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Rules, Standards, Sentencing, and the Nature of Law

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Rules, Standards, Sentencing, and the Nature of Law

Russell D. Covey*

Sentencing law and practice in the United States can be characterized as an argument about rules and standards. Whereas in the decades prior to the 1980s when sentencing was largely a discretionary activity governed only by broad sentencing standards, a sentencing reform movement in the 1980s transformed sentencing practice through the advent of sentencing guidelines and mandatory minimum provisions. As a result, sentencing became far less standard-like and far more rule-like. Although reform proponents believed that this “rulification” of sentencing would reduce unwarranted sentencing disparities and enhance justice, it is far from clear that these goals were achieved. Indeed, the debate between sentencing reformers and their critics is a paradigmatic illustration of the limits of relying upon modifications of legal form to enhance substantive justice. Building upon the work of legal theorists who have considered the rules versus standards conundrum, this article uses sentencing law as a lens to view some of the fundamental perplexities that bedevil law’s grander aspirations—for determinacy, fairness, even coherence itself. Because, it is argued, refinements in legal form will never achieve the substantive goals to which law strives, the Essay urges a turn away from formal equality and toward a conception of sentencing justice that is centered on process values such as respect for those affected by sentencing decisions, concern that all voices be adequately heard, and decision making that reflects the considered moral judgment of the decision maker.

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INTRODUCTION

When Congress enacted the Sentencing Reform Act of 1984 (SRA)¹ and thereby established the United States Sentencing Commission and tasked the new commission with the creation of formal sentencing guidelines, it had two “primary purposes.”² First, Congress hoped to enhance “honesty” in sentencing.³ That is, it sought to ensure consistency between the sentences declared by the courts and those that were actually served by convicts.⁴ This goal proved relatively easy to accomplish. Congress simply abolished parole and, in its place, instructed the Commission to create a determinate sentencing

1. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.); see also 28 U.S.C. § 991 (2012), 18 U.S.C. § 3551 (2012).

2. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

3. *Id.* (citing S. REP. NO. 98-225, at 54, 56 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3237, 3239).

4. *Id.* (citing S. REP. NO. 98-225, at 56 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3239).

system, leavened only with mild reductions for “good time.”⁵ Second, with passage of the SRA Congress sought to “reduce ‘unjustifiably wide’ sentencing disparity.”⁶ As the Act states, the goal of the new sentencing system is to “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted.”⁷ The reduction of unwarranted disparity thus entailed two simultaneous commands: sentence like cases alike, and sentence different cases differently. Uniformity and proportionality, in other words, were the twin attributes that the new sentencing system was intended to safeguard.⁸ But constructing a sentencing system that reduced “unwarranted disparities” would prove more elusive than merely increasing the predictability of time served after a sentence was pronounced.

Three decades later, empirical research on sentencing disparities provides a muddled picture. On some measures, the SRA has clearly reduced sentencing disparities.⁹ Yet on other measures, the SRA has increased sentencing disparities.¹⁰ Racial disparities, for instance, have been exacerbated by the SRA’s increased reliance on sentencing rules, and empirical evidence suggests that racial sentencing disparities are less severe when sentencing courts exercise greater sentencing discretion.¹¹ Thirty years after enactment of the

5. *Id.* (citing 18 U.S.C. § 3624(b) (Supp. IV 1986)).

6. *Id.* (citing S. REP. No. 98-225, at 38, as reprinted in 1984 U.S.C.C.A.N. 3182, 3221).

7. 28 U.S.C. § 991:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . .

8. Breyer, *supra* note 2, at 13 (identifying “two competing goals of a sentencing system: uniformity and proportionality”).

9. See, e.g., James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999) (finding that the expected difference in average sentence length between two judges fell from 17 percent pre-Guidelines to 11 percent in the Guidelines’ early years).

10. See Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 730–31 (2012). Other studies have also found that implementation of the Federal Sentencing Guidelines corresponded with increased racial and ethnic sentencing disparities. See, e.g., Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?*, 6 FED. SENT’G REP. 223 (1994) (attributing increased disparity to mandatory minimum sentencing provisions).

11. Fischman & Schanzenbach, *supra* note 10, at 730–31 (finding that “judicial discretion likely reduces racial disparities”).

SRA, there is no clear proof that federal sentences in the aggregate are any less disparate than they were before that legislation took effect.

On reflection, it is no surprise that the Commission struggled to devise a sentencing-guidelines system that was faithful to this congressionally mandated imperative. The instruction to devise a system that treats like cases alike and different cases differently is but a reenactment of one of the oldest, and most fundamental, puzzles of justice.¹² Indeed, it constitutes one of the basic recurring structural features of the rule of law: the irreconcilability of *ex ante* control and *ex post* discretion over human conduct.

The literature on the nature of and contrast between rules and standards, or between rules and discretion more generally, is extensive.¹³ In general, rules are legal directives that define the content of the law *ex ante* through prescription of concrete empirical triggers that dictate determinate responses. Standards, in contrast, leave the determination of the directive's content to the applier of the standard *ex post*, rely on evaluative triggers rather than empirical ones, and guide rather than determine the choice of response.¹⁴ Rules are said to be "fixed" and standards to be "flexible";¹⁵ rules are blunt and bright and standards are soft and opaque.

Commentators have identified various supposed strengths and weaknesses of rules and standards, often styled as "virtues" and "vices."¹⁶ But a closer look at the supposed virtues and vices of rules and standards suggests that they may be more illusory than real. Understanding the mission of the Sentencing Commission in crafting the Guidelines, and the federal courts in interpreting them, as a series of choices or disputes about rules versus standards makes clear the quixotic nature of the task dictated by the SRA. No set of sentencing guidelines can engender a sentencing system that treats individual offenders

12. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) ("Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood." (quoting ARISTOTLE, *ETHICA NICOMACHEA* V.3.1131a-1131b (W. Ross trans., 1925))).

13. Some writers have formulated the problem as one contrasting rules on the one hand with standards on the other. Others have contrasted rules with unguided discretion, seeing unguided discretion as a more extreme delegation of decisional authority than one in which standards govern. See, e.g., Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995). I do not draw any strong distinction between standards and unguided discretion in this Essay because true unguided discretion is extremely rare, if not altogether absent, in law. In virtually all cases, one can at least find implicit standards that in fact guide decision making. This was the case, I suggest, in the field of pre-guideline sentencing, where no formal standards governed judicial sentencing practice, but judges nonetheless regularly acknowledged a small set of theoretical purposes—retribution, deterrence, and rehabilitation—as establishing the framework within which sentencing decision making was expected to occur.

14. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382-83 (1985).

15. See, e.g., Jeremy Paul, *CLS 2001*, 22 CARDOZO L. REV. 701, 705 (2001) (noting the choice always confronted by lawmakers between "fixed rules (don't violate housing code) or flexible standards (keep the place in habitable condition)").

16. See, e.g., Schlag, *supra* note 14, at 399-418.

both uniformly and proportionately, at least in any nonsuperficial way. Indeed, the nation's recent experiment in sentencing reform is a textbook illustration of one of the fundamental characteristics of law in general—the essential and ultimately unbridgeable tension between generality and particularity, between “mechanical over- and underinclusion” and “biased arbitrariness,”¹⁷ between law and equity.¹⁸

Ultimately, the goal of enhancing uniformity and proportionality through the adoption of a set of firm sentencing rules (mandatory guidelines) is a fool's errand. As I attempt to show below, uniformity and proportionality cannot both be pursued at the same time; any attempt to increase one of these values necessarily results in a decrease in the other. Indeed, it may turn out that the very concepts of “uniformity” and “proportionality” are fundamentally problematic in the sentencing context. What is more, this is not merely a sentencing problem; it is an endemic, unavoidable feature of law writ large.

The argument proceeds as follows. In Part I, this Essay briefly describes the standard model of federal sentencing prior to reform, the reform movement, and the criticisms that followed in reform's wake. This history is essentially a debate between those who favor a discretionary sentencing system and those who favor one that is rule-based. Part II describes the classic rules versus standards debate, defining terms and noting the various conventional arguments that rule proponents and standard proponents use in defending their preferred form of legal directive. It then notes some significant complications to the familiar debate, including the fact that many of the supposed virtues and vices of rules and standards morph into their opposites when viewed from different perspectives, and that rules and standards in any event tend in practice to converge. Part III then uses Justice Stephen Breyer's description of the problems the Sentencing Commission encountered in attempting to craft a set of sentencing rules¹⁹ as a case study in what this Essay refers to as the “rules-standards paradox,” that is, the stubborn resistance of legal form to resolve substantive indeterminacy. The sources of indeterminacy are manifold and well-recognized: rules are “open-textured,” internally and externally incoherent, over- and under-inclusive, complex, and subject to exception. As a result, the promise that uniformity and proportionality in sentencing, or any legal endeavor, might be advanced through reliance on rules is ultimately doomed to failure. Part IV then takes stock of our dilemma and suggests that uniformity and proportionality should be—and can only be—understood by

17. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976).

18. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 48 (1983) (noting that Langdellian formalists distinguished “substantive law on the one hand and procedure and remedies on the other,” and as a result “they treated the distinction between law and equity, potentially an ideologically charged clash of governance by rule with judicial discretion, only as an aspect of the peripheral law of remedies”).

19. See Breyer, *supra* note 2.

virtue of the process that individuals receive, not by the outcomes that the legal system produces. It is in pursuit of fair process, and not in pursuit of substantively just outcomes, that the choice between rules and standards becomes relevant, since that choice is an important determinant in the allocation of decision-making authority among the many participants in sentencing decision making. Ensuring that our sentencing structures create opportunities for each important constituency to have a voice in the process is, ultimately, the true mark of a well-designed legal system.

I.

SENTENCING REFORM AND LAWLESSNESS

As Frederick Schauer has observed, sentencing has traditionally been a field of “legal decision-making that only with difficulty can be characterized as rule-based.”²⁰ In fact, for much of American history sentencing has been a field of law that, to the extent it was subject to law at all, was governed largely by standards rather than rules. Criminal statutes operated like rules only to the extent that they established statutory maximum sentencing parameters. Otherwise, they left the choice of how much of the potential maximum sentence to actually impose to the judge, guided only by the implicit injunction to “do justice” and a widely agreed-upon set of penal theories—retribution, deterrence, incapacitation, and rehabilitation.²¹ In determining what sentence to impose, the judge could take into account “the fullest information possible concerning the defendant’s life and characteristics.”²² In furtherance of that objective, judges were left free from “rigid adherence to restrictive rules of evidence” that might be appropriate in other legal contexts such as trial.²³ And judges were encouraged to craft individualized sentences that were proportionate to the culpability and character of the individual defendant, reflecting the “prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.”²⁴ Indeed, during the pre-reform era, federal sentencing practice reflected a clear priority of sentencing proportionality over sentencing uniformity. As the Supreme Court explained, “[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”²⁵ For most offenders, actual sentencing outcomes were hard to predict and were determined, in any event, by “nonjudicial agencies” such as corrections officials, probation officers, and parole boards.²⁶

20. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 11 (1991).

21. *See Williams v. New York*, 337 U.S. 241 (1949).

22. *Id.* at 247.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 248.

When the SRA was enacted in 1984, it was seen as the capstone of a long battle to reform the lawlessness and anarchy of federal sentencing policy. It was, in a sense, an effort to impose law by rule—and not merely the rule of law—on federal sentencing.²⁷ Judge Marvin Frankel is widely acknowledged as the father of the movement.²⁸ In an influential article written in the early 1970s, Frankel characterized federal sentencing as “a regime of unreasoned, unconsidered caprice,” and called instead for “governance of sentencing by rational, intelligible principles.”²⁹ The primary flaw that Frankel observed with the federal sentencing system was the vast, unconstrained discretion that trial courts wielded in the sentencing process.³⁰ If a criminal defendant were convicted under a provision of the penal code directing the court to sentence within a wide range, Frankel complained, there is “no structure of rules, or even guidelines,” to help the court determine where within that broad range the case before her falls.³¹ Which of the myriad factors—the fact that the defendant pled guilty, that he might have perjured himself, that he is a regular churchgoer, etc.—should matter? The reality, Frankel observed, was that judges regularly considered and responded to such various factors in “contradictory or conflicting” ways.³²

Frankel’s claim that federal sentencing was essentially lawless consisted of three main points. First, apart from the broad statutory ranges established by the federal penal code, no set of rules existed to assist sentencing judges in selecting a sentence.³³ Because a multitude of factors could affect a judge’s determination of the proper sentence and because no set of rules even suggested how these factors should be weighed, the result was significant disparity in sentencing outcomes. As Frankel put it, “nobody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes.”³⁴ Second, Judge Frankel complained, federal judges have little if any training or expertise in federal sentencing, and whatever lessons they learn “along the way” are “likely to be fleeting, random, anecdotal, and essentially trivial.”³⁵ Third, he argued, because there is no requirement that judges explain their sentencing decisions or that

27. See SCHAUER, *supra* note 20, at 167–68 (discussing the difference between law by rule and rule of law as the distinction between an authoritative decision-making system in which rules act as hard constraints on decisions and one in which disputes are resolved by any variety of means, including means other than the application of rules, but not simply by “the exercise of brute physical force”).

28. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 *CIN. L. REV.* 1 (1972).

29. *Id.* at 2.

30. *Id.* at 4.

31. *Id.* at 5.

32. *Id.*

33. See *id.* at 4 (observing that common criminal penalty provisions granting judges the power to impose sentence “characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place between”).

34. *Id.* at 7.

35. *Id.*

judges and parole officials communicate or coordinate with each other, the whole process of sentencing was cloaked in “a shadowland of doubt, ignorance, and fragmented responsibility.”³⁶

Frankel called for the creation of a set of legal and institutional structures designed to rectify those flaws. Specifically, he urged adoption of a sentencing code with “a fairly detailed calculus of sentencing factors, including such use of arithmetical weightings as experimental study might reveal to be feasible.”³⁷ As he argued, determining the proper weight of the relevant sentencing factors “calls for a judgment of policy, suited exactly for legislative action and surely not suited for random variation from case to case.”³⁸ This “is a question of making explicit and uniform what is now tacit, capricious, and often decisive.”³⁹ Additionally, he proposed the creation of a national commission that would be responsible for studying sentencing and corrections, formulating sentencing rules based upon its studies, and enacting those “rules subject to congressional veto.”⁴⁰ Finally, Frankel urged “that sentencing judges explain what they are doing,” and that sentences in general be subjected to meaningful appellate review.⁴¹ Frankel’s proposals, with a surprising degree of fidelity, became the framework for the Sentencing Reform Act of 1984, which saw the creation of the Sentencing Commission and subsequent promulgation of the Federal Sentencing Guidelines.⁴² Frankel’s call for reform was also taken up in many states, where movements emerged to dramatically restrict the discretion of judges and parole boards over sentencing.⁴³ By the time Congress enacted the SRA, numerous states had already adopted determinate sentencing schemes and abolished parole.⁴⁴

The primary goal of modern sentencing reform has thus been to rectify the “rulelessness” of sentencing law. The sentencing reforms adopted in the late 1970s and 1980s attempted to transform sentencing from a system that was at best loosely standards-based, and at worst flatly “lawless,” to one that was governed by well-thought-out, logical rules. The rulification of criminal punishment, moreover, went beyond mere adoption of guidelines. Legislatures

36. *Id.* at 10–11.

37. *Id.* at 47.

38. *Id.* at 46.

39. *Id.*

40. *Id.* at 51.

41. *Id.* at 28.

42. See MICHAEL TONRY, SENTENCING MATTERS 9–12 (1996) (noting that Congress enacted the Sentencing Reform Act in response to the concerns articulated by Frankel); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 76 (2015) (same).

43. Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 650 n.21 (1993) (observing that Frankel’s proposals “charted the general outline of sentencing reform through the 1980s and into the 1990s”).

44. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

adopted a wide variety of mandatory minimum and habitual offender laws that operated in strict rule-like fashion: these laws identified set criteria, typically based on the type or number of convictions, that triggered fixed (and severe) sentencing consequences.⁴⁵ Mandatory minimums, habitual offender laws, and sentencing guidelines all represent efforts to impose more rule-like governing structures on the sentencing process and to subject it, in Frankel's words, to "rational, intelligible principles."⁴⁶ Determinate sentencing systems replaced the standards-based "consider everything" model of sentencing with a rule-based model that focused on a very small number of factors.⁴⁷

Sentencing reform was met with its own vociferous group of critics. These "reform critics" have complained that the problem with sentencing now is "not disparity but excessive uniformity."⁴⁸ According to these critics, the creation of sentencing-guidelines systems, the enactment of mandatory minimum sentencing schemes, and the abolition of parole in many jurisdictions gave rise to an overabundance of "aggregation."⁴⁹ As Professor Albert Alschuler complained, by 1991 it became "apparent that the pursuit of equality through sentencing guidelines often has yielded nonsense rules and inequalities."⁵⁰ The perceived injustice of a "sentencing system that is

45. See Hon. Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 914 (2007) ("There are approximately one hundred mandatory sentencing provisions found in sixty different statutes in the United States Code, and all fifty states had enacted some form of mandatory sentencing by 1994."); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194 (2005) (noting that "[i]n 1980 Minnesota became the first jurisdiction to implement sentencing guidelines developed by a permanent sentencing commission, an idea that had been proposed by federal judge Marvin Frankel in the early 1970s").

46. See Frankel, *supra* note 28, at 2.

47. As Professor Albert Alschuler puts it, "[p]re-guidelines regimes emphasized individualized punishment; to a considerable extent, guidelines regimes substitute punishment based on aggregations of similar cases." Alschuler, *supra* note 44, at 902. The Supreme Court's *Apprendi* doctrine placed some procedural limitations on the kind of evidence that might be taken into account by the sentencing judge, further pushing the sentencing process in the direction of rules and away from standards, albeit in complex ways and with results that are not entirely consistent with either legal form. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In general, however, the unambiguous trend in sentencing reform has been toward turning a regime of loose standards into one of tight, or at least tighter, rules. Of course, the actual implementation of Frankel's call to transform a largely rule-free sentencing system into a rule-based one was arduous, took many years of legislative struggle, and ultimately required the resolution of many difficult and perplexing policy design questions. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

48. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 835 (1992).

49. See, e.g., Alschuler, *supra* note 44, at 902; Schulhofer, *supra* note 48. The principal complaints about the Federal Sentencing Guidelines were presented in KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

50. Alschuler, *supra* note 44, at 903.

unnecessarily cruel and rigid” caused several federal judges to resign.⁵¹ Indeed, the most significant development in sentencing law since the promulgation of the Federal Guidelines was the Supreme Court’s decision in *Booker* to make the Federal Guidelines merely advisory,⁵² and the most consistent criticism of criminal sentencing policy at both the state and federal level centers on the continued use of mandatory minimum sentences. In the world of sentencing, rules are now on the defensive.

From the perspective of the rules-standards debate, the problems and continued criticisms that arose in the course of sentencing reform were entirely predictable. This history exemplifies the paradoxical nature of the rules-standards dialectic. In the next Part, this Essay defines rules and standards with greater precision and reviews the rules-standards dialectic. This sets the stage for consideration of what I refer to as the rules-standards paradox, both in general and as it applies to the sentencing reform debate.

II.

RULES, STANDARDS, AND THE RULES-STANDARDS PARADOX

The terms “rules” and “standards” do not have precise or fixed meanings in the legal literature. Legal scholars have long debated whether legal directives should be formulated as rules or standards, how a chosen formulation impacts the implementation of the law, and even whether or not that choice has any practical consequence.⁵³ In the course of the debate, a general consensus has emerged regarding how the key attributes of rules and standards differ.

A. Rules

Legal directives, as Professor Duncan Kennedy has observed, can be assessed along a variety of formal dimensions, including formal realizability, generality, and formality.⁵⁴ The primary difference between rules and standards is usually understood by reference to their degree of “formal realizability.”⁵⁵ Rules are legal directives that feature a higher degree of formal realizability than standards. In perhaps the leading work on the subject, Professor Frederick Schauer describes some of the primary features of prescriptive rules. As Schauer explains, rules consist of three components: a factual predicate, a consequent, and a justification.⁵⁶ The factual predicate “specifies the scope of the rule.”⁵⁷ It identifies the operative facts that must exist to trigger the rule’s

51. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 20, 25 (2006) (internal quotation marks omitted) (describing several judicial resignations in protest of federal guidelines).

52. *United States v. Booker*, 543 U.S. 220 (2005).

53. See Schlag, *supra* note 14, at 383–84.

54. Kennedy, *supra* note 17, at 1687–94.

55. *Id.* at 1687–88.

56. See SCHAUER, *supra* note 20, at 23–27.

57. *Id.* at 23.

application. The consequent specifies the consequences that are prescribed when the factual predicate of the rule is satisfied. It tells the rule's applier what to do when a qualifying case is encountered. A rule establishing a speed limit, for example, might have as its factual predicate "[i]f a person drives in excess of 55 miles per hour," and as its consequent "*then* that person shall pay a fifty dollar fine."⁵⁸ In addition to factual predicates and consequents, all rules have justifications. The justification of a rule is, naturally enough, the purpose or goal that the rule is thought to advance.⁵⁹ A rule that establishes a speed limit might have as its justification the prevention of unsafe driving.⁶⁰

Because rules by definition are more formally realizable, rules are assumed to provide more notice to the subjects of legal directives regarding the legal consequences of their actions.⁶¹ Compared to a standard's more normative directive, a rule's hard empirical trigger is thought to provide a firmer predictive guide about when and how that rule will be applied. Consequently, rules are said to offer better *ex ante* guidance about how a legal directive will be enforced, and for the same reasons, to more predictably facilitate resolution of disputes *ex post*.⁶² Rules are also thought to be more efficient to adjudicate than standards.⁶³ Adjudicators need not conduct an "all-things-considered" review of circumstances in every case, nor attempt to craft an optimal remedy in each case to maximize the law's objectives. Adjudicators need only determine whether the factual predicate for the rule has been triggered and then respond as the rule's consequent dictates.

In addition, rules are thought to enhance the amount of control that rule makers exercise over the criteria relied upon to trigger application of the consequent or resolve a dispute about its application. Rules thus facilitate delegation where the delegator has a good idea of the conduct sought to be induced or deterred.⁶⁴ The clear triggers and determinate consequents that

58. *Id.*

59. *Id.* at 53 (describing a rule's background generalization as its purpose); *see also id.* at 27 ("[A] rule's factual predicate consists of a generalization perceived to be causally relevant to some goal sought to be achieved or evil sought to be avoided. Prescription of that goal, or proscription of that evil, constitutes the justification which then determines which generalization will constitute the rule's factual predicate.").

60. Of course, in practice, rule justifications are far more complex than this, as will be discussed at greater length below. *See* Part III.E.

61. Kennedy, *supra* note 17, at 1688; *see also* Larry Alexander, "With Me, It's All *er Nuthin'*": Formalism in Law and Morality, 66 U. CHI. L. REV. 530, 543-44 (1999) (arguing that rules are better than standards at improving people's "ability to determine what they need to determine").

62. *See, e.g.,* Kaplow, *supra* note 14, at 561 n.5 (1992) ("[A] law is 'rule-like' if it in fact facilitates resolution of cases *ex post* and makes prediction easier *ex ante*.").

63. Schauer calls this the "argument from efficiency." *See* SCHAUER, *supra* note 20, at 146 ("Rules allocate the limited decisional resources of individual decision-makers, focusing their concentration on the presence or absence of some facts and allowing them to 'relax' with respect to others.").

64. For a discussion of agency costs of delegation in the sentencing context, *see* Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 U.C. DAVIS L. REV. 659, 665 (1992) (explaining that "as the

characterize rules make it easier for drafters to anticipate the effects of rules than of standards. For the same reason, it is also easier for the rule maker, or some other institution (such as an appellate court), to police disobedient rule applicers who adjudicate cases contrary to the rule. Rules thus are said to better prevent official arbitrariness than standards.⁶⁵

The vices of rules largely mirror their virtues. First, because they function through generalization, rules are alleged to be blunter legal instruments than standards.⁶⁶ The factual predicate of a rule identifies a general category of operative facts that, if present, trigger application of a prescribed consequent. Rules are promulgated to serve a function or purpose (that is, they serve an underlying justification), but the fit between the factual predicate of the rule and the justification for it often diverge. In some cases, the factual predicate will encompass conduct or phenomena that is not relevant to or does not advance the underlying justification. In other cases, the factual predicate will fail to encompass conduct or phenomena that clearly does come within the scope or purpose of the underlying justification, and that *ceteris paribus* preferably would be treated as governed by the rule. As Kennedy explained, “[t]he choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules.”⁶⁷ This sacrifice of precision means that rules are invariably both over- and under-inclusive; they will apply in some contexts where they should not and will not apply in some contexts where they should.

The classic “no vehicles in the park” case demonstrates the over- and under-inclusiveness of rules. Is a rule prohibiting vehicles in the park violated when town officials attempt to erect a statue of a car in the park? Assume that the sole justification for the prohibition on vehicles in the park is to protect picnickers from intrusive noise. If the rule were interpreted to apply to both real cars and statues of cars, then the rule would bar erection of the planned statue. Such an application of the rule would be over-inclusive from the perspective of the rule’s justification. At the same time, however, the rule might not apply to the installation of a giant public bongo drum on wheels in the park, even if the playing of the drum would be more disturbing to picnickers than would the presence of the statue. As such, the rule would be under-inclusive as well. All

complexity of the delegated task or decision increases, the advantages of rules relative to standards for the purpose of controlling agency costs decrease, and one would expect to see principals using relatively more delegation of authority and applying standards in their employment of agents”).

65. Kennedy, *supra* note 17, at 1688.

66. See Larry Alexander, *Introduction to the Symposium on the Rationality of Rule-Following*, 42 SAN DIEGO L. REV. 53, 54 (2005) (“Rules achieve their superior ability to provide guidance by being blunt instruments, over and under-inclusive relative to the background moral goals they are meant to achieve.”).

67. Kennedy, *supra* note 17, at 1689.

rules are over- and under-inclusive in this way.⁶⁸ This is a basic and “largely ineliminable” feature of rules.⁶⁹

Second, rules inhibit adjudicators from reaching optimal results in particular cases. As Judge Richard Posner explains, “[a] rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale.”⁷⁰ Adjudicators who are not subject to the limitations of rules and who might resolve a dispute through the direct application of a legal directive’s justifications to the facts of a case are free to craft outcomes that are more consistent with the directive’s justifications. As such, rules are seemingly “suboptimal” compared to standards.⁷¹

B. Standards

Whereas rules seek to identify clear triggering facts, standards tend to refer not to triggering facts per se but instead to “one of the substantive objectives of the legal order,” such as reasonableness or good faith.⁷² This can be understood as a substitution of the factual predicate with the legal directive’s justifications: “[t]he application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”⁷³ As a result, “standards leave most of the important choices to be made by the subject, the enforcer, or the interpreter, and leave them to be made at the moment of application.”⁷⁴ Whereas rules rely on empirical triggers, standards employ more “evaluative” criteria, such as reasonableness, good faith, or due care,⁷⁵ or use multi factor or “totality of the circumstances” tests that do not specify the weight to be given to individual factors. As a result, standards are thought to be more indeterminate in their application.⁷⁶ If a fifty-five mile per hour (m.p.h.) speed limit illustrates a rule, an injunction to drive at a “reasonable speed given the conditions” illustrates a corresponding standard.

The difference between rules and standards has thus been described as one between legal directives that specify the factual triggers ex ante versus

68. SCHAUER, *supra* note 20, at 31.

69. *Id.* at 50.

70. Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 15–16 (quoting *Mindgames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000)).

71. See SCHAUER, *supra* note 20, at 100.

72. Kennedy, *supra* note 17, at 1688.

73. *Id.*

74. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 804 (2005).

75. See Schlag, *supra* note 14, at 382.

76. See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 27 (2000); Schlag, *supra* note 14, at 382–83; see also Alexander, *supra* note 61, at 543 (“Standards are posited norms that contain vague or controversial moral or evaluative terms in their hypotheses.”).

those that leave the determination of the relevant factual triggers to the adjudicator *ex post*. Rules give substantive content to legal directives in advance; standards require the enforcement authority or other standard applier to resolve the meaning of legal directives at the point of application.⁷⁷

Like rules, standards can claim to possess certain virtues. First, standards are thought to be flexible.⁷⁸ Although standards might provide less *ex ante* guidance, standards ensure that *ex post* applications are better aligned with the legal directive's underlying justifications because the standard applier directly determines whether the justifications are furthered by application of the consequent.⁷⁹ Because the applier will know more about the actual circumstances surrounding a dispute, a standard permits adjudicators to root out the anomalies that accompany applications of blunt rules. Standards are, in this sense, not only more flexible but more accurate than rules.

Standards may also be more efficient than rules. First, the cost of formulating standards may be significantly less than the cost of formulating comprehensive sets of rules.⁸⁰ This is one explanation for why tort law uses a general negligence standard rather than rules that establish what constitutes negligent conduct in specific circumstances. Second, by permitting case-specific tailoring of enforcement and remedy, standards safeguard against the wasteful application of unneeded consequents.

With respect to delegation issues, standards also have virtues. Standards permit the delegation of decision-making authority to officials who have more information about the facts and circumstances of cases, while allowing the lawmaker to retain the ability to specify the goals to be achieved. Whereas rules may be better at directing delegates to make decisions based on particular substantive criteria specified in advance, standards are superior where the delegator's goals are clear but the relevant criteria for meeting those goals is not. By mandating that the decision maker evaluate the purpose, policy, or value sought to be achieved, standards allow the delegator to control the agenda while leaving the details of implementation to others.⁸¹

While this is the conventional story, there is also a more complex account of rules and standards that gives rise to the rules-standards paradox. At the heart of the paradox is the observation that the virtues-vices debate is circular

77. Kaplow, *supra* note 14, at 561–62.

78. See John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 939 (2012) (“The inherent flexibility of standards can also enhance efficiency by allowing decision makers to take into account new circumstances and unexpected contingencies and avoid outcomes that produce excessive economic waste or socially intolerable forfeitures.”).

79. See Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 442 (2013) (“Standards are thought to be . . . flexible, adaptable, and better at attaining their underlying purpose.”); Schlag, *supra* note 14, at 400–15.

80. See Kaplow, *supra* note 14, at 569 (explaining that because of the “cost of determining the appropriate content of the law *ex ante*, . . . rules are more expensive to promulgate than standards”).

81. Schlag, *supra* note 14, at 386–87.

and indeterminate; in practice, if not in theory, rules and standards tend to converge.⁸² In addition, both sides of the debate fail to recognize the extent to which their arguments are dependent on perspective. What looks like greater uniformity or predictability from one vantage point might well appear like disparity and random variation from another. Discussion of rules and standards, moreover, is typically conducted within the context of various simplifying assumptions, the most significant of which is that any particular legal directive serves a single or primary purpose. In fact, justifications are multiple, contested, and conflicting, rendering the analysis of concepts such as “fit” or “efficiency” problematic. Not only is it unclear which legal form—rules or standards—better advances the goals of uniformity or proportionality, no resolution of the question seems possible. Indeed, it appears that the primary consequence of framing any legal directive as a rule or a standard is its effect on the distribution of discretion.⁸³ This is far from inconsequential, and I do not mean to suggest otherwise, but it is also less substantive—and perhaps less predictable—than most participants in the rules-standards debate seem to believe.

The next Part explores the more complex account of the rules-standards virtues and vices debate, as that debate has played out in the context of sentencing reform.

III.

RULES, STANDARDS, AND THE QUIXOTIC QUEST FOR UNIFORMITY AND PROPORTIONALITY

The debate between advocates and critics of sentencing reform illustrates with particular clarity some of the fundamental paradoxes of the rules-standards dialogue.⁸⁴ In this Part, I highlight several of those paradoxes. First, I argue that the principal aim of sentencing reformers—to increase sentencing uniformity and proportionality by imposing a regime of rules—is quixotic. Like beauty, uniformity and proportionality are virtues that reside in the eye of the beholder. Because maximizing uniformity and proportionality are often taken to be the aims of law more generally, sentencing reform’s failure to maximize these aims have important lessons to teach about law’s fundamental nature and limitations.

I then proceed to consider several problems that the Sentencing Commission encountered in its attempt to transform federal sentencing into a

82. *Id.* at 383–84; Andrew Morrison Stumpff, *The Law Is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649, 658 n.27 (2013) (arguing that “[d]espite the apparent views of many academics, it would appear that no meaningful distinction can be drawn between rules and standards or any categories in between”).

83. *Cf.* SCHAUER, *supra* note 20, at 159 (describing rules as “tools for the allocation of power”).

84. *See* Breyer, *supra* note 2. Justice Breyer identified seven major issues with which the Commission had to contend and the “key compromises” that were reached in result. *See id.* at 2.

rule-governed enterprise. These problems, I argue, are endemic features of rules. The Sentencing Commission's struggle to resolve them—and the criticisms of those efforts launched by detractors of the new regime—well illustrates the rules-standards paradox.

A. The Empty Idea of Uniformity

In a landmark article, Professor Peter Westen argued that the claim that people should be treated equally in constitutional discourse is essentially empty.⁸⁵ That claim, he explained, is synonymous with an age-old conception of justice as treating likes alike, and unalikes differently.⁸⁶ But “likeness,” Westen observed, is not an inherent quality of things or people. Rather, things and people are all alike in some ways and different in other ways. Whether any two entities are alike in the relevant way depends on the normative purposes motivating the comparison.⁸⁷

To better understand Westen's point, imagine that Bob is allowed to vote in a local election but Nancy is not. Have they been treated in such a way as to violate the rule that “likes should be treated alike”? They have not been treated the same, but whether or not that different treatment violates the principle of equality depends on the reasons for their different treatment. If the voting rules stipulate that only residents of the locality are entitled to vote, and Bob is a resident and Nancy is not, then any complaint about the different treatment of Bob and Nancy is actually a complaint about the justification for limiting voting eligibility in the election to residents. If both Bob and Nancy are residents, we still do not know enough to determine whether Bob and Nancy have been treated equally. What if Bob is a fifty-year-old man and Nancy is a fifteen-year-old girl? Although Bob and Nancy would be alike with respect to their residency, they would be unlike with respect to another relevant criteria—their age. The claim that Bob and Nancy are alike for purposes of the entitlement to vote in the election depends on the criteria identified in the voting eligibility rules and whether Bob and Nancy are alike with respect to these—and only these—particular criteria. In short, the phrase “‘likes should be treated alike’ means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard.”⁸⁸

Because the criteria employed by the rule or standard determine who or what falls under the rule's scope, “the proposition ‘people who are alike should be treated alike’ is tautological.”⁸⁹ The important question is always whether the rule or standard has identified the appropriate criteria to achieve the purposes of the law. Voting eligibility rules that take residency and age into

85. See generally Westen, *supra* note 12.

86. See *id.* at 542–43.

87. *Id.* at 560.

88. *Id.* at 547.

89. *Id.* at 542.

account will produce different outcomes than rules that turn on other factors, such as gender, income, or criminal history. Whether any of those criteria is appropriate to determine voting eligibility will depend on one's assessment of such larger questions as the nature of citizenship, democracy, and fairness.

The assessment must necessarily take place from an external vantage point. One cannot judge whether a rule or standard produces uniform results based solely on the internal criteria of the rule or standard. By their very nature, rules and standards demand that all that falls within the scope of the factual predicate be subject to the rule or standard's consequent. To this, the demand for equality in rule application adds nothing. At most, it boils down to a demand that rules and standards be applied consistently to all those subject to the rules and standards. In this way, the demand for equal treatment is empty.

Westen's insight into the nature of equality claims is as applicable to sentencing as it is to constitutional discourse.⁹⁰ The SRA's stated goal of "avoiding unwarranted sentencing disparities among defendants . . . while maintaining sufficient flexibility to permit individualized sentences when warranted"⁹¹ is, in essence, nothing more than a restatement of the first principle of justice—to treat likes alike and those who are not alike differently, or to use Plato's formulation, to render to each his due.⁹² But the call for "uniformity" in sentencing is empty in just the same way as the call for equality in constitutional discourse: whether sentencing rules are applied uniformly depends on, and can only be measured by, the content of the sentencing rules themselves. If those rules are being applied consistently, they are also being applied "uniformly," regardless of the substantive outcomes. Whether two persons who receive varying sentences have been treated in a way that violates the injunction to treat likes alike depends entirely on the criteria used to measure likeness for purposes of sentencing.⁹³ This is the basic problem with which the Commission had to grapple. It did so primarily by attempting to craft a set of rules for determining when criminal conduct was and was not "similar" and what factors should be considered to make some offenses, or some offenders, deserving of more or less punishment than others.⁹⁴ This attempt led

90. I am not the first to notice this parallel. See Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1337 (1997).

91. 28 U.S.C. § 991(b)(1)(B) (2012).

92. PLATO, *THE REPUBLIC* § 331e.

93. Research demonstrating that post-Guidelines sentencing has reduced disparity has tended to overlook the point that measuring disparity as a function of compliance with the Guidelines amounts to little more than the observation that "[j]udges in our guidelines system have come closer to following the guidelines than judges did before the guidelines were invented." Alschuler, *supra* note 44, at 917 (internal quotation marks omitted) (quoting Kay A. Knapp, *The Sentencing Commission's Empirical Research*, in ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 107 (1987)).

94. In focusing on what constitutes a similar offense and a similar criminal record, the Commission was merely following Congress's lead, as the SRA expressly directs the Commission to

the Commission directly into the problem with rules generally: their inherent over- and under-inclusiveness.

B. *Over- and Under-Inclusiveness of Rules*

When the Commission began contemplating how it should assess whether any two offenders were similarly situated and thus deserving of similar sentences, it faced the classic Aristotelian problem of determining, for the purposes of criminal punishment, who was alike and who was not. The Commission framed the choice as one between two different sentencing models—the “charge offense” model and the “real offense” model.⁹⁵ Charge-offense sentencing relies solely upon the formal offense of conviction to determine the sentence. Real-offense sentencing, in contrast, takes into account all relevant factors, including those not encompassed in the elements of the charge of conviction. As Justice Breyer explained, charge-offense systems differ from real-offense systems in that the former “tie punishments directly to the offense for which the defendant was convicted,” while the latter ask the sentencing court “to look, at least in part, at what *really* happened under the particular factual situation before it.”⁹⁶ The choice between these two types of sentencing systems captures one of the essential sentencing questions: “[W]hat range of information should be considered in fashioning an appropriate sentence?”⁹⁷

Imagine a simple “charge offense” system that “tie[d] punishments directly to the offense for which the defendant was convicted.”⁹⁸ Such a system might provide that all bank robbers receive five-year prison sentences upon conviction.⁹⁹ As Justice Breyer pointed out, “the principal difficulty” with such a simple system “is that it tends to overlook the fact that particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed.”¹⁰⁰ Because all bank robberies are not equal, to treat them equally forces an adjudicator to ignore all of the various characteristics that seemingly make some bank robberies worse than others. Did the robber use a gun? Did he steal a lot of money or only a little? Did he injure his victims? Did he destroy property?

eliminate unwarranted disparities among similar offenders who have similar criminal history. 28 U.S.C. § 991(b)(1)(B).

95. Breyer, *supra* note 2, at 8–9.

96. *Id.* at 9–10.

97. David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 403 (1993).

98. Breyer, *supra* note 2, at 9.

99. Let us stipulate that the purpose of sentencing is to punish offenders in proportion to their culpability and the harms they have caused. It does not matter what justification we choose—retribution, deterrence, incapacitation, rehabilitation, etc. The same problems arise.

100. Breyer, *supra* note 2, at 9.

How intricate was the planning? Was the robber the mastermind of the crime or merely a bit player?

A determinate five-year sentence would understate the appropriate punishment for the worst bank robbers and overstate it for the least culpable bank robbers. Accounting for perceived differences among offenses and offenders, we might, for example, want to impose ten-year sentences on violent bank robbers who steal large amounts of money, but perhaps only a year or two on those who commit their offenses unarmed, harm no one, and steal small amounts. A simple charge-offense system that treated all such offenders similarly would appear ill designed to accomplish the goal of proportionate sentencing.

In contrast to charge-offense systems, real-offense sentencing seems to have substantial advantages for obtaining proportionate sentencing outcomes. Under a pure real-offense system, a sentencing judge faces few limitations on the types of factors that she might consider. She can consider anything, including the specific details of how a crime was committed; the defendant's background, characteristics, attitudes, or identity; and even uncharged crimes or crimes for which the defendant was acquitted. Real-offense sentencing thus provides sentencing judges with substantial discretion to sentence defendants based on virtually unlimited criteria and is a paradigmatically standards-oriented sentencing approach. In seeking to advance the purposes of sentencing directly in each case—by selecting a punishment that appropriately reflects each offender's blameworthiness—judges have greater flexibility to craft sentences that reflect the different degrees of culpability and harm causation with which each offender committed his or her crime.

But while a pure real-offense sentencing system maximizes sentencing flexibility—and consequently, the possibility of maximum proportionality—it fails to achieve much semblance of uniformity. Indeed, the almost total discretionary sentencing system in place prior to the advent of the Guidelines was dumped precisely because of its supposed inability to produce uniform results. To negotiate this impasse, the Sentencing Commission tried to balance the advantages of rules-based and standards-based systems by incorporating the relevant distinctions among offenses and offenders into the Guidelines themselves.¹⁰¹ The Commission's more complex system incorporated a variety of variables, such as those distinctions discussed above in the bank-robber case—use of a gun, amount of loss, and causation of bodily harm—in an effort to balance the competing goals of proportionality and uniformity.¹⁰²

In so doing, the Guidelines required judges to comply with a comprehensive and detailed sentencing code that determined “not only which

101. See *id.* at 11–12 (explaining that the Commission attempted to compromise between charge and real offense sentencing by looking first to the offense charged to establish the “base offense level,” and then modifying “that level in light of several ‘real’ aggravating or mitigating factors”).

102. *Id.* at 12.

factors [were] relevant (and irrelevant) to criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor.”¹⁰³ Critics of the Federal Sentencing Guidelines—especially judicial critics—complained that this stripped federal judges of their most important duty, which is consideration of “the overall culpability of the defendant before [them].”¹⁰⁴ A proper evaluation of culpability, they argued, requires not merely consideration of some predetermined set of categories, but rather “a judgment that takes account of the [full] complexities of the individual case.”¹⁰⁵

Stripping away sentencing judges’ ability to take these complexities into account in sentencing may have been worthwhile if it resulted in less unwarranted sentencing disparities, but there is no basis to conclude that it did. While some data show modest declines in certain kinds of sentencing disparities, other data indicate the opposite.¹⁰⁶ Moreover, disparity cannot be measured without reference to particular criteria, and the lack of agreement about what those criteria should be precludes any measurement of the degree to which sentencing outcomes are disparate, much less the degree to which measurable disparities are unwarranted. For example, empirical data indicates that judicial departures from Federal Sentencing Guidelines’ ranges have increased since *Booker* rendered the Guidelines advisory, and that during the same period, racial disparities have decreased. Whether this shows that sentencing disparities have increased or diminished since *Booker* depends on whether one measures disparity by reference to compliance with the advisory guidelines or to the distribution of punishment by race.¹⁰⁷

Regardless of how many distinctions the sentencing rules reflect, constraints will always ensure that some potentially relevant distinctions are ignored. For example, the sentencing rules might result in varying sentences based on whether offenders use guns, steal large amounts of money, or cause harm to victims, but there will always be other distinctions that the rules omit. Current federal guidelines, for instance, omit consideration of several such variables, including the offender’s age, “family ties and responsibilities, vocational skills, mental and emotional condition, drug or alcohol dependence

103. Kate Stith & José Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254 (1997).

104. *Id.*

105. *Id.* at 1283.

106. See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1326–27 (2005) (explaining that “available evidence suggests that the guidelines have succeeded in reducing judge-to-judge disparity within judicial districts. . . . [but] researchers have found significant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country, and interdistrict disparities appear to have grown larger in the guidelines era, particularly in drug cases” (internal citations omitted)).

107. See Fischman & Schanzenbach, *supra* note 10, at 731 (finding that “racial disparities under the Guidelines are not attributable to judicial discretion; in fact, judicial discretion likely reduces disparities”).

or abuse, employment record, charitable contributions or civic, military or public service, or good works.”¹⁰⁸ Consider just the first: age. Given the wide recognition that the degree of brain development can serve as a mitigating circumstance for young offenders, many argue that this omission is a major defect.¹⁰⁹ But such omissions are inevitable because they are an inherent feature of rules.¹¹⁰ No matter how comprehensive the attempt to take into account all relevant factors, there will always be some omitted factors that could have swayed an adjudicator in a particular case.¹¹¹ Thus, the omission of potentially relevant distinctions means that even under the most complex guidelines, some offenders will receive sentences that understate their culpability, while others will receive sentences that overstate it. The Guidelines’ omission of any age-based distinctions illustrates this.¹¹²

As the Commissioners’ efforts demonstrate, disparity in rule application cannot be eliminated merely through the creation of more detailed rules. Regardless of the level of complexity or degree of detail provided by the rule maker, the interpreter of the rule will still confront a set of unresolved choices about the proper scope, application, and meaning of the rule in question. Different interpreters will reach varying conclusions in such cases. As H.L.A. Hart pointed out, “there is a limit, inherent in the nature of language, to the guidance which general language can provide.”¹¹³ It follows that uniformity in sentencing as in all rule-governed behavior is measurable only in reference to particular values that are extrinsic to the rules and ultimately limited by the indeterminacy of rules.

C. Perspective

While sentencing rules create broad categories of offenses and seek to impose similar sentences on all crimes within a given category, standards advocates, including sentencing judges critical of reform efforts, tend to see cases in their uniqueness and particularity. They perceive substantial differences in the circumstances of the offenses and the character of the

108. Frank O. Bowman, III, *Letter from Frank Bowman Concerning H.R. 1528*, 17 FED. SENT’G REP. 311, 313 n.2 (2005) (citing H.R. 1528 § 12(a)(3)) (identifying factors not included in the Guidelines but commonly cited by courts that downwardly depart from Guideline sentences).

109. See STITH & CABRANES, *supra* note 49, at 120 (discussing the Guidelines’ failure to take age into account).

110. See SCHAUER, *supra* note 20, at 34–37 (discussing “open texture” of rules).

111. See H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961) (discussing the inevitable possibility that unforeseen circumstances, facts, or arguments may become relevant given uncertainty of future contexts); Frederick Schauer, *On the Open Texture of Law* (Sept. 13, 2011) (unpublished manuscript), <http://ssrn.com/abstract=1926855> [perma.cc/54TK-WM93] (discussing Hart’s theory of open texture).

112. See STITH & CABRANES, *supra* note 49, at 123 (arguing that mandatory guidelines are arbitrary because “all defendants, whatever their personal circumstances and whatever the circumstances of their crimes, are subject to the same minimum amount of punishment”); Anderson et al., *supra* note 9, at 274 (noting Guidelines’ elimination of the ability of sentencing judges to consider the “reputational consequences and the loss of potential earnings suffered by white-collar offenders”).

113. HART, *supra* note 111, at 123.

offenders and seek to sentence accordingly. To standards advocates, broad and flexible standards, rather than firm and narrowly fixed rules, thus appear to be far better tools for achieving justice.

But the conventional view that rules are less able to conform outcomes with aims—that is, that rules are more over- and under-inclusive than standards—depends on whose perspective governs the “fit” analysis. As Professor Michael Tonry has observed, “consistency, evenhandedness, and fairness look different when viewed from different places.”¹¹⁴ The claim that rules are more over- and under-inclusive than standards is only true if we assume the perspective of the adjudicator at the time of adjudication. From the rule maker’s perspective, standards—not rules—are over- and under-inclusive.

For example, Congress might believe that all bank robbers deserve ten-year sentences, meaning that conviction of a charge of bank robbery is the only relevant desert criteria for sentencing. In that case, a determinate, rule-based sentencing system will be far more effective than a standards-based system at ensuring that the purpose of the rule—punishing bank robbers with the ten-year sentences Congress intended—is in fact achieved. After all, with more discretion, sentencing judges might take into account additional criteria—mens rea, or amount of money stolen, or role in the offense, etc.—and adjust sentences above or below ten years. Because lawmakers by hypothesis view such considerations as irrelevant to the sentencing calculus, all sentences that deviated from the sentence prescribed by the rule would look “inaccurate” to Congress. Even where the legislature is less sure about the relevant criteria of desert, because standards leave discretion in the hands of the adjudicator to identify that criteria, it is always possible that adjudicators will find some factors relevant that the legislator would not. Thus, just as rules can be characterized as inaccurate from the rule applier’s perspective, standards can be characterized as inaccurate from the legislator’s perspective,¹¹⁵ with identical results regardless of which form is adopted.

From the legislator’s perspective, the problem with standards is lack of parity, not lack of proportionality. Substantial racial, regional, or inter-judge variation in sentences for offenders convicted of the same crimes with the same criminal history looks to the rule advocate like unwarranted disparity. Hence Judge Frankel’s complaint that “nobody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes.”¹¹⁶ Pro-rule reformers like Frankel saw such variation as

114. Tonry, *supra* note 51, at 24.

115. Here, the term “legislator” should be understood to include judges to the extent that judges assume the role of policy makers rather than mere adjudicators. See, e.g., Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007) (discussing the role of judges as strategic policy makers).

116. Frankel, *supra* note 28, at 7.

“lawless[.]”¹¹⁷ and “unjustifiabl[e].”¹¹⁸ At the same time, the rule maker fails to see or care about criteria or factors outside the rules, which are perceived as white noise.

In part, the dispute can be understood as a disagreement about the appropriate focal point of the sentencing inquiry. Rule advocates observe the world through a wide-angle lens, taking in large chunks of the horizon at once. Standards advocates see the world through a zoom lens, focusing closely on the case before them and seeing only a small subset of the whole, but viewing it with far more acuity and precision. In sentencing like offenders alike, whether any two offenders are perceived to be alike—and thus deserving of similar sentences—depends on whether likeness is painted in broad strokes or in minute detail. In determining whether two bank robbers have committed “similar offenses,” the analysis will depend on whether similarity is defined in simple or complex terms. In other words, the analysis will depend on whether similarity is defined in terms of the offense of conviction alone (e.g., bank robbery); the offense and harms caused (e.g., violent versus peaceful bank robberies); the offense, harms caused, and offender characteristics (e.g., violent bank robbers who steal small amounts of money and grew up in impoverished circumstances); and on and on.

D. Administrability

One possible response to the problem of rule over- and under-inclusion is the promulgation of multiple and complex sub rules that attempt to anticipate variances among cases that fall under the general rule. As the Sentencing Commission developed ever more complex rules in its efforts to create a real-offense sentencing system, it increasingly realized that administration of such a complex rule set would inevitably lead to confusion and threaten any uniformity gains it sought to achieve by implementing such rules in the first place. As Justice Breyer observed, the “punishment system becomes much harder to apply as more and more factors are considered, and the probability increases that different probation officers and judges will classify and treat differently cases that are essentially similar.”¹¹⁹ The more complex the rules, the harder it is “to accurately predict how these factors will interact to produce specific punishments in particular cases.”¹²⁰

Simply stated, when rule sets become overly complex, they become difficult to administer. Adjudicators must make nuanced factual distinctions to properly categorize and differentiate the cases that come before them. These added complications give rise to disparities in application for a number of reasons. First, the chances for error—or at least disagreement as to proper

117. *Id.*

118. Breyer, *supra* note 2, at 4.

119. *Id.* at 13.

120. *Id.*

characterization—increases as the number of relevant distinctions increases.¹²¹ Second, the multiplication of distinctions increases opportunities for actors involved in the decision-making process to act strategically. In a sentencing system with many variables, prosecutors' charging decisions, probation officers' investigatory findings, and judges' fact-finding conclusions all might be influenced by personal or professional preferences that are exogenous to the rules. Third, the increased number of narrow rules gives rise to potential “‘jurisdictional’ questions.”¹²² It is not always easy to determine where one rule's boundaries end and another's begin.¹²³ When the jurisdictional boundaries of rules are unclear, the application of rules becomes increasingly indeterminate.

Thick codebooks are complex, and complexity inevitably breeds unpredictability as different adjudicators are required to interpret and apply all the various sub-rules differently. The Commission discovered this in its effort to craft a comprehensive real-offense sentencing system. As Justice Breyer explains, “the Commission went much too far to further proportionality goals” in its initial draft efforts, attempting to craft rules that accounted for every conceivable factor that might differentiate one crime from another.¹²⁴ Eventually, “the Commission realized that the number of possible relevant distinctions is endless.”¹²⁵ Multiplying the distinctions embedded in the sentencing rules not only makes the rules difficult to apply, it also undermines the basic predictability values supposedly served by adopting rules over standards.¹²⁶

Ultimately, the Commission settled for a compromise position: the rules would be moderately complex, contain limited distinctions to differentiate between the offense and offender characteristics deemed most important, and abandon the attempt to fine tune results any further. As a result, the Guidelines came under criticism both for failing to recognize some important distinctions—such as the age of offenders (underinclusion)—and for mandating large sentencing differentials based on criteria that many judges did not believe were very important—such as the quantity of drugs in a drug crime or the size of the loss in a theft crime (overinclusion).¹²⁷ As Professor Kate Stith and Judge Jose A. Cabranes complained about the Federal Guidelines:

121. See Yellen, *supra* note 97, at 417 (“Errors in the application of complex sentencing rules can reintroduce disparity.”).

122. Kennedy, *supra* note 17, at 1690.

123. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 913 (2009) (identifying one source of ambiguity arising from situations where “[o]ne rule may conflict with another and it may not be obvious where to draw the line between them”).

124. Breyer, *supra* note 2, at 13.

125. *Id.*

126. *Id.*

127. See, e.g., Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the ‘Cracked’ Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 139 (2014) (quoting Second Circuit Judge Jon Newman's complaint that Guidelines provisions that increase

The attempt by the Sentencing Commission to develop a system of rules that would both ensure uniformity *and* recognize the variability of crimes and offenders has generated inordinate complexity and confusion in Guidelines definition and application, imposed burdens on both trial and appellate courts, generated case law jurisprudence that is at once trivial and voluminous, dehumanized the sentencing process, and undermined the moral dimension of sentencing and punishment.¹²⁸

The tension between rule precision and administrability well illustrates the contradictory forces at work when trying to both increase uniformity and proportionality.¹²⁹ The greater the drive toward uniformity, the greater the price paid in terms of proportionality, and vice versa. The effort to enhance proportionality by making the rules more complex undermines the gains in uniformity that were the incentive to prefer rules over standards in the first place. This is, perhaps, an example of what one writer aptly termed the “Law of Conservation of Ambiguity,” which holds that the legal “draftsman can control and select *what* will be left ambiguous, but he cannot banish or control the aggregate *amount* of ambiguity.”¹³⁰ The proliferation of rules complicates the task of the adjudicator, who must apply them in ways that not only lead to disparity in application, but also substantially increase the “costs on regulated populations” without diminishing uncertainty.¹³¹

E. Open Texture and Justificatory Pluralism

In negotiating the Scylla and Charybdis of the uniformity-proportionality mandate, the Commission was also forced to confront one of the most perplexing features of the rules-standards paradox—what I refer to here as the “justificatory pluralism” of law. As Hart noted, in determining whether a particular case falls within the scope of a rule, the decision maker must first identify the “plain case” that clearly falls within the rule’s scope and then determine whether the case at hand is sufficiently similar to it to justify treating it in like manner. In making that determination, Hart explains, the criteria of relevance and closeness of resemblance depend in large part “on the aims or purpose which may be attributed to the rule.”¹³² Indeed, rules cannot function

sentences by approximately one year for every two grams of crack cocaine involved in a drug crime were “ludicrous because the number of grams a defendant happens to possess at the moment of arrest has nothing to do with her morality or culpability” (quoting *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2072–73 (1992))).

128. STITH & CABRANES, *supra* note 49, at 7.

129. Other scholars, of course, have made this observation. See Yellen, *supra* note 97, at 413 (noting that “[u]niformity . . . can come at the expense of proportionality”).

130. Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 11 (1982); see also Stumpff, *supra* note 82, at 665 (finding support for Manning’s law of conservation of ambiguity in fractal-like structure of legal rules).

131. Stumpff, *supra* note 82, at 649–50.

132. HART, *supra* note 111, at 124.

without an implicit purpose. Language is far too “open textured” to permit a confident application of a rule’s words to the infinite variety of possible factual contexts without resort to some background understanding of the rule’s purpose.¹³³

According to Hart, “open texture” characterizes rules because rules are afflicted with two “handicaps” that limit all efforts at consistent rule interpretation: “The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim.”¹³⁴ The infinite variability of fact—addressed above—plainly robs the rule makers of the ability to account for every potentially relevant factual difference among cases. No matter how specific the rule set, there will always be some cases that throw the application of the rules into ambiguity. Every rule “will, at some point where their application is in question, prove indeterminate.”¹³⁵ But what Hart termed the “relative indeterminacy of aim,” and what I refer to here as justificatory pluralism, presents an even greater obstacle to rule makers attempting to ensure that rules are applied uniformly, and thus to the Sentencing Commission’s efforts to create sentencing rules that eliminate sentencing disparities.

Scholars studying rules and standards rarely address the problem of justificatory pluralism squarely, but it is foundational. The problem is this: while laws cannot be interpreted or applied without some reference, implicit or explicit, to the law’s supposed justification, justifications themselves are neither monistic nor stable.¹³⁶ As Professor Pierre Schlag points out, no rule has a single justification; rather, every justification for a rule carries with it an implied countervailing objective.¹³⁷ If the only justification for a speed limit was to prevent unsafe driving, then there would be no reason to establish a speed limit of fifty-five m.p.h. rather than, say, ten m.p.h., or to prohibit driving altogether. After all, driving slower on the highways (or not at all) will virtually always, *ceteris paribus*, be safer than driving faster. The fifty-five m.p.h. factual predicate thus represents a compromise between the countervailing

133. *Id.* at 126.

134. *Id.* at 125.

135. *Id.* at 124. Schauer notes that open texture should not be confused with mere vagueness. “When used in the technical sense, ‘open texture’ refers to the unavoidable possibility that some change in the world or in our knowledge of the world might make the most precise terms vague with respect to that unforeseen instance.” Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 421 (1985).

136. See HART, *supra* note 111, at 158–59 (“But sometimes a consideration of the object which the law in question is admittedly designed to realize may make clear the resemblances and differences which a just law should recognize and they may then be scarcely open to dispute.”). On monism versus

pluralism, see Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 839 (1991) (observing critically that “[n]ormative legal thought is *monistic*, it has a single-norm orientation”).

137. Schlag, *supra* note 14, at 401.

objectives of preventing accidents and maximizing the efficiency of movement on the highways.

Moreover, rules can always be interpreted to have multiple justifications. The justification for a state's fifty-five m.p.h. speed limit might be to enhance traffic safety or to conserve fuel. The justification for a rule prohibiting pet owners from bringing their dogs into restaurants might be to combat unsanitary conditions, to protect other restaurant diners from disturbance, or to safeguard patrons with dog allergies. The problem for the interpreter of law is that the choice of which justification to favor will sometimes be dispositive of outcomes. If the justification for the ban on pets was thought to have been motivated by a desire to minimize dining disturbances, then the admission of a well-trained seeing-eye dog along with its blind owner might not be viewed as contravening the rule. But such an interpretation would be less plausible if the purpose of the rule were understood as an allergy-prevention safeguard. Sometimes the multivalent nature of rules is express; at other times, it is implied.¹³⁸ Either way, the presence of multiple justifications dramatically complicates the description or assessment of rule functionality.

The conflict between competing aims or purposes of rules leads to interpretive incoherence. Rules that reflect competing or conflicting purposes can be interpreted consistently only if one of the competing purposes is prioritized over the other(s). But because there often is no authoritative mechanism to resolve the competition among purposes, the use of rules will not generate uniform outcomes.¹³⁹ Indeed, rules may not provide effective tools to guide decision making in any case, given that the rule applier will be confronted with the dilemma of choosing which purpose to favor, often without any framework to guide the decision. Sentencing law—with its multiple recognized purposes—provides an obvious example of such incoherence, at

138. *Id.* at 401–02.

139. Of course, the rule maker might specify the purpose by, for instance, including a “purpose clause” in the rule itself, thus making the initial interpretive task easier. But this solution merely transfers the problem to a different level of abstraction. As the classic work by Hart and Sacks on statutory interpretation makes clear:

[P]urposes can exist at a level of “great generality,” at a level of specificity in which they resolve “specific application[s],” as well as in “hierarchies.” Purposes also pertain not only to the statute as a whole but also to “subordinate provision[s]” within it. The task is to discern *purposes*, plural, for the statute and its provisions, not solely a single overarching purpose.

Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 386 (2012) (discussing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)) (internal footnotes omitted).

Thus, even a clear statement of purpose by the rule maker requires interpreters to make difficult and contestable inferences about purpose at the level of specificity needed to resolve the case before them.

least in cases in which various sentencing purposes conflict with one another.¹⁴⁰

Indeed, justificatory pluralism makes it almost impossible to assess whether a particular interpretation of a legal directive has a tight or loose justificatory “fit.” After all, an interpretation of a rule might fit one justification well while completely failing to serve another justification. Justificatory pluralism thus multiplies the likelihood that rules will be applied in disparate ways. In fact, the multiplicity of rule purposes is one of the main pillars of indeterminacy in the law.¹⁴¹ In interpreting cases, judges might properly cite to some underlying principle that the rule is thought to advance, or alternatively to some custom that the rule enforces, or to some policy that the rule is thought to serve.¹⁴² But these various justifications might support conflicting interpretations. In cases involving conflicts of principle on one hand and policy or custom on the other, some courts inevitably “evade the implications of principle and reach the results suggested by policy or custom, while others . . . conscientiously and woodenly follow principle.”¹⁴³

Similarly, in crafting the Guidelines, the Commission inevitably had to identify the principle by which distribution of punishment would follow—that is, it had to identify the purpose or justification of the sentencing rules.¹⁴⁴ The problem facing the Commission was one of over- rather than under-determination, for it could have selected from several familiar and widely held justifications for punishment. Indeed, the SRA itself formally codified all four of the canonical justifications for punishment.¹⁴⁵ But in many cases, the various penal justifications do not point in the same direction. For example, retribution and rehabilitation might often counsel quite different punishments.¹⁴⁶ But with retribution and rehabilitation both valid penal goals, judges confronting identical cases might reasonably reach different sentencing outcomes.

140. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (discussing conflict among multiple purposes of punishment).

141. See HART, *supra* note 111, at 125.

142. Thus, some rule advocates urge rule makers to specify the purpose of the rules. See Exum, *supra* note 127, at 146–47 (urging that “Congress—preferably with the help of the Sentencing Commission—[should] articulate” sentencing goals for each crime).

143. Grey, *supra* note 18, at 45–46. To the chagrin of legal formalists who assume that formal rules provides a sound basis for decision, the uncertainty caused by the existence of multiple and conflicting rule purposes necessarily makes it difficult for lawyers to advise their clients “in advance how a court would come out.” *Id.* at 46.

144. As Richard Frase explains, “[i]n order to decide that two offenders are similarly situated . . . we must first define the relevant sentencing factors . . . and the weight to be given to each. . . . The choice and weighting of sentencing factors depends, in turn, on the punishment purposes which the sentence is supposed to serve.” Frase, *supra* note 140, at 67.

145. See 28 U.S.C. § 3553(a)(2) (2012) (requiring courts to consider whether retribution, deterrence, protection of the public, or rehabilitation justified imposing a sentence).

146. See, e.g., RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 10 (2013) (giving examples of conflicts among sentencing principles).

The same problem confronted the Commission writ large. It was readily apparent that a coherent set of sentencing rules could be based on retributive, deterrent, rehabilitative, or incapacitative principles, but any system based on one principle would look strikingly different from a system based on another.¹⁴⁷ According to historical accounts of the Sentencing Commission's deliberations, the Commission spent approximately a year debating whether to structure the Guidelines around a unitary organizing principle such as "just deserts" or "deterrence" before ultimately abandoning the effort.¹⁴⁸ The Commission hardly could have done otherwise, given Congress's express recognition that all four traditional penal theories were valid.

Even if the Commission could have chosen one justificatory theory over the others, it would have found that working out the implications of that choice was beyond its capabilities. Despite its best efforts, for example, the Commission members failed to agree on the "rank order of seriousness" of offenses,¹⁴⁹ concluding that any such final ordering would not be "wholly objective."¹⁵⁰ Additionally, because of the inadequacy of extant empirical data, the Commission also abandoned any comprehensive effort to base the Guidelines on the principle of maximizing deterrence.¹⁵¹ In the end, the Commission opted to rely primarily on "past practice" by calculating base guideline sentences using historical average-sentencing data.¹⁵² While this solution had the advantage of glossing over the problem of justificatory pluralism, it did little to ensure that guideline sentences in individual cases would comport with the adjudicator's—or indeed anyone's—understanding of what the relevant sentencing objectives in particular cases might be.¹⁵³

147. See Breyer, *supra* note 2, at 18 (explaining that the Commission expressly declined to base the Guidelines on either "just deserts" or deterrence principles, but instead compromised by using "past practice" as the principal guiding philosophy of the Guidelines).

148. See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 915–17 (1990) (describing the decision by the Commission, made after lengthy debate, to refrain from issuing any "detailed document of stated theoretical principles" or choosing any "particular rationale" for the Guidelines at all).

149. Breyer, *supra* note 2, at 16 (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 17.

152. *Id.* at 18.

153. The use of historical practice as a proxy for penal purpose leads to incoherent results. Imagine, for instance, that a set of unlucky killers all suffered severe injuries while killing their victims and the killers were left quadriplegics. Imagine further that members of this group of unlucky killers found themselves sentenced by a disparate group of judges. In a pre-Guidelines era, some judges would sentence these defendants in accordance with retributive principles. Others would be guided by more utilitarian aims. Recognizing the great harms caused by defendants, the retributive judges might impose long sentences. In contrast, the utilitarian judges, conscious of the high costs of institutionalizing such disabled persons, and convinced that the defendants represent no continuing threat to the community, might impose relatively light sentences on the defendants. Either of these varying sentencing outcomes would arguably be a good "fit" with the purposes of sentencing as understood by the various sentencing courts. But in a post-Guidelines world that fixes base sentences on historical averages, neither retributive nor utilitarian proportionality would prevail. Rather, future

This failure bespeaks more than mere institutional limitations. While it was possible that with more philosophical rigor or detailed empirical research the Commission could have crafted sentencing rules that provided a comprehensive, consistent, and rational punishment scheme, it was highly unlikely. Considering the decades of debate that have ensued about what “just deserts” theory actually entails or whether the death penalty actually deters, such questions appear likely to remain indeterminate for the foreseeable future.¹⁵⁴ That the sentencing commissioners were unable to agree on the correct ordinal ranking of offenses in terms of their gravity—even while all utilizing the same “just deserts” or deterrence goals—does not evidence a mere institutional flaw. The difficulty facing the Commission was more than a technocratic challenge; it was an epistemic impossibility.

The difficulties here are twofold. First, desert may be fundamentally immeasurable. While the primary constituents of desert—harm and culpability—are widely agreed upon, there may be no metric, let alone one that is agreed upon, to calculate or measure either of these variables.¹⁵⁵ Is an acquaintance rape that inflicts no physical injury on the victim more harmful than an aggravated assault in which the victim sustains serious, though non-life-threatening, injuries? Does perjury in a large insider-trading case cause more harm than the theft of an automobile?¹⁵⁶ How much harm did an offender cause in any of these cases? How can we tell? Similarly, while the general scale of culpability (from negligence to recklessness to knowledge to purpose) does not by itself suffer the same problem of immeasurability (in the sense that it represents general points on a spectrum of intentionality), its necessary

unlucky killers could expect mid-range sentences that would arguably serve neither retributive nor utilitarian goals effectively.

154. See, e.g., Paul H. Robinson, *Mercy, Crime Control and Moral Credibility*, in *MERCIFUL JUDGMENTS AND CONTEMPORARY SOCIETY: LEGAL PROBLEMS, LEGAL POSSIBILITIES* 99, 110 (Austin Serat ed., 2012) (arguing that “there is no mechanism” to generate an ordinal ranking of criminal wrongdoing as a matter of deontological reasoning “because philosophers famously disagree among themselves about much, if not most, issues relating to desert”).

155. Research studies suggest that “the concept of harm may not be as cognitively stable or reliable as the legal system assumes.” Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1346 (2012) (reporting research showing that, based on ideological and sectarian biases, individual assessments of harms caused by various actions are socially motivated). Critics of retributive theory often make this general point. See, e.g., WALTER KAUFMANN, *WITHOUT GUILT AND JUSTICE: FROM DECIDOPHOBIA TO AUTONOMY* 64 (1973) (“Not only is it impossible to measure desert with the sort of precision on which many believers in retributive justice staked their case, but the whole concept of a man’s desert is confused and untenable.”); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1636 (1992) (noting “a stock objection to retributivism that there is simply no workable way to determine just *what* punishment a criminal deserves”); Scott W. Howe, *Furman’s Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 466 (2007) (“The principal problem for the Court in using the deserts-limitation to regulate capital sentencing trials is the absence of any apparent agreement about how to measure deserts.”).

156. Chad Flanders makes this same point in his critique of retributivism. See Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 325–26.

linkage to harm only further complicates the ultimate measurability problem. Even if it were possible to determine the relative gravity of harms, is it worse to intend to cause a small harm or to recklessly cause a large one? Again, there may simply be no metric available, or at least no metric that could plausibly garner a consensus, to help answer such questions.¹⁵⁷

The problem here, of course, is not merely one of immeasurability; rather, it is one of incommensurability.¹⁵⁸ While the philosophical debate about commensurability is deep, rich, and contested, and a careful analysis of the debate goes well beyond the scope of this Essay, it seems intuitively obvious to me that any scale of comparative desert can either be based on personal intuitions (or “feelings,” to use Professor John Finnis’s language)¹⁵⁹ or through deeply contingent and contestable mechanisms of political choice. There can be no definitive rank ordering of crimes because crimes are, in essence, assaults on codified human values, and there is no objectively correct rank ordering of human values available for a sentencer to consult. As Jürgen Habermas explains, in order to weigh or compare any two values, those values must be “brought into a transitive order with other values.”¹⁶⁰ But some values are incommensurable; that is, there are “no rational standards” available with which compare them. As a result, “weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.”¹⁶¹ Bodily harms, property harms, harms to the dignity of persons, transgressions of the public trust, and all the other types of harms that are encompassed in the criminal code are fundamentally incommensurable; even more so are degrees of intentionality on the one hand and scope of harm on the other. Because we simply lack any reliable metric to weigh intentionality against harm, there is no apparent way to determine, on a scale of gravity, whether it is a more serious

157. One might propose all sorts of metrics, such as the subjective intuitions of the victim, or a vote in the community, etc., but any proposed metric would necessarily be partial in precisely the same way that choices about rule justifications are partial. *But see, e.g.*, Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1830 n.1, 1854–55 (2007) (arguing that it is possible to construct a reliable ordinal ranking of offenses based on the moral intuitions of lay persons in the community, which Robinson describes as “empirical desert”); Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1637 (2007) (citing research studies reporting “considerable agreement” among research subjects “about the relative amount of punishment that different offenders deserved”).

158. *See generally* John Finnis, *Commensuration and Public Reason*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215, 215–33 (Ruth Chang ed., 1997).

159. *Id.* (arguing that immeasurable values may nonetheless be compared and ranked by individuals and groups based on the feelings and emotions generated).

160. Paul-Erik N. Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 LAW & ETHICS HUM. RTS. 176, 179 n.4 (2010) (quoting JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (William Rehg trans., MIT Press 1998) (1992)).

161. *Id.*

offense to kill one person while intending to kill three or to kill three persons while intending to kill only one.¹⁶²

While the problems preventing consensus on the gravity of crimes for desert purposes are philosophical in nature, the problems preventing consensus on the requirements for developing a comprehensive deterrence-oriented sentencing system were thought to be empirical: the lack of sufficient data regarding the relationship between punishment and crime prevention.¹⁶³ Although this Essay is not the place to solve the problem of insufficient data, my suspicion is that the supposed empirical deficit is more than a mere technical problem. As the debate over the death penalty's deterrent efficacy shows, our ability to determine how and whether any quantum of punishment has a deterrent effect on human conduct is deeply indeterminate. Such determinations may be well beyond human capabilities for the foreseeable future.¹⁶⁴

But to say that we lack the available conceptual tools to construct an objectively correct ordinal scale of the gravity of criminal wrongdoing does not mean, of course, that we cannot construct a scale at all. Rather, it means that any scale will be intuitive (the product of feelings and emotions) and political, and thus subject to contestation by those who do not share the same feelings and emotions or subscribe to the same political beliefs. This absence of agreement on the shape or order of the scale among those tasked with sentencing offenders further muddles the task of doing so uniformly or proportionately.

162. Of course, commentators have taken various positions on this particular issue. Some, like Larry Alexander, believe that intentionality should provide the sole metric of culpability and would argue that the attempted killer of three has committed the more culpable act. But others, who like Michael Moore, contend that wrongdoing matters, might well argue that the killer of three is more culpable than the killer of only one. Compare Larry Alexander, *Culpability*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 218, 218–39 (John Deigh & David Dolinko eds., 2011), with Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 280–81 (1994) (arguing that desert requires consideration of harm as well as culpability). Legal codes treat such conflicts in varying ways. The Model Penal Code focuses primarily on intentionality to determine culpability and thus treats attempts of equal gravity as completed crimes. Most state criminal codes, however, would impose a greater punishment on the offender who causes more harm, at least in this context. See Model Penal Code § 5.05 (Official Draft and Revised Comments 1985) (providing that “attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy”); Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 614 (2012) (“The accepted practice among many jurisdictions in this regard is to punish an attempt with half of the sanction that is attached to the completed crime.”).

163. See Breyer, *supra* note 2, at 17.

164. See Tonry, *supra* note 51, at 20 (calling the utilitarian “felicific calculus” “impossible” and noting that “[f]undamentally contested literatures on economic costs of crime, especially pain and suffering, deterrent and incapacitative effects, and crime prevention more broadly demonstrate that we are far away from a time when we know enough to take the Benthamite model seriously” (internal citations omitted)).

F. Further Complications: Complexity, Incoherence, and Evasion

The problems of immeasurability and incommensurability that afflicted the Commission's efforts to construct a rational rule set, and which apply to all rule-based efforts to order human affairs, are only magnified by other problems that arise in the endeavor to govern any significant area of human conduct through rule making. These include complexity, incoherence, and evasion.

1. Complexity

The capacity of rules to produce uniform results is in part a function of their complexity. The more complex a rule set, the less uniform its application. This is readily evident in the sentencing context. Even if one could generate an objectively correct rank ordering of crimes by seriousness, the multiplicity of counts and the variability of quantified harms would exponentially increase the difficulty of generating a coherent and consistent scale of deserved punishment. Although there may be general agreement that it is a more serious crime to sell six hundred grams of cocaine than one hundred grams of cocaine, is it six times more serious? Does a bank robber convicted of three counts of bank robbery deserve a sentence triple that of a bank robber convicted of only one count?¹⁶⁵ Rules that fix the weight of component factors are especially problematic because of the heightened degree of unforeseeability caused by the interplay of a greater number of variables. Two mathematical formulas, one that multiplies a factor by two and the other that squares the factor, would look identical in cases where the factor's value was two. But in cases where the factor's value was two hundred, the difference between the formulas would become quite apparent. The same dynamic is at work with sentencing guidelines. Decisions about how to weigh variables such as drug quantity might have an appropriately proportionate effect in some cases and, based on factors that the Sentencing Commissioners did not anticipate, an extremely disproportionate impact in others.

Part of the problem here relates back to the immeasurability of harm: What metric is available to measure the relative harm of selling an extra hundred grams of cocaine? The problem can also be traced to incommensurability—that is, the inability to compare values due to the absence of sufficient common qualities. For example, which part of the seriousness of the bank robber's criminal conduct can be attributed to her choice to *be* a bank robber, and which part can be attributed to the amount of money that she steals? The first decision constitutes a culpable intent; the latter is merely a matter of happenstance (how much money was in the vault). There is no single basis on which to compare these attributes of criminal conduct to reliably

165. Justice Breyer referred to this as “the ‘intractable sentencing problem.’” Breyer, *supra* note 2, at 25.

assess just how much worse the supposedly greater crime is from the lesser crime.

Complexity may also arise from the interworking of different rules. The Guidelines' sentencing rules, for example, operate by breaking down the whole into its constituent parts and assigning quantitative weights to each of those parts. But as the sum of the parts may not rationally reflect what considered judgment might suggest about the whole, requiring the judge to apply a predetermined formula to specified factual findings may lead to sentencing distortions. In addition, rules that require treatment based on some factors may prevent courts from taking into account other factors that are relevant but not technically before it or over which the court lacks jurisdiction.

According to some critics of the Guidelines, the complexity inherent in sentencing can only be dealt with by delegating discretion to judges. These critics argue that in determining what an appropriate and proportional punishment is in a particular case, a sentencing judge must consider the entire course and quality of the offender's conduct and the context—including the offender's background and circumstances—in which that conduct occurred. I call this the holistic necessity argument.¹⁶⁶ As Stith and Cabranes complain,

By largely eliminating from the sentencing proceedings the power of any individual to consider the circumstances of the crime and of the defendant in their entirety and to form a judgment on that basis, the Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater in which defendants are not persons, but *kinds* of persons—abstract entities to be defined by a chart, their concrete existence systematically ignored and thus nullified.¹⁶⁷

Because of the unpredictable or unforeseeable distortions that arise from multiple rule interactions, complex rule sets make it more likely that specified outcomes will diverge from those that would have been chosen had the adjudicator retained more discretion. Where multiple factors are at issue, as they are in complex sentencing situations, the ability to make holistic sentencing determinations may be crucial to ensuring that the end result properly balances the often competing sentencing considerations in ways that do not produce unjustifiable outcomes.

2. *External Incoherence*

No legal directive exists in a vacuum; rather, in any sophisticated legal system, legal directives are embedded in a complex and multi layered web of laws. This multiplicity, however, is another disparity-generating force. As much as rule makers might try to create discrete and consistent rule sets, the

166. See, e.g., Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 412 (2006) (explaining that after *Booker* "section 3553(a) requires sentencing judges to exercise reasoned judgment in the course of a holistic sentencing decision-making process").

167. STITH & CABRANES, *supra* note 49, at 84.

complexity and multiplicity of legal rules ensures that rule interpreters often must reconcile contradictory rules.¹⁶⁸ The sheer number of legal directives challenges the coherence of rules, and like the other problems discussed, undermines the effort to eradicate disparity through rule promulgation.

The Sentencing Commission confronted this problem when it attempted to promulgate sentencing guidelines in a manner consistent with Congress's intent. In enacting the SRA, Congress directed the Commission to promulgate guidelines that were both uniform and proportionate. At the same time, Congress also enacted a set of specific prescriptions—such as increased penalties on certain types of offenders and mandatory minimum sentences—that were inconsistent with that direction. Thus, the Commission was forced to try to reconcile irreconcilable statutory objectives.¹⁶⁹ The effort to do so necessarily led to an internally inconsistent rule set.

3. *Evasion*

Evasion is a problem for any system of rules adopted in the expectation that it will produce predictable results. Realist critics long ago noted that when “clear and objective rules” produce injustice, some courts would respond by applying the rule “while others would find ways to wriggle out and reach the sensible result,” undermining the very predictability that the rule was intended to create.¹⁷⁰

In rule-based sentencing systems, judges are apt to engage in judicial evasion whenever rule-generated sentences conflict with considerations of justice.¹⁷¹ While many judges might feel constrained to impose the rule-based sentence in such cases, others might not. Judges who do not feel constrained might do whatever they can to reach a just result, leaving appellate courts to either chastise the sentencing court or look the other way.¹⁷² Prior to *Booker*, increasing numbers of federal judges found ways to soften or evade application

168. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 15 (1984) (“If legal theories and rules are internally contradictory or inconsistent, they cannot determine our choices. Nonetheless, contradiction is a common characteristic of legal doctrine.”).

169. Breyer, *supra* note 2, at 31.

170. Grey, *supra* note 18, at 45.

171. Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 123 (1994) (discussing judges' responses to a survey on sentencing guidelines).

172. See, e.g., *United States v. Maddox*, 48 F.3d 791, 799–800 (4th Cir. 1995) (“We are well aware of the difficulties that statutory mandatory minimum sentences and the Sentencing Guidelines impose on district courts faced with the unenviable task of sentencing criminals who present sympathetic cases. As Chief Judge Ervin has aptly noted in another case, however, although ‘[i]t is perhaps understandable for sentencing judges . . . to feel constrained by the Guidelines (as well as mandatory minimum sentences) on occasion . . . we must admonish the district courts instead to apply the Guidelines as written. Attempts, in effect, to manipulate the Guidelines in order to achieve the “right result” in a given case are inconsistent with the Guidelines’ goal of creating uniformity in sentencing.’” (citing *United States v. Harriott*, 976 F.2d 198, 202–03 (4th Cir. 1992)).

of unjust mandatory Guideline provisions.¹⁷³ Contrary to common assumptions, in such cases the goal of predictability might actually be better achieved under a regime of standards rather than one of rules. As Thomas Grey noted, “[i]n many situations decisions would be both more predictable and more acceptable if the ruling norm were a vague standard that allowed judges or juries to apply their intuitive sense of fairness case-by-case, rather than a clear rule that was sporadically and covertly evaded.”¹⁷⁴

In some cases, evasion may be facilitated by one of the principal virtues of rules—the greater clarity with which they identify the factual predicates necessary to trigger specified consequences. On the other hand, that clarity gives rise to one of rules’ principal vices: opportunities for strategic manipulation. Although this clarity helps provide actors with more ex ante certainty about the consequences of their conduct, it also permits those intent on gaming the system to better calibrate their actions to skirt the line without triggering adverse consequences.

While this feature of sentencing rules is marginally relevant to criminal offenders, who in theory might alter their criminal conduct to take advantage of specific features of sentencing rules, it is hard to imagine that many criminals actually behave with this degree of foresight. There is little evidence that changes in statutory penalties have a deterrent effect on criminal conduct, and even less evidence that changes in guideline sentences might do so.¹⁷⁵ But criminals are not the only class of persons whose conduct is affected by sentencing rules. Prosecutors and defense lawyers must also make decisions in anticipation of sentencing rules, and in this context the rules do seem to make an important impact on ex ante decision making. By clarifying the likely sentencing outcomes that would occur in the absence of settlement, predictable sentencing rules make it easier for prosecutors and defense attorneys to settle cases without judicial oversight.¹⁷⁶ They also permit litigants to circumvent rule-dictated sentencing results through negotiation in ways that would be harder to achieve in standards-driven sentencing systems that give judges more

173. See Schanzenbach & Tiller, *supra* note 115, at 52 (finding that under the Federal Guidelines “judges mask much of their sentencing discretion through adjustments to the offense level” in order to “maximize their sentencing policy preferences”); Tonry, *supra* note 51, at 25 (citing Frank O. Bowman & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001)).

174. Grey, *supra* note 18, at 45.

175. Donald A. Dripps, *Rehabilitating Bentham’s Theory of Excuses*, 42 TEX. TECH L. REV. 383, 387 (2009) (“If we look at empirical evidence on deterrence, it seems reasonably clear that punishment, in a general way, deters; that marginal changes in legal doctrine do not translate into marginal changes in criminal behavior; and that marginal policy changes that increase the certainty, rather than the severity, of punishment have the best chance of reducing criminal behavior.”).

176. Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 949 (2007) (explaining that “the more precisely defined are the punishments that attach to each crime, the more accurately the prosecutor (and the defense) can predict the practical effect of entering into a plea agreement, making bargains more certain and therefore more likely”).

discretion over sentencing outcomes. Parties can utilize tactics such as fact bargaining—a form of plea bargaining that occurs when the parties purposefully withhold facts from the judge or probation officer—to circumvent applicable sentencing rules.¹⁷⁷

As a result of their relative invariability, rules also encourage those charged with enforcing them—police officers and prosecutors in the criminal law context—to act strategically at earlier stages of criminal enforcement. Rules requiring mandatory license suspension, for instance, might induce a police officer to let an errant driver off with a mere warning rather than write a citation that triggers the mandatory penalty. When they are aware that mandatory-minimum sentencing provisions might require imposing onerous sentences even when mitigating facts exist, prosecutors might file less serious charges or drop prosecutions altogether to avoid what they consider to be unjustifiable results. Jurors aware that guilty verdicts carry harsh penalties might acquit incontrovertibly guilty defendants rather than authorize unwarranted sentences.¹⁷⁸ The potential that poor-fitting rules might be avoided, rather than tolerated, by numerous decision makers in any rule-enforcement action is yet another force that undermines the supposed uniformity advantages of rules. Where legal regimes shift toward rules, the likely increase in evasive responses by system participants equates to a displacement, rather than a reduction, in disparity.

Taken together, these facets of rule systems require reconsideration of the conventional understanding of the virtues and vices of rules and standards. One simply cannot say that rules are more predictable than standards.¹⁷⁹ Where rule

177. They may also engage in charge bargaining, which permits the parties to control sentencing outcomes by changing the statutory ranges available to judges at sentencing, or sentence bargaining, which provides substantial power to the parties to reach results different from those the sentencing rules would otherwise generate. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1260 (2008) (discussing relative ease of evading rule-based limits on plea bargain discounts under charge bargaining); Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 858 (2014) (observing that though judges initially resisted plea bargaining, “[o]ver time . . . judges cooperated in the practice through sentence-bargaining by rewarding defendants who pled guilty with lower sentences than those convicted at trial of the same crimes”).

178. See, e.g., Tonry, *supra* note 51, at 26 (discussing juries’ historical resistance to convict defendants of capital or other serious crimes when juries perceived punishment as excessive).

179. Thus, it seems to me that Alexander’s argument that standards are always less effective than rules at providing guidance is simply not correct. See Alexander, *supra* note 61, at 543. Alexander contends that a “pure rule” such as “drive fifty-five,” settles questions about what should be done better than standards. See *id.* at 547. No community, however, could enact a “drive fifty-five” rule, because people would violate the rule when accelerating and decelerating to reach fifty-five m.p.h. Also, braking to avoid collisions would violate such a rule. So imagine the jurisdiction instead adopts a fifty-five m.p.h. maximum speed limit. But cases would arise in which cars drove so slowly on the highway that they impeded the flow of traffic. The jurisdiction might solve this problem by enacting a thirty-five m.p.h. minimum speed limit. When it snows, however, it is unsafe to drive even thirty-five m.p.h. To resolve that problem, the jurisdiction might pass yet another rule and set a maximum speed limit of twenty-five m.p.h. during icy conditions. Imagine that those three rules were in effect, and a driver on the highway notices that it has begun to snow and that the roads have started to whiten. No

sets are complex, prompt evasion by those responsible for enforcing them, or are internally or externally incoherent, outcomes may be highly unpredictable. In contrast, standards-based regimes might be easier to comply with and may lead to more predictable outcomes because various considerations that demonstrate what a standard of conduct requires may not have been incorporated into a rule.

G. Convergence

While the choice between rules and standards has consequences, those consequences may not be as substantive, or at least as predictable, as many commentators suppose. This is because the legal form of a directive plays only one part in determining how that legal directive will be enforced. All legal directives are embedded in complex structural systems that oversee their interpretation and application. These structural systems may minimize the ultimate effects of adopting one legal form over another. Enforcement discretion, precedent, interpretation, and exceptions all tend to cause rules to operate in more standard-like ways and standards to operate in more rule-like ways such that the two practically converge.¹⁸⁰

1. Enforcement Discretion

Enforcement discretion is a major contributor to rules-standards convergence. Consider the case of a legal directive that regulates driver speed on the roads. Compare a rule imposing a fifty-five m.p.h. speed limit with a standard generally prohibiting driving at unsafe speeds. The conventional view is that, by providing a clear and simple factual predicate, the fifty-five m.p.h. rule is easier for drivers to understand and for adjudicators to apply than the more abstract standard. But as long as law enforcement officials fail to regularly enforce the rule, from the perspective of the driver calculating how fast she can drive on the highways without getting a ticket, the rule-like quality of the fifty-five m.p.h. rule starts to fade.

Indeed, on the Atlanta highways that I drive, speed limits in the metropolitan area were until recently uniformly set at fifty-five m.p.h. No one obeyed them. In my experience, the average speed on the highways hovers around sixty-five m.p.h., with many drivers routinely exceeding seventy-five or eighty m.p.h. In fact, I have seen several accidents occur before my eyes while driving on Atlanta highways, but I have not yet actually witnessed a highway

matter what the driver now does, she will violate one of the traffic rules. An injunction to drive reasonably might well be easier to follow than any attempt to predict which of the various rules will be enforced under the circumstances, a point that Alexander himself concedes. *See id.* at 544–45.

180. *See* Schauer, *supra* note 74, at 806 (noting that “interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree”); Schlag, *supra* note 14, at 428–29 (noting tendency of rules and standards to converge).

driver pulled over for speeding.¹⁸¹ So although the rule purported to establish a fifty-five m.p.h. speed limit, due to discretionary enforcement, the speed limit law actually functioned more as a standard than a rule. I do not have any precise idea what degree of excess speed would trigger enforcement of the speeding law—I am sure one hundred m.p.h. would do it, maybe even eighty-five m.p.h., but who knows? To the extent highway patrol officers are exercising discretion about whom to pull over, they appear to be applying some sort of “unsafe driving” standard to govern their enforcement decisions, and most drivers seem to understand this. In this context, speed limits are really governed by the unstated unsafe-driving standard rather than the stated fifty-five m.p.h. rule.

The same phenomenon is apparent in the sentencing context as well. Prosecutorial discretion regarding whether to charge repeat offenders under state career criminal provisions provides an example. California’s Three-Strikes law, for instance, established a strong rule that mandated minimum twenty-five year sentences for third strike offenders. Although the law also attempted to require prosecutors to bring three-strikes charges in all eligible cases,¹⁸² California prosecutors nonetheless in practice remain largely free to decline to bring three-strikes charges against repeat offenders, and in the vast majority of cases, they do not.¹⁸³ Prosecutors use the leverage the rule creates to improve plea-bargaining outcomes in cases in which they want it, and they simply ignore the rule in cases where they believe harsh punishment is unnecessary.¹⁸⁴ Like the highway speed-limit example, selective enforcement of California’s Three-Strikes law makes the supposedly uniform rule function more like a standard, mandating harsh prison outcomes for persons deemed by prosecutors to be recalcitrant plea-bargainers¹⁸⁵ or truly dangerous criminals.

Moreover, although prosecutors exercise substantial discretion over the application of the three-strikes law, judges also retain authority over its application. In California, trial courts retain statutory authority to strike prior

181. Although I, of course, have many times passed drivers who have been stopped by police on the highways.

182. CAL. PENAL CODE § 667(g) (West 2012) (“Prior serious and/or violent felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony serious and/or violent convictions and shall not enter into any agreement to strike or seek the dismissal of any prior serious and/or violent felony conviction allegation except as provided in paragraph (2) of subdivision (f).”).

183. See, e.g., Samara Marion, *Justice by Geography? A Study of San Diego County’s Three Strikes Sentencing Practices from July–December 1996*, 11 STAN. L. & POL’Y REV. 29, 30 (1999) (finding that approximately three out of every four convicted defendants charged with a three-strike offense were not ultimately sentenced under the Three Strikes law).

184. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 943 (2006) (explaining that “prosecutors turn three-strikes strictures into tools, using them to extract tougher but still discounted plea bargains”).

185. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (affirming mandatory life sentence under habitual offender act even though prosecutor only filed charges under the act after defendant rejected a five-year plea offer).

conviction allegations.¹⁸⁶ This is an example of a rule that, as a result of the larger context governing its application, functions in a standard-like way. In jurisdictions where judges lack formal authority to vacate prior strikes, career-offender laws operate more like the fifty-five m.p.h. speed limit, where all of the flexibility in the rule is concentrated in enforcement discretion. Once the decision is made to enforce the rule, adjudicators have very little discretion over outcomes. Proof that the offender was, in fact, driving over fifty-five m.p.h., or that the third-strike offender had two prior strikes, is almost certainly dispositive of the sentencing outcome. The standard-like function of appealing to the underlying justifications for legal directives may be concentrated in the hands of the enforcement agent—the cop and the prosecutor and not the judge—but will rarely be dispensed with altogether.

Practical enforcement decisions regarding application of sentencing rules have a similar effect. Research studies have found that prosecutors overtly manipulate the Guidelines in approximately 20 percent to 35 percent of all cases.¹⁸⁷ Judges may similarly transform rules into standards through their discretionary judgments regarding whether and how to apply them. Sentencing guideline provisions that instruct judges to increase or decrease an offender's offense level based on the finding of various offense-related facts can and routinely are manipulated by judges to generate sentencing outcomes more in line with their subjective assessment of just sentences. By making factual findings regarding a variety of issues—the quantity of drugs, the offender's role in the offense, whether the offender caused serious bodily harm to another, and so forth—the judge can dramatically impact sentencing outcomes. According to one federal judge, “[w]e spend our time plotting and scheming, bending and twisting, distorting, and ignoring . . . [all] in an effort to achieve a just result.”¹⁸⁸ Not surprisingly, appellate courts take a dim view of such efforts.¹⁸⁹ Still, there is little doubt that such practices are routine.

2. Precedent

Meanwhile, just as enforcement discretion can turn rules into standards, precedent can do the opposite, transforming standards into rules.¹⁹⁰ Even though a standard might direct the fact finder to consider a variety of factors, or to consider the totality of the circumstances, prior decisions interpreting the standard might effectively limit judicial consideration to only one or two factors. In these cases, what looks like a broad standard on its face operates in

186. See, e.g., *People v. Garcia*, 976 P.2d 831 (Cal. 1999).

187. See 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, 533–34 (1992).

188. Weinstein & Bernstein, *supra* note 171, at 123 (quoting a federal judge responding to survey on sentencing-guidelines practice).

189. See *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995).

190. Kaplow, *supra* note 14, at 564.

practice as a narrow rule. In fact, appellate decisions might expressly create a subset of rules to interpret a standard. Many of the Supreme Court's Fourth Amendment decisions do just this, clarifying, for instance, that a positive alert from a trained drug-sniffing dog is sufficient to establish probable cause,¹⁹¹ or that an uncorroborated anonymous tip is not.¹⁹²

In the sentencing context, some commentators have argued that a standard-driven sentencing system requiring sentencing courts to explain their sentencing decisions and appellate courts to develop guiding precedents would create a better sentencing regime than the complex and tedious Guidelines system that was foisted upon the federal courts.¹⁹³ This argument simply captures the insight that standards governed by precedent may more successfully generate stable and predictable outcomes than a regime of rules.

3. *Interpretation*

If the main distinction between rules and standards is whether the governing law is made *ex ante* or *ex post*, then interpretive ambiguities in rules will blur the distinction between them. To the extent that any feature of a rule's meaning is indeterminate, the content of that rule will only become known after its interpreter has spoken on the matter. The Federal Sentencing Guidelines' introduction of an extensive set of new and opaque legal concepts, such as the distinction between being a "minor" and a "minimal" participant in a crime, has been the target of complaint by critics on this very ground.¹⁹⁴ If the meaning of any term in a rule cannot be determined in advance, the rule no longer provides *ex ante* guidance to those subject to the rule. In this way, rules, like standards more generally, will call for substantial discretion at the point of application.

4. *Exceptions*

While rules purport to provide clear guidance to those subject to them and to adjudicators as well, the ubiquity of exceptions undermines the rule-like quality of rules.¹⁹⁵ California's Three-Strikes law again provides an example. Although the three-strikes law articulates a clear and simple factual predicate that triggers a clear and mandatory punishment, separate statutory provisions expressly permit prosecutors and judges to ignore the rule where doing so furthers the "interests of justice."¹⁹⁶ As a result, whether a prosecutor will bring

191. *Florida v. Harris*, 133 S. Ct. 1050 (2013).

192. *Florida v. J.L.*, 529 U.S. 266 (2000).

193. See *STITH & CABRANES*, *supra* note 49, at 112.

194. See *id.* at 91–92.

195. Singer, *supra* note 168, at 16.

196. *People v. Superior Court*, 917 P.2d 628, 644 n.11 (Cal. 1996) (interpreting provisions of the three-strikes law to permit a sentencing judge's dismissal of allegations of prior felony conviction in order to avoid a mandatory three-strikes sentence).

a three-strikes charge and whether a court will sustain it is no more predictable than the application of a standard that simply demands that any three-strikes charge be applied only if it furthers the “interests of justice.”

Moreover, the firmer the rule, the more likely that a judge will be moved to apply an exception to it in cases where its application would lead to grossly unjust outcomes.¹⁹⁷ For example, efforts to impose mandatory sentences are often, though not always, “nullified by juries, judges, and prosecutors” who disagree with the substantive outcome.¹⁹⁸

In any event, it is far from clear that the conventional assumption that rules provide more *ex ante* guidance than standards is correct. A clear rule like “drive fifty-five” will usually provide drivers with reliable guidance about how fast they can drive before putting themselves at risk of sanction. But where police regulation of conduct is frequent and routine, enforcement of a standard like “drive at a reasonable speed” will also undoubtedly lead to equally clear guidance.

However, the guidance provided by both rules and standards may both break down in unusual cases. Consider the woman who goes into labor while her husband is driving her to the hospital. Resort to a standard now provides little help. What is a reasonable speed to drive when one’s wife is in labor? It is hard to anticipate how the standard will be applied. But then, the rule provides no better guidance. Is there an exception to the “drive fifty-five” rule when a baby’s birth is imminent? The rule does not say, again leaving the driver to mere guesswork.

Additionally, while standards are typically thought to be better than rules when regulating unusual activities because the costs of anticipating every potential scenario exceed the benefits, unusual cases also challenge that notion. After all, situations that rarely arise are, in some sense, most in need of rules because there will be no custom or precedent to guide conduct in unusual cases. Rules would most help decision makers in such cases precisely because they would provide a basis for decision. Standards will provide the least *ex ante* certainty to actors in exactly those cases that are thought to be most appropriately managed through their use.

H. Summary of the Rules-Standards Paradox

The takeaway here is that there is no way out of the box. Regardless of how the rules-standards problem is negotiated, outcomes will always violate the uniformity-proportionality test from one perspective or the other. The root

197. Kennedy, *supra* note 17, at 1701 (“The more general and the more formally realizable the rule, the greater the equitable pull of extreme cases of over- or underinclusion.”).

198. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1683–84 (1992) (“Discretionary actors, including judges, prosecutors, defense attorneys, and probation officers, find themselves torn between allegiance to rigid rules and an urge to do justice in individual cases.”).

problem is the infinite number of factors that might be deemed relevant under varying circumstances, accompanied by the difficulty of determining a priority among them. As the Commission realized, the list “of possible relevant distinctions is,” quite literally, “endless.”¹⁹⁹ This is the essential quandary of the rule maker, who must select out of an infinite array of factual possibilities a finite set of predefined factual predicates that will trigger application of the consequent. Under such circumstances, some relevant factors will always be excluded by the rule.

But this is also the essential quandary of the standard applier. Even where the standard applier has total freedom to determine their course of action, the standard applier’s attention is not unlimited. The standard applier must still identify—from the infinite array of possible factual circumstances present in every case—which of those factual circumstances matter and the extent to which they matter. Like the rule maker, the standard applier still must determine which categories of facts are relevant and which are irrelevant. One important difference between them is that the rule maker makes the determination *ex ante* while the standard applier makes theirs *ex post*. But the necessary choices made by both are subject to similar criticisms, as the requirement to select the controlling factors necessarily excludes application of other relevant factors.

Basically, to generate outcomes that do the sorts of things we believe rules should do, such as coordinate human actions, resolve moral disputes, and treat people uniformly, we need, in Larry Alexander’s words, “determinate rules, not indeterminate standards.”²⁰⁰ But as Alexander notes, because of the infinite number of variables relevant to the application of those rules and the inability of rule makers to anticipate all those variables, we need the rules to be general and flexible.²⁰¹ However, as rules become increasingly general and flexible, they tend to look more and more like standards. Therefore, to respond to the variability of human affairs and satisfy the demands of proportionality, we need indeterminate standards, not determinate rules. This is the essence of the rules-standards paradox: we need standard-like rules and rule-like standards. The choice between rules and standards thus poses a dilemma that does not appear subject to rational resolution.

All of this suggests that, just as there is no resolution to the rules-standards debate, there is no ultimate answer to the debate between rule-minded and standard-minded sentencing reformers. Which is not to say that the choice between a rule-based and a standards-based sentencing regime has no consequences. It clearly does. But the choice might entail simply substituting one set of problems for another. So where does that leave us? If the substitution of a regime of rules for a regime of standards does not promote uniformity or

199. Breyer, *supra* note 2, at 13.

200. Alexander, *supra* note 61, at 548.

201. *Id.*

proportionality in a deep sense, what exactly does it do? Here we can point to two consequences.

First, the adoption of a rule or a standard determines who is allocated discretion to identify the facts and circumstances that trigger application of any particular consequent. When rules govern sentencing, the rule makers—Congress, the Sentencing Commission, and ultimately the appellate courts in the case of post-Guideline federal sentencing practice—have primary responsibility for determining the relevant facts and their relative weight when deciding a sentence. Just as importantly, when rules govern sentencing, sentencing judges will be precluded from considering potentially relevant factors outside the rules. This will be true, at least, where the sentencing rules leave relatively little room for judicial discretion, as did the pre-*Booker* mandatory Federal Guidelines. As noted above, this does not mean that judges lack the ability, even under mandatory guideline regimes, to affect sentencing outcomes. Rule systems are not mechanical and the application of rules always requires the finding of facts, the interpretation of texts, and myriad discretionary judgment calls. However, judges subject to a regime of sentencing rules will be forced to resolve a different set of questions than judges operating under a regime of standards. The obligation to resolve the numerous micro questions that arise under a complex set of guidelines will tend to shift the locus of the court's consideration from the larger questions of deterrence, culpability, and desert to the smaller questions of offender baselines, enhancements, and the like. Because they are not asked to do so, judges sentencing offenders under mandatory guidelines have far less incentive to make holistic judgments about culpability, desert, and penal justice, and often simply will not.

Second, rules more readily permit appellate courts to police sentencing judges' decisions. Rules tend to be more transparent than standards, and it is thus easier for appellate courts to review trial court decisions based on whether they followed or contravened sentencing rules. It should come as no surprise, therefore, that appellate courts have been far more accepting of mandatory sentencing rules than trial courts. Even in the post-*Booker* era of nonbinding guidelines, federal appellate courts have consistently attempted to rein in the discretion exercised by sentencing judges, showing little sympathy for the Supreme Court's *Apprendi* project.²⁰² Indeed, the greater leverage provided by rules helps explain why appellate courts, including the Supreme Court, might often prefer rules to standards even if adoption of rules serves to limit the appellate court's own discretion in future cases.²⁰³

202. See Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti-Booker Backlash*, 82 U. CHI. L. REV. 201 (2015).

203. See Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4 J. LEGAL ANALYSIS 329, 355 (2012) (explaining that the Supreme Court "may move from a standard to a more rule-like form, simply because of the difficulty confronting the Supreme Court in communicating its

IV.

PROCEDURAL INTEGRITY: TOWARD A DIFFERENT TYPE OF UNIFORMITY AND PROPORTIONALITY

In this Essay, I have attempted to show that the choice of rules or standards does not enhance or diminish sentencing uniformity and proportionality. Rather, the choice of the form of legal directives merely redistributes existing disparities and disproportionalities and empowers some decision makers at the expense of others, often in complex ways that may not be predictable by those responsible for selecting the form of legal directives.²⁰⁴

Indeed, it makes little sense to speak of “unwarranted disparities” in a context in which there is no available metric to determine whether such disparities were, in fact, warranted or not. Two individuals with similar backgrounds who commit similar crimes might well be sentenced differently by judges who simply have different conceptions about how to weigh the relevant factors and about what even constitutes a relevant factor. This difference may not indicate any dysfunction in sentencing process.²⁰⁵ Rather, it might merely reflect the multiplicity of values at work in criminal sentencing.

If I am correct, and the heated debate between sentencing reformers (rule advocates) and reform critics (standards advocates) amounts to little more than a substantive wash, then where does that leave us? It leaves us, I would suggest, with a reason to talk about something besides promoting uniformity and proportionality through sentencing rules or standards.²⁰⁶ Since sentencing outcomes cannot be definitively evaluated in terms of whether they are uniform and proportional—at least not unless common sentencing purposes and a metric are agreed upon—then we should be paying more attention to sentencing processes rather than sentencing outcomes.

We should, in other words, begin to conceptualize justice in criminal sentencing as a by-product of the processes through which sentences are

policies and the risk that lower courts will make mistakes in applying the doctrine”). Of course, of all U.S. courts, the Supreme Court is undoubtedly the least bound by considerations of precedent, given its ability to decline to apply *stare decisis* to its decisions whenever it deems it inappropriate to do so. The advantages of adopting rules rather than standards would thus seem apparent, at least in cases in which the Court wants to exercise control rather than delegate substantive decision-making power to others.

204. The problem here is similar to another one that scholars have long considered: how judges should decide hard cases within a context of legal indeterminacy. That is, if the traditional sources of legal authority—statutes, precedents, rules of interpretation, and so forth—fail to provide answers in hard cases, how should judges decide? See David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 *BUFF. L. REV.* 529, 534 (2014) (arguing that judges should rely on practical wisdom to decide hard cases).

205. Kevin Cole arrives at the same basic conclusion. See Cole, *supra* note 90, at 1339 (arguing that “[i]dentical defendants who committed identical crimes, but who are perceived differently by different sentencing courts, have not been treated unequally: each receives the sentence that appears appropriate in light of the epistemic limitations of humans involved in the system”).

206. See Schlag, *supra* note 14 (calling for a change in the conversation about rules and standards).

shaped rather than the outcomes that are produced. Professor Tom Tyler's work on procedural justice is highly relevant here. According to Tyler, participants in various legal proceedings tend to assess the fairness or justness of those proceedings based on four primary considerations: (1) whether the proceeding provided them an opportunity to participate, or a "voice" in the proceeding; (2) whether the forum was neutral; (3) whether authorities appeared trustworthy; and (4) "the degree to which people receive treatment with dignity and respect."²⁰⁷

These seem like obviously important values and essential components of meaningful sentencing procedures. A similar set of considerations might be generated if we think about what a fair sentencing procedure might look like from the perspective of procedural integrity. For a sentencing hearing to be deemed fair or adequate by the defendant, the sentencing judge must, at minimum, have provided the defendant an opportunity to participate in the hearing, presided neutrally over the proceedings, and made a meaningful effort to think not only about the applicable sentencing rules but also about the particular facts of the crime and the offender's background and circumstances.²⁰⁸ The obligation to treat people with dignity and respect, moreover, extends beyond merely being polite and fair-minded in the courtroom. It requires judges to take the competing accounts presented by the litigants and other interested parties seriously,²⁰⁹ to explain their sentencing decisions, and to provide reasons for the particular sentence chosen.²¹⁰ As Professor James Boyd White has explained, justice cannot be located in a mechanical examination of fit between a rule or standard and the facts, but rather justice "resides" in the "attention itself" that the judge brings to bear on the case.²¹¹

Regardless of whether sentencing proceeds under rules or standards, sentencing courts may best achieve just results by explicitly identifying the

207. Tom R. Tyler, *Procedural Justice*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 435, 445 (Austin Sarat ed., 2004).

208. Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 400 (2013) ("[M]orally appropriate judgments require at least some measure of individualized input.").

209. As James Boyd White has written, "The ideal would be a judge who put his (or her) fundamental attitudes and methods to the test of sincere engagement with arguments the other way. . . . The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments both ways." JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 47 (1985).

210. Cf. Tonry, *supra* note 51, at 24 ("To be consistent with core values underlying constitutional notions of due process and equal protection, sentencing needs to respect offenders' rights to be treated as equals, to have decisions about them made deliberately and impartially, and to be dealt with under fair procedures.").

211. See WHITE, *supra* note 209, at 133-34 ("We are entitled not to 'like results' but to 'like process' (or 'due process'), and this means attention to the full merits of a case, including . . . to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.").

purposes sought to be achieved through imposition of the sentence and the specific facts and circumstances that, in the view of the sentencing court, are relevant to those purposes. Under a rules-based system, courts will need to articulate which facts and circumstances they took into account in light of the formal parameters of any applicable rule-triggers and the extent to which deviations from the rules are permitted. Under a standards-based system, courts will need to articulate which facts and circumstances figured most prominently in triggering the sentencing outcomes they selected. Either way, sentencing courts striving to conform their decisions to the dictates of procedural justice should think through the relationship between the purposes of sentencing, the priority among those purposes, the general categories used to distinguish among greater and lesser offenses, and the particular facts relevant to each unique offense and offender who stands before the court.²¹²

What is more, the imperatives of justice are not determined from the viewpoint of criminal defendants alone. A plurality of voices can rightly claim the court's ear. These include legislators, sentencing commissioners, appellate courts, prosecutors, probation officers, corrections officials, police, offenders, victims, and local communities. Because each participant in the sentencing process brings a unique moral perspective and varying practical needs to the sentencing courtroom, sentencing practices should reflect recognition of this multiplicity and foster engagement from all stakeholders. Sentencing practices that foster greater dialogue among this large community of interested participants would thus seem preferable to more monistic or authoritarian practices.

Perhaps not surprisingly, then, the least controversial and most successful sentencing reform to emerge from the SRA was not the imposition of rules on sentencing practice but rather the introduction of the requirement that sentencing courts explain their sentences.²¹³ That requirement has permitted appellate courts to participate meaningfully in the sentencing process for the first time.²¹⁴ It has allowed the emergence of a protean common law of sentencing that surely remains in its infancy, but which could potentially transform and enrich sentencing practice and policy. The *Booker* decision has

212. The process suggested here accords with accounts of judging by so-called “virtue ethics” theorists. “In sentencing, judges balance the various social ends of punishment—retribution, utilitarian goals, mercy—to arrive at proportionate punishment ‘only one way: by the exercise of mature judgment immersed in the human context of the particular case.’” Darryl K. Brown, *What Virtue Ethics Can Do for Criminal Justice: A Reply to Huigens*, 37 WAKE FOREST L. REV. 29, 41 (2002) (quoting Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 441 (2002)).

213. See Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 122 (2001) (explaining that SRA “directed judges to explain sentences with statements of reasons” that allowed appellate review of sentences and addressed “longstanding concerns about the unfairness of a process that provided no standards for sentencing judges and no review on appeal”).

214. *Id.*

contributed substantially to this enterprise.²¹⁵ By transforming the Federal Guidelines from a rigid set of rules into a looser set of standards, *Booker* leveled the playing field between courts and the Sentencing Commission. The resulting federal sentencing law, odd and awkward as it sometimes appears, does two things: First, it allows the Commission to continue to function as a data clearinghouse of national sentencing practices and policy advisor. Second, it strips the Commission of its more authoritarian control over sentencing decision making.

Recognizing that questions regarding the purposes of punishment, the goals of sentencing, the proper way to measure culpability, and the deterrent effects of sentencing are and will remain fundamentally indeterminate, we should design sentencing processes in ways that foster dialogue rather than monologue. And this goal, finally, should lead us once again to pay attention to the form in which we cast legal directives, but not because doing so will improve substantive outcomes or enhance uniformity or proportionality in any absolute sense. Rather, the form of legal directives matters most in shaping the kind of process that emerges from our sentencing practices, and most importantly, the role that each of the stakeholders in that practice plays.

Legislatures, sentencing commissioners, probation officers, juries, trial judges, appellate courts, criminal defendants, victims and their families, and local communities all have a critical stake in sentencing outcomes. Rules make it possible for rule makers—legislators and administrative bodies like sentencing commissions—to assert a stronger voice in identifying the purposes, priorities, and objectives of sentencing. This in turn means that their constituencies—citizens and voters at the state and national levels and the executive branches—can actively participate in the sentencing conversation. At the same time, standards maximize the discretion that judges can exercise in sentencing proceedings, which in turn allow other voices, including criminal defendants, victims, family members, local community representatives, probation officers, and corrections officials an opportunity to be heard.

Wise sentencing practices, and wise law more generally, requires a judicious balance of rules and standards to bring all of these voices into the discussion.²¹⁶ Ultimately, sentencing fairness can only be measured by the extent to which each stakeholder has a voice in the process. An imbalance in the mix of rules and standards is harmful not because it leads to indefensible substantive outcomes, but because it inevitably shuts out essential voices from

215. See Bierschbach & Bibas, *supra* note 208, at 432 (“At least as between the Commission and the courts, then, *Apprendi* made possible the ‘continuous evolution’ through interbranch dialogue that the Sentencing Reform Act had contemplated.”).

216. See FRASE, *supra* note 146, at xii (advocating for sentencing structures reflecting an “acceptable balance” between rules and discretion through creation of guideline systems that “structure and confine case-level sentencing discretion” but “leave judges and other officials with a substantial degree of discretion to tailor the form and severity of sanctions to the facts of particular cases so as to achieve justice, effective crime control, and efficiency”).

participating in the conversation, which in turn fosters disenchantment, resistance, and evasion by those who have been excluded. We should judge the quality of our rules by measuring the extent to which they establish broad yet flexible frameworks that guide judicial discretion without eliminating or distorting it.²¹⁷ Assessment of sentencing outcomes in individual cases, in turn, requires us to evaluate whether sentencing judges have made reasonable, good-faith efforts to consider the entire range of unique facts and thus craft sentences based on experienced, educated, and morally informed practical judgment. A proper mix of sentencing rules and standards that limits any one participant's ability to dictate outcomes is essential, moreover, to provide critical checks and balances that will "help to legitimize sentences and to give content to the notion of moral appropriateness."²¹⁸

Oddly enough, this is more or less where the debate between sentencing reformers and critics has landed us. To be sure, there are many imbalances that remain unaddressed. Sentencing almost surely remains too heavily tilted toward rules over standards, with the pervasiveness of mandatory minimum sentencing provisions the primary villain.²¹⁹ But close consideration of the rules-standards paradox suggests that stalemate between rules and standards may be all that we can ask for in the sentencing context, or indeed, in any important legal context. Hopefully it is not asking too much.

CONCLUSION

The choice of legal form has a clear impact on a number of important issues. Will the criteria for decision be set in advance or after the fact? Who will decide which criteria are relevant or irrelevant in any particular case? What happens when some unexpected fact or circumstance suggests that application of the rule in a particular case leads to suboptimal results? And, given that law is a cooperative enterprise, how will authority be distributed between those subject to the law and those who oversee it?

It is clear, however, that formal characteristics of law do not determine the substantive features of justice that rightly concern the majority of legal actors and commentators. Neither a rule nor a standard can guarantee that different actors are treated with appropriate degrees of equality or proportionality. Such questions are both highly political and deeply moral. They are political in that identification of the criteria used to make such assessments must be built on a wide consensus among an array of legal actors. They are moral in that any short list of criteria deemed generally appropriate to achieve the purposes sought by legal actors will never be definitive; they will always be subject to reassessment in light of the purposes thought to be important and the facts and

217. *Id.*

218. Bierschbach & Bibas, *supra* note 208, at 400.

219. *See* FRASE, *supra* note 146, at 18.

circumstances that arise in individual cases. Perhaps the most we can do to satisfy these competing objectives is to ensure that whatever formal mechanisms we adopt reflect these competing contradictory needs in a balanced measure. Our formal mechanisms will not effectively reflect the multiplicity of voices that have a stake in questions such as criminal sentencing unless the critical stakeholders from across the spectrum are represented in the formulation, enforcement, and application of rules and standards. At every step along the way, those who apply those rules and standards must listen with both ears and hear both the commands of generality and the cries of particularity that ultimately compete for their attention.