

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

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I. The Pointless Forest and the Pointless Man

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

Nilsson put these insights to good use, later producing an album and an animated film, both entitled “The Point.”² In either format, “The Point” told the story of Oblio, who along with his dog, Arrow, is thrown out of the land of Point because Oblio does not have a point on top of his head like everyone else. They are banished to the scary Pointless Forest, where they encounter the Pointless Man, another banished soul who welcomes them as they begin their journey. The “Pointless Man,” as drawn, has several pointy

¹ *The Point*, Harry Nilsson Web Pages, <http://www.harrynilsson.com/page-the-point.html> (last visited November 20, 2007).

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

faces and actual arrows emanating from his torso, all pointing in different directions.

Once Oblio enters the Pointless Forest and actually meets the so-called Pointless Man, he has a radical change in perspective:

You see the Pointless Man did have a point. In fact, he had hundreds of them, all pointing in different directions. But as he so quickly pointed out, a point in every direction is the same as no point at all.³

Which (of course) brings us to Congress and federal sentencing. Congress has issued at least 31 separate directives setting general policy goals in criminal sentencing.⁴ Section II describes some of these policy

³ Harry Nilsson, *The Pointless Man*, The Point Soundtrack (BMG Entertainment 1970).

⁴ Those 31 directives would mandate that each of the following be considered in creating guidelines, sentencing individuals, or both:

- 1) **The nature of the offense** (18 U.S.C. § 3553(a)(1))
- 2) **The circumstances of the offense** (18 U.S.C. § 3553(a)(1))
- 3) **The history of the defendant** (18 U.S.C. § 3553(a)(1))
- 4) **The characteristics of the defendant** (18 U.S.C. § 3553(a)(1))
- 5) **The seriousness of the offense** (18 U.S.C. § 3553(a)(2)(A))
- 6) **Promotion of respect for the law** (18 U.S.C. § 3553(a)(2)(A))
- 7) **Just punishment for the offense** (18 U.S.C. § 3553(a)(2)(A) & USSG §1A.1, intro to comment, pt. A, ¶ 2)
- 8) **Deterrence to criminal conduct** (18 U.S.C. § 3553(a)(2)(B) & USSG §1A.1, intro to comment, pt. A, ¶ 2)
- 9) **Protection of the public from further crimes by the defendant** (18 U.S.C. § 3553(a)(2)(C))
- 10) **To provide defendants with needed education or vocational training** (18 U.S.C. § 3553(a)(2)(D))
- 11) **To provide defendants with needed medical care or other correctional treatment** (18 U.S.C. § 3553(a)(2)(D))
- 12) **The kinds of sentences available** (18 U.S.C. § 3553(a)(3))
- 13) **Policy statements by the sentencing commission** (18 U.S.C. § 3553(a)(5))
- 14) **The need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar conduct** (18 U.S.C. § 3553(a)(6) & USSG §1A.1, intro to comment, pt. A, ¶ 2)
- 15) **Provision of restitution** (18 U.S.C. § 3553(a)(7))
- 16) **Incapacitating the offender** (USSG §1A.1, intro to comment, pt. A, ¶ 2)
- 17) **Rehabilitating the offender** (USSG §1A.1, intro to comment, pt. A, ¶ 2)

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

Section III, in turn, describes some of the underlying conflicts between these principles, and then describes the effect of combining a 31-point policy directive together with a strong mandate for uniformity. This project-- putting a pointless mish-mash of policy directives together with a demand for uniform punishments-- doesn't make much sense. Without a clear policy goal, after all, uniformity is as likely to be uniformly *wrong* as it is to be uniformly *right* relative to any understandable principle or set of principles. What is the sense in having consistent and uniform sentencing if

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- 18) **Proportionality in sentencing for conduct of differing severity** (USSG §1A.1, intro to comment, pt. A, ¶ 2)
 - 19) **Input from the Probation system, Judicial conference, DOJ, and Federal Defenders** (28 U.S.C. § 994(o))
 - 20) **Directions from Congress** (note following 28 U.S.C. § 994)
 - 21) **Maintaining sufficient flexibility to permit individualized sentences when warranted** (18 U.S.C. § 991(b)(1)(B))
 - 22) **Advancements in knowledge of human behavior** (18 U.S.C. § 991(b)(1)(C))
 - 23) **Neutrality as to race, sex, national origin, creed, and socioeconomic status of offenders** (28 U.S.C. § 994(d))
 - 24) **Fairness in sentencing** (28 U.S.C. §§ 991(b)(1)(B) & 994(f))
 - 25) **Sentences need to be near the statutory maximum for crimes of violence or certain drug offenses** (28 U.S.C. § 994(h))
 - 26) **Sentences need to allow for probation for certain first offenders** (28 U.S.C. § 994(j))
 - 27) **Average sentences prior to imposition of the Guidelines** (28 U.S.C. § 994(m))
 - 28) **Effect on prison populations** (28 U.S.C. § 994(q))
 - 29) **Certainty** (28 U.S.C. §§ 991(b)(1)(B) & 994(f))
 - 30) **The community view of the gravity of an offense** (28 U.S.C. § 994(c)(4))
 - 31) **The current incidence of an offense in the community and nation as a whole** (28 U.S.C. § 994(c)(7))

it is consistently and uniformly *wrong*? To insist on uniformity without principled directives to create those uniform results does nothing less than rob sentencing of any sense of real authority, by making it morally indeterminate.⁵

Finally, Section IV suggests a do-over for federal sentencing, in which a new Sentencing Commission would start with a small number of reasonable policy goals and then re-make the guidelines in a way which would allow those goals to be met. Opponents to re-making the guidelines would no doubt (correctly) fear the specter of greater discretion for judges being a feature of any new system. This “fear of judging,” as Cabranes and Stith called it,⁶ is our modern equivalent of the Pointless Forest— we (through our legislators) are scared to enter a world where judges exercise independent discretion because we don’t know everything that may lie in wait for us there. Individuals, even individual judges chosen expressly for their superior discretion and judgment, can be unpredictable, after all. Given the pointlessness of current “policy,” however, the prospect of reformed guidelines with individual judges more actively evaluating cases becomes

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

⁶ Kate Stith and Jose A. Cabranes, *Fear of Judging in the Federal Courts* (1998).

more appealing. With a new system and more-empowered judges a greater degree of judicial discretion, there would be a much better chance that policy and outcome would match, something that Congress has currently made impossible at the macro level with too many policy directives and a welter of statutes mandating uniform sentencing.⁷

II. A Point in Every Direction is the Same as No Point At All

A. It used to be simple

Once upon a time, the policy goals of federal sentencing were simple. As continues to be true in many other nations,⁸ four simple goals structured sentencing.⁹ These four shifted in importance over time relative to one another, but as a whole remained constant. One advantage to this framework was that the goals of sentencing were easily understood— they simply sought to (1) punish offenders (“retribution”), (2) deter both that individual and others from committing further crimes (“deterrence”), (3) to incapacitate dangerous individuals so that they could not cause more harm

⁷ Even with the elimination of mandatory guidelines, not only the advisory guidelines but several mandatory minimum sentences serve the purpose of mandating uniformity; e.g. the mandatory minimum sentences for sexual exploitation of children, 18 U.S.C. § 2251(d).

⁸ Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court’s Sentencing Structure*, 33 New England J. on Crim. & Civ. Confinement 609, 618 (2007).

⁹ Patricia M. Wald, *Why Focus on Female Offenders?*, 16 Crim. Just. 10,11 (Spring, 2001)(listing traditional goals of sentencing).

(“incapacitation”), and (4) to rehabilitate some offenders for both their benefit and that of the larger society (“rehabilitation”).

Certainly, these four traditional goals were often in tension.¹⁰ For example, in a given case some might insist that incapacitation of the defendant through imprisonment was necessary to protect the community, while others might insist that rehabilitation is possible. These goals would be served by different means; prison for the former, treatment for the latter. Despite such tensions, these limited goals allowed judges to weigh them relative to one another and evaluate each defendant by the same standards.

On a macro level, the simplicity of these traditional goals also allowed for a national debate over which should predominate, and they shifted in importance over time. For example, beginning in the late nineteenth century the goal of rehabilitation was ascendant.¹¹ As Doug Berman has noted, this rehabilitative ideal was framed in medical terms, with the criminal viewed as “sick” and in need of “cure.”¹² The traditional goals, then, provided not only reasonable guideposts for the use of discretion, but framed the national debate on sentencing in an understandable way, with a known and limited number of trade-offs available.

¹⁰ Kate Stith and Jose A. Cabranes, *Fear of Judging in the Federal Courts* 9-22 (1998) (describing the conflicts between and changing roles of these sentencing goals in American history).

¹¹ Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. Chicago Legal Forum 1, 3 (2005).

¹² *Id.* at 4.

These goals of retribution, deterrence, incapacitation, and rehabilitation still remain in the federal scheme, at least in the sense they are listed in the statute book. Specifically, 18 U.S.C. § 3553(a)(2)(A)-(D) directs a judge to consider the need for a sentence to reflect “just punishment,”¹³ to provide “adequate deterrence to criminal conduct,”¹⁴ “to protect the public from further crimes by the defendant,”¹⁵ and to “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁶

Unfortunately, Congress did not stop there. While the policy goals encompassed within retribution, deterrence, incapacitation, and rehabilitation remain in the books, they have been buried beneath an avalanche of other goals, including (perhaps most importantly) uniformity. While I have previously addressed the sad fact that the federal Sentencing Guidelines wholly ignore these goals in the machinery it establishes to calculate a sentence,¹⁷ here I address a related but different question: Has the wide variety of diverse policy goals packed into the federal sentencing system made that system morally indeterminate?

¹³ 18 U.S.C. § 3553(a)(2)(A).

¹⁴ 18 U.S.C. § 3553(a)(2)(B)

¹⁵ 18 U.S.C. § 3553(a)(2)(C)

¹⁶ 18 U.S.C. § 3553(a)(2)(D)

¹⁷ Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, The False Trail of Uniformity and Process, and the Way Back Home*, 54 S.Car. L. Rev. 649 (2003); Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 Fed. Sentencing Rptr. 253 (2004), *quoted in* *United States v. Booker*, 543 U.S. 220, 297 n. 15 (dissent of Stevens, J.).

B. The Non-Traditional Policy Goals

I have already described the traditional sentencing policy goals and how they are included in the sentencing scheme at 18 U.S.C. § 3553(a)(2)(A)-(D). Now, let's explore the remainder of Congress's policy directives to the Sentencing Commission and judges, both of which have roles in turning policy into action—the Sentencing Commission through creation and revision of the sentencing guidelines, and judges through the act of sentencing itself.

The policy directives for sentencing, sadly, are not grouped together in the federal code despite having been largely enacted together through the Sentencing Reform Act of 1984.¹⁸ Rather, they are lumped together in three separate places, leading to frequent redundancies. One of those places is 18 U.S.C. § 3553, which has been at the center of nearly every federal sentencing controversy since *United States v. Booker*,¹⁹ which declared in 2005 that the sentencing guidelines were no longer strictly mandatory and that § 3553 was to be the guiding statute of sentencing judges and courts of appeal.²⁰ Though § 3553 itself seems clearly directed to sentencing judges

¹⁸ For a worthwhile history of the Sentencing Reform Act of 1984, see Kristin J. Balding, *It Is a 'War On Drugs' and It Is Time To Reload Our Weapons: An Interpretation of 21 U.S.C. § 841*, 43 St. Louis U. L.J. 1449,

¹⁹ 543 U.S. 220 (2005).

²⁰ 543 U.S. at 259-260.

and not to the Sentencing Commission,²¹ 28 U.S.C. § 991(b) in turn directs the Sentencing Commission to consider some of those same objectives.²²

As Justice Breyer somewhat famously put it in *Rita v. United States*,²³ “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”²⁴

Though 18 U.S.C. § 3553 contains the best-known set of sentencing policy goals, it by no means contains the only set. 28 U.S.C. § 991, the statute which established the Sentencing Commission itself, contains not only specific sentencing policy goals²⁵ but a sweeping description of what the guidelines as a whole should look like:

The purposes of the United States Sentencing Commission are to ... provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted....²⁶

²¹ For example, the key provisions included at 18 U.S.C. § 3553(a) are prefaced with “The court, in determining the particular sentence to be imposed, shall consider-- ...”

²² Specifically, 28 U.S.C. § 991(b) directs the Sentencing Commission to “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)....”

²³ 127 S. Ct. 2456 (2007).

²⁴ *Id.* at 2463.

²⁵ E.g., that statute’s requirement that sentencing guidelines “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process....” 28 U.S.C. § 991(b)(1)(C).

²⁶ 28 U.S.C. § 991(b)(1)(B).

The real mother lode of policy goals, though, is found at 28 U.S.C. § 994, which is directed at the Sentencing Commission and sets out with both great specificity²⁷ and stunning breadth²⁸ what should be contained in the guidelines themselves.

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

²⁷ E.g., that consecutive sentences for both an offense and conspiracy to commit that offense should be avoided. 28 U.S.C. § 994(1)(1)(B)(2).

²⁸ E.g., these directives echo the others in seeking “fairness.” 28 U.S.C. § 994(f).

1. Broad Dictates.

The broad-dictate provisions of federal law direct sentencing towards general goals rather than specific objectives. This group includes the four traditional goals already discussed, of course. It also includes several other broad goals which in many cases will undercut those traditional goals, including the following, which reflect only a fraction of the total number of policy goals:²⁹

- a. *Uniformity*

Perhaps the most commonly-recognized non-traditional goal of sentencing is uniformity, which is codified as part of the long list found at 18 U.S.C. § 3553(a).³⁰ What Congress sought in mandating sentencing guidelines was, above all else, uniformity between judges and within a judge's own docket in sentencing cases which are at least somewhat similar.³¹ As discussed in the next section at some length, the Department of Justice and some in Congress have straightforwardly declared uniformity to be the paramount goal of the sentencing system, and it is fair to say that it is the pursuit of this goal which has driven the restructuring of the federal

²⁹ For a more complete list, see note 4, *supra*. This list omits for the sake of efficiency some important codified principles which also create conflict, such as the principle of proportionality.

³⁰ 18 U.S.C. § 3553(a)(6).

³¹ As Stith and Cabranes described it, "Congress's concern with reducing perceived or assumed disparities in federal sentencing is reflected in the debates leading up to the Acts's passage, in the Senate report accompanying it, and in the text of the Act itself." Stith and Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104 (1998).

sentencing system³² through guidelines, mandatory minimum sentences, and Court of Appeals opinions on what is “reasonable” in the period after *United States v. Booker*.³³

b. *Parsimony*³⁴

What is commonly called the “parsimony clause” of 18 U.S.C. § 3553(a) sets forth that “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection....” This directive sets out a clear principle: That a sentence should not exceed that necessary to fulfill the factors set out in the following paragraph, which include the traditional goals of retribution,³⁵ deterrence,³⁶ incapacitation,³⁷ and rehabilitation.³⁸

Unfortunately, post-guideline courts have rarely tried to give the parsimony clause much meaning.³⁹ It’s no wonder, either, as trial courts generally follow the sentencing guidelines, which serve a multitude of other goals (and sometimes, seemingly, no goal at all). The guidelines are simply

³² Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U.Cin. L. Rev. 749, 756-791 (2006).

³³ 534 U.S. 220 (2005).

³⁴ 18 U.S.C. § 3553(a).

³⁵ 18 U.S.C. § 3553(a)(2)(A)

³⁶ 18 U.S.C. § 3553(a)(2)(B)

³⁷ 18 U.S.C. § 3553(a)(2)(C)

³⁸ 18 U.S.C. § 3553(a)(2)(D)

³⁹ It is important to distinguish the principle of parsimony from the rule of lenity, which historically has little to do with sentencing. Rather, the rule of lenity is a rule of statutory construction which insists that application of a criminal statute be construed in favor of a defendant when it is unclear whether or not that law applies to the defendant’s actions at all. *See* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. Tol. L. Rev. 511 (2002).

not calibrated to follow the simple parsimony directive, as Justice Breyer seemed to acknowledge in *Rita v. United States*.⁴⁰ In that opinion, Justice Breyer noted that in the course of trying to use the four traditional goals and the parsimony provision to arrive at a foundational set of guidelines, a conflict arose among those drafting the guidelines “when the Commission attempted to reconcile the different perceptions of the purposes of criminal punishment.”⁴¹ Rather than resolving this conflict, the Commission simply punted on the issue, instead choosing to codify past practices by averaging out the results from thousands of prior cases.⁴² Thus, the Commission tossed out any real consideration of the parsimony provision becoming one of the structuring mechanisms for the guidelines, while at the same time 18 U.S.C. § 3553(a) affirmatively directed that it be considered by judges in sentencing individual defendants.

This, predictably, set up constant conflicts between the guidelines and a sentencing judge’s attempt to use the parsimony provision as it applied to any specific case, since the guidelines were developed without active reference to that guiding principle, yet judges were both bound to the

⁴⁰ 127 S. Ct. 2456 (2007)

⁴¹ 127 S. Ct. at 2464, *quoting* United States Sentencing Guidelines § 1A.1, intro to comment, pt. A, ¶ 3.

⁴² *Id.*

guidelines and charged with employing parsimony.⁴³ These conflicts have extended beyond the ruling in *Booker* that the guidelines were no longer mandatory, and will likely be litigated into the future as courts resolve what type of application of the parsimony clause is “reasonable.”⁴⁴ While at some point in the past it might have been said that the parsimony clause was of no significance, the more recent Supreme Court decisions point in the other direction, meaning that this clause will step up among the many others competing for the attention of the Sentencing Commission and judges.

c. *Following advancements in knowledge of human behavior*⁴⁵

One of Congress’s principle directives to the Sentencing Commission was to establish policies which “reflect, to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process...”⁴⁶ On its face, this directive tells the Commission that it must monitor scientific progress that would relate to things such as possible rehabilitation through new therapies.

Frank Bowman has argued that the guidelines themselves are not only unscientific, but constitute “a reaction *against* the notion that science has

⁴³ It should be no surprise, then, that both *Kimbrough v. United States*, 128 S. Ct. 558 (2007) and *Gall v. United States*, 128 S. Ct. 586 (2007) arose out of this foundational conflict between, on the one hand, the traditional goals and the parsimony provision as applied by a judge, and, on the other, the sentencing guidelines.

⁴⁴ *Id.*

⁴⁵ 28 U.S.C. § 991(b)(1)(C)

⁴⁶ *Id.*

very much to say about criminal punishment.”⁴⁷ In a broad sense this is absolutely correct. The available histories of the development of the guidelines reflect no substantive reference by the framers of the guidelines to the social or biological sciences. However, in some instances the Sentencing Commission itself has developed policies while relying on specific scientific findings. One such instance involves crack cocaine sentencing, in which two decades after adopting an unscientific approach the Commission reversed course based on scientific data.

In developing the sentencing guidelines for crack cocaine, the Sentencing Commission adopted the 100-to-1 powder-to-crack cocaine ratio contained in 21 U.S.C. § 841(b), even though that ratio had no scientific foundation.⁴⁸ In 2002⁴⁹ and in 2007,⁵⁰ the Commission issued lengthy reports which relied on current scientific studies to refute its own 100-to-1 ratio.⁵¹ Ultimately, in 2007, the Commission adjusted that ratio in the guidelines based in part on the findings in its own report,⁵² despite the fact

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

⁴⁸ CITE

⁴⁹ CITE

⁵⁰ CITE

⁵¹ For example, the 2007 Report refutes the idea that crack cocaine affects fetal development disproportionately relative to powder cocaine. United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, 68-71 (2007) (available at <http://ussc.gov>).

⁵² Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-28572.

that Congress had taken no action to change that ratio as contained in the corresponding set of mandatory minimum sentences.⁵³

While some may dismiss the imperative of considering new science as toothless, in at least one high-profile sentencing realm it has played a role in a major change.

d. *Neutrality as to race, sex, national origin, creed, and socioeconomic status*⁵⁴

In one of the few absolutes among the directives by Congress, 28 U.S.C. § 994(d) mandates that “The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” In turn, the Commission placed equally strong language in the guidelines themselves, providing flatly that race, sex, national origin, creed, religion, and socioeconomic status of a defendant are all factors which “are not relevant in the determination of a sentence.”⁵⁵

The breadth of this prohibition is striking. Though it is contained within the chapter of the guidelines which describes departures from a guideline range,⁵⁶ the language there is distinct from surrounding guidelines,

⁵³ 21 U.S.C. § 841(b)

⁵⁴ 28 U.S.C. § 994(d)

⁵⁵ United States Sentencing Guideline § 5H1.10.

⁵⁶ United States Sentencing Guidelines § 5.

all of which limit their affects to departure considerations.⁵⁷ In contrast, the prohibition against consideration of race, sex, national origin, creed, religion, and socioeconomic status apply to all aspects of determining a sentence—including the establishment of a sentence within a guideline range. In other words, by the plain language of the guideline, it is improper for a sentencing judge to even consider the fact that the defendant is female when sentencing *within* a guideline range.

This absolutist nature of this rule of neutrality has brought the race/sex/national origin/creed/ religion/socioeconomic status ban into conflict with other of the policy directives. For example, the mandate to follow current science (discussed above) runs into a wall when it conflicts with the bar on consideration of these factors. The idea of whether such science *mandates* consideration of a defendant’s sex is an actively debated question. In relation to female offenders, for example, some have employed reams of statistical analysis to oppose the ban on taking gender into account when sentencing, arguing that this masks important and relevant gender effects which pervade society as a whole.⁵⁸

⁵⁷ E.g. United States Sentencing Guideline § 5H1.5, which states that “Employment record is not ordinarily relevant in determining whether a departure is warranted.”

⁵⁸ E.g., Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 Pepp. L. Rev. 905 (1993). Using criminological data to back up her point, Raeder argues that “Treating men and women fungibly for sentencing purposes overlooks the role played by gender in criminality.” *Id.*, at 908. See also Nekima

The strict bar on considering protected class status continues to have a strong impact on sentencing, even as it comes under harsher attack from those who would bend this rule to allow for certain factors (such as gender) into account.⁵⁹

e. *Fairness*⁶⁰

Fairness, mandated as a part of the guideline scheme at both 28 U.S.C. §§ 991 & 994, seems so vague a concept that we might imagine it has not been a substantive policy issue in the grand debates over sentencing. However, as the guidelines were formed the idea of “fairness” was given two contradictory but precise meanings, and each played a role in how those guidelines were constructed.

In recounting the creation of the sentencing guidelines’ structure, now-Justice Stephen Breyer has spoken quite clearly about some of the compromises which were made by the first Sentencing Commission.⁶¹ In the course of that discussion, he describes fairness in two clear but opposing

Levy-Pounds, *From the Frying Pan Into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 Santa Clara L. Rev. 285 (2007),

⁵⁹ Despite the ban on considering gender, there do seem to be gender effects in sentencing, with women getting lighter sentences than similarly situated men. Anne Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 Berkeley J. of Crim. L. 43, 48-49 (2006).

⁶⁰ 28 U.S.C. §§ 991(b)(1)(B) & 994(f)

⁶¹ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1 (1988).

ways—first, in terms of procedural fairness, and second as substantive fairness.⁶²

To Breyer, procedural unfairness results when a judge determines facts which enhance a sentence in an informal way, without jury determinations, the rules of evidence, or the requirement of proof beyond a reasonable doubt. As Breyer puts it, “the more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be.”⁶³ Intriguingly, each of these shortcomings became a feature of the sentencing system, and they are at the core of the issues raised in *Booker* and its progeny.

On the other hand, Breyer seems to think that allowing the judge to adjust the range to account for “real” offense conduct (that is, acts beyond those charged in an indictment or information) almost always with a higher sentence, provides “substantive” fairness by allowing the punishment to fit the real crime.⁶⁴ The inclusion of this principle in the sentencing scheme has brought us such controversial features as sentencing a given defendant under the guidelines for which the defendant has been acquitted.⁶⁵

⁶² Id. at 8-12.

⁶³ Id. at 11.

⁶⁴ Id. at 11-12.

⁶⁵ For a thorough explanation of how courts have justified this, see *John Lanny Lynch v. United States*, 437 F. 3d 902 (9th Cir. 2006)(en banc).

In the end, according to Breyer, the Commission compromised between these two types of fairness, essentially by giving up on both.⁶⁶ That compromise resulted in a number of troubling features of the guidelines, including the lack of jury findings which brought us to *Booker* and the crucial effect of relevant conduct in calculating a sentence.⁶⁷ Far from being meaningless, the principle of “fairness” played a major role in shaping federal sentencing. In fact, it can be safely said that the failure to give the idea of “fairness” a single and unique meaning within the mandated sentencing goals at the time the guidelines were framed (and thus requiring a “compromise”) was a major factor in the disruption within federal sentencing we have experienced in *Booker* and beyond.

f. *Consistency with prior practices*⁶⁸

In 28 U.S.C. § 994(m), Congress gave a very specific mandate to the Sentencing Commission:

The Commission shall ensure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting

⁶⁶ In a broad sense, it is difficult to reconcile these two ideas of fairness. Breyer defines “procedural fairness” as the opposite of complexity, and “substantive fairness” as the opposite of efficiency. Assuming that simple things are more efficient than complex things, it is hard to reconcile these two definitions, yet apparently each played a role in the framing of the guideline scheme in the form of what Breyer describes as a “compromise.” *Id.*

⁶⁷ The guidelines expressly direct a court to consider uncharged “relevant conduct” in calculating a guideline sentence, which means that acts never charged will be the basis of sentencing if they are found to have been committed by the judge under a mere preponderance standard. U.S.S.G. § 1B1.3.

⁶⁸ 28 U.S.C. § 994(m).

point for its development of the initials sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission....”⁶⁹

In other words, the Commission was directed to first survey the then-current sentences being given, then create guidelines that reject those averages and instead create guideline ranges which “accurately reflect the seriousness of the offense.”⁷⁰ In other words, the Sentencing Commission was directly told to ascertain the collective judgment of hundreds of experienced judges, and then substitute it with their own.

It is beyond dispute that they did exactly that, in an imprecise, contentious, and hurried way.

First, the commission gathered data on past practices. Those with a better knowledge of statistical analysis than I possess have been critical of this process, in that the Commission’s methods did not meet social science standards, focused on a small number of relevant variables, and were shrouded in mystery even to those with an expertise in such analysis.⁷¹

With the data they did gather and analyze, however inadequately, the Commission then followed the mandate of Congress to reject that

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Bernard E. Harcourt, *From the Neer-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 SUM Law & Contemp. Probs. 99, 123 (2003).

accumulated wisdom. Among other adjustments, they significantly raised sentences under the guidelines for violent crimes, white-collar crimes, and narcotics crimes, relative to prior practice.⁷²

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

⁷² Id. at 125-126.

g. *Certainty*⁷³

The very act of creating guidelines in part fulfilled the mandate of 28 U.S.C. § 991(b)(1)(B) that the Sentencing Commission establish policies and practices that provide “certainty” in meeting the purposes of sentencing, in the sense that it made sentencing more predictable and “certain” from the perspective of the defendant being sentenced. Justice Breyer called this factor “honesty,” and described it as one in which “the sentence the judge gives is the sentence the offender will serve....”⁷⁴ More significant to the achievement of certainty than the guidelines, though, may have been the elimination of parole and drastic reduction in ‘good time’ credit allowed those who had already been sentenced.

This project as a whole is perhaps best understood through the guidelines’ own description of “The Basic Approach.”⁷⁵ There, the Commission explained its understanding of such certainty, relative to the regime it was replacing:

... Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by ‘good time’ credits. In

⁷³ 28 U.S.C. §§ 991(b)(1)(B) & 994(f).

⁷⁴ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4 (1988).

⁷⁵ U.S.S.G §1A1.1(A)(3).

addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve.⁷⁶

Getting rid of parole⁷⁷ and limiting ‘good time’ credit to 15% of the total sentence,⁷⁸ though not directly related to the guidelines, nonetheless had an impact on the operation of the guidelines and the problems that resulted. Because the term of imprisonment was determined in whole at the time of sentencing (rather than being subject to later revision by parole boards and the Bureau of Prisons), that made the sentence issued in the judgment more important, and amplified the distortions and anomalies contained therein, including those caused by the confusion cloud of policy goals discussed here.

Importantly for this discussion, the elimination of parole and good time meant that where there previously had been multiple chances to achieve the goals of sentencing, now there was only one—the sentencing itself. Without the possible mitigating effects of parole and good time, in any individual case only the courtroom judge (and the Sentencing Commission directing her via the guidelines) was left to make real the many and conflicting goals of sentencing articulated by Congress.

⁷⁶ Id.

⁷⁷ 18 U.S.C. § 3624(a).

⁷⁸ 18 U.S.C. § 3624(b).

h. *Reflecting community beliefs*⁷⁹

Among the many sentencing goals which promote national standards and uniformity, there is a striking anomaly: 28 U.S.C. § 994(c)(4) directs that the guidelines shall take into account to the extent it is relevant “the community view of the gravity of the offense.”⁸⁰ While this goal is not explicitly reflected in the guidelines themselves, they are built into the structure they are a part of, through the great deal of discretion the guidelines and related statutes give to localized federal prosecutors. Stephanos Bibas has chronicled the significance of these local variations through prosecutorial discretion,⁸¹ which the Sentencing Commission has continued to allow. Specifically, Bibas describes significant variations in the way, for example, that different federal prosecutors employ substantial assistance departures.⁸²

Such localized variations, of course, undermine many of the other goals described here. Most obviously, it cuts against uniformity, the goal some see as first among many.⁸³

⁷⁹ 28 U.S.C. § 994(c)(4).

⁸⁰ *Id.*

⁸¹ Stephanos Bibas, *Regulating Local Variations In Federal Sentencing*, 58 *Stanford L. Rev.* 137 (2005)

⁸² *Id.* at 148-153.

⁸³ Stith and Cabranes, *Fear of Judging*, 104 (1998)(“Reduction of ‘unwarranted sentencing disparities’ was a—probably *the*—goal of the Sentencing Reform act of 1984.”)(emphasis in original)

i. *Commonality of the offense*⁸⁴

The Commission is charged in 28 U.S.C. § 994(c)(7) with crafting guidelines that take into account (where relevant) “the current incidence of the offense in the community and in the Nation as a whole.” This, it must be acknowledged, the Commission has certainly done, at least when it is reacting to the emergence of a new narcotic. Often, this has been in response to a direct Congressional directive. One good example of this dynamic is the recent treatment of anabolic steroids.

In February, 2004, Attorney General John Ashcroft personally announced the indictment of several men connected with the BALCO lab in San Francisco, who were charged with making and selling steroids.⁸⁵ President Bush even denounced steroid use in his State of the Union address that year,⁸⁶ and subsequently Senator John McCain and others promoted bills in Congress which would require mandatory uniform testing of professional athletes for the use of anabolic steroids.⁸⁷ Clearly, the nation’s politicians perceived a growing epidemic of steroid use.

⁸⁴ 28 U.S.C. § 994(c)(7)

⁸⁵ Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30 Nov. *Champion* 22 (2006).

⁸⁶ *Id.*

⁸⁷ Lindsay J. Taylor, *Congressional Attempts to “Strike Out” Steroids: Constitutional Concerns About the Clean Sports Act*, 49 *Ariz. L. Rev.* 961, 961-962 (2007).

Consistent with 28 U.S.C. § 994(c)(7), Congress then directed the United States Sentencing Commission to consider an increase to the steroid guidelines.⁸⁸ The Sentencing Commission took this advice and acted, bumping up the guidelines sentence for a given amount of steroids.⁸⁹

Whether or not there was an upsurge of steroid use around 2004, the guidelines reacted to the *perception* that there was such a relevant change in the commonality of that particular type of drug abuse, reflecting yet another Congressional directive to sentencing.

j. *Effect on prison populations*⁹⁰

At the time the guidelines were created, Congress ordered that the Sentencing Commission, in conjunction with the Bureau of Prisons, report to Congress on the “maximum utilization of resources to deal effectively with the federal prison population.”⁹¹ This implies, at least, that the guidelines are to be created with an eye to the effect that the guidelines would have on prison populations. Presumably, this would be to limit the effect of the guidelines on prison populations—that is, to avoid the need for a prison-building binge due to the impact of sentencing guidelines.

⁸⁸ Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 118 Stat. 1661, § 3 (2004)(codified at 21 U.S.C. § 801, 802, & 811 (2004)).

⁸⁹ The commission achieved this increase by adjusting the dosage amount for steroids. Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30 Nov. *Champion* 23 (2006).

⁹⁰ 28 U.S.C. § 994(q).

⁹¹ *Id.*

It is unclear that this implication had much effect. Prior to the guidelines, about four in ten federal offenders went to prison.⁹² By 2006, that number was 9.5 out of ten:⁹³ Twenty-some years down the guideline path, nearly all defendants are going to prison. Predictably, the federal prison population shot up. In 1984, there were 32,317 people in federal prisons.⁹⁴ By 1992, that figure had doubled, and in 2007 the federal prison population stood at a shocking 198,656⁹⁵-- six times the population at the time the guidelines were created.

Unlike the other broad directives discussed above, it seems as if the mandate to consider prison populations had little direct effect on the guidelines themselves. However, it could be that the Commission's reports may have deterred Congress from passing some laws which might have had a drastic effect on prison populations. For example, in analyzing the proposed Gang Deterrence and Community Protection Act of 2007, the Commission reported that that act would create the need for \$9,000,000,000 to construct about 23,600 additional prison beds.⁹⁶ It's easy to imagine that

⁹² Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, 71 *Federal Probation* 10, 13 (September 2007).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Tiffany Sykes, *Much Ado About Something: Reconciling Roper v. Simmons With the Gang Deterrence and Community Protection Act of 2007 and the Possibility of Inconsistent Jurisprudence*, 34 *New Eng. J. on Crim. and Civ. Confinement* 163, 171 (Note)(2008), *citing* Jeffery A. Kidder, *Gang Deterrence and the Community Protection Act of 2005: Why the Federal Response to MS-13 is Flawed*

in tough economic times, this may have dampened chance for the passage of that bill.

2. Specific Provisions

Some of Congress’s policy goals apply only to certain types of cases. Listed below are only a fraction of the total number of these specific sentencing goals.

a. *Restitution*

In concert with the creation of the guidelines, Congress directed that the court in a given case consider the need for the defendant to “provide restitution to any victims of the offense.”⁹⁷ The guidelines, consistent with statute,⁹⁸ direct that the payment of restitution be required for the full amount of the victim’s loss,⁹⁹ even if that would reduce the amount of a fine.¹⁰⁰

Conceivably, this commitment to restitution would auger against a sentence of imprisonment, so that the defendant would be free to work and earn money in order to pay off the restitution amount. This tradeoff—disfavoring prison for probation where restitution is possible—seems to be

and How it Will Have An Adverse Impact On Your State, 33 New Eng. J. on Crim. and Civ. Confinement 639, 648 n. 85 (2007).

⁹⁷ 18 U.S.C. § 3553(a)(7).

⁹⁸ 18 U.S.C. 3572(b).

⁹⁹ U.S.S.C. § 5E1.1(a)

¹⁰⁰ U.S.S.C. § 5E1.1(c).

in tension with some of the other principles articulated above, including the call to uniformity¹⁰¹ and the ban on considering socioeconomic status.¹⁰²

b. *Harsh punishment for certain crimes*¹⁰³

18 U.S.C. § 994(h) created what we now know as the career offender provisions of the guidelines,¹⁰⁴ which advise harsh punishments for those charged with drug crimes or crimes of violence and who have at least two such prior convictions.¹⁰⁵ Such offenders receive a stiff upward adjustment not only in their offense level score,¹⁰⁶ but in the other axis of the sentencing grid, the criminal history category, regardless of their actual criminal history.¹⁰⁷ Thus, an offender with three minor marijuana trafficking offenses spread over two decades may end up with a more severe sentence than some drug kingpins. As set out in the next section, this creates a direct conflict with the competing principle of parsimony.¹⁰⁸

c. *Rewarding Co-operators*¹⁰⁹

Congress further mandated that the guidelines encourage cooperation with the government through the promise of lower sentences and the waiver

¹⁰¹ There would be conflict because in otherwise similar cases, defendants with the ability to pay would get probation, while those with lesser job skills might end up in prison.

¹⁰² Presumably, socioeconomic status relates to earning power, which will equate to a greater ability to pay restitution if the defendant receives a sentence of probation.

¹⁰³ 28 U.S.C. § 994(h).

¹⁰⁴ U.S.S.C. §4B1.1.

¹⁰⁵ U.S.S.C. §4B1.1(a).

¹⁰⁶ U.S.S.C. §4B1.1(b).

¹⁰⁷ *Id.*

¹⁰⁸ Section III(A)(1), *supra*

¹⁰⁹ 28 U.S.C. § 994(n).

of mandatory minimum sentence provisions for those who provide the government with what the government decides is “substantial assistance.”¹¹⁰ This mandate was fulfilled in the guidelines through the provisions at § 5K1.1, which allow downward departures for cooperators. These authorized departures are now particularly important in federal criminal law, as they not only are an essential tool for prosecutors, but hold out for many defendants the only hope to escape harsh mandatory minimum sentencing provisions.¹¹¹

By making the breaks given to cooperators so important within federal sentencing, Congress and the Commission, of course, sacrifice the hope of fulfilling certain of the other principles they have set out. Uniformity, of course, loses out, as does neutrality as to race and socioeconomic class.¹¹²

3. Trap-door provisions

A final category of Congressional requirement would be trap-door provisions, which allow for an unlimited number of additional policy provisions to enter into the calculations that supposedly are determining a federal sentence. The legislative equivalent of using a magical wish to ask for more wishes, federal law contains two primary trap doors, allowing unforeseen new principles to be introduced to the scheme through further

¹¹⁰ Id.

¹¹¹ E.g. 21 U.S.C. § 841.

¹¹² Those defendants with access to other defendants, often through bonds of race and class, have the best chance of successfully getting a break for cooperating with federal investigators.

directions from Congress,¹¹³ and directions from Sentencing Commission.¹¹⁴ This allows both bodies to develop even more guiding principles on the fly, as if the welter of provisions we already have is not enough. Periodically we see this happen, such as when Congress decided to protect the integrity of professional sports against the threat of steroids, as discussed above.¹¹⁵

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

III. **The Problems of Pointlessness and Uniformity**

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

¹¹³ 28 U.S.C. § 994 & note following.

¹¹⁴ 18 U.S.C. § 3553(a)(5).

¹¹⁵ Section II(B)(1)(i), *supra*.

A. The conflicts within the policy swamp

While describing¹¹⁶ some of the policies involved in federal sentencing and the guidelines, I have mentioned a few of the conflicts created when these policy goals conflict. I would like now to evaluate a few more in order to exemplify the workings of these conflicts at ground level. I am able to describe only a small fraction of the total conflicts; at some level, of course, each of the policy goals opposes all the others for primacy in affecting the sentence of any given defendant.

1. Parsimony v. Harsh Punishment for Certain Offenders

The principle of parsimony, as described above,¹¹⁷ requires that a sentence should be “sufficient, but not greater than necessary,” to comply with the traditional sentencing goals.¹¹⁸ Congress chose to place this principle at the heart of its description of sentencing process.¹¹⁹

At the same time, however, Congress created the career offender provisions,¹²⁰ which direct especially harsh sentences for those convicted of narcotics or violent crimes who have two prior convictions for drug

¹¹⁶ Section II, *supra*.

¹¹⁷ Section II(B)(1)(b), *supra*.

¹¹⁸ 18 U.S.C. § 3553(a).

¹¹⁹ *Id.*

¹²⁰ Section II(B)(2)(b), *supra*.

trafficking or violent crimes.¹²¹ This is a particularly blunt instrument, as it covers both drug kingpins and those who have three relatively minor convictions for selling small amounts of marijuana.¹²²

It's not hard to see how these two policies conflict.¹²³ If the career offender provision is followed, in many cases it will run contrary to the parsimony provision which requires more individualized consideration. A good example of this conflict was described in *United States v. Fernandez*,¹²⁴ in which the district judge considered a defendant who qualified as a career offender, based on two relatively minor prior convictions.¹²⁵ The judge there noted that the career offender provisions applied but would double the sentence,¹²⁶ and rejected the application of those provisions in the case, as “the advisory guideline range was greater than necessary to satisfy the purposes of sentencing.”¹²⁷ Other judges seem

¹²¹ U.S.S.C. § 4B1.1(a).

¹²² *Id.*

¹²³ The parsimony provision, of course, conflicts with a number of other policies as well. For example, it conflicts with the directive to base the guidelines on prior experience, which may not reflect parsimony. Parsimony also conflicts with the desire for guidelines to reflect community beliefs, which may exaggerate the threat posed by a given category of crime based on sensationalistic media reports.

¹²⁴ 436 F. Supp. 2d 983 (E.D. Wisc. 2006).

¹²⁵ 436 F. Supp. 2d at 987.

¹²⁶ 436 F. Supp. 2d at 990.

¹²⁷ *Id.*

to be reaching the same conclusion,¹²⁸ a result which over time will erode the uniformity sought by the career offender provision.¹²⁹

2. Neutrality v. Consistency with prior sentencing practices

If the guidelines are clear in stating anything, it is that both the guidelines themselves and sentencing judges are to be strictly neutral as to race, sex, national origin, creed, and socioeconomic status.¹³⁰ Nonetheless, Congress decreed that the starting point for creating the new guidelines be a survey of existing practices.¹³¹

What was not done in basing the guidelines on prior practices was to filter those practices for racial, gender, and other disparities. In other words, the guidelines, while expressing strict neutrality, began with the simple step by the Commission of building into the guidelines structure, root and branch, any bias and prejudice that may have existed in the sentencing practices of the judges who were surveyed.¹³²

¹²⁸ E.g., *United States v. Ortiz*, 502 F. Supp. 2d 712 (N.D. Ohio 2007); *United States v. Vigorito*, 2007 WL 4125914 (N.D. Ohio 2007).

¹²⁹ One could argue that the erosion of one Congressional mandate by judicial action is not an inherent conflict, but rather a dialogue. Remember, however, that the provisions of 18 U.S.C. § 3553(a) (including the parsimony provision) are to direct the Sentencing Commission as well in formulating the guidelines. 28 U.S.C. § 991(b).

¹³⁰ Section II(B)(1)(d), *supra*.

¹³¹ Section II(B)(1)(f), *supra*.

¹³² One exception to this general observation would be that the directive to adjust under-punished crimes (18 U.S.C. § 994(m)) was employed to raise sentences for white-collar criminals, a result that may have countered a pre-existing bias in favor of the wealthy as a socioeconomic group. *See* Stephen Breyer, *The*

3. Certainty v. Rewarding Co-operators

The federal sentencing scheme changed drastically at the time the guidelines were first employed, in part because of the initial emphasis on certainty of sentencing at the time sentence is announced, achieved in large part by eliminating parole and diminishing the effect of ‘good time’ credit.¹³³ At the same time, Congress insisted that defendants who assist the prosecution be rewarded for their efforts with a break in their sentences.¹³⁴

The tension between these two directives comes from the fact that many cooperators are rewarded with a break on their term of incarceration *after* they are sentenced, as is authorized by Federal Rule of Criminal Procedure 35(b). Thus, certainty at the time of sentencing is undone. In fact, the amount of uncertainty created by the re-sentencing of cooperators is exacerbated by the fact that the guidelines do not restrict the size of a departure once the court has found that “substantial assistance” has been given.¹³⁵ Thus, the judge is free to change the sentence as much as she wants, giving her powers similar to that of the parole board before certainty became a central aspect of federal sentencing.¹³⁶

Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

¹³³ Section II(B)(1)(g), *supra*.

¹³⁴ Section II(B)(2)(c), *supra*.

¹³⁵ U.S.S.G. § 5K1.1.

¹³⁶ The analogy to a parole board is not a tight fit, of course, since the judge reviewing a defendant’s assistance after sentencing will often be the same person who issued the initial sentence, and looks to

Needless to say, this is just a thimbleful from the swamp of conflicts created by the very fact that at least 31 policy goals fight for attention in the realm of federal sentencing. The biggest problem with this is simple: The failure to articulate a reasonable set of goals robs the guideline system of any hope of moral authority. There is no way to measure success when so many factors are in play and in tension. By its nature, a system with so many goals has the moral trajectory of a toy boat in a baby pool being splashed by a group of toddlers. At the heart of what should be the most transparently moralistic of our governmental functions, we have nothing less than moral relativism, where a virtually limitless set of principles are at play with no sorting mechanism at hand.

B. The Dangerous Combination: Uniformity and Pointlessness

Federal sentencing policy isn't really a policy; it's a grab-bag of too many ideas and priorities. On its own, this could be seen as typical of Congressional action in many areas where it creates an administrative agency and then hands off power to that agency. Congress is free in those circumstances to decree what is important by laying out guiding principles, and then leave the messy work of implementation to others—that is the

different criteria that a parole board would. The analogy is apposite only in that certainty at the point in time of judgment is undermined.

structure of our government. What is perhaps unusual about sentencing, though, is that in creating the guidelines and the Sentencing Commission, there was also an overarching goal at work, which was the perceived primary virtue of the guidelines—the desire to achieve uniform sentences from case to case and judge to judge. To anyone paying attention, it is perfectly clear that Congress’s primary sentencing goal has been the same for the past 20-some years: Eliminate disparities and create uniform sentences across the nation.¹³⁷

Congress has attempted to achieve this goal through the imposition of sentencing guidelines, the passage of mandatory minimum sentences,¹³⁸ and the reporting of individual judges’ sentences to the United States Sentencing Commission for evaluation.¹³⁹ Intriguingly, within the debate over sentencing, uniformity is consistently discussed as *an end in itself* rather than as a tool to best fulfill other policies.¹⁴⁰ The result, even after *Booker*, has been the most restrictive sentencing system in the nation—one that imposes more uniformity and restricts judicial discretion more severely than

¹³⁷ Stith & Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104 (1998).

¹³⁸ E.g., 21 U.S.C. § 841(b).

¹³⁹ These reports are made within 30 days of the entry of judgment in every federal case, and are mandated by 28 U.S.C. § 994(w)(1).

¹⁴⁰ For example, in the *Kimbrough* opinion on crack cocaine sentencing, even while acknowledging that *Booker* marked a departure from strict uniformity, the Supreme Court simply stated without elaboration that “it is unquestioned that uniformity remains an important goal of sentencing.” 128 S. Ct. 558, 573 (2007).

any of the 50 state systems that overlap with federal courts in their common project of regulating crime.¹⁴¹

Certainly, the argument can be made, and Albert Altschuler has made it quite convincingly,¹⁴² that despite these efforts, uniformity has not been achieved. Altschuler points out that regional disparities tripled after the guidelines went into effect, rather than decreasing as intended, and further argues that disparities as a whole increased in the first fifteen years of the guidelines' existence.¹⁴³ Credibly, in explaining this unexpected result, he points to prosecutorial discretion being employed in far different ways in different parts of the country.¹⁴⁴

The desire to create uniformity, whether it has been fulfilled or not, never made sense in the first place unless those uniform results were consistent with understandable, limited, and discrete goals. The failure to articulate a *simple* set of goals before imposing the machinery of uniformity¹⁴⁵ had two major effects. First, this robbed the guidelines of the chance of cleanly measuring success in achieving any one of the too-many goals. Second, it amplified the problems associated with the lack of a moral

¹⁴¹ Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stanford L.Rev. 155 (2005).

¹⁴² Albert W. Altschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stanford L. Rev. 85 (2005).

¹⁴³ *Id.* at 101.

¹⁴⁴ *Id.* at 102. Stephanos Bibas describes in some detail the way in which this works as to two components of judicial discretion—the use of fast-track programs and employment of substantial assistance departures. Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stanford L. Rev. 137 (2005).

¹⁴⁵ Mandatory minimums and the guidelines.

compass described in the preceding section,¹⁴⁶ by prescribing bright normative lines that are unmoored from a simple, understandable moral anchor.

1. The Unmeasurable Goals

Like a sports league for six-year-olds where the score is not kept because it might make one of the teams feel bad, Congress has created a system in which cause and effect cannot be measured, and which as a result is without accountability to anything. Having a huge number of conflicting policy goals makes it almost impossible to measure the success of progress towards any one of those goals.¹⁴⁷ Even the goal which should be simple to measure, uniformity, seems not to have worked out the way people hoped, or easy to measure.¹⁴⁸ As Amy Baron-Evans points out, fifteen years after the guidelines were imposed it was still unclear whether the increased severity of the guidelines¹⁴⁹ had accomplished any sentencing purpose.¹⁵⁰

¹⁴⁶ Section III(A), *supra*.

¹⁴⁷ William Stuntz has compellingly described the natural tendency to constantly increase the number of crimes on the books, to the point where the criminal code is so broad that it covers an astonishing array of activities, to the point where the penal code becomes almost indeterminate. William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 555-57 (2001). What I critique here is distinct but parallel to that analysis—I am making the same argument as to Congress's policy goals as articulated in statute. The two intersect, of course—those policy goals at times will serve as justification for expanding the penal code as well as jacking up guideline ranges.

¹⁴⁸ Albert W. Altschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stanford L. Rev. 85, 100-103 (2005).

¹⁴⁹ Discussed *supra*, § II(B)(1)(f).

¹⁵⁰ Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply With § 3553(a)*, 30 Oct Champion 32, 34-35 (September/October 2006).

Thus we are left with a guideline structure created with no clear relationship to its founding principles (other, perhaps, than uniformity), and which continues to function without an ability to measure a relationship to those founding principles. The sentencing guidelines are not a success, in part because the goals they aim to meet are so numerous that they defy the effort to collect and analyze data which could support the conclusion that any one of them were a success or failure.¹⁵¹ Much like a game of Chinese checkers that 31 people can play at the same time, it is extremely difficult to figure out what is going on.

2. Harshness in Service of Nothing

Because the guidelines are pointless, they cannot be rational in relationship to any discrete sentencing goal. Yet, in striving for uniformity, Congress has made them uniformly harsh. On a playground, we know what the combination of irrationality combined with harshness is—it is a bully, looking to pick on those with less power. The same combination in the person of our federal sentencing scheme produces a system, a machine really, that resembles nothing so much as that playground bully—unreasoning, uncompassionate, and unprincipled.

¹⁵¹ The problem is not a simple lack of data relative to sentencing—the sentencing commission has produced thousands of pages of data relative to sentencing in the federal courts. (These reports are available at <http://ussc.gov>). Rather, the problem is that it is impossible to analyze that data so that it can reveal how any one of the tens of policy goals are being fulfilled.

This moral relativism born of too many goals is especially sad in an era where very often criminal law is said to be about “sending signals.”¹⁵² Those signals are, or should be, moral signals about the bounds of socially acceptable behavior, and the price to be paid for differentiated acts (which is what the guidelines are about—normative price-setting for specific wrongful acts). Included in these signals are messages about *why* an act is especially reprehensible. Without a set of clear policy goals behind it, sentencing practice loses the value of this important function. In fact, it seems that if there is one message conveyed to the public under the contemporary scheme, it is one of simple retribution for any type of crime, a message inconsistent with much (though certainly not all) of what Congress has articulated as the policy goals¹⁵³ of the guidelines.¹⁵⁴

In particular, this perceived message of widespread, consistent, and harsh retribution is at odds with the parsimony principle which Congress has established as the fulcrum of a trial court’s sentencing mechanism.¹⁵⁵ That provision specifically demands that a sentencing judge impose a sentence

¹⁵² See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harvard L. Rev. 413 (1999); Eric A. Posner, *Law and Social Norms* (2000).

¹⁵³ Section II, *supra*.

¹⁵⁴ In addition, this message is inconsistent with what highly selective federal prosecutors actually do. Federal prosecutors handle less than 5% of the nation’s felonies, with the rest going to the state systems. The great majority of these could have been tried at either the state or federal level. William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 542-543 (2001), *citing* Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics—1998*, at 387-388 table 5.6 (Kathleen Maguire and Ann L. Pastore, eds., 1999).

¹⁵⁵ 18 U.S.C. § 3553(a).

“not greater than necessary” to accomplish the aims of the four traditional sentencing goals. While retribution is one of those goals, it is both one among equals and is held in check by the others, in particular the principled goal of rehabilitation. Beyond that necessary balancing which is obscured by the call to broad retribution, the claim that retribution is primary ignores the other goals which can often be seen pulling the other way—including the findings of social science,¹⁵⁶ the idea of fairness (either procedural or substantive),¹⁵⁷ the effect of mass incarceration on prison populations,¹⁵⁸ the need to encourage restitution,¹⁵⁹ and the benefits given to often highly-culpable cooperators under guideline section 5K1.1.¹⁶⁰

This cry of retribution, while not supported by Congress’s articulated sentencing goals as a whole, does accurately reflect the general harshness of the federal scheme.¹⁶¹ Were the guidelines to be underpinned by a reasonable and understandable principle or set of principles, harshness (or surprising lenience) might be a cost worth paying. However, when we cannot say that uniformity or any other goal is being achieved, and recognize

¹⁵⁶ Section II(B)(1)(c), *supra*.

¹⁵⁷ Section II(B)(1)(e), *supra*.

¹⁵⁸ Section II(B)(1)(j), *supra*.

¹⁵⁹ Section II(B)(2)(a), *supra*.

¹⁶⁰ Section II(B)(2)(c), *supra*.

¹⁶¹ For a good description of the mechanisms that lead to harsher sentences in the federal system, see Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387 (2004).

that the goals of sentencing have become convoluted, multifarious, and unworkable, it may be time to seek change.

IV. Into the Pointless Forest

If the guideline system is pointless and amoral, shouldn't it matter that they are no longer mandatory? Certainly, the effects of *Booker* may over time mitigate some of the harms created by the guidelines by allowing sentencing judges more discretion. However, the sentencing guidelines are still at the center of the process of sentencing in federal court. As *Booker* made clear, the mechanisms of sentencing are the same—including revision of the guidelines and calculation of a guideline range in every case.¹⁶² Given that, it is fair to say that the guidelines have less authority, but still play a major role in federal sentencing. The critique above¹⁶³ applies regardless of whether the guidelines are mandatory, advisory, or somewhere in between. Do we want an irrational and pointless construct at the center of our sentencing structure, even if it is not strictly mandatory? I would hope not. So long as the guidelines remain at the center of the mechanism for sentencing, they should be tethered to a few understandable and easily articulated principles.

¹⁶² 543 U.S. at 767.

¹⁶³ Section II and III, *supra*.

If there is to be change, it seems there are three options. First, Congress could scrap the guidelines altogether. While this might solve some of the problems associated with the system as it exists, it seems politically unlikely, given the sentiment in Congress for retaining some measure of uniformity in federal sentencing.

Another option would be for Congress to restrict the statutory goals of sentencing to the traditional goals while leaving the guidelines in place, hoping that they evolve into something better over time. One could read this article (at least up to this point) as an argument for doing exactly that-- limiting the sentencing policy goals to a few understandable points. While the need for fewer and simpler goals is certainly a part of my argument, redefining the goals of sentencing would not make much sense unless the guidelines themselves were either revised or removed from federal sentencing. Unfortunately, the guidelines are now filled with the numerical results of thousands of actions taken on behalf of one or another of the goals described above. It would be impossible to undo the moral relativism of the guidelines system without taking them apart and remaking them in a better and more understandable fashion.

Finally, Congress could start the process over again with fewer goals and advisory guidelines which are written from scratch. If we are to have

principled, understandable sentencing in the federal courts, this might be the single best politically palatable option.

A. A Project for Principles: Rewrite the Guidelines

Unless we are comfortable with the amoral strictness of the guidelines we have, they must be remade.

Is it possible to take apart the guidelines and remake them? To do so would require a massive effort involving the convening of a new guideline Commission charged with starting from scratch the project of coming up with federal sentencing guidelines.

Still, this undertaking might be worthwhile. A second-generation Sentencing Commission starting with a clean sheet of paper would have significant advantages over the group which came up with the first edition.

First, a new founding Commission would have the advantage of learning from the problems with the current guidelines. For example, it would allow for the thorough rethinking of charge v. real offense conduct as the basis for sentencing. The first Commission's compromise on this, which allowed for relevant conduct including acquitted conduct to be considered,¹⁶⁴ has been subjected (properly) to withering criticism for importing into the current system, without context, a single feature of a

¹⁶⁴ U.S.S.G. § 1B1.3.

bygone era in which rehabilitation was a primary goal of sentencing.¹⁶⁵ In relation to this, a new commission would have the benefit of the reams of data gathered by the Sentencing Commission staff over the past two decades. This could be combined with other social science data from other sources, in order to broaden the perspective of these second-generation framers.

Second, the new Commission would be much better positioned than the first to learn from the examples provided by several states with advisory guidelines in place. The first Commission looked only the example of Minnesota and Washington, both of whom had fairly new guideline regimes at that time, and seemed to summarily reject them as too simplistic.¹⁶⁶ Now, however there has been two decades of guideline experiments in a number of states, all of which provides trial-and-error lessons for a new federal system.

Third, starting from scratch at this point would allow the new Commission to draw from the body of scholarship which has developed since the mid-1980's by writers such as Douglas Berman, Michael O'Hear,

¹⁶⁵ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *Yale L.J.* 1681, 1712-1713 (1992); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, The False Trail of Uniformity and Process, and the Way Back Home*, 54 *S.C. L. Rev.* 649, 669 (2003).

¹⁶⁶ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *Hofstra L. Rev.* 1, 3 (1988).

Frank Bowman, Steven Chanenson, and Stephanos Bibas, each of whom has focused on this field and who have had a significant impact on its development.

Finally, a new Commission would have the advantage of a limited and understandable group of directive principles. Part of the legislation creating a new guideline Commission could start by phasing out 18 U.S.C. § 3553(a), 28 U.S.C. § 991 and 28 U.S.C. § 994 in favor of a much briefer articulation of goals. It might be that the parsimony provision of 18 U.S.C. § 3553(a) plus the four traditional sentencing goals would serve this purpose,¹⁶⁷ were they expressly made the basis for guidelines in an active way, freed from the command to place sharp limits on judges and increase sentences.

2. Change as the Pointless Forest

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

¹⁶⁷ Like the parsimony provision, the four traditional goals are currently contained in 18 U.S.C. § 3553(a).

prosecutors,¹⁶⁸ and the risk of losing that power would no doubt cause them to employ their significant lobbying abilities¹⁶⁹ to stop any such change.

One would expect in such an instance that the Department of Justice would argue, in part, that changing the current system in a way which might give judges more discretion would bring back disparities and destroy uniformity. There are many counter-arguments to this, of course, including some already made here: That the guidelines have increased, not decreased, disparity,¹⁷⁰ and that prosecutors themselves create great disparities under the current system.¹⁷¹ The best counter-argument to the Department of Justice would be, though, that the guidelines must be reformed if they are to give us hope for principled justice through federal criminal law.

Conclusion

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

¹⁶⁸ Albert Altschuler has described the employment of this discretion as being in the nature of the "good cop" to Congress's mean "bad cop." Albert Altschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stanford L. Rev. 85, 112-113 (2005).

¹⁶⁹ William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 534 (2001).

¹⁷⁰ Albert Altschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stanford L. Rev. 85, 101-102 (2005).

¹⁷¹ Id.; Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stan. L. Rev. 137 (2005).

... one of the first things Oblio and Arrow noticed about the pointless forest was that all the leaves on all the trees had points, and all the trees had points. In fact, even the branches of all the trees pointed in different directions, which seemed a little strange for a pointless forest.¹⁷²

The critics of increasing judicial discretion are right in saying that it creates disparities—that the branches (judges) do tend to point in different directions. Judges differ, and they do so in substantive and occasionally troubling ways. Nonetheless, they tend to sentence on principles which *do* directly bear on the question at hand—that is, they have a concrete reason for doing what they have chosen with a given defendant. There will be, in other words, at least one principle at play which directly underlays the crafting of the sentence, a principle which is going to be articulated, explained, and connected expressly to the result by that judge.¹⁷³ In short, the sentence that results from the discretion of a judge has a *point*, even if it is not the same point another judge might make in similar circumstances. While this does risk endangering the (perhaps false) perception of uniformity under the guidelines, it at the least is better than our current guideline-driven system, which is so awash in conflicting policy goals that a principled point is not even possible.

¹⁷² Harry Nilsson, *The Pointless Man*, The Point Soundtrack (BMG Entertainment 1970)

¹⁷³ As Judge Cabranes put it, when a judge has discretion “Judgment proceeds from principles. These principles can and should be stated, rationally discussed, attacked, and defended.” Stith and Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 82 (1998).

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

It may seem harsh to describe Congress's actions as an "acid trip," but the analogy is not entirely inapt. One symptom of LSD¹⁷⁴ use is the "fear of losing control."¹⁷⁵ It is indisputable that if a new guideline system was put into place, it might lessen Congress's control relative to sentencing judges. However, this shift is necessary if we are to regain moral credibility in sentencing.

¹⁷⁴ Lysergic acid diethylamide.

¹⁷⁵ National Institute on Drug Abuse, "NIDA Infofacts: LSD," available at <http://www.nida.nih.gov/infofacts/lsd.html>.