to facts and circumstances that set the present crime and/or criminal apart from the benchmark.

In order to make such a system viable, lawmakers would need to establish relatively wide boundaries of punishment for a given crime, broad enough to encompass the potentially infinite iterations of events and individuals in real life, thus affording sentencing judges the necessary discretion to reach moral judgments. By comparison, the narrow punishment ranges constructed by the Guidelines have great difficulty accommodating the important variations among cases. Although there may be some correlation between a given range and an abstract offender, there appears to be little agreement between the prescribed punishment under the Guidelines and an appropriate sentence for an actual defendant—which, of course, is the precise judgment that must be made by a trial court.<sup>413</sup> Unlike the fixed limits imposed by the Guidelines' "25 percent" rule, an approach mindful of case-based variations might construct a sufficiently low baseline

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<sup>411</sup> See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25-26 (Louisiana State University Press 1969).

<sup>412</sup> Alschuler, *supra* note 315, at 941; see also Michael O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249 (2005) (advocating "a more open-ended inquiry" for the federal system involving "specific examples of fact patterns").

<sup>413</sup> See *United States v. Jaber*, 362 F. Supp. 2d 365, 375 (D. Mass. 2005) (discussing and quoting PETER H. ROSS & RICHARD A. BERK, *JUST PUNISHMENT: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED* (1997)).

of punishment for the otherwise decent, first-time, low-level offender and a sufficiently high sentencing ceiling for the vicious, unrepentant recidivist—irrespective of the statistical difference between the two—with the aforementioned benchmarks helping to guide judges in determining an exact punishment within the legislative boundaries.

Real guidelines and sufficiently wide statutory ranges could be part of the common law of federal sentencing advocated by many scholars and jurists, with today's courts drawing upon the analysis and conclusions of prior judicial opinions. The common law model would seem to entail at least three elements, two of which are already in effect. To begin with, trial courts would need to give written reasons for their sentences, describing the precise rationale for the given punishment in a manner accessible to both professionals and lay participants. In turn, appellate judges would review the lower court judgment to guarantee the fair application of real guidelines or a warranted variation from these benchmarks, free of racial or class-based bias toward the defendant. The evolving post-*Booker* jurisprudence necessitates both written sentencing opinions and appellate review for reasonableness,<sup>414</sup> although still employing the formulaic language of the Guidelines. Presumably, however, both district and appellate courts could continue these valuable practices under a system of real guidelines.

Moreover, the written reasons of trial judges and the opinions of appellate courts could contribute to a third element of common law sentencing—the creation of a type of institutional memory for the federal system, where judges can extract relevant information from a database of prior sentences. Just recently, Professor Marc Miller described the concept of a “sentencing information system” (SIS):

Judges are provided with sufficient information to determine how other offenders like the offender in front of the judge have been sentenced before. Judges can ask a series of “what if” questions by varying each of the relevant factors to see how each variation changes the sentences others have imposed. More complex systems can allow the “what ifs” to vary over specified time periods (or to show trends) and over different political units or groups, such as sentences by the same judge, by other judges in the same courthouse, or by other judges in the same state or country. Unlike sentencing guidelines, an SIS does not tell judges what they must do or should do; it tells judges what others have done, thus allowing a better-informed judgment in each case. An SIS allows for the development and expression of social norms in ways akin to traditional common law reasoning by analogy.<sup>415</sup>

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<sup>414</sup> See, e.g., *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005); see also *United States v. Engler*, 422 F.3d 692, 697 (8th Cir. 2005) (criticizing district court for failing to explain its reasoning for sentence).

<sup>415</sup> Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L.

Professor Miller notes that this type of sentencing technology has been adopted in a number of foreign jurisdictions, including Canada, Scotland, and part of Australia.<sup>416</sup> To me, at least, it is rather shocking that tech-savvy Americans have failed to employ such techniques. Unlike the formulaic, pseudo-scientific results under the Guidelines—rightly deplored by Judge Jenkins as a substitute for human judgment—a sentencing information system would aid the district court in reaching the best possible punishment by providing constructive information rather than demanding a predetermined outcome. Thoughtful opposition to mechanical law does not resist the use of technology by the courts, so long as the resulting tools support rather than replace the moral decisionmaking of judges.<sup>417</sup>

Considerate reforms would also be mindful of the discretionary decisions existing throughout the criminal justice system, not merely those made by the judiciary. Legislators, investigators, prosecutors, jurors, and various other actors play crucial, highly discretionary roles in the punishment process, and any meaningful changes in federal sentencing would have to consider, for instance, the system-wide impact of prosecutorial discretion in charging. Conversely, it seems possible that the sharing of advice or even discretion among decisionmakers might have a positive synergistic effect on the overall quality of case judgments. Although many reasons exist to empower federal judges with the ultimate decision at sentencing, there would be nothing untoward about having a jury remain impaneled after conviction to consider the evidence and arguments regarding punishment and then offer an advisory opinion on a proper sentence. Such an approach would be consistent with the letter of *Booker* and the spirit of the Sixth Amendment right to trial by jury.<sup>418</sup>

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REV. 1351, 1370-71 (2005); see also Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1386 (1999) (describing the use of sentencing information system by Scottish judges).

<sup>416</sup> Miller, *supra* note 415, at 1371.

<sup>417</sup> The real-time sharing of information and discussion via the internet would also seem to encourage free dialogue about federal punishment, also promoting moral judgment by sentencing judges. As mentioned previously, Professor Berman's web log has become one of the most important resources for jurists, practitioners, and scholars in a post-*Booker* world, see *supra* notes 212-13 and accompanying text—and in a very real way, the Berman blog is now an active part of the federal system's large-scale deliberations and institutional memory on sentencing issues.

<sup>418</sup> See, e.g., *United States v. Booker*, 125 S. Ct. 738, 779-82 (2005) (Stevens, J., dissenting in part) (advocating jury factfinding); Pamela Manson, *Sentencing Rules Face High Scrutiny in Wake of Ruling*, SALT LAKE TRIBUNE, July 19, 2004, at A1 (describing U.S. District Court Judge Dale Kimball's use of specialized jury questions to determine the existence of sentencing enhancements).



The federal system might also incorporate “restorative justice” programs which allow victims, offenders, their families, and all other stakeholders in a particular case to enter into “a process of group decisionmaking on how to handle the effects of the crime and its significance for the future.”<sup>419</sup> Through mediated dialogue, these parties would attempt to reach agreement on a suitable punishment, which could then be taken into consideration by the sentencing judge. Another possibility for the federal system would be the creation of a “drug court,” a relatively recent innovation highlighted in a series of concurrences by Judge Donald Lay:

In most drug courts, nonviolent, substance-abusing offenders charged with drug-related crimes are channeled into judicially supervised substance abuse treatment, mandatory drugs testing, and other rehabilitative services in an effort to reduce recidivism. Eligible offenders typically have the charges against them stayed and dropped if treatment is successful, or plead guilty with prosecution deferred and criminal punishment withheld if treatment is successful.<sup>420</sup>

Drug courts in the federal system could reduce recidivism, Lay notes, and thus “save a significant amount of money for taxpayers.”<sup>421</sup>

Finally, whatever system replaces the current regime should engender honesty throughout the process of punishment.<sup>422</sup> The mechanical legisprudence of federal sentencing triggered secret maneuvering by the trial judge and stealthy negotiations among the litigants, all the while generating dubious “facts” and court rulings in order to circumvent the Guidelines. Most of these machinations were aimed at seemingly justifiable ends in difficult cases, namely, evading excessive sentences demanded under the federal regime. But as a recurring, almost organized practice, this type of legal subterfuge can only undercut the legitimacy of the criminal justice system and its actors, as the moral authority of law depends not merely on just outcomes but also justifiable procedures in reaching such results. “Our government is the potent, the omnipresent

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<sup>419</sup> Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3. See generally Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 36 MCGEORGE L. REV. (forthcoming 2006).

<sup>420</sup> *United States v. Ellefson*, 419 F.3d 859, 868 (8th Cir. 2005) (Lay, J., concurring); *United States v. Baccam*, 414 F.3d 885, 887 (8th Cir. 2005) (Lay, J., concurring); *United States v. Gardner*, 139 F. App’x 762, 767-68 (8th Cir. 2005) (Lay, J., concurring).

<sup>421</sup> *Gardner*, 139 F. App’x at 768.

<sup>422</sup> For arguments in support of transparency in criminal justice see Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) [hereinafter Luna, *Transparent Policing*]; Erik Luna, *Race, Crime, and Institutional Design*, 65 L. & CONTEMP. PROBS. 183 (2003); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 517 (2000).

teacher,” Justice Louis Brandeis once warned, and “if the government becomes a lawbreaker, it breeds contempt for law.”<sup>423</sup> Regrettably, the Guidelines taught practitioners and jurists alike that thwarting the law was bearable, so long as it was done behind closed doors and then concealed in public with misinformation. It almost goes without saying that a legitimate, properly functioning criminal justice system would never tolerate such deception.<sup>424</sup>

#### CONCLUSION

I hope that readers have been entertained by my allegorical critique of the Guidelines, although it was not meant to merely tickle the funny-bone through the otherwise humorless media of law reviews. Instead, the similarities between Flatland and federal sentencing help highlight the folly of formulaic approaches to punishment. Only time will tell whether the post-*Booker* world will revolt against the limitations of mechanical sentencing or simply remain gridlocked in Gridland. If nothing else, the Supreme Court has forced scholars and practitioners to reassess, at least indirectly, the problems of sentencing in a two-dimensional world. For all the above reasons, I would hope that any reforms would not just tinker with the Guidelines but instead would raze the regime and start over, remembering the lessons of the past and using whatever knowledge can be gleaned from the nearly two-decade long misadventure. Of course, the real test will be for Congress—whether federal lawmakers have the intestinal fortitude to seriously reconsider their own contrivance.

Still, I remain (maybe naively) optimistic that someone will hear the “Gospel of the Three Dimensions” and liberate the process of sentencing from the bounds of Gridland. Like A. Square, I am just a writer and a lawyer who recognizes that there is something outside of the two-dimensional realm of the Guidelines, and my entreaty may be “absolutely destitute for converts.”<sup>425</sup> But I join *Flatland’s* narrator in hoping that these words “may find their way to the minds of humanity in some dimension, and may stir up a race of rebels who shall refuse to be confined to limited

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<sup>423</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also Luna, *Transparent Policing*, *supra* note 422, at 1154-65 (discussing importance of citizen trust in public assessments of legitimacy of criminal justice).

<sup>424</sup> See also Luna, *Misguided Guidelines*, *supra* note 96, at 19-20 (suggesting that any sentencing reform efforts should also examine the bloated and unruly body of federal crimes). See generally Luna, *Overcriminalization*, *supra* note 256 (critiquing expansion of criminal law).

<sup>425</sup> ABBOTT, *supra* note 2, at 119.

dimensionality.”<sup>426</sup> There is a world beyond the grid, and it is “broad and wide.”<sup>427</sup>

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<sup>426</sup> *Id.*; see *United States v. Sidhom*, 144 F. Supp. 2d 41, 42 (D. Mass. 2001):

The Court does not delude itself that its feeble gesture of protest will be of any consequence, except as a personal sacrifice, for the Court has always enjoyed the trial of criminal cases. However, the organized bar, which is as aware as are judges of the unfairness of the Guidelines in action, should raise its powerful voice and urge the Congress to abolish them or, at the very least, to render them hortatory and not mandatory.

See also *United States v. Dyck*, 287 F. Supp. 2d 1016, 1022-23 (D.N.D. 2003) (“Perhaps this opinion, as an appeal for a restoration of individualized sentencing, will provoke some thoughtful discussion on these important issues and help restore the traditional sentencing discretion of the district courts usurped by the legislative and executive branches of our government.”).

<sup>427</sup> ABBOTT, *supra* note 2, at 1.