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Why Logic, Experience, and Precedent Compel the Demise of Mandatory Sentencing Statutes

William Wray Jr.*

INTRODUCTION

My comment begins with an uncontroversial maxim: "Let the punishment fit the crime."[1] From that modest beginning it alternately crawls, leaps, and shuffles towards its brassy conclusion: in order that the punishments better fit the crime, sentencing discretion should be vested in judges, and mandatory sentencing statutes should be abolished. Mandatory sentencing statutes needlessly inject complex heuristics into a decision that may be made equally as well—if not better—from the judge's bench.

Though loathe to suggest that the strength of an argument depends on the author's perspective, I note that I would describe neither myself nor this argument as "pro-Defendant" or "pro-Prosecution." If mandatory sentencing statutes are abolished, the net effect may be to decrease the aggregate length of criminal sentences. Or the net effect might be an increase in the aggregate length of criminal sentences. My argument is merely that if

* Lord of Sealand, candidate for Juris Doctor. I'd like to thank Nick Nybo and the other editors of this article, and my family. To the extent that this shabby note can support a dedication, it is dedicated to Thanh Van Tran and Robert O. Wray Sr., two men who emerged from war-torn Vietnam to share enduring principles for a happy and fulfilling life.

1. This maxim was popularized by W.S. Gilbert in his 1885 opera the "Mikado." W.S. GILBERT & A. SULLIVAN, MY OBJECT ALL SUBLIME, IN A TREASURY OF GILBERT AND SULLIVAN 284 (Simon & Schuster eds. 1941) [hereinafter GILBERT, MY OBJECT ALL SUBLIME].

mandatory sentencing statutes are abolished, sentences will more precisely reflect the culpability of the defendant. If this is not an outright improvement for both groups, it is at least a Pareto improvement.

Throughout this comment, I will use the term "rounding error" to describe a flaw that I believe is common in mandatory sentencing statutes. In brief, if Alice, Bobby, and Carol are convicted of the same crime and receive the same sentence although they deserve different sentences based on facts not accounted for in the sentencing statute, then the statute has committed a "rounding error." Bobby is the type of criminal contemplated by the drafters of the mandatory sentencing statute and receives the mandatory, and appropriate, sentence of eight years. Alice's crime, however, involved aggravating factors not accounted for in the statute and deserved a sentence of ten years instead of the eight she ultimate receives. Carol's crime involved mitigating factors not accounted for in the statute, and deserved a sentence of seven years. The "rounding error" in Alice's case is two years and in Carol's case, one year. Rather than calculate the sentence based on Alice, Bob, and Carol's individual culpability, the statute has "rounded" three factually different crimes into one crime.

Part I lists a series of rounding errors which illustrate how mandatory sentencing statutes are flawed. Part II discusses the federal Armed Career Criminal Act as an example which neatly illustrates almost all of the flaws described in Part I. Part III slips the surly bonds of empiricism and offers a rationalist argument that vesting sentencing discretion in judges (or juries) better serves each of the four Supreme Court-approved goals justifying penal sanctions (retribution, deterrence, incapacitation, and rehabilitation). Part IV summarizes Supreme Court jurisprudence regarding the individualization of sentencing determinations, and suggests that the Court is nudging the states towards adopting individualized sentencing determinations. Though the Supreme Court has stated that in most cases "individualizing sentencing determinations . . . [is] simply enlightened policy rather than a constitutional imperative,"[2] a string of recent cases suggest that it may have had its fingers crossed. And since the Court has

2. Woodson v. N. Carolina, 428 U.S. 280, 304 (1976).

departed from an originalist reading of the Eighth Amendment,[3] the would-be limiting principle to these cases is society's limitless "evolving standards of decency."[4] Part V addresses some of the counter-arguments to the thesis that judges are better sentencers than statutes, and suggests that the experience of the Federal Sentencing Guidelines and empirical studies indicate that these objections are unfounded.

PART I. FLAWS OF MANDATORY SENTENCING STATUTES

Mandatory sentencing statutes exhibit some of the following flaws:

(1) They are underinclusive. Though legislators intended to sanction violent criminals, in their attempts to draft the statute so as not to be overinclusive, violent criminals in fact escape the sanction.[5]

(2) They are overinclusive. Though the drafters may have intended to sanction only violent criminals, non-violent criminals are in fact sanctioned.[6]

(3) They omit relevant mitigating and aggravating factors. Though mandatory sentencing statutes may include mitigating and aggravating factors, (youth, criminal record, etc.), sometimes relevant factors are omitted[7] or calculated too rigidly.

(4) They are cumbersome to apply.[8]

(5) They are wasteful. The "cumbrous and expensive"[9] machinery of the state is set in motion to determine whether a given defendant is guilty. In the process, details relevant to the culpability of the defendant are learned by the judge and the jury. Yet mandatory sentencing schemes, which by necessity lump

3. *See, e.g.,* Graham v. Florida, 130 S. Ct. 2011, 2040 (2010).
4. *Id.* at 2024.
5. *See infra* Part II.
6. *See infra* Part II.
7. *See, e.g.,* Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011) (addressing "the mandatory sentencing of children fourteen years of age and younger to life without the possibility of parole."), *rev'd sub nom.* Miller v. Alabama, 132 S. Ct. 2455 (2012). Notably, in *Jackson v. Norris*, the fact that the criminal was 14-years-old was irrelevant to his sentence as the Arkansas Supreme Court refused "to extend the Court's bans to homicide cases involving a juvenile where the death penalty is not an issue." *Id.* at 106.
8. *See infra* Part II.
9. O.W. HOLMES, JR., THE COMMON LAW 96 (1881).

disparate defendants into broader categories, "waste" these valuable facts by ignoring them.

(6) They are either useless or unjust, depending on the range of sentences provided. Much like price floors and price ceilings, if the mandatory sentencing scheme sets a range which is broad enough to allow a sentencing judge to consider every possible mitigating or aggravating factor, whether or not included in the statute, then they do not constrain judges. If the statute sets a narrower range such that a judge may not hand down different sentences to defendants who, though categorized identically, exhibit different levels of culpability, then they are unjust.

PART II. THE ARMED CAREER CRIMINAL ACT.

Though examples of mandatory sentencing statutes abound, I have chosen the Armed Career Criminal Act ("ACCA") as illustrative of several issues with mandatory sentencing schemes.

The portion of the Armed Career Criminal Act discussed herein mandates a minimum sentence of imprisonment of fifteen years for "armed career criminals,"[10] or, more precisely, those who have violated 18 U.S.C. § 922(g)(1) (which criminalizes the possession of firearms by felons) [11] *and* have a criminal record consisting of three or more violent felonies.

So far, this sounds dandy. The title "Armed Career Criminal Act" and its statutory text evoke a common-sense story: a criminal with a prior violent felony record is caught with a gun; since he is an armed career criminal, he should receive a mandatory boost to his sentence relative to non-armed and/or non-career criminals. (Of course, even if the ACCA were abolished, a defendant's criminal history would bear directly on the length of the sentence.)[12]

A nit-picker might harvest his first nit from the term "armed career criminal." Though there is a sort of surface logic in the term—one has to be both armed and a career criminal—the label obscures the fact that the two adjectives may have been earned disjunctively. An eighteen-year old boy—let's call him Sue—may

10. THOMAS W. HUTCHISON ET AL., FED. SENTENCING L. & PRAC. § 4B1.4 (2012 ed.) [hereinafter FED. SENTENCING L. & PRAC.].

11. 18 U.S.C. § 922(g)(1) (2006) (hence "career criminals").

12. FED. SENTENCING L. & PRAC., *supra* note 10, at §5A (charting the effect of a defendant's criminal history on a putative federal sentence).

amass before his twenty-second birthday a record of three felonious assault and battery convictions (Bar fights. Sue was inexplicably touchy.). He is now and always will be a "career criminal" according to 924(e)(1) of the ACCA.[13] If, after a saintly forty years, Sue buys a hunting rifle in Tennessee and is caught as he drives into Arkansas, he is now an "armed career criminal." But Sue was not armed for the qualifying felonies; Sue's career was not necessarily criminal.

The ACCA's flaws are not simply semantic; it exhibits many of the wasteful, unjust mechanisms that taint mandatory sentencing schemes. The seat of these defects is its definition of a violent felony, which itself informs who is an armed career criminal. An armed career criminal is "a person who . . . has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense."[14] A violent felony is a crime that

> [1] has as an element the use, attempted use, or threatened use of physical force against . . . another, [2] . . . is burglary, arson, or extortion, [or] involves use of explosives . . . or [3] otherwise involves conduct that presents a serious potential risk of physical injury to another.[15]

Condition 1 is called the "Force Clause." Condition 2 has no pithy name – I will call it the "Enumerated Felonies Clause." Condition 3 is called the "Residual Clause."

A. The Force Clause: Violently Underinclusive

Force Clause analysis of a given crime presents to judges an abstract question, "Is battery violent?", rather than "Was the battery committed by John Smith on December 1st violent?"[16] As a result, though 99% of battery convictions may be based on violent behavior, battery may not qualify as a violent felony under the Force Clause. Judges are barred from utilizing police reports, complaint applications, etc. to flesh out details germane to violence *vel non* because they are "generally limited to examining

13. 18 U.S.C. § 924(e)(1) (2006).
14. *Id.*
15. *Id.* § 924(e)(2)(B)(i)-(ii).
16. Johnson v. United States, 130 S. Ct. 1265, 1273 (2010).

the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[17] Judges must assume a categorical approach to a crime: if there is but one way that the given crime may be committed non-violently, then the entire crime is 'not violent' under the Force Clause.[18]

Thus is the Force Clause underinclusive. In *Johnson v. United States*, the Supreme Court was obliged to determine whether Florida battery constituted a violent felony under the Force Clause of the ACCA[19] (When analyzing what the elements of a given crime are, federal courts are to refer to state law constructions of the crime.)[20]

In Florida, one may be convicted of battery whenever "the element of actually and intentionally touching [is satisfied]," and "*any* intentional physical contact, no matter how slight," satisfies the requirement.[21] By contrast, the ACCA definition of physical force—a matter of federal law[22]—is "*violent* force-that is, force capable of causing physical pain or injury to another person."[23] Since, in Florida, "[t]he most nominal contact, such as a ta[p] . . . on the shoulder without consent, establishes a violation," the crime of battery in Florida is *not* a violent felony under the Force Clause.[24]

It may well be that 99% of batteries committed in Florida involve the use of "violent force." But because judges—in the absence of documents which detail a specific instance of a crime—are obliged to deem a crime non-violent because there is theoretically a way to commit the crime *without* violent force, then individuals who have committed violent felonies escape the ACCA's sentencing enhancement.

B. The Enumerated Felonies

The first clause of 18 U.S.C. § 924(e)(2)(b)(ii) simply lists some

17. Shepard v. United States, 544 U.S. 13, 16 (2005).
18. *See, e.g., Johnson*, 130 S. Ct. at 1266.
19. *Id.* at 1269.
20. *Id.*
21. *Id.* at 1269-70 (internal citations and quotations omitted).
22. *Id.* at 1267.
23. *Id.* at 1271.
24. *Id.* at 1270 (internal citations and quotations omitted).

per se violent felonies, "burglary, arson, or extortion, [or a crime that] involves use of explosives." This is both under and overinclusive. Because all of the enumerated crimes could be committed non-violently, particularly extortion, this clause is overinclusive. In Iowa, one may be convicted of extortion if one so little as "[t]hreatens to expose any person to hatred, contempt, or ridicule."[25] Nevertheless, the Eighth Circuit recently confirmed that a conviction of extortion counts as a violent felony for the purpose of the sentencing guidelines.[26]

The underinclusiveness of the enumerated felonies clause stems from the Supreme Court's holding in *Taylor v. United States*.[27] The Court analyzed the legislative history of ACCA and determined that when the enumerated felonies were listed, Congress did not contemplate that any state conviction which happened to be labeled burglary is necessarily a violent offense; instead, Congress intended for the "modern 'generic' view" of the crime to be counted as a violent felony.[28] Thus, in order for a state conviction for one of the enumerated crimes to count as a violent felony, it must both 1) require the jury to find all of the elements of the crime of "generic" burglary, and 2) not criminalize a wider, less culpable range of conduct than that which the generic offense entails.[29] The Court held that the defendant's conviction of burglary in Missouri could not be counted as a violent felony, because "most but not all the . . . Missouri statutes defining second-degree burglary include all the elements of generic burglary. . . . [I]t is not apparent to us from the sparse record before us which of those statutes were the bases for Taylor's prior convictions."[30] Illustrative of the second requirement is California's burglary statute: the Supreme Court suggested in dicta that because "California defines 'burglary' so broadly as to

25. IOWA CODE ANN. § 711.4 (West 2007).

26. United States v. Malloy, 614 F.3d 852, 856 (8th Cir. 2010), *cert. denied sub nom.* Kluge v. United States, 131 S. Ct. 3023 (2011). Note that this decision was in fact addressing the definition of a violent felony under the "career offender" portion of sentencing enhancements, though the language of § 924(e)(2)(b)(ii) and § 4B1.1 of the United States Sentencing Guidelines is substantially identical. *Malloy,* 614 F.3d at 856-57.

27. 495 U.S. 575 (1990).

28. *Id.* at 589.

29. *See id.* at 602.

30. *Id.*

include shoplifting and theft of goods from a 'locked' but unoccupied automobile,"[31] a conviction of burglary in California would not count as a violent felony under the ACCA. Whether one is chagrined that a bevy of burglars escape sentencing enhancement or delighted that shoplifters are off the hook is a matter of penological taste. Either way, a more precise result obtains from a judge's discretion, rather than a statute's blind groping.

C. The Residual Clause

The Residual Clause theoretically tightens up the underinclusiveness of the Force Clause. A crime qualifies as a violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another[.]"[32] Justice Breyer explains that the Residual Clause of the ACCA is meant to cover crimes which are "typically committed by those whom one normally labels armed career criminals . . . [it targets behavior that] show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger."[33] Thus the fact that "battery" may not qualify as a violent felony under the Force Clause does not necessarily foreclose the possibility of it qualifying as such under the Residual Clause.[34] The Residual Clause's meaning is informed by the enumerated felonies – in the text of the statute, the two are within the same sentence.

Many an ink cartridge has coughed out its last word in a vain effort to bring some semblance of regularity or principle to the application of the Residual Clause. Four times since 2007 has the Supreme Court addressed the question of "what is a violent felony"[35] under this clause, and four interrelated tests—all of

31. *Id.* at 591 (citing CAL. PENAL CODE § 459 (West 2010) *and* United States v. Chatman, 869 F.2d 525, 528-529, & n.2 (9th Cir. 1989)).

32. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

33. Begay v. United States, 553 U.S. 137, 146 (2008).

34. In *Johnson v. United States,* discussed *supra* at page 6, the Supreme Court neither considered the issue of whether Florida battery qualified under the Residual Clause nor remanded for consideration of the issue because the Government "disclaimed at sentencing any reliance upon [it.]" 130 S. Ct. 1265, 1274 (2010).

35. *See* Sykes v. United States, 131 S. Ct. 2267 (2011); Chambers v. United States, 555 U.S. 122 (2009); *Begay*, 553 U.S. at 137; James v. United

which remain good law—have emerged.[36] The fault may not lie entirely with the drafters of the ACCA. It would have taken a particularly perspicacious legislator to foresee the results of two subsequent Supreme Court cases which would render Residual Clause analysis, like Force Clause analysis, a categorical inquiry.[37] Concurring with the Court in an opinion which held that failure-to-report was not a violent felony, Justice Alito wrote that:

> In 1986, when Congress enacted ACCA's Residual Clause . . . Congress may have assumed that [ACCA] . . . would . . . require federal sentencing judges to determine whether the particular facts of a particular case [that is, the career criminal's three prior convictions] triggered a mandatory minimum sentence. But history took a different track. [The] Court held that ACCA requires the sentencing court to look only to the fact that the defendant had been convicted of *crimes falling within certain categories, and not to the facts underlying the prior convictions*.[38]

The Supreme Court kicked off its most recent "ACCA-thon" in 2007 with *James v. United States*, which discussed whether a conviction for attempted burglary in Florida constituted a violent crime.[39] There the Court explained that a crime qualifies as a violent felony if, in the typical case, the commission of the crime creates a degree of risk "comparable to that posed by its closest analog among the enumerated offenses."[40] The Court found that

States, 550 U.S. 192 (2007).

36. *See* U.S. v. Oliveira, 798 F. Supp. 2d 319, 329 (D. Mass. 2011) ("Importantly, *Sykes* did not overrule any of the previous [cases], and *James*, *Begay*, and *Chambers* remain good law.").

37. *See James*, 550 U.S. at 202 ("[W]e employ the categorical approach . . . . Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.") (internal quotation marks and citations omitted); *see also* Taylor v. United States, 495 U.S. 575, 599–602 (1990).

38. Chambers, 555 U.S. at 132 (internal citations and quotation marks omitted) (emphasis added).

39. 550 U.S. at 192.

40. *Id.* at 203.

the closest analog to attempted burglary was burglary, and decided that attempted burglary was a violent felony because, like the enumerated offenses, it "create[s] significant risks of bodily injury to others, or of violent confrontation that could lead to such injury."[41]

The 2007 *James* decision was closely followed by 2008's *Begay,* which analyzed whether the New Mexico offense of driving under the influence ("DUI") qualified as a violent felony under the ACCA's Residual Clause.[42] The Tenth Circuit answered in the affirmative, because drunk driving has a similar degree of risk of harm to the enumerated felonies.[43] The Supreme Court reversed and remanded, distinguishing the DUI offense from the enumerated felonies in that DUI offenders do not exhibit "purposeful, violent, and aggressive conduct."[44] It may have seemed, at the time, that this decision simply narrows *James*' scope – not only must a crime create significant risks of bodily injury or violent confrontation, the underlying conduct must also be purposeful, violent, and aggressive. As the discussion of *Sykes v. United States* below indicates, however, that interpretation evidently "overreads" *Begay*.[45]

In 2009, the Supreme Court was again called upon to apply Residual Clause analysis in *Chambers v. United States*.[46] There they held that a prior conviction of failing to report for court-ordered detention did not qualify as a violent felony, though both the District Court and the Seventh Circuit (in an opinion by Judge Posner)[47] had decided the opposite. The Court noted that the statute under which the defendant was convicted covered two separate crimes – failure to report for detention, and escape from a penal institution coupled with failure to report.[48] Both the

41. *Id.* at 193.
42. Begay v. United States, 553 U.S. 137 (2008).
43. *Id.* at 140.
44. *Id.* at 144 (internal quotations omitted).
45. Sykes v. United States, 131 S. Ct. 2267, 2275 (2011) ("In [petitioner's] view this Court's decisions in *Begay* and *Chambers* require ACCA predicates to be purposeful, violent, and aggressive in ways that vehicle flight is not. Sykes, in taking this position, overreads the opinions of this Court.").
46. 555 U.S. 122 (2009).
47. United States v. Chambers, 473 F.3d 724, 725 (7th Cir. 2007).
48. *Chambers*, 555 U.S. at 122.

District Court and the Seventh Circuit had decided as they did base on the "escape" behavior encompassed by the statute.[49] The critical factor for the Supreme Court, however, was that the crime did not "involve conduct that presents a serious potential risk of physical injury to another."[50] This determination was in part based upon a study which purported to demonstrate the correlation *vel non* between convictions for escape and probability that violence would accompany the crime.[51]

The Supreme Court's latest decision applying the ACCA's Residual Clause was *Sykes v. United States*, decided on June 9, 2011, which held that a violation of Indiana's felony vehicle flight statute constituted a violent felony.[52] After explaining that felonious vehicle flight did not qualify as a violent felony either under the Force Clause[53] or the enumerated felonies, Justice Kennedy valiantly attempts to summarize the methodology underlying Residual Clause analysis:

> The sole decision of this Court concerning the reach of ACCA's residual clause in which risk was not the dispositive factor is *Begay,* which held that driving under the influence (DUI) is not an ACCA predicate[, because it is] not purposeful, violent, and aggressive. . . . [DUI was] analogiz[ed] to strict-liability, negligence, and recklessness crimes. . . . The phrase 'purposeful, violent, and aggressive' has no precise textual link to the residual clause. . . . In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same. As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to

49. *Chambers*, 473 F.3d at 727.
50. *Chambers*, 555 U.S. at 128 (internal citations omitted).
51. *Id.* at 129 ("The [Report on Federal Escape Offenses in Fiscal Years 2006 and 2007] identifies every federal case in 2006 or 2007 in which a federal sentencing court applied the Sentencing Guideline. . . and in which sufficient detail was provided, say, in the presentence report, about the circumstances of the crime to permit analysis.").
52. 131 S. Ct. 2267 (2011).
53. *Id.* at 2275.

resolve the case before us.[54]

Though the Court quoted *James'* articulation that a crime is a violent felony when the degree of risk posed by the crime is "comparable to that posed by its closest analog among the enumerated offenses,"[55] it did not identify a closest analog for the crime of vehicle flight. Instead the Court decided that vehicle flight was a violent felony because it is at least as risky as arson or burglary.[56]

The petitioner had partially relied upon *Begay*, suggesting that it set a substantive requirement that ACCA predicate crimes had to be purposeful, violent, and aggressive.[57] The Court demurred and suggested that the key distinction was that DUI was a type of strict liability or negligence crime, whereas the statute in question had a *mens rea* requirement of purposeful or knowing.[58] Again, the Court relied upon a statistical record – this time suggesting that felonious vehicle flight was correlated strongly with violence – in its determination that it was a violent felony.

Justice Scalia dissented and opined that the ACCA should be declared void for vagueness.[59] Justice Scalia wrote that "[t]he residual-clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home."[60] Justice Scalia found some merit in the petitioner's argument that felonious vehicle flight is neither violent nor aggressive, and thus should not qualify as a violent felony: "If the test excluded only [certain] unintentional crimes, it would be recast as the 'purposeful' test, since the last two adjectives ('violent, and aggressive') would do no work."[61] The Supreme Court has not issued another decision clarifying the application of the Residual Clause of ACCA, though not for lack of petitioners.

54. *Id.*
55. *Id.* at 2275.
56. *Id.* at 2273-75.
57. *Id.* at 2275.
58. *See* IND. CODE ANN. § 35–44–3–3(a) (West 2012) (requiring a *mens rea* of "knowingly or intentionally").
59. *Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting).
60. *Id.* at 2287 (Scalia, J., dissenting).
61. *Id.* at 2285 (Scalia, J., dissenting).

In the Ninth Circuit, *United States v. Mayer* held that convictions obtained under Oregon's first degree burglary statute qualify as violent felonies under the ACCA.[62] The statute applied to unlawful entries into "any booth, vehicle, boat, [and] aircraft,"[63] rather than limiting burglary to entrances into buildings and structures. Still, the Oregon burglary statute qualified because the behavior prohibited leads to "a serious potential risk that [the crime] will result in physical injury to another."[64] Judge Kozinski noted (while dissenting from denial of rehearing *en banc*) that "Oregon prosecutes as burglars people who pose *no* risk of injury to anyone," and cited an Oregon Supreme Court case affirming a burglary conviction for "entering public telephone booths to steal change from coin boxes."[65] Though consistent with one line of Supreme Court precedent on the ACCA's Residual Clause – (*Sykes* states that "[t]he sole decision of this Court concerning the reach of ACCA's residual clause in which risk was not the dispositive factor is *Begay*"[66]) the Ninth Circuit's conclusion seems to run contrary to the aforementioned dicta in *Taylor*.[67]

In *United States v. Johnson,*[68] the Second Circuit held that the Connecticut offense of "rioting at a correctional institution,"[69] which punishes a defendant for, *inter alia*, "tak[ing] part in . . . organized disobedience to the rules and regulations of [a correctional] institution,"[70] qualifies as a violent felony under the ACCA's Residual Clause. Though organized disobedience could encompass hunger strikes, the court wrote that even inciting or participating in a hunger strike "involve[s] deliberate and purposeful conduct."[71]

And, in the words of Justice Scalia, the Fourth Circuit has recently suggested that "Oliver Twist was a violent felon,"[72]

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62. 560 F.3d 948 (9th Cir. 2009).
63. *Id.* at 959.
64. *Mayer*, 560 F.3d at 962.
65. *Id.* at 952 (citing State v. Keys, 419 P.2d 943 (Or. 1966).
66. *Sykes*, 131 S. Ct. at 2275.
67. *See* Taylor v. United States, 495 U.S. 575, 599 (1990).
68. 616 F.3d 85 (2d Cir. 2010), *cert. denied sub nom.* Derby v. United States, 131 S. Ct. 2858 (2011).
69. CONN. GEN. STAT. ANN. § 53a–179b(a) (West 2012).
70. *Id.*
71. *Johnson*, 616 F.3d at 90.
72. Derby v. United States, 131 S. Ct. at 2859 (Scalia, J., dissenting

because larceny from the person (defined as theft of money or anything worth five dollars or more)[73] "does not necessarily involve violence, but [does] require[ ] the offender to make purposeful, aggressive moves to part the victim from his or her property, creating a similar risk of violent confrontation."[74]

What do these cases have in common? Besides the fact that certiorari was denied on all three,[75] they demonstrate that the application of the ACCA's Residual Clause, even after four Supreme Court opinions in four years, is hopelessly muddled and may lead to paradoxical results which bestow the label "violent felon" upon those who do not deserve it, or withhold it from those who do.

PART III. A RATIONALIST ARGUMENT FOR INDIVIDUALIZING SENTENCING.

In Part III.A I suggest that setting the appropriate sentence for a crime is more accurate when more facts about the criminal and the crime are known to the sentencing authority, regardless of one's philosophical justification for penal sanctions. Imagine that for each crime – not each crime generically, like 'second degree murder', but for each *actual* crime, like "Jerry stole $5 from Tom's hand while Tom was standing on the street corner, then ran off," – there is an ideal sentence.

The sentence must be justified by at least one[76] of the "legitimate" goals of penal sanctions recognized by the Supreme Court: deterrence, retribution, incapacitation, or rehabilitation.[77] The ideal sentence, then, should deter Jerry (and the population) from future mischief, and/or it should punish Jerry in proportion to his injuries to society, and/or it should incapacitate him for a time such that he will not be able to commit further crimes, and/or

from denial of certiorari).

73. VA. CODE ANN. § 18.2-95 (West 2009).

74. United States v. Jarmon, 596 F.3d 228, 232 (4th Cir. 2010) *cert. denied*, 131 S. Ct. 145 (2010).

75. *Derby*, 131 S. Ct. at 2858; *Jarmon*, 131 S. Ct. at 145; Mayer v. United States, 130 S. Ct. 158 (2009).

76. *But see* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory.").

77. Graham v. Florida, 130 S. Ct. 2011, 2016 (2010).

it should place him in prison for long enough that he is rehabilitated. These four goals may lead to contrary results. For instance, this crime may excite little to no moral outrage in the retributionist, while a utilitarian may suggest that "making an example" out of Jerry will deter many petty thieves.

Whichever penological goal is preferred by the state, the introduction of more facts should not hinder the ability to fashion the most appropriate sentence. A retributionist is concerned with righting the wrong done to a victim or society. Retribution finds its justification in remedying past wrongs, rather than preventing future wrongs. It follows, then, that a retributionist could better fashion a sentence if she had a more precise understanding of the past wrong. Who was the offender? Was there any element of the offender's crime that makes his transgression less culpable? A woman who struck her husband may have been provoked in a way that fell short of an affirmative legal defense, but that nonetheless makes her less culpable than a woman who struck her husband with no provocation. For the retributionist, a verdict of "guilty" or "not guilty" and a set of nondescriptive legal elements do not tell the whole story. So too for the incapacitationist, who imprisons offenders so that they will not cause further harm to society. Offenders whose crimes are legally identical may have committed those crimes in such a way – or the offenders may have certain characteristics – that make it more or less likely that they will offend again in the future. And the rehabilitationist, whose goal is to prevent habitual offending and "cure" the antisocial tendencies of the criminal, is surely more likely to succeed in any such course of treatment if more about the criminal and his crime are known to the sentencing authority. For those concerned with individual deterrence,[78] characteristics about the offender and his crime would help fashion a sentence that would better deter an offender. In each case, a sentencing authority has the opportunity to set a sentence that better redresses the harm to society, better deters the offender from future harm, better safeguards society from the offender's actions, or better plots the rehabilitative program.

General deterrence, however, is concerned with deterring

78. By "individual deterrence," I mean "specific deterrence," which is aimed at discouraging the individual offender from committing future crimes, rather than the general population from committing the crime.

future offenders, rather than the specific offender before the Court. The philosophy has been challenged by skeptics who claim that the fundamental assumption of general deterrence – that the public is aware of crimes and their respective sentences, and make cost-benefit decisions on that basis – is flawed.[79] One concerned with general, population-wide deterrence might instead set the same punishment for all offenders who commit legally identical crimes, on the theory that setting a uniform sentence for the same "harm" – regardless of motive, background, and victim - establishes a splendid deterrent.[80] But are general deterrers better off with mandatory sentencing statutes? Not necessarily. In order for general deterrence to be better served by mandatory sentencing statutes, the given criminal offense must criminalize a narrow range of conduct. If a given offense criminalizes a wide range of conduct, then even general deterrers might see the need for more particulars before sentencing is passed down.

Or, if mandatory sentencing statutes are abolished *and* the unlikely worst case scenario results (judges give wildly disparate sentences based on their own pet notion of penal sanctions and for some reason appellate review of disparate sentences is ineffective), then the goal of general deterrence may be met by making each trip before a judge the equivalent of penal sanction Russian roulette. Chamber 1, rehabilitationist, Chamber 2, specific deterrer, Chamber 3, general deterrer, BLAM, serious jail time. If a criminal is rational enough to be susceptible to general deterrence, then they may be rational enough to avoid penal sanction Russian Roulette.

PART IV. SUPREME COURT JURISPRUDENCE

A. **"**Death is Different**"** as the Dividing Line

The police powers reserved to the state,[81] as well as an

79. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950-54 (2003) (discussing the legal knowledge hurdle and collecting scholarship challenging the general deterrence rationale).

80. This is conceding that criminal statutes always describe the same "harm" when they measure it in, e.g., dollars stolen.

81. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding the authority of states to enforce compulsory vaccinations laws); Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that zoning

originalist reading of the Constitution, theoretically limit the ability of the Court to tinker with state sentencing practices. But in the last forty years, the Court has used the Eighth Amendment to narrow the states' freedom to punish as they see fit. In *Woodson v. North Carolina* the Court confirmed with one hand that "individualizing sentencing determinations . . . [is] simply enlightened policy rather than a constitutional imperative," but with the other it "require[d] consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [82]

Woodson's language was strong, but its limiting principle was crisp: the death penalty. The Court has continuously recognized that "death is different,"[83] and until recently it seemed that the line would not be crossed, even though the Court made decisions relative to the death penalty that, in principle, should be applicable to non-capital cases. For instance, in the 1982 case *Enmund v. Florida*, the Court held that Florida could not execute a defendant convicted of murder on accessorial felony-murder theories.[84] Since the defendant did not kill, attempt to kill, or intend to kill, it was impermissible under the Eighth Amendment for a state to treat the defendant as it treated the robbers who killed.[85] This striking decision theoretically undermines the vitality of the felony-murder doctrine: the Court stated that the Eighth Amendment of the United States Constitution requires that states measure the culpability of a so-called felon-murderer based on his individual conduct.[86] Indeed, if *Enmund* were not limited to the death-penalty context, it would be a *de facto* abolition of felony-murder.[87]

ordinances are within a village's police power).

82. 428 U.S. 280, 304 (1976).

83. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012); *Woodson*, 428 U.S. at 305 ("The penalty of death is qualitatively different from a sentence of imprisonment, however long.").

84. 458 U.S. 782, 801 (1982).

85. *Id.* at 796, 798.

86. *Id.* at 798.

87. Though states could still label defendants like Enmund, as felon-murderers, they would be constitutionally required to sentence such defendants based on their conduct. *See, e.g.,* ARK.CODE ANN. § 5–10–101(a)(1)(B) (2006) (requiring that a death occur in the course of a qualifying

The "death is different" line was well-defended by conservative members of the Court for a decade or so, but in the early nineties fault lines began to show. In 1991, it was only for a fractured 5-4 Court that Justice Scalia confirmed "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[88]

B. Now Age is Different, too.

In the 2010 case *Graham v. Florida,* the Supreme Court crossed the "death is different" line.[89] Justice Kennedy wrote for a 5-4 majority that juvenile offenders who do not commit homicide may not receive a sentence of life imprisonment without parole.[90] Though the Court has in a few instances overturned noncapital sentences on a defendant-by-defendant basis using the so-called narrow proportionality principle,[91] *Graham* was the first case in which the Court established a broad, categorical rule against the imposition of a punishment on a certain class of offender.[92] Chief Justice Roberts opined that the majority established "a new constitutional rule of dubious provenance."[93] Justices Scalia, Thomas, and Alito dissented based on an originalist reading of the Eighth Amendment.[94]

Graham's effect, admittedly, is narrow: it applied only to juveniles who did not commit homicide, and only to sentences of life imprisonment without parole.[95] Only 123 prisoners nationwide were so sentenced.[96] But *Graham* is notable not for its effect, but because it added another clause to the "death is different" line. *Graham* left us with the much less pithy adage that death, and life imprisonment without parole as applied to juveniles who do not commit homicide, are different. But *Graham* did not apply *Woodson*'s mandate that certain punishments require

felony).

88. Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991).
89. 130 S. Ct. 2011 (2010).
90. *Id.* at 2034.
91. *See, e.g.,* Solem v. Helm, 463 U.S. 227 (1983).
92. *Graham*, 130 S. Ct. at 2022-23.
93. *Id.* at 2036 (Roberts, C.J., concurring).
94. *Id.* at 2043-58 (Thomas, J., dissenting).
95. *Id.* at 2034.
96. *Id.* at 2024.

individualized sentencing determinations.

Miller v. Alabama did.[97] Decided on June 25, 2012, *Miller v. Alabama* struck yet another blow against mandatory sentencing schemes. *Miller* was consolidated with *Jackson v. Hobbs*; both cases involved 14-year-olds convicted of murder.[98] These are the facts of *Jackson*, as set forth in the dissenting opinion of the Arkansas Supreme Court:

> Appellant Kuntrell Jackson was barely fourteen on the night of the incident that led to his arrest. He was walking with an older cousin and friend, Travis Booker and Derrick Shields, through . . . [a] housing project . . . when the boys began discussing the idea of robbing the Movie Magic video store. On the way to Movie Magic, Jackson became aware of the fact that Shields was carrying a sawed-off .410 gauge shotgun in his coat sleeve. When they arrived at the store, Shields and Booker went in, but Jackson elected to remain outside by the door. Shields pointed the shot gun at the video clerk, Laurie Troup, and demanded that she "give up the money." Troup told Shields that she did not have any money. A few moments later, Jackson went inside. Shields demanded that Troup give up the money five or six more times, and each time she refused. After Troup mentioned something about calling the police, Shields shot her in the face. The three boys then fled to Jackson's house without taking any money.[99]

Jackson was tried as an adult and convicted of felony-murder.[100] A sentencing statute mandated a sentence of life imprisonment without parole.[101] The statute precluded consideration of Jackson's youth, his precise role in the crime, and other arguably mitigating circumstances.[102] His conviction was affirmed on direct appeal in 2004,[103] but in 2005 the Supreme

97. 132 S. Ct. 2455, 2475 (2012).
98. *Id.* at 2463.
99. Jackson v. Norris, 378 S.W.3d 103, 107 (Ark. 2011) (Danielson, J., dissenting), *rev'd sub. nom.* Miller v. Alabama, 132 S. Ct. 2455 (2012).
100. *Id.* at 108 (Danielson, J., dissenting).
101. ARK. CODE ANN. § 5-10-101(c)(1) (2006).
102. *Miller*, 132 S. Ct. at 2468.
103. Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004).

Court decided *Roper v. Simmons*, and in 2010, *Graham v. Florida. Roper v. Simmons* categorically forbade the execution of any offender for a crime committed before the offender's eighteenth birthday.[104] Both decisions exempted juveniles from certain types of punishment because they were less culpable than adult offenders. This categorical rule was justified by scientific research indicating that, as compared to adults, juveniles exhibit "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."[105]

Holding that the logic of those cases was not "crime-specific," the Court in *Miller* fashioned a new rule protecting juveniles: Mandatory life without parole for juveniles, even those who commit homicide, is cruel and unusual.[106] But *Miller*'s importance to the fate of mandatory sentencing schemes had more to do with a distinction drawn in the majority opinion between cases where the Court "categorically bar[s] a penalty" and those where it "mandates only that a sentencer follow a certain process . . . before imposing a particular penalty."[107]

Categorical challenges to a given punishment require that the defendant seeking relief provide evidence of national consensus (legislative enactments and state practice) regarding the sentencing practice.[108] Given that a majority of United States jurisdictions made a life without parole sentence mandatory for juveniles who committed homicide,[109] it seemed unlikely that any national consensus against that sentencing practice could be found. But Justice Kagan, writing for the majority, shouldered aside the requirement for national consensus against a given sentencing practice by recasting the petitioners' challenge as one to the *process* of meting out the penalty.[110] The decision cites several cases for support that there is such a thing as a process-based challenge under the Eighth Amendment,[111] but each one of

104. 543 U.S. 551, 568 (2005).
105. *Id.* at 569-70.
106. 132 S. Ct. at 2475.
107. *Id.* at 2471.
108. Graham, 130 S. Ct. at 2022.
109. *Miller*, 132 S. Ct. at 2471.
110. *Id.*
111. *Id.*

those cases was decided in the context of the death penalty.[112] *Miller* casually extends this process-based challenge to youths,[113] ensuring that "[t]here is no clear reason that [this] principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[114] Indeed, there is no clear reason that this principle would not bar all mandatory sentences for any defendants who exhibit some characteristic that uniformly mitigates their culpability for a crime (e.g., mentally deficient defendants) or those who did not pull the trigger in a felony-murder. By holding that in process-based challenges, "we have not scrutinized or relied in the same way on legislative enactments," the *Miller* court cast loose the Court's Eighth Amendment jurisprudence from the strictures of national consensus.[115]

The decision to allow youths to bring process-based challenges to their sentences is all the more striking because it was not forced. The Court could have obtained the same result without such a broad ruling: it could have extended *Enmund*'s special treatment of felon-murderers from the death penalty context to the juvenile-life-without-parole context, effectively holding that *Graham* already covers juvenile felon-murderers. Indeed, this holding was hinted at by Justice Breyer's concurrence, which was joined by Justice Sotomayor:

> [I]f the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson "kill[ed] or intend[ed] to kill" the robbery victim. In my view, without such a finding, the Eighth Amendment as interpreted

112. *See* Sumner v. Shuman, 483 U.S. 66, 67 (1987) (a Nevada statute that mandates death penalty for a prison inmate convicted of murder while serving a life imprisonment is unconstitutional); Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (remanding Oklahoma capital sentence for consideration of mitigating circumstances); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (Ohio statute does not allow the sentencer to consider mitigating factors).

113. *Miller*, 132 S. Ct. at 2471 ("Our decision . . . mandates only that a sentencer follow a certain process" and recognize "that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments.").

114. *Id.* at 2482 (Roberts, C.J., dissenting).

115. *Id.* at 2471.

in Graham forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.[116]

Justice Breyer's concurrence echoes the holding in *Graham* that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[117] What does it mean to commit homicide? The plain meaning of "commit homicide" is likely the taking of one human life by another. State classifications of "commit homicide" are not so clear, and include felony-murders, which rely on the doctrine of transferred intent to supply the requisite *mens rea* for the non-triggerman defendant.[118] But if *Graham*'s holding meant for the plain meaning of homicide to control, then non-triggerman felon-murderers are already protected by *Graham*. This reading is supported by the Court's repeated reference to "juvenile offender[s] who did not kill or intend to kill."[119] Indeed, the opposite holding – that state classifications of homicide control – leads to a paradoxical result. In Arkansas, which has a felony-murder statute, Jackson's conduct is deemed homicide and a life without parole sentence is (under current law) constitutional, so long as it is not imposed mandatorily.[120] In Kentucky, which does not have a felony-murder statute, Jackson's conduct would not be a homicide offense.[121] In order to avoid the absurdity of Eighth Amendment rights changing over a 100-mile stretch of I-55, the plain meaning of homicide may control.[122]

Death is different, and now children too. Punishment by punishment, characteristic by characteristic, the Court is

116. *Id.* at 2475 (Breyer, J., concurring).
117. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).
118. *See, e.g., Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring) (discussing the doctrine).
119. *Graham,* 130 S. Ct. at 2027.
120. *Miller*, 132 S. Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. . . . [T]he mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").
121. KY. REV. STAT. ANN. § 507.020 (LexisNexis 2008).
122. Note, however, that *Graham's* analysis of national consensus regarding life without parole for juvenile non-homicide offenders arrived at the 123 figure (for individuals serving life without parole sentences for non-homicide crimes) by disincluding juvenile felon-murderers. 130 S. Ct. at 2035.

establishing that while individualized sentencing was once no more than enlightened policy, it is now a constitutional imperative.

PART V. WHY MANDATORY SENTENCING SCHEMES WILL PERSIST.

Why will mandatory sentencing schemes persist? There are both sound and unsound reasons. Beginning with the latter, it appears that passing a mandatory sentencing scheme may be politically expedient. Those who are most directly affected by a penal sanction – i.e., criminals - are rarely politically powerful or widely popular. This is especially so for so-called *malum in se* crimes. If a politician proposes that every sexual offender receive a mandatory two year enhancement on top of whatever already exists, then the parties most interested in opposing the statute are likely sexual offenders. Though some concerned citizens may point out that, for instance, urinating in public may qualify one as a "sex offender,"[123] public discourse may not reach a level of detail such that the unintended consequences of the bill are discussed. The Economist describes the mechanism by which sex offense laws become harsher and harsher:

> Sex-offender registries are popular. Rape and child molestation are terrible crimes that can traumatise their victims for life. All parents want to protect their children from sexual predators, so politicians can nearly always win votes by promising curbs on them. Those who object can be called soft on child-molesters, a label most politicians would rather avoid. This creates a ratchet effect. Every lawmaker who wants to sound tough on sex offenders has to propose a law tougher than the one enacted by the last politician who wanted to sound tough on sex offenders.[124]

Similarly, ACCA, for all its rounding errors, applies only to a felon arrested with a firearm who has three arguably violent

123. *See Sex Laws: Unjust and Ineffective*, THE ECONOMIST, Aug 6, 2009, *available at* http://www.economist.com/node/14164614?story_id=14164614&source=hptextfeature; *see, e.g.,* CAL. PENAL CODE § 314 (West 1999).

124. *Sex Laws: Unjust and Ineffective*, THE ECONOMIST, Aug 6, 2009, *available at* http://www.economist.com/node/14164614?story_id=14164614&source=hptextfeature.

felonies or serious drug offenses on his record.[125]

Of course, not all of those who object to vesting sentencing discretion in judges are demagogues. Concerns about irregular sentencing (disparate sentences for similar crimes) as well as outlier judges (i.e., judges who are far too lenient or far too harsh with their sentences) are not irrational. However, these concerns can be addressed by adopting a system similar to the Federal Sentencing Guidelines.

The Federal Sentencing Guidelines are the product of the United States Sentencing Commission, an independent agency of the judicial branch created by the Sentencing Reform Act of 1984.[126] The guidelines were originally conceived of as mandatory, but in *United States v. Booker*[127] and *United States v. Fanfan*, decided in January 2005, the Supreme Court held that the Federal Sentencing Guidelines violated the Sixth Amendment right to a trial by jury. Since the guidelines obliged judges to make factual findings that may increase a defendant's sentence above what would be permitted by a jury's verdict, the Court determined that mandatory application of the guidelines was unconstitutional.[128] The Court instead made them mandatorily advisory, which means that judges must meditate on what sentences would be under the guidelines, but are ultimately free to depart from that figure.[129] The Supreme Court decided that appellate review of district court sentences outside the advisory guidelines would be conducted under the "unreasonableness" standard.[130]

In short, a mandatory sentencing scheme has been replaced by an advisory scheme which compels the judge to take into account what similar offenders have received as sentences for the same crime in the past, yet allows for departure from the guidelines if the judge deems the departure necessary. A sentence outside of the Guidelines leads to a review for unreasonableness.

Have federal sentences become, as a result, too lenient? Apparently not. A 2009 study demonstrated that above-

125. 18 U.S.C. § 924(e)(1) (2006).
126. *See* 18 U.S.C. §§ 3551-3586 (2006).
127. 543 U.S. 220 (2005).
128. *Id.* at 245.
129. *Id.* at 246.
130. *Id.* at 261.

Guidelines-range sentences are imposed at a rate double that of the rate before *Booker*.[131] Even while the Guidelines were in effect, the mandatory minimums did not have the effect that "sentencing hawks" might have preferred: that is, reigning in liberal judges who gave squishy, lenient sentences.[132] Commentators instead note that the mandatory minimums frustrate Republican political appointees (with political party being an admittedly imperfect proxy for whether a judge is being tough on crime) at the same level or a higher rate than the general population of federal judges.[133]

Have federal sentences become, as a result, too harsh? It is theoretically possible that releasing federal judges from the strictures of a mandatory sentencing scheme has permitted them to hand down unforgiving sentences. But as one commentator noted, it is unlikely: "Because legislatures tend to write high statutory maxima into the criminal code—to take account of the worst possible offense within each classification—the limitation placed on judicial discretion by the [guideline] is seldom confining."[134] And in any case, the switch from a mandatory sentencing scheme to an advisory scheme provides a corrective mechanism defendants did not have before: appellate review of their sentence. Prior to the *Booker* decision, appellate review of sentences within the Guidelines was unavailable except in cases of clear error or unconstitutionality.[135]

131. Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 236 (2009).

132. *See, e.g.,* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform,* CHAMPION, June 2003, at 7.

133. *See, e.g.,* David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 76 n.256 (2008); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 227-28 (2004); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 646 (2004); Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 13-20 (2004).

134. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences,* 91 NW. U. L. REV. 1441, 1445 n.19 (1997).

135. Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all

Still, any sentencing scheme which vests discretion in judges, and subjects that discretion to review by judges, arguably attenuates democratic influence on criminal sentencing. Judges, even those that are elected, are theoretically less responsive to public opinion than are legislators. But that is not to say that they do not alter their sentences based on popular opinion. A recent study of Washington State judges demonstrates that judges appear to respond to political forces when issuing sentences: "Whether judges respond to political pressure is an important question occupying social scientists. We present evidence that Washington State judges respond to such pressure by sentencing serious crimes more severely."[136]

CONCLUSION

Given the potential for mandatory sentencing statutes to err in fashioning the correct sentence for defendants, sentencing discretion should be vested in judges. Without having to invest scarce resources in separate sentencing hearings or further fact-finding, vesting judges with sentencing discretion will result in a more particularized determination of culpability. And perhaps, with our "object all sublime, [we] shall achieve in time – to let the punishment fit the crime."[137]

practical purposes, not reviewable on appeal."); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) ("For over two hundred years, there was virtually no appellate review of the federal trial judge's exercise of sentencing discretion.").

136. Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing* (Loyola-LA Legal Studies Paper No. 2012-50), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=219460.*

137. GILBERT, MY OBJECT ALL SUBLIME, *supra* note 1.