Tennessee Law Review

Volume 83
Issue 1 *Fall 2015*

Article 3

2015

SENTENCING RULES AND STANDARDS: HOW WE DECIDE CRIMINAL PUNISHMENT

Jacob Schuman

SENTENCING RULES AND STANDARDS: HOW WE DECIDE CRIMINAL PUNISHMENT

JACOB SCHUMAN*

Over the past 300 years, American sentencing policy has alternated between "determinate" and "indeterminate" systems of deciding punishment. Debates over sentence determinacy have so far focused on three main questions: Who should decide punishment? What makes punishment fair? Why should we punish wrongdoers at all?

In this Article, I ask a new, fourth question: How should we decide punishment? First, I demonstrate that determinate sentencing uses rules to decide sentences, while indeterminate sentencing relies on standards. Next, I show how the trigger-based nature of rules—in contrast to the qualitative character of standards—makes them vulnerable to four different kinds of substantive and formal errors. Applying that analysis, I argue that district court judges often use "departures" and "variances" from the Federal Sentencing Guidelines to correct the errors that result from rule-based decision-making instead of sentencing based on the § 3553(a) standard. Finally, I propose that judges should be more willing to depart or vary from the Federal Sentencing Guidelines in cases where the Sentencing Guidelines would otherwise impose particularly large or numerous sentence adjustments because these adjustments exacerbate the impact of rule-based errors.

---

* Jacob Schuman is an associate at Zuckerman Spaeder LLP, in Washington, D.C., where he practices criminal defense and civil litigation. He received his J.D. from Harvard Law School in 2012, and his B.A. from Brown University in 2008. He thanks Judge James E. Boasberg, Daniel Hemel, Professor Adam Kolber, and Edward Schuman for their helpful comments, which greatly improved the article. All views expressed are his own.

INTRODUCTION

Over the past 300 years, American sentencing policy has alternated between "determinate" and "indeterminate" systems of deciding punishment. Debates over sentence determinacy have so far focused on three main questions: Who should decide punishment? What makes punishment fair? Why should we punish wrongdoers at all?

In this Article, I ask a new, fourth question: How should we decide punishment? First, I demonstrate that determinate sentencing uses rules to decide sentences, while indeterminate sentencing relies on standards. Next, I show how the trigger-based nature of rules—in contrast to the qualitative character of standards—makes them vulnerable to four different kinds of substantive and formal errors. Applying that analysis, I argue that

district court judges often use "departures" and "variances" from the Federal Sentencing Guidelines ("Guidelines") to correct the errors that result from rule-based decision-making instead of sentencing based on the § 3553(a) standard. Finally, I propose that judges should be more willing to depart or vary from the Sentencing Guidelines in cases where the Sentencing Guidelines would otherwise impose particularly large or numerous sentence adjustments because these adjustments exacerbate the impact of rule-based errors.

Systems of criminal punishment take two basic forms: "determinate" sentencing and "indeterminate" sentencing.[1] Determinate sentencing means that the law defines a set penalty for each crime, which automatically applies to all offenders.[2] The Book of Exodus, for example, commands a determinate sentence for murder: "He that smiteth a man, so that he die, shall be surely put to death."[3] Indeterminate sentencing, by contrast, means that the law prescribes a broad range of possible penalties for each crime and then allows judges to choose an appropriate sentence for each individual wrongdoer.[4] In the 1970s, the federal crime of rape carried an indeterminate sentence: "Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life."[5] "Sentence determinacy," then, is the degree to which the punishment for a crime is decided in advance of its commission.

Most sentencing systems, of course, are neither entirely determinate nor entirely indeterminate. Instead, most systems fall

---

1. These labels have not been used consistently. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 86 (1973); Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–84 (1996). The main alternative definitions of the terms turn on the availability of parole. According to such characterizations, a "determinate" regime is one in which a defendant must serve out the full prison term imposed at the time of sentencing, while an "indeterminate" regime permits the offender to obtain early release, typically at the discretion of a parole board. *See* Bowman, *supra* at 681–82. Rather than "legislatively fixed" or "judicially fixed," an indeterminate regime under this definition might be described as an "administratively fixed" model of sentencing. Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 129–30 (1976). While the availability of parole has some relevance to the definitions I use above, it is largely beyond the scope of my argument.

2. United States v. Grayson, 438 U.S. 41, 45 (1978).

3. *Exod.* 21:12 (King James).

4. Mistretta v. United States, 488 U.S. 361, 363 (1989).

5. 18 U.S.C. § 2031 (1970).

somewhere along a spectrum of determinacy. In this Article, I show how the spectrum of sentence determinacy has defined the past 300 years of punishment policy in the United States, which I trace across four main eras: first, the Colonial Era, defined by determinate sentencing; second, the post-Civil War Era, when the nation shifted to indeterminate sentencing; third, the Guidelines Era, marked by the development of determinate-guidelines regimes; and finally, today's *Booker* Era, in which the federal government uses a hybrid approach to punishment that combines elements of both determinate and indeterminate sentencing systems.

The determinacy spectrum may appear, on the surface, to simply be a measure of the discretion allowed to judges—determinate sentencing systems give judges less discretion, while indeterminate sentencing systems provide them more discretion.[6] The distinction, however, runs far deeper than that, and in fact, implicates some of the most important issues in sentencing policy, including institutional choice, justice, and theories of punishment. In this Article, I review these subjects and then raise a new, fourth issue: the *form* that sentencing directives take. Jurists have long recognized two basic forms of legal directive: "rules" turn on specific triggers, while "standards" apply a qualitative analysis. Applying this distinction to the law of sentencing, I contend that determinate sentencing uses a rule-based method of deciding punishment, whereas indeterminate sentencing employs a standard-based approach.

This rules-versus-standards distinction helps to explain—and may even help to improve—the current federal system of hybrid sentencing. I demonstrate that rule-based reasoning uses factual and normative triggers to make decisions, whereas standard-based reasoning applies a qualitative analysis. This difference leads rules to commit two categories of error—substantive and formal—that are comprised of four types of erroneous rules—incomplete rules, incorrect rules, bumpy rules, and disaggregated rules. I argue that federal law attempts to identify and correct such errors through the use of "departures" and "variances," which permit judges in certain cases to reject the rule-based Federal Sentencing Guidelines in favor of the § 3553(a) factors for sentencing; but, it does so only haphazardly. I contend that sentencing policymakers and practitioners must do more to correct rule-based errors, especially in cases where sentence adjustments are particularly large or particularly numerous.

---

6. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 885–99 (1990).

In Part I of this Article, I recount the history of American sentencing policy by tracing it across four separate eras, each defined by its relationship to the determinate/indeterminate-sentencing spectrum. In Part II, I review the three fundamental questions of sentencing policy that have so far been asked in discussions of sentence determinacy: Who should decide punishment? What makes punishment fair? Why do we punish wrongdoers? In Part III, I ask a new, fourth question, applying the notion of legal form: *How* should we decide punishment? In Part IV, I argue that the nature of rule-based decision-making leads it to commit four different kinds of errors, involving both legal substance and form, and demonstrate how the federal law of sentencing recognizes these errors and tries—inconsistently—to correct them. Finally, in Part V, I conclude that correcting rule-based errors may improve sentencing as well as legal decision-making more broadly.

I. FOUR ERAS OF AMERICAN SENTENCING POLICY

The history of American criminal punishment comprises four distinct eras, each defined by its relationship to the spectrum of sentence determinacy:

A. The Colonial Era: Determinate Sentencing;
B. The Post-Civil War Era: Indeterminate Sentencing;
C. The Guidelines Era: Determinate-Guidelines Sentencing; and
D. The *Booker* Era: Hybrid Sentencing.

In this Part, I tell the story of these four eras of sentencing policy.[7] Section A begins with determinate sentencing in the colonial era, when legislatures set fixed punishments for each crime. Part B traces the shift toward indeterminate sentencing in the era following the Civil War, when legislatures gave judges discretion to select an appropriate sentence for each individual offender. Part C examines the backlash against indeterminate sentencing in the 1970s, which led jurisdictions to restore determinacy to punishment through the adoption of sentencing guidelines. Finally, Part D shows how the Supreme Court's decision in *United States v. Booker* created a "hybrid" sentencing system on the federal level, which combines aspects of both determinate and indeterminate sentencing.[8]

---

7. *See* Dershowitz, *supra* note 1, at 124–29.
8. 543 U.S. 220, 262 (2005).

A. The Colonial Era: Determinate Sentencing

From colonial times up to the early nineteenth century, Americans used determinate systems of sentencing.[9] Under this approach, the legislature prescribed a set sentence for each crime, applicable equally to all who violated the law, in order to provide "retribution and punishment" for wrongdoing.[10]

The colonies inherited[11] their criminal law from England, where Parliament mandated capital punishment for all felony offenses and prescribed corporeal punishments or fines for the rest.[12] Similarly, in the early days of the United States, colonial legislatures enacted criminal codes under which "[s]pecific crimes were punished . . . with relatively specific penalties."[13] "Often, th[e] prescription was death."[14] The 1648 *Laws and Liberties of Massachusetts*, for example, imposed a mandatory, automatic death sentence for a large variety of crimes, including most forms of homicide, kidnapping, and adultery.[15] For lesser violations, the *Laws and Liberties* imposed set

---

9. United States v. Grayson, 438 U.S. 41, 46–49 (1978).

10. *Id.* at 46; *see also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940 (1988) (stating that "[m]any early examples of sentencing law focused on retribution and restitution").

11. *See* Nagel, *supra* note 6, at 892.

12. Blackstone counted 160 crimes "worthy of instant death." 4 WILLIAM BLACKSTONE, COMMENTARIES *18.

> The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law implies that it shall be punished with death.

Id. at *98.

13. Dershowitz, *supra* note 1, at 124; *see also Grayson*, 438 U.S. at 45–46 (stating that "[i]n the early days of the Republic . . . [e]ach crime had [a] defined punishment"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 70–71 (2003) (arguing that giving juries the power to impose specific levels of punishment would protect a defendant's liberty interest and provide a check on government abuses); Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 693–94 (2010) (describing the history and evolution of American sentencing approaches).

14. Dershowitz, *supra* note 1, at 125.

15. *See* Lauues and Libertyes of Massachusetts (1648), http://www.commonlaw.com/Mass.html (last visited Feb. 11, 2016); *see also* Dershowitz, *supra* note 1, at 124–25 (describing the various criminal sentencing periods throughout United States

fines or specified forms of torture, including branding, forced labor, whipping, time in the stocks, or cutting off of the ears.[16] Although colonial legislatures sometimes provided some limited discretion for judges to vary "the duration of an offender's stay in the stocks or the pillory . . . in general, punishments were legislatively prescribed with some precision."[17] Even after the Revolutionary War, when incarceration began to supplant torture and execution as the preferred mode of punishment, the prison term for each crime was still "generally prescribed with specificity by the legislature."[18]

Under Colonial Era determinate sentencing, the imposition of punishment "was merely a ministerial act."[19] Because the legislature mandated a specific consequence for each specific crime, all a judge had to do after a jury returned a guilty verdict was look up the applicable punishment and impose it on the defendant. This was "a ceremonial rather than a decision making process"[20] and followed "at once" upon conviction.[21] Sentencing would not develop as "a truly distinct procedural phase" until the latter half of the 19th century, when jurisdictions in the United States began to move toward indeterminate systems of punishment.[22]

B. The Post-Civil War Era: Indeterminate Sentencing

American sentencing policy began to change following the Revolutionary War, and especially after the Civil War, as the country reformed its laws to adopt indeterminate-sentencing systems. Under this approach, the legislature set a broad range of possible penalties for each crime and gave judges "virtually unlimited discretion" to select an appropriate punishment for each individual offender.[23]

---

history).

16. *See* Dershowitz, *supra* note 1, at 124–25; Lauues and Libertyes of Massachusetts, *supra* note 15.

17. Dershowitz, *supra* note 1, at 125.

18. Nagel, *supra* note 6, at 892; *see also* Dershowitz, *supra* note 1, at 125–26 (stating that following the Revolutionary War the legislature determined sentencing ranges and gave the judiciary limited, narrow discretion to impose sentences).

19. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 (1992).

20. Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821 (1968).

21. SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (1883).

22. Herman, *supra* note 19.

23. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A*

Three developments in American criminal law spurred the transition from determinate to indeterminate sentencing. First, the "excessive rigidity" of determinate-sentencing systems grew unpopular as it became apparent that not every criminal act within a particular offense category deserved the same exact punishment.[24] Beginning in the early 1800s, some jurisdictions reformed their laws to allow judges "to consider aggravating and mitigating circumstances surrounding an offense" and to adjust offenders' punishments accordingly.[25] Second, around the same time, incarceration gained favor as a more humane alternative to capital punishment.[26] A prison term is a "quantifiable sanction," unlike a death sentence, which meant judges needed the discretion to select an appropriate period of incarceration for each offender.[27] Finally, and perhaps most importantly, rehabilitation replaced retribution as the primary goal of criminal punishment.[28] While before, criminal punishment was intended to exact vengeance on wrongdoers, the new, "medical" theory of crime[29] held that incarceration was a kind

---

Structural Analysis, 105 COLUM. L. REV. 1315, 1322 (2005); *see also* United States v. Grayson, 438 U.S. 41, 46–47 (1978) (stating that a movement began in the late nineteenth century proposing a flexible sentencing system that gave judges more discretion in determining the appropriate punishment).

24. *Grayson*, 438 U.S. at 46–47 (quoting Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 529 (1958)); Nagel, *supra* note 6, at 892–93.

25. *Grayson*, 438 U.S. at 46–47 (quoting Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 529 (1958)) (internal quotation marks omitted); Nagel, *supra* note 6, at 892–93.

26. *See* Dershowitz, *supra* note 1, at 125–26; Nagel, *supra* note 6, at 892–93.

27. Herman, *supra* note 19.

28. The National Congress of Prisons expressed this shift in perspective in 1870, declaring:

> The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.

Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association, AMERICAN CORRECTIONAL ASSOCIATION, http://www.aca.org/ACA_PROD_IMIS/docs/1870Declaration_of_Principles.pdf (last visited Dec. 23, 2015).

29. Dershowitz, *supra* note 1, at 128; *see also* Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388–89 (2006) (noting that "[t]he rehabilitative ideal was often conceived and discussed in medical terms"); Bowman, *supra* note 23, at 1321 (describing the dominancy of the rehabilitative ideal

of "treatment" for convicts who were considered "sick."[30] "[T]hrough carefully calibrated systems of discipline, labor, and religious exhortation," it was hoped that prison could "'cure' . . . offender[s] of [their] criminogenic patholog[ies]."[31] This approach to punishment called for "a flexible sentencing system permitting judges . . . to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism."[32]

By the 1960s, every jurisdiction in the country, including the federal government, had adopted an indeterminate-sentencing regime.[33] As mentioned earlier for example, the federal law of rape at that time was almost purely indeterminate.[34] A rapist convicted in federal court might walk free, face death, or spend any number of years in prison; it was entirely up to the sentencing judge. Most criminal statutes, of course, did not give judges such limitless discretion and instead set—quite broad—maximum and minimum bounds on the possible punishments for each offense. The federal crime of racketeering, for instance, could be punished with a fine of up to $25,000, a term of imprisonment of up to twenty years, or both.[35]

Jurisdictions that adopted indeterminate-sentencing regimes also added a new stage to their criminal proceedings: the sentencing hearing. When a judge chose a punishment for an offender, he or she often had to weigh evidence that would be considered irrelevant or prejudicial if presented to a jury.[36] "[M]ost jurisdictions assumed," therefore, "that a separate sentencing proceeding was needed to develop whatever . . . facts the sentencing judge might consider

---

throughout much of the twentieth century); Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 14 ANN. REV. CRIM. PROC. 225, 226 (1984) (indicating that, under indeterminate sentencing, "crime is seen as a disease to be cured"). For a critical analysis of the medical approach to criminal punishment, see generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

30. Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 22, 28 (1899).

31. Dershowitz, *supra* note 1, at 125.

32. United States v. Grayson, 438 U.S. 41, 46 (1978); *see also* Nagel, *supra* note 6, at 893–94 ("So long as reformation was the principal goal of imprisonment, it was reasoned that the prisoner should be sentenced until he or she had reformed . . . .").

33. Nagel, *supra* note 6, at 894; *see also* Dershowitz, *supra* note 1, at 128 ("By 1922, 37 states had similar forms of indeterminate sentencing.").

34. *See* 18 U.S.C. § 2031.

35. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922 (1970) (codified at 18 U.S.C. § 1963(a) (1970)).

36. Herman, *supra* note 19.

relevant."[37] Following a guilty verdict at trial, the judge would hear arguments from each side on an appropriate punishment for the defendant, after which he or she would announce his or her decision. Procedural protections at these occasions were basically nonexistent: "There was no limitation on either the type or quality of information a judge could consider at sentencing. Moreover, none of this information was subject to filtering by the rules of evidence, and the judge was required to make no findings of fact."[38] Despite concerns about the fairness of this approach, the Supreme Court signed off on it in its 1949 *Williams v. New York* decision,[39] emphasizing the rehabilitative purpose of criminal punishment and explaining that it was "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence . . . " that the judge obtain "the fullest information possible concerning the defendant's life and characteristics."[40]

C. The Guidelines Era: Determinate-Guidelines Sentencing

After a century of dominance,[41] indeterminate sentencing gave way in the 1970s and 1980s, replaced across the country—most notably at the federal level—by "determinate-guidelines" systems. Sentencing guidelines reflected a return to determinate punishment, but they provided more precision than the old colonial approach by scoring the seriousness of each individual defendant's offense and then translating that score into a specific prison term.[42]

In the early 1970s, opponents of indeterminate sentencing, most notably Judge Marvin Frankel of the Southern District of New York, started to speak out against the country's system of punishment and

---

37. *Id.* at 303; *see also Grayson*, 438 U.S. at 48 ("Indeterminate sentencing under the rehabilitation model presented sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion placed within the realm of possibility. An obvious, although only partial, solution was to provide the judge with as much information as reasonably practical concerning the defendant's 'character and propensities[,] . . . his present purposes and tendencies,' . . . and, indeed, 'every aspect of [his] life.'" (quoting Williams v. New York, 337 U.S. 241, 250 (1949); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

38. Bowman, *supra* note 23.

39. 337 U.S. 241.

40. *Williams*, 337 U.S. at 247.

41. *See* Dershowitz, *supra* note 1, at 128.

42. *See* Berman, *supra* note 29, at 393–96; Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 8–11 (2005); Bowman, *supra* note 23, at 1325.

called for a new, guidelines-based approach.[43] They highlighted three problems with indeterminate sentencing in particular. First, indeterminate-sentencing schemes lacked in transparency and accountability. Judges were not required to make findings of fact or to explain the reasons for why they chose the sentences that they did. Their decisions were practically unreviewable on appeal.[44] A guidelines-based system, it was hoped, would bring structure, clarity, and predictability to this otherwise "lawless" system.[45] Second, the medical model of criminal justice had lost credibility.[46] Anecdotal and empirical evidence suggested that prisons were not reforming most offenders; meanwhile, crime rates were rising.[47] Practitioners, commentators, and the public no longer believed in

---

43. Judge Frankel's 1972 book, *Criminal Sentences: Law Without Order*, was the inspiration for federal sentencing reform as well as the creation of the United States Sentencing Guidelines. *See* FRANKEL, *supra* note 1; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228–30 (1993); Dershowitz, *supra* note 1, at 131.

44. *See* FRANKEL, *supra* note 1, at 17–25, 39–49, 76, 81–82; Bowman, *supra* note 23, at 1322–23. Judge Frankel recounted the following memory as a particularly chilling example of the consequences of this lack of transparency:

> One story concerns a casual anecdote over cocktails in a rare conversation among judges touching the subject of sentencing. Judge X . . . told of a defendant for whom the judge, after reading the presentence report, had decided tentatively upon a sentence of four years' imprisonment. At the sentencing hearing in the courtroom, after hearing counsel, Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the "kangaroo court" in which he'd been tried, and the legal establishment in general. Completing the story, Judge X said, "I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of the four." . . . Would we tolerate an act of Congress penalizing such an outburst by a year in prison? The question, however rhetorical, misses one truly exquisite note of agony: that the wretch sentenced by Judge X never knew, because he was never told, how the fifth year of his term came to be added.

FRANKEL, *supra* note 1, at 18–19.

45. Frankel & Orland, *supra* note 29, at 232.

46. Relatedly, many wondered whether trial judges—educated in law, not the behavioral sciences—really had the expertise necessary to decide just how long a criminal should spend in prison in order to become rehabilitated. *See* FRANKEL, *supra* note 1, at 3–25, 86–124.

47. *See id.* at 89–102; Bowman, *supra* note 23, at 1322–23; Nagel, *supra* note 6, at 895–97; Stith & Koh, *supra* note 43, at 227.

the rehabilitative project of the criminal law,[48] which had formed the theoretical foundation for the indeterminate approach. Finally, and most importantly, there was a growing body of evidence revealing that sentencing outcomes often varied significantly depending on the identity of the sentencing judge.[49] Particularly disturbing were studies linking sentencing disparities to the offender's race, gender, and socioeconomic status.[50] Binding guidelines, it was thought, could end such disparities by ensuring that like cases were treated equally.

Just as before, states across the nation, as well as the federal government, quickly amended their laws to implement the new approach. This was a "true 'sentencing revolution,'" as Douglas Berman has described it, "in which the highly-discretionary indeterminate sentencing systems that had been dominant for nearly a century . . . " was replaced by an "array of sentencing structures that now govern[ed] sentencing decision-making and shape[d] sentencing outcomes."[51] The most significant development was at the federal level.[52] In 1984, Congress passed the Sentencing Reform Act, which abolished indeterminate sentencing in the federal courts and created a new government agency—the United States Sentencing Commission—to promulgate mandatory guidelines that would restrict the discretion of district court judges when they imposed punishments on criminal offenders.[53] By the year 2000,

---

48. Judge Frankel opined:

> We sentence many people every day who are not "sick" in any identifiable respect and are certainly not candidates for any form of therapy or "rehabilitation" known thus far. . . . This is a group who, as nearly as anyone can perceive, are not driven by, or "acting out," neurotic or psychotic impulses. Instead, they have coldly and deliberately figured the odds, risked punishment for rewards large enough (in their view) to justify the risk, but then had the misfortune to be caught.

FRANKEL, *supra* note 1, at 90.

49. *See id.* at 6–11, 21–25; Berman, *supra* note 29, at 393; Nagel, *supra* note 6, at 895–97.

50. *See* FRANKEL, *supra* note 1, at 6–11, 21–25; Berman, *supra* note 29, at 393; Nagel, *supra* note 6, at 895–97.

51. Berman, *supra* note 29, at 395.

52. *See* Bowman, *supra* note 23, at 1318, 1320 ("The federal government has been a leader . . . in its embrace of structured sentencing. . . . As the largest and only national sentencing regime, the federal system inevitably acts as a model, both positive and negative, for developments in the states.").

53. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. § 3551 (2000)).

practically every jurisdiction in the United States had enacted a determinate-guidelines scheme.[54]

The United States Sentencing Guidelines—first published by the Sentencing Commission in 1987 and updated every year since—offer a useful example of how determinate-guidelines sentencing worked in practice. The easiest way to understand the Federal Sentencing Guidelines is to start at the finish line.[55] The Guidelines are, in essence, "nothing more than a big set of instructions for one particular chart—the Sentencing Table."[56] The Sentencing Table compares two different numbers across its x- and y-axes—the "offense level" (a measure of the seriousness of the crime at issue) and the "criminal history category" (a measure of the defendant's past wrongdoing).[57] The intersection of these two figures yields a recommended prison term, which, at the time Congress passed the Sentencing Reform Act, was intended to bind the district court judge.[58]

To calculate the "offense level," the Guidelines assign each type of crime a default number called a "base offense level." Aggravated assault, for example, has a base offense level of 14.[59] The Guidelines then instruct that the sentencing judge should adjust the base level by applying a series of rules that tie various increases and decreases to the offense level to account for the unique circumstances of each case. If the offender brandished a weapon when he committed the crime, for example, his or her offense level would increase by three.[60] The offense level would decrease by two, by contrast, if the defendant was only a minor participant in the offense.[61] Each upward and downward change to the defendant's offense level requires a factual finding on the record, which the sentencing judge makes after an evidentiary hearing. Possible offense levels range from one to forty-three.[62]

To determine the "criminal history category," the Guidelines assign a set number of points for each previous prison sentence the offender has served—two points for each sentence of at least sixty

---

54. *See* Berman, *supra* note 29, at 394; *see also* NORAH DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 147 (2d ed. 2007).

55. *See* Bowman, *supra* note 1, at 693.

56. *Id.*

57. *See id.* at 695–97.

58. *See id.* at 700.

59. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(a) (U.S. SENTENCING COMM'N 2014).

60. *See id.* § 2A2.2(2)(C).

61. *See id.* § 3B1.2(b).

62. *Id.* ch. 1, pt. A(h).

days, three points for a prior sentence exceeding one year and one month, and so on.[63] The Guidelines also add points if the defendant committed the offense at issue while he was under the supervision of the criminal justice system—for instance, if he was on probation.[64] The offender's total criminal history points are then translated into a criminal history category, which ranges from I (one) to VI (six).[65]

Once these calculations are complete, the judge takes the resulting numbers and compares them against one another on the Guidelines' "Sentencing Table," which yields a recommended prison sentence for the case. This recommendation comprises an extremely narrow range of possible prison terms in contrast to the broad statutory range.[66] An offense level of five and a criminal history category of II, for instance, would result in a recommended sentence of zero to six months imprisonment.[67] An offense level of thirty-nine and a criminal history category of III would yield a recommendation of 324 to 405 months (27 to 33.75 years in prison).[68]

When Congress passed the Sentencing Reform Act, the sentence recommended by the Guidelines was intended to bind the district court judge, requiring him or her to choose a sentence within the narrow range provided.[69] The Act specified only three circumstances in which the judge could depart from the Guidelines' recommendation. First, the judge could reject the Guidelines if the case featured "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . that should [have] result[ed] in a sentence different from that described."[70] Second, the judge could depart if the offender's "criminal history category substantially under-represent[ed] . . . [or] substantially over-represent[ed] the seriousness of the defendant's criminal history or the likelihood [of

---

63. *See id.* § 4A1.1(a)–(c).

64. *See id.* § 4A1.1(d).

65. *See id.* ch. 5, pt. A.

66. As directed by the Sentencing Reform Act, the maximum recommended term under the Guidelines could not exceed the minimum term by more than twenty-five percent or six months, whichever was greater. *See* 28 U.S.C. § 994(b)(2).

67. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2014).

68. *See id.*

69. *See* Mistretta v. United States, 488 U.S. 361, 367 (1989).

70. 18 U.S.C. § 3553(b)(1) (Supp. 2004); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1) (U.S. SENTENCING COMM'N 2014) (allowing the sentencing court to depart from the Guidelines range if it finds that § 3553(b) aggravating or mitigating circumstances exist). The Guidelines specifically exclude many factors from departure consideration. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H (U.S. SENTENCING COMM'N 2014).

recidivism.]"[71] Third, and finally, the judge could impose a more lenient sentence if the defendant had provided "substantial assistance in the investigation or prosecution of another person who ha[d] committed an offense."[72] The district judge's calculation of the Guidelines' sentence, and any decision to depart from that recommendation, was made reviewable de novo on appeal.[73] In 2003, Congress made it even more difficult for judges to depart from the Guidelines' recommendations by raising the standard of appellate review for such decisions and ordering the Sentencing Commission to amend the Guidelines to "substantially reduce" the departure rate.[74]

Almost as soon as state and federal guidelines were enacted, critics complained that they were too severe, too rigid, too complicated, and too impersonal.[75] Yet, up to the end of the twentieth century, the Supreme Court repeatedly upheld guidelines' systems against constitutional attack.[76] Determinate sentencing, in the form of binding guidelines, had returned. It seemed that it was here to stay.

D. The Post-Booker Era: Hybrid Sentencing

At the beginning of the new millennium, the Supreme Court issued a series of three opinions that transformed American sentencing policy once again, most notably at the federal level, where the Court effectively invented a new, hybrid sentencing regime. Culminating in its landmark 2005 *United States v. Booker* decision, the Supreme Court held that the Sentencing Guidelines could advise, but could not bind, district court judges, thus injecting

---

71. *See id.* § 4A1.3(a)(1), (b)(1).

72. 18 U.S.C. § 3553(n) (Supp. 2004).

73. *See* 18 U.S.C. § 3742(e) (2000).

74. *See* PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(1)–(2), 117 Stat. 650, 670 (2003) (amending 18 U.S.C. § 3742(e)(3)).

75. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 922 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1703 (1992); Ogletree, *supra* note 10, at 1949; Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1248 (1997); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 905 (1992).

76. *See, e.g.*, United States v. Watts, 519 U.S. 148, 156 (1997); Mistretta v. United States, 488 U.S. 361, 412 (1989); *see also* Berman, *supra* note 42, at 8, 15–24 (describing the process by which the Court "through the 1980s and 1990s continued to sanction an administrative model of sentencing decision-making").

an element of indeterminacy into determinate-guidelines sentencing and creating a hybrid system of punishment.[77]

The two decisions that laid the groundwork for *Booker* were *Apprendi v. New Jersey*[78] and *Blakely v. Washington*.[79] In *Apprendi*, the Court struck down a New Jersey statute that empowered state judges to increase the statutory maximum for a crime if they found that the offender had been motivated by racial animus.[80] The *Apprendi* majority based its decision on the Sixth Amendment right to a jury trial and stated the holding simply: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[81] In *Blakely*, the Court confronted a similar statute from Washington State, which allowed judges to sentence above the guidelines' recommendation if they found additional facts—for instance, that the offender had acted with deliberate cruelty—that justified a more severe punishment.[82] The Court held that this law also violated the Sixth Amendment, thus extending the *Apprendi* rule from statutory maximums to mandatory Guidelines' maximums:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . . When a judge inflicts punishment that the jury's verdict alone does not allow, . . . [he] exceeds his proper authority.[83]

The Supreme Court issued the final blow[84] to the federal government's own determinate-guidelines' system just a year later

---

77. 543 U.S. 220, 233–34 (2005).

78. 530 U.S. 466 (2000).

79. 542 U.S. 296 (2004).

80. *See Apprendi*, 530 U.S. at 497.

81. *Id.* at 490.

82. *Washington*, 542 U.S. at 299–300 (2004) (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (2000)).

83. *See id.* at 303–04.

84. Although the *Blakely* majority expressly declined to pass judgment on the constitutionality of the federal Sentencing Guidelines, *see id.* at 305 n.9, Justice O'Connor, author of the principal dissent, *see id.* at 314 (O'Connor, J., dissenting), feared from the beginning that the decision was a "No. 10 earthquake." *Senate, Judges Urge 'Blakely' Redux*, N.Y.L.J., July 26, 2004. As soon as *Blakely* came down, it seemed clear that the United States Sentencing Guidelines would not last long in this world. *See* Berman, *supra* note 42, at 35–38.

in *United States v. Booker*,[85] which involved a challenge to the Federal Sentencing Guidelines analogous to the one brought in *Blakely*.[86] In *Booker*, the defendant had been convicted of trafficking over fifty grams of crack cocaine for which the Sentencing Guidelines recommended a punishment of 210 to 262 months incarceration.[87] The sentencing judge, however, found that the defendant had actually trafficked over 600 grams of crack, thus yielding a much higher Guidelines' recommendation of 360 months to life in prison.[88] A majority of the Supreme Court, applying *Apprendi* and *Blakely*, concluded that this violated the Sixth Amendment right to trial by jury.[89] As a remedy, a different majority of the Court struck and severed the provision of the Sentencing Reform Act that made the Guidelines mandatory, thereby rendering them "effectively advisory."[90] "So modified, . . . " the Court explained, the Act would "require[] a sentencing court to consider Guidelines ranges, . . . " but would also "permit[] the court to tailor the sentence in light of other statutory concerns."[91] On appeal, sentencing decisions would now be reviewed for "reasonableness."[92]

After *Booker*, federal sentencing works as follows. The district judge must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[93] That range serves as "the starting point and the initial benchmark" for the rest of the decision-making process,[94] but it is "not the only consideration."[95] The judge must also perform "an individualized assessment"[96] of the case and take into account "the basic sentencing objectives that the statute sets forth in 18 U.S.C. §3553(a)."[97] These additional considerations include:

---

85. 543 U.S. 220 (2005).

86. *Washington*, 542 U.S. 296.

87. *Booker*, 543 U.S. at 227 (Stevens, J.).

88. *See id.* Elsewhere, I have explored the problematic relationship between drug-quantity determinations and sentencing, even under the advisory post-*Booker* Guidelines. *See* Jacob Schuman, *Probability and Punishment: How to Improve Sentencing by Taking Account of Probability*, 18 NEW CRIM. L. REV. 214 (2015).

89. *See Booker*, 543 U.S. at 229 (Stevens, J.).

90. *Id.* at 245 (Breyer, J.).

91. *Id.* at 245–46.

92. *Id.* at 260–62.

93. Gall v. United States, 552 U.S. 38, 49 (2007).

94. *Id.*

95. *Id.*

96. *Id.*

97. Rita v. United States, 551 U.S. 338, 347 (2007).

> (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[98]

If the judge concludes that, in light of the factors enumerated in § 3553(a), the Guidelines' sentence is either too high or too low, he or she may vary upward or downward from that recommendation, so long as he or she remains within the prescribed statutory range.[99] The judge may give almost any reason to justify his or her decision to vary from the Guidelines, including personally disagreeing with the Sentencing Commission policy.[100]

Although *Booker* gives district judges significant discretion to depart from the Sentencing Guidelines, a number of pressures work together to encourage them to adhere to the Commission's recommendations. First, judges are required to "begin their analysis with the Guidelines" and to "remain cognizant of them throughout the sentencing process,"[101] a practice that inevitably exerts a psychological pull.[102] Next, judges must specifically justify any decision to vary from the Guidelines' recommendation, and the more they vary, the greater the justification they must provide.[103] Finally, on appeal all sentences are reviewable for "reasonableness," and in most circuits a within-Guidelines sentence is presumed reasonable.[104] As a result, the empirical evidence shows that judges

---

98. *Id.* at 347–48 (citing 18 U.S.C. § 3553(a) (2000 | Supp. IV)).

99. *See id.* at 351.

100. *See Gall*, 552 U.S. at 50; Kimbrough v. United States, 552 U.S. 85, 101, 109–10 (2007).

101. *Gall*, 552 U.S. at 50 n.6.

102. *See* United States v. Ingram, 721 F.3d 35, 40–41 (2d Cir. 2013); Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 519–29 (2014).

103. *See Gall*, 552 U.S. at 50.

104. *See* United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1053–54 (10th Cir. 2006) (per curiam); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005). *But see* United States v. Cooper, 437 F.3d 324, 331–32 (3d Cir. 2006) (holding no presumption of reasonableness); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (same); United States v. Jimenez-

tend to stick to the Guidelines' recommendations: "[W]hen a Guidelines range moves up or down, offenders' sentences move with it."[105] "In less than one-fifth of cases since 2007 have district courts imposed above- or below-Guidelines sentences absent a Government motion."[106] Indeed, just over half of all sentences handed down in 2012 followed the Guidelines' recommendation.[107]

After *Booker*, then, federal sentencing policy reflects a new, determinate/indeterminate approach to punishment: a hybrid model. The system is determinate insofar as it requires district judges to calculate a recommended sentence for each case based on the Sentencing Guidelines and then pressures them to adhere to that recommendation.[108] Empirical evidence, as outlined above, shows that our sentencing system remains significantly determinate. At the same time, however, the Supreme Court's decision in *Booker* frees district judges to conduct an individualized assessment of the facts of each case and to reject the Guidelines' recommendation if they find it inappropriate in light of the goals of punishment set out in § 3553(a).[109] The restoration of that discretion injects a fundamental indeterminacy into the heart of contemporary federal sentencing practice.

II. THREE QUESTIONS OF SENTENCING POLICY: WHO, WHAT, AND WHY?

In the real world, as I mentioned earlier, it is rare to find sentencing systems that are entirely determinate or entirely

---

Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (same); United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005) (per curiam) (same). The Supreme Court signed off on this practice in *Rita v. United States*, 551 U.S. 338, 347 (2007).

105. Peugh v. United States, 133 S. Ct. 2072, 2084 (2013). Indeed, in *Peugh*, the Court recognized the enduring power of the Guidelines by extending defendants' *ex post facto* rights to cover Guidelines amendments. *See id.*

106. *Id.*

107. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2012 1 (2012), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_Quarter_Report_Final.pdf (indicating that, out of 82,674 cases in fiscal year 2012, 52.4% resulted in a Guidelines-range sentence). Data such as this led Frank O. Bowman, III to declare that "[t]he Guidelines still matter. They still matter nearly as much as they did on the day before *Booker* was decided." Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUST. L. REV. 1227, 1269 (2014).

108. *See Gall*, 552 U.S. at 51.

109. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005) (Breyer, J.) (citing 18 U.S.C. § 3553(a) (2012)).

indeterminate. Most fall somewhere in between.[110] Debates over punishment policy, then, often play out as a tug-of-war across the spectrum of sentence determinacy, with reformers of each era seeking to pull the law in one direction or the other. In today's *Booker* era, the relationship between determinate and indeterminate sentencing has become an especially important concern because the federal government's hybrid regime requires district judges to choose between a determinate (Guidelines) and an indeterminate (§ 3553(a)) approach every time they sentence an offender.[111]

So far, discussions of determinate and indeterminate sentencing have centered around three interrelated questions of sentencing policy:

A. Who should decide punishment: legislatures or judges?

B. What makes punishment fair: uniformity or proportionality?

C. Why do we punish: retribution or rehabilitation?

In the next three sections, I explore each of these questions. Then, in Part III, I suggest a new, fourth question for discussion: *How* should we decide punishment—rules or standards? I then explain this question's special significance under the federal government's hybrid sentencing system.

A. Who Should Decide Punishment: Legislatures or Judges?

The first way to think about sentence determinacy is in terms of institutional choice, or rather, *who* should decide punishment.[112]

---

110. The highly determinate regime enacted in the 1648 *Lauues and Libertyes*, for example, still allowed judges some limited discretion to choose how long an offender might spend in the stocks or how many lashes of the whip he might receive. *See* Lauues and Libertyes of Massachusetts, *supra* note 15. Similarly, the highly indeterminate systems that reigned in the mid-twentieth century usually set maximum or minimum bounds on the possible sentences for each crime. Even in the case of offenses for which the judge could choose any prison term at all, they at the very least enumerated the types of penalty available (e.g., fines and incarceration, not corporeal punishment). *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943 (1970) (codified at 18 U.S.C. § 1963(a) (1970); 18 U.S.C. § 2031 (1976 ed.)).

111. *See Booker*, 543 U.S. at 245–46 (Breyer, J.).

112. Many decision-makers, of course, play a role in determining sentences, including prosecutors, defense attorneys, probation officers, and correctional authorities. *See* Freed, *supra* note 75, at 1696. I touch on two of those decision-makers—prosecutors and sentencing commissions—below. *See infra* pp. 24–25. Legislatures and judges, however, have traditionally been the institutional actors assigned primary authority to decide punishment. *See* Freed, *supra* note 75, at 1693 (identifying legislatures and district courts as the guiding forces behind federal sentencing policy).

Determinate sentencing, as Alan Dershowitz has explained, is a "legislatively fixed" model of punishment, while indeterminate sentencing is a "judicially fixed" model of punishment.[113] Because determinate sentencing is legislatively fixed, it is more democratic, better coordinated, and more transparent.

First, the legislature is the most representative branch of government, which means that determinate sentences "express[] the collective moral judgment of the community."[114] Senator Strom Thurmond, for example, supported the Sentencing Reform Act in part because he hoped it would prevent over-indulgent judges from subverting the popular will by imposing inappropriately lenient punishments.[115] At the same time, however, making sentencing more determinate and thus more democratic may also lead to sentences becoming excessively punitive. Social concern about crime is ever present, and criminal defendants have no significant lobby to oppose voices calling for harsher sentencing policies.[116] Legislators face powerful, ongoing public pressure to toughen the criminal law, but very little to temper it.[117] Indeed, over the past few decades, Congress has voted again and again to make the federal criminal code more punitive, especially for drug-related crimes (with the notable exception of the 2010 vote to reduce the severity of crack cocaine sentencing).[118]

Second, centralizing sentencing decisions in the legislature allows determinate regimes to harmonize criminal justice policy. A legislature that sets punishments can coordinate sentencing laws to address systemic concerns, such as rising crime rates or overcrowded

---

113. Dershowitz, *supra* note 1, at 129.

114. Bowman, *supra* note 23, at 1344; *see also* FRANKEL, *supra* note 1, at 107 ("[I]t is for the legislature in our system to decide and prescribe the legitimate bases for criminal sanctions.").

115. *See* Stith & Koh, *supra* note 43, at 261–62.

116. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 25 (1997).

117. *See* Alschuler, *supra* note 75, at 934; Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709, 717–18 (2009); Bowman, *supra* note 23, at 1318, 1344; Eric. S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L & CRIMINOLOGY (forthcoming 2015) (manuscript at 21), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496724.

118. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 47–58 (2012); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 251–74 (2011). *But see* The Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (2010).

prisons.[119] It can also impose a "consistent sentencing philosophy across the entire jurisdiction."[120] Realistically, of course, modern legislatures have neither the time nor the expertise to spell out an appropriate punishment for every possible offense.[121] Although not so difficult in colonial days, in the modern age it would be a massive—if not impossible— undertaking for legislators to spell out an entirely determinate sentencing regime. Thus, legislatures inevitably have to delegate at least some of their power to decide sentences.[122]

Finally, legislatively announced punishments make determinate systems more predictable and transparent. Because the legislature sets each punishment by statute, every convicted defendant knows what to expect when he or she walks into a courtroom for sentencing.[123] When fixed punishments are enacted into law, moreover, the public has a measure by which to evaluate the performance of criminal justice policymakers and can more easily debate, improve, and implement new sentencing policies.[124] Predetermined punishments, however, also make it harder to do justice in individual cases, as I will show below.

Indeterminate sentencing, by contrast, is judicially fixed, which makes it more professional, more individualized, and more human.

First, because judges enjoy greater political independence than legislators, indeterminate sentences reflect more detached, objective judgments. Judges are not subject to the same pressure as legislators to increase prison terms or crack down on unpopular defendants, and they gain experience in criminal punishment throughout their careers, which they can apply in order to sentence

---

119. *Cf.* Fish, *supra* note 117 (manuscript at 26) ("The main disadvantage of granting judges sentencing discretion is that they are unable to effectively coordinate with one another.").

120. *Id.* (manuscript at 28); *cf.* FRANKEL, *supra* note 1, at 6 (criticizing indeterminate sentencing because "a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between").

121. Fish, *supra* note 117 (manuscript at 20).

122. *Id.*

123. *See* Dershowitz, *supra* note 1, at 129 (noting that, for legislatively fixed sentences, "the sentence is determined in advance of the crime and without knowing who the criminal is").

124. *See* Bowman, *supra* note 23, at 1346–47 (noting that the U.S. Sentencing Commission's "ongoing work in gathering and disseminating data has made informed discussion about [the sentencing] factors possible"); *see also* Bowman, *supra* note 1, at 720 ("The Guidelines let light into the black box of sentencing.").

more effectively.[125] At the same time, however, the power to decide punishment is a fearsome one to vest in a single individual. Judge Frankel condemned "the almost wholly unchecked and sweeping powers . . . give[n] to judges" under indeterminate regimes, decrying such discretion as "terrifying and intolerable for a society that professes devotion to the rule of law."[126] Judicially fixed sentences, furthermore, often result in disparities between different judges who hold different visions of the criminal law, or who harbor racial, gender, or class prejudices against particular defendants.[127]

Second, judicially determined punishment enables a case-by-case approach to sentencing, under which the judge selects an appropriate sentence for each individual offender. While determinate sentencing requires the legislature to create "a comprehensive framework [for punishment] all at once," indeterminate sentencing allows the judge to consider the particular circumstances of every situation, one at a time.[128] This means that judges can take into account all the relevant facts of each case, which may include new details—such as an aggravating feature of the crime or a mitigating factor drawn from considering the offender's background—that the legislature would not have foreseen.[129] Furthermore, because judges interact with the parties in each case, they are "better placed than other actors to observe the defendant and make a decision about the wrongfulness of their actions and their likelihood of reoffending."[130] This approach, however, also makes it more difficult to obtain system-wide agreement on certain basic questions of sentencing policy. Leaving each judge to decide on his or her own, for example, what factors should increase or decrease sentences or what the actual purpose of punishment is, may lead to an inconsistent, if not arbitrary, system of criminal justice. [131]

---

125. Fish, *supra* note 117 (manuscript at 24). *But see* FRANKEL, *supra* note 1, at 12–14 (decrying judges' lack of attentiveness to sentencing both before and after taking the bench).

126. FRANKEL, *supra* note 1, at 5.

127. *Id.* at 6. As Judge Frankel explained, "It is not self-evident that the flesh-and-blood judge coming (say) from among the white middle classes will inevitably achieve admirable results when he individualizes the narcotics sentences of the suburban college youth and the street-wise young ghetto hustler." *Id.* at 10.

128. Fish, *supra* note 117 (manuscript at 24). The Supreme Court invoked judges' need to consider a wide variety of facts related to each case under an indeterminate regime in order to justify the more lax procedural protections at sentencing. *See* Williams v. New York, 337 U.S. 241, 246–50 (1949).

129. *See* Fish, *supra* note 117 (manuscript at 24).

130. *Id.*

131. FRANKEL, *supra* note 1, at 25, 107.

Finally, judges put a "human face o[n] justice."[132] When judges impose punishment, the process takes "the form of a face-to-face encounter between individuals," communicating to the condemned and to the public that the decision is a moral and weighty one, not merely a dry administrative calculus.[133] This encounter may have an impact on the judge as well, since "[i]mposing a term of imprisonment on a specific individual standing before you is very different from deciding sentence lengths for certain fact patterns in the abstract."[134] Judicial sentencing thus enhances the moral legitimacy of the law.[135] Skeptics of this argument, however, contend that the abstract moral benefits of indeterminate sentencing are outweighed by its concrete costs of irrationality and inconsistency.[136]

Two final institutional actors bear mentioning in the discussion of sentence determinacy and institutional choice: sentencing commissions and prosecutors.

Sentencing commissions—government agencies charged with researching and publishing sentencing guidelines—are a key feature of determinate guidelines systems. They are intended to solve two of the problems associated with more traditional, legislatively prescribed determinate schemes.[137] First, sentencing commissions are, in theory, more politically insulated than legislatures and thus may not feel the same public pressure to ramp up punishments beyond what is necessary to control crime.[138] Second, sentencing commissions have both the time and the experience necessary to enumerate a comprehensive determinate regime and improve it over time.[139] Whether sentencing commissions have actually fulfilled these two purposes, however, is the subject of ongoing debate.[140]

Prosecutors, too, are significant players in deciding sentences. Traditionally, prosecutors have the sole power to decide which charges to bring (or to drop) against a defendant. [141] Under

---

132. Stith & Cabranes, *supra* note 75, at 1253; *see also* Fish, *supra* note 117 (manuscript at 25) ("[J]udges also provide human face to punishment.").

133. Stith & Cabranes, *supra* note 75, at 1253, 1263.

134. Fish, *supra* note 117 (manuscript at 25).

135. *See id.*

136. *See* Bowman, *supra* note 1, at 711–12.

137. Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUST. L. REV. 341, 376–78 (2006).

138. *See* Bowman, *supra* note 23, at 1324.

139. *See id.*; Fish, *supra* note 117 (manuscript at 28–29).

140. *See, e.g.*, Berman, *supra* note 137, at 378 (criticizing the U.S. Sentencing Commission for failing to fulfill its purpose); Bowman, *supra* note 23, at 1341–46 (placing most of the blame instead on Congress).

141. *See* Bowman, *supra* note 23, at 1336.

determinate regimes, then, prosecutors can control the punishment that a convicted defendant will face by adding or dropping charges in order to raise or lower the applicable penalty.[142] Determinate guidelines systems, similarly, allow prosecutors to influence punishment outcomes by asking for upward sentence adjustments or, conversely, by conceding downward ones.[143] As "masters of the facts," moreover, prosecutors may also leave out (or deemphasize) damaging evidence that would trigger increased punishments.[144] The criminal law's increasing severity along with the generally lax rules regarding plea agreements have further augmented prosecutorial power. Prosecutors can now threaten to seek significant sentence enhancements unless a defendant accepts a plea deal that restricts what remains of the judge's sentencing discretion.[145] Alas, unlike legislatively or judicially-fixed sentences, prosecutors' decisions take place behind closed doors, making them even more vulnerable to disparity and bias.[146]

---

142. *See id.*; Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 365 (2005).

143. *See, e.g.*, United States v. Cobbins, 749 F. Supp. 1450, 1458 (E.D. La. 1990) (holding that a prosecutor's exercise of discretion in influencing sentencing did not violate a defendant's due process rights); Bowman, *supra* note 23, at 1337; Gardina, *supra* note 142, at 369. *But see* Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1591–92 (1997) ("[T]he argument that the Guidelines provide prosecutors with an inordinate amount of discretion . . . is limited.").

144. Bowman, *supra* note 23, at 1336; *see also* Gardina, *supra* note 142, at 367–68 (explaining "fact bargaining" as when "[t]he prosecutor and defendant stipulate to a factual scenario different from reality to control not only the sentencing range but the applicable mandatory minimum"). By charging one defendant with first-degree murder, for example, and another with the lesser crime of manslaughter, the prosecutor will have determined which of the two will suffer the harsher consequence.

145. *See* Freed, *supra* note 75, at 1696–97. As Albert W. Alschuler puts it:

> The sentencing commission plays the role of the "bad cop," threatening the accused with harsh treatment. The prosecutor, the "good cop," then agrees to protect the defendant, but only if he or she abandons the right to trial. Substantial sentencing discretion remains except for those defendants who claim the right to their day in court.

Alschuler, *supra* note 75, at 928.

146. *See* Freed, *supra* note 75, at 1723–24.

B. What Makes Punishment Fair: Uniformity or Proportionality?

The second way to think about sentence determinacy is in terms of justice, or *what* makes punishment fair. As then-Circuit Judge Breyer explained, every sentencing system must choose between "two competing goals[:] . . . uniformity and proportionality."[147] Determinate sentencing ensures uniform punishment, while indeterminate sentencing ensures proportionate punishment. No sentencing system, however, can fully achieve both goals simultaneously.[148]

The more determinate a sentencing system is, the more uniform its punishments will be, meaning that similar crimes will be more likely to receive similar penalties.[149] Determinate systems ensure that offenders who commit the same violation receive the same punishment by "group[ing] offenders into like categories according to the offense for which they were convicted" and then "prescrib[ing] like sentences for these allegedly like groups."[150] A determinate regime, for example, might require that all first-degree murder be punished by death, thus ensuring that all murderers receive the same treatment—execution—without regard to the identity of the sentencing judge or the defendants' race, gender, and class.[151] Indeed, sentencing reformers in the 1970s pushed for a more determinate system chiefly due to the lack of uniformity that defined the old indeterminate system.[152] The Sentencing Reform Act, in particular, singled out inconsistency in criminal punishment as one

---

147. Stephen Breyer, *The Federal Sentences Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988); *see also* Rita v. United States, 551 U.S. 338, 349 (2007) ("The Guidelines commentary explains how, despite considerable disagreement within the criminal justice community, the Commission has gone about writing Guidelines that it intends to embody these ends. It says, for example, that the goals of *uniformity* and *proportionality* often conflict. The commentary describes the difficulties involved in developing a practical sentencing system that sensibly reconciles the two ends.").

148. *See* Nagel, *supra* note 6, at 932 ("[T]he Sentencing Reform Act envisioned guidelines sensitive to concerns for both uniformity and proportionality. Attempts to maximize one goal may sometimes compromise the other."); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, not Disparity*, 29 AM. CRIM. L. REV. 833, 836–37 (1992).

149. *See* Breyer, *supra* note 147, at 13.

150. Nagel, *supra* note 6, at 933.

151. Systemic disparities might still persist, however, due to the discretion remaining in other criminal justice actors, such as the police and the prosecutors. *See* Berman, *supra* note 42, at 46–47 (noting that uniformity is likely to always be an elusive goal because of the overlapping discretion of other actors).

152. *See, e.g.*, FRANKEL, *supra* note 1, at 21.

of its primary concerns,[153] and modern-day reformers remain devoted to the ideal of uniformity.[154]

The more indeterminate a sentencing system is, by contrast, the more proportionate its sentences will be, meaning that each offender will be more likely to receive an appropriately severe penalty. [155] By giving judges the discretion to select punishments based on the unique facts of each case,[156] indeterminate systems ensure that offenders who commit a more serious crime receive a more serious punishment and vice versa. An indeterminate regime, for example, might provide that a bank-robber be punished with a prison sentence between zero and twenty years, thus ensuring that each individual bank-robber receives a punishment as harsh or as lenient as he deserves. In every case, the sentencing judge would take all the circumstances into account, distinguishing between more or less culpable bank robbers and assigning each a corresponding sentence. Indeed, when the Supreme Court upheld New York's indeterminate sentencing scheme against constitutional attack in *Williams v. New York*. The Court praised the flexibility of the approach, contrasting it with the excessively uniform nature of the old, determinate model: "The belief no longer prevails that every offense in a like legal

---

153. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (2004), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; *see also* 18 U.S.C. § 3553(a)(6) (designating "sentenc[ing] disparities among defendants with similar records who have been found guilty of similar conduct" as a factor to be considered by the court during sentencing); Breyer, *supra* note 147, at 4–5 (identifying Congress' purpose as "reduc[ing] 'unjustifiably wide' sentencing disparity"); Nagel, *supra* note 6, at 883 (recognizing disparity as one of three primary purposes of the Sentencing Reform Act); Ogletree, *supra* note 10, at 1944, 1944 n.38 (explaining that "[t]he most frequent criticism" of indeterminate sentencing was the "disparate treatment [of] similarly situated individuals"); Stith & Koh, *supra* note 43, at 227–28 (stating that "disparity in the sentences received by persons who had committed the same crime" was a criticism of indeterminate sentencing). The statute's requirement that the maximum of each recommended guideline range not exceed the minimum by more than twenty-five percent reflects "the tolerable level of disparity acceptable to Congress." Nagel, *supra* note 6, at 933; *see* 28 U.S.C. § 994(b)(2).

154. *See* Berman, *supra* note 42, at 46.

155. *Cf.* Nagel, *supra* note 6, at 932 (stating that "[a] central purpose for the passage of the Sentencing Reform Act was to reduce unwarranted disparity among defendants with similar records convicted of similar criminal conduct, and to increase uniformity, certainty, and fairness").

156. *See* Bowman, *supra* note 1, at 682–83 ("There was no limitation on either the type or quality of information a judge could consider at sentencing.").

category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions."[157]

The sentencing goals of uniformity and proportionality are fundamentally irreconcilable. The uniformity provided by determinate sentencing, for instance, comes at the cost of proportionality. When determinate systems group offenders into abstract categories based on their crimes, they also inevitably "lump together cases which, in punitive terms, should be treated differently."[158] As Michael Tonry has explained, "[r]igid sentencing laws . . . create unacceptable risks of injustice because they make it impossible to take account of important differences between defendants."[159] Imagine, for example, a law mandating that all defendants convicted of bank robbery receive a ten-year prison sentence. Such a law would ensure that bank robbers receive uniform punishments—every robber gets ten years in prison—but it would also subject a less culpable robber (one who, say, used a toy gun and caused no injuries) to the exact same punishment as a more culpable robber (one who used a machine gun and seriously injured three people). The ten-year sentence, as a result, would either overpunish the less-culpable robber or fail to sufficiently punish the more culpable one, depending on what one believes about how to punish robbery. Either way, "proportionality [w]ould be compromised by overreaching uniformity."[160]

The proportionality provided by indeterminate sentencing, conversely, comes at the cost of uniformity. When indeterminate systems give judges the discretion to select punishments on a case-by-case basis, similar cases inevitably receive dissimilar sentences, depending on each individual judge's perspectives on sentencing philosophy, views on what sentencing factors are relevant or irrelevant, and race, gender, or class biases.[161] Indeed, Frank O. Bowman, III derides as "utopian" the notion that "a single human judge can make rational and consistent choices that take account [of appropriate sentencing factors while] . . . exclud[ing others]," and at the same time, "with neither central guidance nor collective consultation, be acceptably consistent with the choices of hundreds

---

157. Williams v. New York, 337 U.S. 241, 247 (1949) (indicating that the SRA attempted to balance the determinate goal of uniformity with the indeterminate goal of "set[ting] sentences that constitute just punishment for the offense").

158. Breyer, *supra* note 147, at 13.

159. MICHAEL TONRY, SENTENCING MATTERS 7 (1996).

160. Nagel, *supra* note 6, at 935.

161. *See* FRANKEL, *supra* note 1, at 21.

of fellow judges making their solitary decisions."[162] The Senate Judiciary Committee, when it considered the Sentencing Reform Act, similarly concluded that sentencing disparity under the old indeterminate system could be "traced directly to the unfettered discretion the law confers on those judges . . . responsible for imposing . . . the sentence."[163] "[T]rying to individualize sentences," in short, "inevitably results in disparity."[164]

Even a determinate guidelines system, which adds a significant degree of precision to determinate sentencing, will still suffer from a lack of proportionality. The Federal Sentencing Guidelines attempt to tailor each recommended sentence to each offender by enumerating a variety of sentence enhancements and reductions based on the specific circumstances of each case.[165] The robbery guideline, for example, increases the defendant's offense level if he used a weapon or injured a victim.[166] The resulting sentence, accordingly, will be more proportionate than if all bank robbers received the exact same punishment. But this approach only goes so far. Because "the number of possible relevant distinctions [between two crimes] is endless,"[167] picking out a few distinctions as solely determinative of punishment necessarily means overlooking others.[168] Ilene Nagel explains:

> One could easily accomplish uniformity by sentencing all offenders convicted of bank robbery to the same sentence. However, some bank robbers may have used a gun, a knife, a club, or a simulated weapon; some may have taken hostages who they restrained and beat, others may have taken hostages without violence, while still others may not have taken any hostages; some robberies may have involved the use of masks, getaway cars, maps, or lookouts, while others may have been committed by lone offenders in a rather

---

162. Bowman, *supra* note 1, at 711–12.

163. S. REP. NO. 98–225, at 38 (1983).

164. Bowman, *supra* note 1, at 708.

165. *See* United States v. Booker, 543 U.S. 220, 236 (2005) (Stevens, J.) (describing the increasing number and severity of Guidelines enhancements).

166. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B3.1(2)–(3) (2014).

167. Breyer, *supra* note 147.

168. Indeed, scholars have criticized the federal Guidelines on precisely these grounds. *See* Alschuler, *supra* note 75, at 917 ("[T]his regime may have come closer to treating all offenders who committed the same crimes alike, but it may not have been as successful in treating offenders of comparable culpability alike. . . . Indeed, when the guidelines rest on nonsense standards (as . . . some of them do), it may be the judges of the older regime who treated offenders more equally.").

> spontaneous, unplanned manner; some robbers may have taken $10,000, some $50,000, and some $5,000,000.[169]

Even under a guidelines system that differentiates between all these situations, one could still dream up other possibly relevant distinctions between two bank robberies, such as "whether the defendant robbed other banks during the recent period."[170] Unless the guidelines include an infinite list of enhancements or reductions, they will invariably result in the occasional unjust sentence.[171] It is no surprise, then, that critics of the pre-*Booker*, mandatory federal Guidelines highlighted the irrational outcomes they produced, complaining that the severity of the recommended sentence did not always correlate with the offender's culpability.[172]

As a determinate guidelines scheme becomes more precise, moreover, it begins to lose in uniformity what it gains in proportionality. Every additional distinguishing factor included in a guidelines system not only makes the system less manageable, but also provides another opportunity for judges (and prosecutors) to exercise their discretion in ways that lead to disparate outcomes.[173] A judge, for example, might apply a sentence enhancement to one offender but not another or might generally be more or less willing to apply sentence enhancements than another judge. Every additional sentencing factor, in other words, effectively makes the sentencing system more indeterminate, which, as explained above, also makes it more vulnerable to disparity.[174] Indeed, critics of the Federal Sentencing Guidelines have expressed concern about the complexity of the system for precisely this reason.[175] Accordingly, although the

---

169. Nagel, *supra* note 6, at 934–35.

170. *Id.* at 935; *see also* Breyer, *supra* note 147, at 13 ("[T]he proportionality goal seeks to approach each of the myriad bank robbery scenarios from varying sentencing perspectives. The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes.").

171. *See* Fish, *supra* note 117, (manuscript at 30–31) ("[M]any defendants will end up with unfair sentences because their particular aggravating or mitigating circumstances were not, and could not have been contemplated . . . .").

172. *See, e.g.*, Alschuler, *supra* note 75, at 918–24.

173. *See* Bowman, *supra* note 23, at 1336–40; Breyer, *supra* note 147, at 13–14.

174. The provision for judicial departure from the Guidelines, 18 U.S.C. § 3553(b)(1) & (n), of course, only further exacerbates this problem. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 106–07 (2005) (describing a five percent increase in downward departures from 1995 to 2001); Nagel, *supra* note 6, at 938–39.

175. *See* Bowman, *supra* note 23, at 1340.

Sentencing Reform Act lists proportionality as one of its goals,[176] Judge Breyer, then a circuit judge, recalled that the Sentencing Commission ultimately decided to prioritize uniformity as its primary objective.[177] Whether or not the Commission has succeeded in that effort, however, remains an open question.[178]

C. Why Do We Punish: Retribution or Rehabilitation?

The third and final issue commonly discussed in relation to sentence determinacy is that of purpose, or *why* we impose punishment on criminal wrongdoers. Determinate sentencing is traditionally associated with a retributive theory of punishment, while indeterminate sentencing reflects a rehabilitative justification for punishing wrongdoers.

Determinate sentencing suits the retributive justification for punishment, since both employ an offense-based analysis of crime.[179] The retributive theory of punishment, also known as "just deserts," is "a backward-looking perspective focus[ed] on the moral duty to punish past wrongdoing."[180] Retributivists focus primarily on the blameworthiness of an offense when they apportion punishment; they are less concerned with other factors, such as the social context of the criminal act or any mitigating circumstances unique to the offender.[181] Because determinate regimes set sentences in advance, they similarly tend to tie punishments to the general elements of each crime—considerations that are easier to describe in the abstract, rather than the individual characteristics of the offender, which are harder to predict and articulate.[182] Indeed, the link

---

176. 18 U.S.C. § 3553(a)(2)(A).

177. *See* Breyer, *supra* note 147, at 13–14. Justice Breyer explains, "Punishment, as the Commission came to see, is more of a blunderbuss than a laser beam." *Id.* at 14.

178. *See* Bowman, *supra* note 23, at 1326–27.

179. *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform*, 58 STAN. L. REV. 277, 280–85 (2005); Berman, *supra* note 29, at 395–96; Andrew von Hirsh, *Guidance by Numbers or Words? Numerical Versus Narrative Guidelines for Sentencing*, *in* SENTENCING REFORM: GUIDANCE OR GUIDELINES? 46, 49 (Martin Wasik and Ken Pease, eds., 1987).

180. Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. L. REV. 815, 818 (2008).

181. *See* Nagel, *supra* note 6, at 898; von Hirsh, *supra* note 179.

182. *See* Berman, *supra* note 117, at 718; *see also* Alschuler, *supra* note 174, at 92–93 ("Describing in general terms the appropriate influence of situational and personal characteristics on sentences is often impossible. Quantifying harms, however, seems easy. Just count the stolen dollars and weigh the drugs.").

between determinate sentencing and retributivism dates back at least to Mosaic law, where violations of the codes of behavior reflected an affront to God and were prescribed corresponding punishments.[183]

Indeterminate sentencing, by contrast, was "founded upon" the rehabilitative theory of punishment, since both reflect an offender-based analysis of crime.[184] The rehabilitative approach to punishment, also known as the "medical model,"[185] embodies a "forward-looking" perspective[186] that seeks to reform criminals "through a combination of deterrence motivated by the unpleasant experience of incarceration, and personal renewal spurred by counseling, drug treatment, job training and the like."[187] Proponents of rehabilitation focus on the offender when they decide sentences, "almost like a doctor or social worker exercising clinical judgment."[188] They take into account each defendant's unique background and needs in order to select a punishment that is most likely to help him reform.[189] Indeed, the Supreme Court has expressly linked indeterminate sentencing to the rehabilitative theory of punishment: "A fundamental proposal of th[e rehabilitative] movement [i]s a flexible sentencing system permitting judges . . . to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism."[190] It is no surprise, then, that

---

183. *See* Nagel, *supra* note 6, at 887–88. Indeed, the 1648 *Lauues and Libertyes of Massachusetts*'s provisions on sentencing cite repeatedly to Old Testament codes. *See* Lauues and Libertyes of Massachusetts, *supra* note 15.

184. Nagel, *supra* note 6, at 894.

185. Bowman, *supra* note 1, at 684.

186. Nagel, *supra* note 6, at 898.

187. Bowman, *supra* note 1, at 685.

188. Berman, *supra* note 42, at 4.

189. *Id.* at 3, 4; *see also* Bowman, *supra* note 1, at 684–85. ("[T]he precise combination of punitive and reinforcing measures which w[ill] maximize the chances of rehabilitation presumably var[y] from person to person," so the judge must have access to "the widest possible array of information about every defendant" and the widest possible range of punishments from which to select.).

190. United States v. Grayson, 438 U.S. 41, 46 (1978). In *Williams v. New York*, the Supreme Court gave the constitutional seal-of-approval to indeterminate sentencing precisely because of its link to the "[r]eformation and rehabilitation of offenders," emphasizing that "the modern philosophy of penology [holds] that the punishment should fit the offender, and not merely the crime." *See* 337 U.S. 241, 247–48 (1949); *see also* Burns v. United States, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion."); Berman, *supra* note 29, at 388–91.

commentators regard indeterminate sentencing and rehabilitative punishment as two complementary halves of a single approach to criminal justice.[191]

The emergence of determinate-guidelines systems has only somewhat complicated this story. Proponents of sentencing guidelines in the 1970s and 1980s never rallied behind a single theory of punishment so much as they united in opposition to the rehabilitative approach.[192] According to Professor Berman, the push for binding guidelines was "a conceptual anti-movement" that "simply [reflected] a rejection of the rehabilitative ideal that had been dominant for nearly a century . . . . [T]he only clear goals of the sentencing reforms in many jurisdictions were the repudiation of rehabilitation as the dominant theory of punishment."[193] The Sentencing Reform Act and the Federal Sentencing Guidelines, in particular, were roundly criticized for their failure to endorse any particular theory of punishment.[194] Instead, the Act included all four traditional justifications for punishment (retribution, rehabilitation, deterrence, and incapacitation),[195] and the Guidelines, rather than adopt a single theory, relied "primarily upon typical, or average, actual past practice."[196] Even today, commentators differ on what theory of punishment the Guidelines actually reflect.[197]

---

191. *See, e.g.*, Bowman, *supra* note 23, at 1322; Bowman, *supra* note 1, at 684–85.

192. *See* Berman, *supra* note 29, at 394–95.

193. Berman, *supra* note 42, at 11.

194. *See id.* at 12 n.60 (collecting sources).

195. *See* 18 U.S.C. § 3553(a)(2) (2012); Berman, *supra* note 42, at 11–12.

196. Breyer, *supra* note 147, at 17. Justice Breyer explains that the Commission was torn between a retributive and a deterrent approach to punishment. Because the former lacked objectivity and the latter empirical backing, the agency compromised by rejecting both and instead using past practice.

> The distinctions that the Guidelines make in terms of punishment are primarily those which past practice has shown were actually important factors in pre-Guideline sentencing. The numbers used and the punishments imposed would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals. Where the Commission did not follow past practice, it would consciously articulate its reasons for not doing so.

Id. at 17–18; *see also* Rita v. United States, 551 U.S. 338, 349 (2007) ("Rather than choose among differing practical and philosophical objectives, the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding

III. A NEW QUESTION FOR SENTENCING POLICY: HOW SHOULD WE DECIDE PUNISHMENT?

This Part suggests a new, fourth question for understanding the relationship between determinate and indeterminate sentencing: *How* should we decide punishment? This question concerns the form that legal directives for sentencing take, and whether they should be framed as rules or as standards. Section A reviews the literature on these two basic forms of legal directive. Section B shows how the distinction between rules and standards maps onto the distinction between determinate and indeterminate sentencing. Finally, Section C explains why thinking about the determinacy spectrum in terms of rules and standards is important, especially under the federal government's hybrid sentencing regime.

A. Rules and Standards

Laws take two basic forms: "rules" and "standards."[198] These legal forms serve as "intermediaries" for the various background social and political principles—for instance, truth, fairness, efficiency, autonomy, or democracy—that laws are intended to implement.[199] When legal decision-makers—typically judges—apply rules and standards in order to resolve disputes, it is hoped that they will reach outcomes consistent with the relevant background principles at stake.

---

inconsistency, complying with congressional instructions, and the like.").

197. Professor Bowman, joined by Judge Paul Cassell, suggests that, in reality, the Guidelines rejected rehabilitation and instead pursue "a somewhat imprecise amalgam of 'just deserts' retributivism and utilitarian 'crime control' theories of deterrence and incapacitation." Bowman, *supra* note 1, at 693; *see also* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1020 (2004) ("In the Guidelines themselves, the Sentencing Commission articulates two primary purposes of sentencing: (1) 'just deserts' . . . and 'crime control'[,] . . . [b]ut the determinate sentencing structure of the federal system implicitly rejects the idea that rehabilitation should determine the length of sentences."). Professor Berman, by contrast, contends that the Guidelines abandoned the rehabilitative ideal in favor of a "uniformity ideal." Berman, *supra* note 42, at 46. Unfortunately, as Professor Berman notes, the pursuit of uniformity "is fundamentally vacuous when not grounded in a particular theory of punishment." *Id.*

198. *See* Antonin Scalia, *The Rule of Laws as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1985); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985); Kathleen M. Sullivan, Foreword: *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

199. Sullivan, *supra* note 198, at 57.

A "rule" picks out a key factual or normative consideration related to the relevant background principle and turns it into a "trigger" that directs a particular outcome for each case.[200] The sixty-five mile-per-hour speed limit on the highway, for example, is a factually triggered rule.[201] The trigger is the driver's speed. If the driver was traveling faster than sixty-five miles-per-hour, then he or she committed the offense of speeding. If the driver was traveling slower than the speed limit, then he or she did not.

A "standard," by contrast, uses a qualitative analysis that directly applies the relevant background principle to the "totality of the circumstances" of each case.[202] A speed limit framed as a standard, rather than a rule, for instance, would prohibit drivers from traveling "faster than is reasonably safe under the circumstances."[203] To determine if a driver violated the law, a judge would consider all the facts of the case and then decide whether the driver's speed was "reasonably safe." If the judge determines that the speed was reasonably safe, then the driver did not commit the offense of speeding. If judge determines that the speed was not reasonably safe, then the driver did commit the offense.

Rules allow judges less discretion than do standards.[204] Rules "confine the decisionmaker" to specified considerations, "leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."[205] Standards, by contrast, direct judges to consider all the factors in each case and then to perform a qualitative assessment of the situation. Of course, as with determinate and indeterminate models of sentencing, the relationship between rules and standards reflects a spectrum, rather than a sharp binary.[206] Kathleen Sullivan explains:

> A rule may be corrupted by exceptions to the point where it resembles a standard; likewise, a standard may attach such fixed weights to the multiple factors it considers that it resembles a rule . . . . A strict rule may have a standard-like

---

200. *See id.* at 58.

201. *See* Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 562–63 (2010).

202. Scalia, *supra* note 198, at 1179; Sullivan, *supra* note 198, at 58–59.

203. *See* Morse, *supra* note 201, at 562–63.

204. Sullivan, *supra* note 198, at 57.

205. *Id.*

206. *See id.* at 61–62.

> exception, and a standard's application may be confined to areas demarcated by a rule.[207]

The relative advantages and disadvantages of rules and standards have generally been understood in terms of four pairs of competing values: (1) formal equality versus substantive justice; (2) certainty versus flexibility; (3) liberty versus substantive equality; and (4) democracy versus deliberation. Below, I briefly summarize each of these dichotomies. If this discussion seems to echo my review of the differences between determinate and indeterminate sentencing, that is because, as I show later, each of those approaches to punishment also reflects a rules-versus-standards approach to legal decision-making.

1. Formal Equality versus Substantive Justice

Rules ensure formal equality at the cost of substantive justice, while standards promote substantive justice at the cost of formal equality.[208] Rules ensure that judges will treat like cases alike by limiting their discretion to deciding the presence or absence of specific triggering facts; this prevents judges with contrasting visions of the law or who harbor personal prejudices from reaching different outcomes in identical cases.[209] At the same time, however, rules also produce occasional injustices. Because they turn solely on a few particular facts, they "necessarily capture[] the background principle . . . incompletely[,] and so produce[] errors of over- or under-inclusiveness."[210] Standards, by contrast, ensure that judges will make substantively just decisions by instructing them to consider the totality of the circumstances of each case, thus "decreas[ing] . . . errors of under- and over-inclusiveness."[211] Simultaneously, however, standards also result in occasional disparities, since, by giving judges such broad discretion, they allow their personal policy views or biases to influence their decision-making.

---

207. *Id.* at 61.
208. *Id.* at 62.
209. *Id.*
210. *Id.* at 58.
211. *Id.*

2. Certainty versus Flexibility

Rules provide certainty at the cost of flexibility, while standards allow flexibility at the cost of certainty.[212] Rules are clearly announced in advance, which allows private actors to conform their conduct to the law[213] and makes it easier for judges to resolve disputes without reconsidering the unique facts of every single case.[214] The rigidity of rules, however, also renders them vulnerable to bad faith manipulation[215] and makes them more costly to develop at the outset.[216] Standards, by contrast, have less clearly defined bounds, which gives them a useful flexibility that makes them both harder to manipulate and cheaper to develop.[217] The unpredictability of standards, of course, also leaves private parties unsure if and when they are violating the law[218] and forces judges to engage "the elaborate, time-consuming, and repetitive application of background principles to facts" every time they decide a case.[219]

3. Liberty versus Substantive Equality

Rules protect liberty while reducing substantive equality, whereas standards promote substantive equality at the cost of liberty. Rules limit the government's power to defined bounds, which cannot be changed by reference to vague legal principles.[220] Although fixed rules may protect individuals from encroaching government influence, however, they may also undermine substantive equality, since they "enable[] the shrewd, the calculating, and the wealthy to manipulate [their] forms to their own advantage."[221] Standards, conversely, promote substantive equality since they "favor distributive and paternalist motives."[222] They do so,

---

212. *Id.* at 62.
213. *Id.*
214. *Id.* at 63.
215. *See id.*
216. *See* Morse, *supra* note 201, at 567.
217. *See id.*; Sullivan, *supra* note 198, at 66.
218. Sullivan, *supra* note 198, at 63.
219. *Id.*
220. *See id.* at 63–64.
221. Morton J. Horwtiz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).
222. Sullivan, *supra* note 198, at 67; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1741–51 (1976).

of course, at the cost of liberty, since their lack of formality may "pave the way for official 'arbitrariness' if not totalitarianism."[223]

4. Democracy versus Deliberation

Rules are more democratic but less deliberative than standards, while standards encourage deliberation but are less democratic than rules. Rules ensure a more consistent application of the popular will because they limit judges solely to deciding the presence or absence of particular triggers, thus preventing the imposition of judges' personal policy preferences.[224] That kind of mechanistic decision-making, however, is also less effective at communicating the reasons for each outcome and may allow judges to avoid personal responsibility for their decisions.[225] The qualitative nature of standards, by contrast, promotes deliberation, since it "make[s] the judge face up to his choices . . . [and] make[s] visible and accountable the inevitable weighing process that rules obscure."[226] Judicial deliberation, unfortunately, comes at the cost of democracy because it makes it easier for judges to substitute their own values for those of the lawmakers.

B. Sentencing Rules and Standards

The distinction between determinate and indeterminate sentencing—which has previously been analyzed in terms of institutional choice, conceptions of justice, and theories of punishment—can also be understood in terms of the form of legal decision-making used by each system. Determinate sentencing employs a rule-based system to decide punishments, while indeterminate sentencing relies on a standard-based approach. The federal government's hybrid sentencing scheme combines these two approaches, instructing judges to consider a rule-derived sentence and a standard-derived sentence and then to pick the better option.[227]

---

223. Sullivan, *supra* note 198, at 64.

224. *Id.*; *see also* Schlag, *supra* note 198, at 386 ("By describing the [judge's] authority in empirical terms, the possibility of usurpation of authority or shirking of responsibility is minimized.").

225. Sullivan, *supra* note 198, at 67.

226. *Id.*

227. Adam H. Morse made a similar observation in the context of Supreme Court jurisprudence. According to Morse, the Court tends to favor standards over rules when it issues "fractured" decisions that lack a single majority opinion. *See* Morse, *supra* note 201, at 561–62. He offers several examples of such decisions, including

Determinate-sentencing systems use rules to decide punishment. Under a determinate regime, each criminal conviction serves as the "trigger" for a set penalty provided by the law. Determinate guidelines systems are a bit more complicated. Rather than relying on the single trigger of a conviction to determine a penalty, sentencing guidelines use a series of triggers linked to the facts of each case in order to calculate an appropriate punishment. Ultimately, however, this approach to punishment still reflects an extended exercise in rule-based sentencing. The Federal Sentencing Guidelines, for example, assign each crime a base offense level. That directive takes the form of a rule—each type of offense triggers a set base level. Next, the Guidelines instruct the judge to either increase or decrease the offense level depending on the presence or absence of particular facts about the case. Again, each of these instructions takes the form of a rule—the presence or absence of the relevant facts serves as a trigger for increases or decreases in the offense level. Third, the Guidelines direct the judge to calculate the defendant's criminal history category by adding up points based on the lengths of the offender's prior sentences. Once again, these calculations are all rule-based. Finally, the judge applies a final rule by comparing the offender's offense level and criminal history on the Sentencing Table to yield a narrow range of prison terms. Considered all together, the Guidelines simply use a more involved version of the same rule-based decision-making process employed under traditional determinate sentencing.

Indeterminate sentencing, by contrast, uses standards to decide punishment. Under an indeterminate regime, judges have wide discretion to consider all the unique facts of each case and then to select an appropriate penalty. This decision requires the judge to perform a qualitative assessment of the case based on the prevailing theory of punishment. In the post–Civil War era, for example, when

---

United States v. Booker, 543 U.S. 220 (2005), which he claims "transformed the [Sentencing] Guidelines from rules to standards." *Id.* at 596; *see also id.* at 595–604. As far as I am aware, Morse is the only other scholar to note the relation of determinate and indeterminate sentencing to the distinction between rules and standards. I part ways from him, however, on two points. First, as I explained earlier, I do not believe that *Booker* turned the Sentencing Guidelines into a standard-based regime. *United States v. Booker*, 543 U.S. 220 (2005). District court judges must still calculate a Guidelines' recommendation at each sentencing, and numerous forces work to encourage most judges to stick to that recommendation. As a result, I believe that the Guidelines are best understood as a hybrid, rules/standards-based system of decision-making. Second, while Morse focuses on Supreme Court practice—and offers an interesting argument on that point—my primary concerns are sentencing policy and criminal justice.

the medical model of punishment dominated, the sentencing judge would sentence based on his assessment of what was necessary to rehabilitate each offender. The § 3553(a) factors, by contrast, include the rehabilitative, retributive, incapacitative, and deterrent justifications for punishment.

The federal government's post-*Booker*, hybrid sentencing regime uses both rules and standards to decide punishment. First, the district judge uses the Guidelines' rules to calculate a recommended, but not binding, sentence. This rule-based process reflects the Commission's attempt, "wholesale," to achieve a "rough approximation" of the principles of sentencing enumerated in § 3553(a).[228] Second, the judge conducts an "individualized assessment" of the facts of each case in light of the sentencing standard set out in § 3553(a).[229] This assessment includes the four traditional justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation), the need to avoid disparities, and the need to provide restitution to the victim.[230] This standard-based, qualitative analysis constitutes a "retail" attempt to achieve the objectives of § 3553(a).[231] Finally, the judge must decide whether to stick with the Guidelines' recommended sentence or to vary from it based on his or her individualized assessment of the case. Post-*Booker*, hybrid sentencing, in sum, allows district judges to choose between rule-derived punishments (the Guidelines) and standard-derived punishments (the § 3553(a) factors).

C. Why Sentencing Rules and Standards Matter

The relationship between determinate and indeterminate sentencing on the one hand, and rules- and standards-based decision-making on the other, is interesting enough on its own, but

---

228. Rita v. United States, 551 U.S. 338, 348–50 (2007).

229. Gall v. United States, 552 U.S. 38, 50 (2007).

230. *See* 18 U.S.C. § 3553(a) (2012).

231. *Rita*, 551 U.S. at 348. Professor Berman describes this step in the sentencing process as an exercise in "reasoned judgment." He explains:

> After *Booker*, federal judges may no longer simply find guideline-specified facts, plug these facts into a guideline calculation, and then in rote fashion follow the guidelines' predetermined sentencing outcomes. Rather, federal judges must now integrate and assimilate the facts emphasized by the guidelines with the dynamic judgment-oriented considerations that are set forth in section 3553(a).

Berman, *supra* note 29, at 410–13.

why does it matter? There are at least three important reasons to think hard about the connection between sentence determinacy and legal forms.

First, rules and standards may teach us a lot about sentencing law and policy. There is already an extensive body of literature analyzing the relative advantages and disadvantages of rule- and standard-based decision-making schemes; this runs the gamut from philosophical inquiries and critical investigations to behavioral and economic analyses.[232] Applying these insights to the field of sentencing may yield new insights on criminal punishment. To sample briefly just a few of the recognized differences between rules and standards outlined above, it may be that the clarity of rule-based determinate schemes makes them more powerful deterrents to potential wrongdoers,[233] or it could be that standard-derived punishments permit a more altruistic and humanist approach to sentencing[234] (a conclusion that would contradict sentencing reformers who claimed that rule-based guidelines systems would lead to shorter prison terms).[235] Indeed, in the next Part of this Article, I pick up on one of the most recognized differences between rules and standards—that rules are inevitably over- or under-inclusive as compared to standards—and use it both to explain the law governing departures and variances from the federal Guidelines and to suggest improvements to that doctrine.

Second, sentencing law and policy may help us learn more about rules and standards. The history of determinate and indeterminate sentencing in the United States, recounted only briefly above, offers over three centuries of material for the study of rules and standards in the real world. The post-*Booker*, hybrid system, in particular, constitutes a veritable laboratory of rule- versus standard-based decision-making. Analyzing sentencing through the lens of rules and standards, therefore, may allow us to test some of our hypotheses about these legal forms. If, for example, we find that sentencing guidelines really do make punishments more uniform, we could corroborate the belief that rules promote formal equality.[236]

---

232. *See, e.g.*, Morse, *supra* note 201, at 563 nn.14–16 (collecting sources).

233. *Cf.* Sullivan, *supra* note 198, at 62 ("[R]ules afford certainty and predictability to private actors, enabling them to order their affairs productively.").

234. *Id.* at 66; *see also* Kennedy, *supra* note 222, at 1741–51 (discussing the history of and comparing the formal and substantive economic arguments in private law conflicts).

235. *See* Alschuler, *supra* note 75, at 933.

236. *Cf.* Sullivan, *supra* note 198, at 62 ("The argument that rules are fairer than standards is that like rules require decision makers to act consistently, treating like cases alike. . . . [R]ules reduce the danger of official arbitrariness or bias.").

Contrarily, if we find that federal judges consistently choose to vary downward from Guidelines' recommendations that are too high, then we might realize that rules are not quite as liberty-protective as previously thought.[237] Accordingly, in the next Part of this Article, I analyze the law of departures and variances from the Guidelines in order to help clarify precisely what occurs at the level of legal form when a rule is over- or under-inclusive as compared to a standard.

Finally, the federal government's current hybrid sentencing scheme makes it particularly important to appreciate the distinction between rule- and standard-based decision-making. The law governing federal sentencing, as explained earlier, requires a district judge to consider both a rule-derived sentence (the Guidelines' recommendation) and a standard-derived sentence (the § 3553(a) factors) and then to choose the better option. Understanding the differences between rule- and standard-based decision-making may help to inform that choice. Picking up on this theme, in the next Part, I show that rules are both "bumpy" and "disaggregated," which makes rule-derived punishments more likely to be inconsistent when sentence enhancements are particularly large or particularly numerous. In such cases, I suggest that judges should be more willing to vary from the Guidelines' recommendations and to use § 3553(a)'s standard-based approach.

IV. THE LAW OF DEPARTURES AND VARIANCES: WHEN THE RULES "DO NOT QUITE FIT"

Rules and standards, as just explained, each have several advantages and disadvantages as compared to the other. One of the key weaknesses of rules is that they are inevitably over- and under-inclusive as compared to standards. As Justice Scalia puts it: "All generalizations (including, I know, the present one) are to some degree invalid, and hence every rule of law has a few corners that do not quite fit."[238] The hybrid system of sentencing that the federal government employs addresses this problem by permitting judges to "depart" or "vary" from the Guidelines' rule-based decision-making process.[239] District court judges, in other words, may reject the

---

237. *Cf. id.* at 63–64 (stating that individuals should be able to make decisions on the basis of their expectations of how judges will exercise their authority).

238. Scalia, *supra* note 198, at 1177.

239. There is really only a technical difference between "departures" and "variances." A "departure" is based on a provision provided in the Guidelines themselves (essentially, an exception included by the Commission). A "variance," by contrast, is based on the judge's independent, post-*Booker* authority to treat the Guidelines as merely advisory. *See* United States v. Rangel, 697 F.3d 795, 801 (9th

Guidelines' recommended sentences when they "do not quite fit" the standard for sentencing set out in § 3553(a).[240]

This Part studies the law of departures and variances through the lens of rules and standards.[241] As I show below, federal law recognizes two basic categories of error that may result from rule-based decision-making. Each of those categories, in turn, can be subdivided further into two particular kinds of erroneous rules, although the law is neither fully realized nor fully consistent in its treatment of them. I map the concepts as follows:

A. Substantive Errors:

1. Incomplete Rules: Addressed by Sentencing Guidelines 4A1.3 and 5K2.0 as well as *United States v. Booker*.[242]

2. Incorrect Rules: Addressed by *Kimbrough v. United States*.[243]

B. Formal Errors:

1. Bumpy Rules: Addressed by Sentencing Guideline 4A1.3(b) and application note 3, as well as *United States v. Gigante*.[244]

2. Disaggregated Rules: Addressed by Sentencing Guideline 5K2.0(c).[245]

In the next few sections, I examine each of these categories and the specific kinds of errors they reflect. Section A shows that a concern over substantive errors—mistakes caused by the content of a rule—explains nearly all of the law of departures and variances. Section B demonstrates that federal law also acknowledges, albeit obliquely and inconsistently, formal errors—mistakes caused by the structure of rule-based decision-making. I argue that the law of

---

Cir. 2012). Fundamentally, however, both departures and variances allow district judges to reject the rule-based decision-making process contained in the Guidelines when it fails to capture the background principles of sentencing set out in § 3553(a) of the Sentencing Reform Act. While *Booker* makes this clear in the case of variances, it is also true for departures. As the Guidelines explain: "Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, cmt. background (U.S. SENTENCING COMM'N 2014).

240. Scalia, *supra* note 198, at 1177.

241. The one type of departure I do not examine is the one for "substantial assistance to authorities," since this is intended not to correct an error in rule-based decision-making, but rather to reward defendants who help with other prosecutions or investigations. U.S. SENTENCING MANUAL §5k1.1 (U.S. SENTENCING COMM'N 2014).

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

243. Kimbrough v. United States, 552 U.S. 85 (2007).

244. United States v. Gigante, 94 F.3d 53 (2d Cir. 1996).

245. Sullivan, *supra* note 198, at 59.

sentencing should more directly and consistently recognize formal errors and, accordingly, that judges should be willing to vary from the Guidelines' recommendations when they involve sentence adjustments that are particularly large or particularly numerous.

A. Substantive Errors

A substantive error occurs when, due to the composition of a rule's triggers, it directs an outcome contrary to the background principle that it is intended to capture. Below, I explain in a bit more detail what I mean by the "substance" of a rule. Then, in the next two sections, I explore how the law of sentencing allows judges to depart or vary from the Guidelines in order to correct two different kinds of substantive errors.

A rule works, as explained earlier, by picking out a few key considerations related to the background principle at stake and turning them into triggers that direct a particular outcome for each case. By selecting the right triggers, it is hoped that the rule will produce outcomes that are consistent with the background principle it is intended to capture. The selection of certain triggering factors and the disregard of others is the "substance" of a rule. A standard, by contrast, involves the direct, qualitative application of the background principle itself to the "totality of the circumstances" of each case. Because a standard does not depend on triggers, it does not limit judges to considering only a few particular factors in their analyses.

The Sentencing Commission chooses the substance of the rules in the Guidelines in order to capture the background principles of sentencing enumerated in § 3553(a).[246] In other words, the rules that comprise the Guidelines—the base offense level assignments for each crime, the hundreds of possible upward and downward adjustments, the criminal history calculation, etc.—are all written to produce recommended sentences approximately in line with the § 3553(a) principles. Take, for instance, the two-level weapon enhancement for defendants convicted of burglary.[247] If a defendant possessed a "dangerous weapon (including a firearm)" during his offense, the Guidelines instruct the judge to increase his or her offense level by two.[248] This upward adjustment, presumably, reflects the Commission's judgment that a burglar who possesses a weapon commits a more serious crime than one who does not, and

246. *See* Rita v. United States, 551 U.S. 338, 348–50 (2007).

247. U.S. SENTENCING GUIDELINES MANUAL § 2B2.1 (U.S. SENTENCING COMM'N 2014).

248. *Id.*

therefore that the § 3553(a) principles favor a harsher punishment. Although every individual burglary involves countless other factors that inform whether the crime was more or less serious,[249] the substance of the weapon enhancement includes only the single trigger of whether the burglar possessed a dangerous weapon. Each sentencing, of course, involves the application of multiple rules, each containing different triggers that reflect additional considerations.

A rule commits a substantive error when, due to the composition of its triggers, it directs an outcome that is contrary to the background principle that it is supposed to implement. This can occur in one of two ways, both of which the federal law of sentencing directly addresses and accommodates. First, a rule may err because its triggers are incomplete, meaning that it omits from consideration factors that are relevant to the background principle at stake. Second, a rule may err because its triggers are incorrect, meaning that it addresses all the relevant factors but does so in a way that is contrary to the intended background principle.

1. Incomplete Rules

A rule is incomplete when its selection of triggers omits factors relevant to the background principle at issue. This problem occurs when rulemakers fail to foresee the unique circumstances of a particular case or, because they prefer the form of a rule to standard, they consciously choose to limit their considerations to a few specific triggers. Because standards use a "totality of the circumstances" approach,[250] they are never incomplete in the same way as rules are.

The rules that compose the Sentencing Guidelines are impressively comprehensive, but they are still inevitably incomplete. The Sentencing Commission does not have the time or perfect foresight necessary to address every possible contingency, nor does it claim to cover so much ground.[251] As a former member of the Commission, Justice Breyer noted that it is always possible to think of some additional factor that might affect the seriousness of an offense.[252] Return, for example, to the burglary guideline. A

---

249. *See* Breyer, *supra* note 147, at 13.

250. *See* Sullivan, supra note 198, at 59.

251. *See* Breyer, *supra* note 147, at 13–14 ("One can always find an additional characteristic *X* such that if the bank robber does *X*, he is deserving of more punishment.").

252. *See id.* at 13 (discussing how unmanageable the sentencing system becomes if the system attempts to account for the limitless amount of factors that could potentially affect the nature of a crime); *see also* Nagel, *supra* note 6, at 935 (hypothesizing the various factors that could affect the seriousness of a bank robbery

defendant who bashes his way in through the front door of an occupied home at night will receive the exact same recommended sentence as one who creeps in through the window of an empty home during the day. Either way, because the Guidelines do not include triggers that cover the three distinguishing factors (mode of entry, occupancy, and time), they do not register the difference between these two crimes. By failing to differentiate between the two offenses, the Guidelines commit a substantive error. We know this because, if we considered all the circumstances of each crime in light of the § 3553(a) principles—in other words, if we applied the § 3553(a) principles as a standard—we would very likely conclude that the two crimes actually do deserve different punishments.[253] The omission in the Guidelines' rules of certain considerations thus produces an outcome contrary to the background principles at stake.

Fortunately, the law of departures and variances provides two means for correcting incomplete rules. In such cases, the law permits sentencing judges to reject the Guidelines' rule-derived punishment in favor of one derived from § 3553(a). An individualized, "totality of the circumstances" assessment of the case based on the § 3553(a) standard allows the sentencing judge to account for the factors that the Guidelines' rules missed.[234.1]

First, even before *Booker* rendered them advisory, the Sentencing Guidelines authorized judges to depart from their recommended sentences if those recommendations failed to account for all the relevant facts of a case. After *Booker*, these departures remain available to judges and take two forms: departures based on aggravating or mitigating circumstances that the Sentencing Commission did not consider[254] and departures based on the

---

such as the use of weapons, the amount of money taken, or whether hostages were taken).

253. That there is a meaningful difference between these two crimes is evidenced by the fact that many jurisdictions distinguish between occupied and unoccupied buildings as well as between daytime and nighttime in defining the crime of burglary. *See, e.g.*, D.C. Code § 22-801 (2012) (defining first-degree burglary as breaking and entering an occupied building with the intent to commit a crime inside and second-degree burglary as breaking and entering an unoccupied building with the intent to commit a crime inside); FLA. STAT. ANN. § 810.02 (West 2007) (defining second-degree burglary as breaking and entering an occupied structure with the intent to commit a crime inside and third-degree burglary as breaking and entering an unoccupied structure with the intent to commit a crime inside); Model Penal Code § 221.1 (AM. LAW INST., Official Draft 1962) (defining second-degree burglary as entering a building at night with the intent to commit a crime inside and third-degree burglary as entering a building during the day with the intent to commit a crime inside).

254. *See* U.S SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING

inadequacy of the criminal history category.[255] For the first, the Guidelines provide that the judge may depart from their recommendation if the case features:

> [A]n aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.[256]

This departure, in other words, recognizes that the triggers comprising the offense-level section of the Guidelines are incomplete,[257] and may therefore miss important considerations that should result in a higher or lower sentence in light of the principles of sentencing enumerated by Congress. The Guidelines therefore permit the sentencing judge to correct the Sentencing Commission's omission by adjusting upward or downward in accordance with the § 3553(a) standard. For the second form of departure, the Guidelines provide that the judge may depart upward from their recommendation "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[258] The Guidelines then define "reliable information" as follows:

> (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses); (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions; (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order; (D) Whether the defendant was pending trial or sentencing on another charge at the time of

---

COMM'N 2014).

255. *See id.* § 4A1.3.

256. *Id.* § 5K2.0(a)(1).

257. The Guidelines specifically identify a few relevant circumstances that the Commission may have failed to consider, *see id.* §§ 5K2.0–5K2.24, and they also acknowledge that there may be "exceptional case[s]" featuring not-yet-identified but still relevant circumstances. *Id.* § 5K2.0.

258. *Id.* § 4A1.3(a)(1).

> the instant offense; (E) Prior similar adult criminal conduct not resulting in a criminal conviction.[259]

Each of these provisions concerns a past criminal act that is not included in the initial criminal history calculation. Once again, this departure recognizes that the triggers comprising the criminal history section of the Guidelines are incomplete, and may therefore produce sentences that are too lenient. In such cases, the Guidelines permit the sentencing judge to correct the error by departing upward. There is also a parallel provision allowing downward departures when the criminal history category "substantially over-represents the seriousness of the defendant's criminal history,"[260] although, as I show below, the story there is even more interesting.

Second, after *Booker* rendered the Guidelines advisory, federal judges have used their power to vary from their recommendations when they missed some important aspect of the case. Recall that a consequence of *Booker*'s adjustments to the Sentencing Reform Act is that district judges must now "give respectful consideration to the Guidelines," but are permitted "to tailor the sentence in light of [§ 3553(a)] concerns as well."[261] Most of the cases in which judges have embraced their new power to vary from the Guidelines have involved situations where the Sentencing Commission failed to consider all the relevant circumstances presented by the case. In *United States v. Ruvalcava-Perez*, for instance, the Guidelines recommended a sentence of 130 to 162 months for a drug offender.[262] The district court varied upward by forty-eight months—imposing a 210 month prison term—because it concluded that the Guidelines failed to account for the offender's long history of violence, particularly against women.[263] In *United States v. Autery*, a child pornography case, the Guidelines recommended a forty-one to fifty-one month term of imprisonment, but the district court varied downward to a sentence of five years probation. The court found that the recommendation did not account for the fact that the defendant did not fit the profile of a pedophile and that he had the full support of his family.[264] Finally, in *United States v. Cavera*, the district court varied upward by six months from a Guidelines' recommendation of twelve to eighteen months on the ground that the crime—gun smuggling—was more harmful when committed in the unique urban

---

259. *Id.* § 4A1.3(a)(2).
260. *Id.* § 4A1.3(b)(1).
261. Kimbrough v. United States, 552 U.S. 85, 101 (2007).
262. *See* United States v. Ruvalcava-Perez, 561 F.3d 883, 885 (8th Cir. 2009).
263. *Id.* at 885–86.
264. United States v. Autery, 555 F.3d 864, 867–68 (9th Cir. 2009).

environment of New York City.[265] Countless additional examples exist in which judges have varied from recommended sentences.[266] Together, these cases demonstrate that judges are willing to vary from the Guidelines in favor of the § 3553(a) standard when the rule-based decision-making process omits an important trigger.

2. Incorrect Rules

A rule is incorrect when its triggers address all the relevant factors in a case but do so in a way that is at odds with the background principle at issue. This problem occurs when rulemakers exercise bad policy judgment. The identification of such errors then depends on one's personal political perspective. Because standards employ a more flexible, qualitative analysis, they allow judges the discretion to avoid the kinds of policy errors caused by incorrect rules.

To understand what happens when a rule is incorrect, imagine, for example, a (fictional) upward adjustment that increases the base

---

265. United States v. Cavera, 550 F.3d 180, 185 (2d Cir. 2008) (en banc).

266. *See, e.g.*, United States v. Sprague, 370 F. App'x 638, 646 (6th Cir. 2010) (upward variance based on the fact that defendant, a child molester, had been "actively seeking additional victims"); United States v. Tristan-Madrigal, 601 F.3d 629, 635 (6th Cir. 2010) (upward variance based on defendant's repeated illegal reentries and DUIs); United States v. Hilgers, 560 F.3d 944 (9th Cir. 2009) (upward variance based on defendant's past criminal conduct and con man behavior); United States v. Almenas, 553 F.3d 27, 37 (1st Cir. 2009) (downward variance based on defendant's physical and mental disabilities); United States v. Seay, 553 F.3d 732, 742 (4th Cir. 2009) (upward variance based on defendant's increasing dangerousness); United States v. Howe, 543 F.3d 128, 137 (3d Cir. 2008) (downward variance based on defendant's military service and remorse); United States v. Huckins, 529 F.3d 1312, 1319 (10th Cir. 2008) (downward variance based on defendant's youth and depression at the time of the offense and his rehabilitation efforts since); United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (downward variance based on defendant's familial support and potential for rehabilitation); United States v. Lehmann, 513 F.3d 805, 809 (8th Cir. 2008) (downward variance based on defendant's need to care for his disabled son); United States v. Dehghani, 550 F.3d 716, 722–23 (8th Cir. 2008) (upward variance based on the seriousness of the defendant's conduct and his outrageous behavior during the pendency of the case); United States v. Anderson, 533 F.3d 623, 633 (8th Cir. 2008) (downward variance based on other forms of punishment defendant had suffered for his crime); United States v. McBride, 511 F.3d 1293, 1296, 1298 (11th Cir. 2007) (downward variance based on defendant's severe history of abuse); United States v. White, 506 F.3d 635, 644 (8th Cir. 2007) (downward variance based on defendant's age and medical condition); United States v. Pauley, 511 F.3d 468, 474 (4th Cir. 2007) (downward variance based on fact that child pornography was in the form of Polaroid photos, rather than digital files).

offense level for the crime of burglary by twenty if the offender broke into a home at nighttime, rather than daytime. Although this rule addresses a potentially relevant factor, it does so in an excessively punitive way. Or, take the guideline for a drug trafficking offense, which assigns offense levels based on the quantity of drugs that the defendant possessed during the offense.[267] The Sentencing Commission recently voted to approve an across-the-board reduction of the levels prescribed by the table, based on its conclusion that the provision was unnecessarily harsh.[268] In other words, the Commission decided that the old rule was incorrect. Indeed, many criticisms of the Sentencing Guidelines are actually identifications of incorrect rules. "At or near the root of virtually every serious criticism of the [G]uidelines is the concern that they are too harsh."[269] This is especially true for drug-related crimes.[270] Such critics—including Justice Kennedy[271]—are not suggesting that the Commission missed some relevant factor that should have been taken into consideration. Instead, they are arguing that the Commission miscalibrated in the way that it addressed the relevant factors in light of the § 3553(a) goals of sentencing. Again, because the identification of an incorrect trigger reflects a policy judgment, not everybody may agree on which rules are incorrect.

A series of cases since *Booker* have provided a way for judges to remedy incorrect rules, permitting them to vary from the Guidelines based on policy disagreements with the Sentencing Commission and to apply instead their own interpretation of the § 3553(a) sentencing standard. The main case is *Kimbrough v. United States*,[272] in which a district judge varied downward from a Guidelines' recommendation for a crack cocaine offender on the ground that the Guidelines' disparate treatment of crack and powder cocaine offenses was both "disproportionate" and "unjust."[273] The judge lamented that if the defendant had been convicted of a powder cocaine offense, the recommended sentence would have been only half as long.[274] The

---

267. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(5), (c) (U.S. SENTENCING COMM'N 2014).

268. News, Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014).

269. Bowman, *supra* note 23, at 1328–32.

270. *See id.*

271. *See* Justice Anthony M. Kennedy, Speech Delivered at the American Bar Association Annual Meeting, 2003 WL 23475479 at *127 (Aug. 9, 2003).

272. 552 U.S. 85 (2007).

273. *Kimbrough*, 552 U.S. at 93.

274. *Id.*

Supreme Court affirmed the variance, emphasizing that *Booker* made the Guidelines "'effectively advisory,'" and therefore that "even in a mine-run case," district courts have the authority to conclude "that the crack/powder disparity yield[ed] a sentence greater than necessary to achieve § 3553(a)'s purposes."[275] Two years later, the Court reaffirmed that district courts have the "authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them."[276] Since then, courts of appeals around the country have expanded *Kimbrough* to permit policy-based variances from other Guidelines, including those for child pornography,[277] career offenders,[278] offender characteristics,[279] and firearms.[280] As a result of these cases, district courts have the power to vary from the Guidelines if they believe that their rules are incorrect in light of the principles for sentencing set out in § 3553(a).

B. Formal Errors

A formal error occurs when, due to a rule's trigger-based structure, the rule directs an outcome at odds with the background principle at stake. Below, I explain what I mean by the "form" of a rule. Then, in the following two sections, I show how the law of sentencing allows judges to depart or vary from the Guidelines in order to correct two kinds of formal errors, albeit only obliquely and inconsistently. I argue that federal law should be more direct and more consistent in permitting judges to reject the Guidelines' recommendations when they have reason for concern about formal errors, especially when sentence adjustments are particularly large or numerous.

A rule works, as explained earlier, by instructing a judge to make a particular factual or normative finding, which then triggers a predefined consequence. When a trigger is factual, it requires the judge to decide whether, given the applicable standard of proof, the fact in question is sufficiently likely to be true. For example, when a

---

275. *Id.* at 90, 110 (internal quotation marks omitted).

276. Spears v. United States, 555 U.S. 261, 264 (2009) (per curiam).

277. *See* United States v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010); United States v. Grober, 624 F.3d 592, 606 (3d Cir. 2010); United States v. Huffstatler, 571 F.3d 620, 623 (7th Cir. 2009); United States v. Vanvliet, 542 F.3d 259, 271 (1st Cir. 2008).

278. *See* United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 666 (2d Cir. 2008).

279. *See* Pepper v. United States, 562 U.S. 476, 488 (2011); United States v. Simmons, 568 F.3d 564, 568 (5th Cir. 2009).

280. *See* United States v. Cavera, 550 F.3d 180, 195 (2d Cir. 2008).

judge applies the speed limit, he or she must determine whether the driver exceeded sixty-five miles per hour. If so, the offender receives a ticket. When a trigger is normative, it asks the decision-maker to determine whether some particular value has been satisfied. For instance, the self-defense justification for murder depends on whether the defendant's use of self-defense was "reasonable." If it was, he or she is acquitted.[281] Two key features define this method of decision-making. First, it is *binary*. Second, it is *atomized*. This binary, atomized structure is the "form" of a rule.

Rules are binary because they turn on triggers. Triggers limit judges' decision-making to only two options. Either the trigger is satisfied and the rule's consequence applies, or the trigger is not satisfied and the rule's consequence does not apply. This makes rules look a little like on/off switches. A judge applying a rule must decide whether or not its trigger is fulfilled. If it is, the rule turns "on," and its specified consequence applies in full. If it is not, the rule stays "off," and there is no consequence at all. A standard, like a rule, may also feature a binary structure if it involves an analysis with just two possible outcomes. The speed limit standard referenced earlier, for example, asks only whether the defendant's driving was reasonably safe or not. At the same time, however, the qualitative nature of a standard allows it to take a non-binary form, directing a decision-maker to select from a broad range of options based on his or her general assessment of the case.

Rules are atomized because they turn on a limited number of triggers. Rules typically include just one trigger, and hardly ever more than two or three triggers, because anything more would become unmanageable. This means that rules break down situations into individual considerations, each weighed in isolation from the other, rather than all at once. A judge applying multiple rules to a single case, in other words, must make a discrete finding for whether each trigger for each separate rule has been fulfilled. Instead of conducting an overall assessment of the situation, the judge applies multiple rules seriatim, one at a time, in order to produce a result. A standard by, contrast, is not atomized because it involves a "totality of the circumstances" analysis. This comprehensive review of the case allows a judge to simultaneously weigh all the relevant considerations, rather than take them one-by-one in a broken-down, atomized fashion.

---

281. *Cf.* Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 40–41 (2012) (explaining that if the reason for using force was "nearly reasonable" and the level of force was "nearly reasonable[,]" then aggregating the defenses could lead to acquittal).

A rule commits an error of form when, due to the binary, atomized structure of trigger-based decision-making, it directs an outcome that is inconsistent with the background principle that it is supposed to implement. This can occur in one of two ways. First, the binary structure of rules makes them "bumpy," meaning that they fail to account for gradual changes in probabilistic or normative inputs. Second, the atomized structure of rules makes them "disaggregated," meaning that they fail to provide an overall evaluation of probabilities or normative weights. Because these errors are caused by the structure of a rule and not its content, a rule can commit a formal error *even if* it completely and correctly addresses all the relevant circumstances of a case.

1. Bumpy Rules

Rules are "bumpy," which means that their outputs do not account for gradual changes to their inputs. Rules therefore direct outcomes that do not accurately reflect the strength of the evidence or the normative weight of that evidence, creating tension—and sometimes outright contradiction—with the background principles they are intended to implement. As I show below, this problem occurs in two forms: probabilistic bumpiness and normative bumpiness. The law of sentencing has, in a few isolated places, allowed district courts to correct bumpy rules. However, I argue that policymakers and judges must do more to address this concern, particularly in cases involving large sentence adjustments.

a. Probabilistic and Normative Bumpiness

Adam J. Kolber uses the terms "bumpy" and "smooth" to describe the relationship between inputs and outputs in legal decision-making.[282] A law is "bumpy," he explains, "when a gradual change to the input sometimes dramatically affects the output and sometimes has no effect at all."[283] A law is "smooth," by contrast, "when, as the input gradually changes, the output gradually changes in the appropriate direction."[284] Kolber offers the example of a traditional light switch versus a dimmer knob to illustrate the difference between bumpy and smooth laws. Light switches are bumpy: "When the switch begins to arc from the off position to the on position, it has no effect at all on the light in the room. Then, at some particular

282. Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. 655, 661–62 (2014).

283. *Id.* at 657.

284. *Id.* at 661.

place along the path of the switch, the light suddenly turns on."[285] Dimmer knobs, by contrast, are smooth: "As you gradually turn the knob clockwise, the light emitted gradually increases. As you gradually turn the knob counterclockwise, the light emitted gradually decreases."[286]

Rules' being reliant on binary triggers makes them "bumpy" in their evaluation of factual probabilities and in their assessment of normative weights. To apply a rule, the judge must determine whether its trigger has been satisfied. If that trigger is tied to a fact, then the judge must decide whether the evidence for that fact satisfies the requisite burden of proof. If, alternatively, the rule's trigger is tied to a value, then the judge must decide whether that value has been satisfied. Either way, this is the "input" for the rule. As a result of the judge's determination, the rule's consequence will either apply in full or it will not apply at all. This is the "output" for the rule. Because each step in this process comprises a binary, "all-or-nothing" pair of options,[287] the rule's trigger is either fulfilled or not fulfilled; its consequence either applies or does not apply. The relationship between a rule's input and output is bumpy. As the input increases, nothing happens until the rule's trigger has been satisfied. Until that point, there is no output. After that point, the output applies in full. The greater a rule's consequences, the greater the disparity between its input and its output, and the bumpier it is. Standards, by contrast, employ a less rigid qualitative analysis, permitting judges to adjust legal outcomes in light of the applicable principles and thus avoid the bumpiness caused by binary rules.[288]

---

285. *Id.* at 662.

286. *Id.* at 661.

287. *Cf.* Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 834–35 (2012) (construing conviction as "an on-off decision, leading to all-or-nothing sentencing").

288. Professor Kolber observes that the smooth/bumpy distinction does not map perfectly onto the rule/standard distinction because the latter "helps us formulate a threshold test to distinguish permitted and prohibited conduct . . . [but] says nothing . . . about whether the penalty associated with crossing the threshold kicks in gradually or dramatically." Kolber, *supra* note 282, at 666. The speed limit, for example, can be articulated as a rule ("no driving faster than sixty-five miles per hour") or as a standard ("no driving faster than is reasonably safe"). Either way, however, that distinction serves only to identify what conduct constitutes illegal speeding. In both cases, the associated penalty could either be bumpy (a flat $100 fine for all violations) or smooth (a $10 fine for every mile-per-hour driven over sixty-five, or a fine proportional to the unreasonableness of the driver's speed). *See id.* "Hence," Professor Kolber concludes, "whether a threshold is framed as a rule or a standard, the penalty for violation can be either smooth or bumpy." *Id.* at 67. This is half true. While the consequences for both rules and standards can be made more or

Rules may be bumpy in two ways: probabilistically and normatively. Both forms of bumpiness will sometimes produce outcomes that are at odds with the rule's background principle. Remember, because these are errors of form, not substance, they will occur even if lawmakers design rules that completely and correctly address all the relevant factors in every case.

A rule with a factual trigger is probabilistically bumpy. As the probability of the fact's truth increases, there is no change in the rule's output until the applicable standard of proof has been satisfied. Once that threshold of proof has been crossed and the truth of the fact is established, the rule's output applies in full. Take the "Use of Body Armor" provision in the Sentencing Guidelines, which instructs the sentencing judge to raise a defendant's offense level by four if he or she finds that the offender used body armor in the commission of a drug-trafficking crime or a crime of violence.[289] As the evidence against a defendant piles up, the probability that he used body armor will increase—from ten percent to thirty percent to forty-nine percent—but there will be no change in consequences until the requisite probability threshold (fifty percent) has been crossed.[290] At that point, the judge will conclude that that the defendant indeed used body armor, and the rule's output—a four-level offense level increase—will apply in full. If the evidence continues to accumulate, and the probability that the defendant used body armor increases beyond fifty percent, there will, again, be no change in consequences.

Probabilistically bumpy rules will occasionally—and inevitably—produce outcomes at odds with their relevant background principles. For example, when a sentencing judge believes that there is a seventy percent chance that a defendant used body armor in the

---

less bumpy, the trigger-based nature of rules means that they will always be fundamentally bumpy. Only standards can be made perfectly smooth. Take, for example, Professor Kolber's example of a speed-limit rule with a smooth penalty—a $10 fine for every mile-per-hour driven faster than sixty-five. This is certainly less bumpy than an automatic $100 penalty imposed on all violators, regardless of their speed. But because it turns on a trigger—each mile per hour driven over the speed limit triggers a $10 increase in the fine—it is still inherently bumpy. The penalty does not distinguish, for instance, between a driver who traveled at seventy miles-per-hour and one who traveled at 70.9 miles-per-hour. Both receive the same $50 fine. Only a standard, which uses a qualitative analysis, can be made perfectly smooth because it allows decision-makers to select consequences that scale seamlessly to their assessments of the facts.

289. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.5 (U.S. SENTENCING COMM'N 2014).

290. *Cf.* Fisher, *supra* note 287, at 835 (explaining the threshold model of criminal conviction).

commission of a crime, he or she will apply the full four-point offense-level increase, even though there is a thirty percent chance that the defendant did not actually use body armor, and consequently, that the increase should not be applied at all. Put another way, for thirty percent of all such enhancements applied at seventy percent certainty, defendants will have their sentences extended despite the fact that they did not actually use body armor. In those cases where the defendant did not actually use body armor, the Guidelines' recommended sentence is longer than the § 3553(a) punishment standard would provide. Conversely, if the judge believes that there is no greater than a forty-nine percent chance that a defendant wore body armor, he or she will apply no offense-level increase, even though there is a high probability that he or she should have. In just under half of such cases, then, the sentence will be shorter than it should be according to the § 3553(a) principles.

A rule that turns on a value judgment is normatively bumpy.[291] As the normative weight supporting the value in question increases, there is no change in the rule's output. Once that value has been established, however, the rule's output applies in full. Consider, for example, the "Reckless Endangerment During Flight" provision in the Sentencing Guidelines, which instructs that if a sentencing judge finds that a defendant "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer," he or she should increase his offense level by two.[292] The input for this Guideline is a value judgment—it is triggered if the defendant's conduct while he fled from law enforcement was "reckless."[293] To make a finding of whether or not the defendant's behavior was reckless, the sentencing judge must base this consideration on a normative scale of carelessness. As the carelessness of the defendant's conduct increases, there will be no additional consequence until the judge concludes that the threshold for recklessness has been crossed. At that point, the rule's output—a two-level offense level increase—will apply in full. If the carelessness of the defendant's conduct increases beyond that required for recklessness, there will, again, be no further consequence.

Normatively bumpy rules will occasionally—and unavoidably—produce outcomes in tension with their relevant background principles. For instance, when a sentencing judge believes that a defendant's conduct just barely crosses the line into recklessness, he

---

291. *Cf.* Porat & Posner, *supra* note 281, at 6 (explaining that normative aggregation has "cross-claim[s], cross-element[s], and within-element variations").

292. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.2 (U.S. SENTENCING COMM'N 2014).

293. *Id.*

or she will apply the full four-level adjustment, even though that defendant is only barely culpable enough to warrant the increased punishment. A *marginally* reckless defendant, in other words, will receive the exact same sentence enhancement as an *egregiously* reckless defendant. Such an outcome seems in conflict with the § 3553(a) sentencing principles, which would suggest that the more reckless defendant should receive a longer sentence than the less reckless one.[294] Similarly, if the judge believes that a defendant's behavior fell just short of recklessness, then she will apply no increase at all, although that defendant may still have been quite careless. The just-barely-not-reckless defendant, then, will receive a significantly shorter sentence than the just-barely-reckless defendant. Again, the standards for sentencing set out in § 3553(a) would counsel in favor of a different outcome:[295] because these two defendants engaged in nearly identical conduct, they should receive the same punishment.

b. Bumpiness in the Law of Sentencing

The law of sentencing allows judges to reject Guidelines' recommendations when they pose problems of probabilistic or normative bumpiness, but it does so only obliquely and inconsistently. This is a problem, especially for particularly large—and thus particularly bumpy—sentence adjustments. In such cases, judges should correct the error by varying from the Guidelines and instead sentencing based on the § 3553(a) standard, which allows them to take into account subtler gradations in probabilities and norms.

The Second Circuit addressed the Guidelines' probabilistic bumpiness in *United States v. Gigante*,[296] a case involving two defendants convicted of extortion.[297] At sentencing, the Guidelines assigned each defendant a base offense level of eighteen, which, in combination with their criminal histories, would have yielded recommended sentences of twenty-seven to thirty-three months.[298] The district judge, however, applied several upward adjustments related to the defendants' roles in the offense, taking into consideration the amount of money they extorted and their attempts

---

294. *See* 18 U.S.C. § 3553(a) (2012).

295. *See id.*

296. 94 F.3d 53, 56 (1996).

297. *See* United States v. Gigante, 39 F.3d 42, 44, 46 (2d Cir. 1994), *vacated, reh'g denied and abrogated by* 94 F.3d 53 (2d Cir. 1996).

298. *Id.*; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENTENCING COMM'N 2014).

to obstruct justice.[299] In total, these enhancements raised the defendants' total offense levels to thirty-four and thirty-five, yielding much higher recommended sentences of 151 to 188 months and 168 to 210 months, respectively.[300] The judge ultimately imposed a 188-month sentence on one defendant and a 200-month sentence on the other.[301]

Although the Second Circuit affirmed both sentences, it also warned district judges to remain aware of the "danger of factual error" when they applied probabilistically bumpy offense-level adjustments, especially if those adjustments were particularly large.[302] The court contrasted the trigger-based nature of Guidelines' sentencing to the standard-based approach of "the pre-Guidelines era," noting that, back then, "the extent of judicial discretion was such that the sentence might be ratcheted in a rough way upward or downward according to the weight of the evidence."[303] The Second Circuit advised sentencing judges to reject the Guidelines' recommendations when the probability of the relevant facts was not commensurate with the extent of the applicable offense-level adjustments. In other words, the court held that district judges should depart from the Guidelines when they are particularly bumpy:

> In our view, the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. With regard to upward adjustments, a sentencing judge should require that the weight of the factual record justify a sentence within the adjusted Guidelines range. In doing so, the Court may examine whether the conduct underlying multiple upward adjustments was proven by a standard greater than that of preponderance, such as clear or convincing or even beyond reasonable doubt where appropriate. Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly.[304]

---

299. *Id.*

300. *Id.*; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENTENCING COMM'N 2014).

301. *See Gigante*, 39 F.3d at 44, 46.

302. *See id.* at 46–47.

303. *Id.*

304. *Id.*

By departing from the Guidelines in favor of the § 3553(a) standard, *Gigante* suggests that judges can factor "the weight of the evidence" into their sentencing decisions and thus ensure sentencing outcomes more consistent with the background principles of punishment.[305] This decision demonstrates that the judiciary is at least partly aware of the problem posed by probabilistically bumpy rules for deciding punishment. It also shows that the law of sentencing is capable of taking that problem into account.

The Sentencing Guidelines also hint at some awareness of the problems posed by normatively bumpy rules in the provision concerning departures for a defendant having an inadequate criminal history. The Guidelines, as mentioned above, instruct that judges should depart downward from a recommended sentence if the criminal history category "substantially over-represents the seriousness of the defendant's criminal history."[306] The policy statement appended to this section offers a crucial example: "A downward departure from the defendant's criminal history category may be warranted if . . . the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period."[307] This statement is, in effect, recognition that the rules for calculating a defendant's criminal history are normatively bumpy.[308] "[T]wo minor misdemeanor convictions close to ten years prior to the instant offense" will cross the normative threshold necessary to

---

305. Because *Gigante* was decided before *Booker*, the Court had to justify this departure authority using the text of the Guidelines and did so by holding that "the risk of factual error in a series of adjustments, each of which involves conduct proven by a bare preponderance, is a circumstance present at least 'to a degree' not adequately considered by the Commission." *Gigante*, 94 F.3d at 56 (citing 18 U.S.C. § 3553(b)). Of course, since *Booker* rendered the Guidelines non-binding, this doctrinal grounding is no longer necessary—as I explain further below, a variance would be perfectly appropriate in this situation.

306. U.S SENTENCING GUIDELINES MANUAL § 4A1.3(b)(1) (U.S. SENTENCING COMM'N 2014).

307. *Id.* § 4A1.3 cmt. 3.

308. *Cf.* United States v. Shoupe, 988 F.2d 440, 445 (3d Cir. 1993) ("'Criminal history' is, relatively, one of the most flexible concepts in the guidelines. While it is possible to classify the severity of current federal offenses with a reasonable degree of precision, mathematically accurate evaluation of the countless permutations of criminal history, involving offenses high and petty committed in numerous jurisdictions, would be at best unwieldy. The Sentencing Commission recognized this difficulty, and though it prescribed a mathematical method to calculate criminal history, it specifically identified overstatement or understatement of the seriousness of the defendant's past conduct as a ground for departure from the raw criminal history score.").

trigger an increase to a defendant's criminal history category.[309] Yet they are so close to the normative line that the policy statement suggests that it would be a mistake to enhance an offender's sentence on that basis alone. In such cases, again, departing from the Guidelines in favor of the § 3553(a) standard allows judges to finely tune their sentences based on a more gradated assessment of the case. Although the Commission has only addressed the problem of normative bumpiness in this one, relatively obscure corner of the Guidelines, the same potential error, of course, may occur with the application of any of the rules in the Guidelines that turn on value-based triggers.

The law of sentencing can and should address the errors caused by probabilistically and normatively bumpy rules by expanding judges' authority to depart or vary from the Guidelines in such cases. This expansion should begin with the largest sentence adjustments, which are also the bumpiest and thus commit the most significant formal errors. Take, for example, the Sentencing Guidelines' provision for the crime of possessing dangerous weapons or materials aboard an aircraft.[310] The Guidelines assign a base offense level of nine for the crime, but then instruct that the judge should apply a *fifteen-level* increase if the offense "was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life."[311] That upward adjustment would *quintuple* the recommended prison sentence for a first time offender, potentially based on only a fifty-one percent certain factual trigger.[312] The disparity between the input and output for this rule is quite significant, making this Guideline extremely bumpy. Although gun-toting aircraft passengers are probably not the primary concern of sentencing policymakers, this is not the only large upward adjustment in the Guidelines.[313] The Guidelines' drug-trafficking provisions, which are a significant focus of criminal justice reformers and apply in approximately one-third of all federal sentencings,[314]

---

309. U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 cmt. 3 (U.S. SENTENCING COMM'N 2014); *see id.* §4A1.1(b), (c).

310. *Id.* § 2K1.5.

311. *Id.* § 2K1.5(a), (b).

312. *See* Schuman, *supra* note 88, at 229–30.

313. The crime of mishandling environmental pollutants, for example, has a base offense level of six, which is increased by eleven points if "the offense resulted in a substantial likelihood of death or serious bodily injury." U.S. SENTENCING GUIDELINES MANUAL § 2Q1.3(a), (b)(2) (U.S. SENTENCING COMM'N 2014).

314. *See* U. S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. A: Offenders in Each Primary Offense Category, http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/201

are also extraordinarily bumpy. Drug-trafficking sentences depend, in large part, on the sentencing judge's determination of the quantity of drugs involved in the offense, a fact finding that has the potential to effectively increase a defendant's offense level by as many as *thirty-two levels*.[315] Indeed, drug-quantity determinations routinely result in increases of ten offense levels or more.[316]

District courts should therefore be ready to use their authority under *Booker* to vary from Guidelines' recommendations that involve especially large sentence adjustments. When a judge calculates a Guidelines' sentence using a particularly bumpy rule, the output may either fail to accurately reflect the strength of the evidence in the case (probabilistic bumpiness) or the normative weight of that evidence (normative bumpiness). In such cases, the Guidelines' recommendation will not be consistent with the principles of sentencing set out in § 3553(a). Under *Booker*, then, the sentencing judge may vary from the Guidelines' recommendation in favor of a qualitative application of the § 3553(a) standard, which would allow him or her to take into account the gradations in the relevant evidence and norms and impose a more appropriate sentence.[317] Meanwhile, at a systemic level, Congress and the Sentencing Commission should reform the federal law of sentencing to address the problems caused by bumpy rules. For instance, to make the Sentencing Guidelines smoother, they could decrease the size of the largest sentence adjustments, which would ensure a closer relationship between each rule's inputs and outputs. Or, to account for the bumpiest rules, policymakers could add a downward departure to the Guidelines for cases involving particularly large sentence adjustments, such as drug-trafficking offenses.[318]

2. Disaggregated Rules

Rules are "disaggregated," which means that they break down their analysis of a situation into individual, isolated components. Rules, therefore, direct outcomes that are inconsistent with an

---

2/FigureA.pdf.

315. Schuman, *supra* note 88, at 252.

316. *See* United States v. Mills, 710 F.3d 5, 13 (1st Cir. 2013) (twelve level upward adjustment); United States v. Correa-Alicea, 585 F.3d 484, 488 (1st Cir. 2009) (four level upward adjustment); United States v. Jarvi, 537 F.3d 1256, 1258 (10th Cir. 2008) (twelve level upward adjustment); United States v. Culps, 300 F.3d 1069, 1077 (9th Cir. 2002) (sixteen level upward adjustment).

317. *See* United States v. Booker, 543 U.S. 220, 267 (2004).

318. *Cf.* Schuman, *supra* note 88, at 268–69 (suggesting one such reform for the drug-trafficking Guideline).

overall evaluation of the case, thus contradicting their background principles. As I show below, this problem, just like bumpiness, occurs in two forms: probabilistic disaggregation and normative disaggregation. The law of sentencing has provided a partial means to correct disaggregated rules, but I contend that policymakers and judges must do more to address this concern, particularly in cases involving multiple sentence adjustments.

a. Probabilistic and Normative Disaggregation

Ariel Porat and Eric Posner identify "aggregation puzzles" as "an important vulnerability at the heart of the law."[319] Because the law "relies on legal categories that organize the judicial treatment of disputes," and because "[t]hese categories operate at different levels of generality," judges frequently must "disregard information that is relevant to an *overall* evaluation of the asserted wrongdoing."[320] In particular, the professors say, the law fails to aggregate "two types of things: factual information and normative weight."[321]

Rules' atomization of the facts of a case into separate triggering factors means that when a judge applies multiple rules, they will be "disaggregated" in their evaluation of factual probabilities and their assessment of normative weights.[322] When a judge applies a rule, he or she is effectively analyzing a situation based on only one specific triggering factor. When he or she applies multiple rules, each triggering factor "is considered separately, isolated from" the other, such that "some of the factual information that is relevant for evaluating" the overall merits of the case "may need to be

---

319. Porat & Posner, *supra* note 281, at 4, 7; *see also* Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 MINN. L. REV. 261, 266 (2009) (discussing the utility and potential objections to implementing the aggregate probabilities principle in various areas of the law).

320. Porat & Posner, *supra* note 281, at 7 (emphasis added).

321. *Id.* at 8.

322. Professors Porat and Posner only hint at the relationship between rules and disaggregation:

> All of the[se] cases reflect a familiar rules/standards tradeoff. . . . The basic breakdown of wrongdoing into bodies of law, and then those bodies of law into claims, and those claims into elements, brings a regimented clarity to the process of learning and applying the law. But the disaggregation of wrongdoing into a series of rules comes at a cost: morally relevant information is lost.

Id. at 9.

disregarded when one claim is evaluated, and other factual information disregarded when the other claim is evaluated."[323] As a result, if a case falls just short of fulfilling the triggers for two separate rules, neither of the consequences for the rules will apply, even though an overall evaluation of the case might have counseled in favor of applying at least one of them.[324] Standards, by contrast, apply a qualitative analysis to the "totality of the circumstances" of each case, allowing judges to consider all the facts of a situation simultaneously and, thus, to avoid the disaggregation caused by atomized rules.

Once again, there are two forms of disaggregation: probabilistic and normative. Both probabilistically and normatively disaggregated rules will sometimes produce outcomes that contradict their relevant background principles. Recall, that these are errors of form, not substance. Such errors will occur even if lawmakers design rules that completely and correctly address all the relevant factors for every case.

Rules with factual triggers are probabilistically disaggregated. When a judge applies multiple fact-triggered rules to a single case, he or she is unable to perform an overall evaluation of the evidence. Imagine, for instance, a defendant sentenced under the "aggravated assault" provision of the Sentencing Guidelines.[325] At the sentencing hearing, the district judge concludes, based on the evidence, that it is forty-five percent likely that the defendant planned the assault (a two-level increase), forty-five percent likely that he discharged a firearm (a five-level increase), forty-five percent likely that the victim suffered an injury (a three-level increase), and forty-five percent likely that the defendant was motived by a payment of money (a two-level increase).[326] Because the judge considers each adjustment in isolation, none of them will apply, and the defendant will not receive an increased sentence. Yet, if we aggregated the probabilities for each adjustment, we would find that it is over ninety percent certain that *at least one* of them should have applied (in other words, that at least one of the triggering facts was actually true).[327] Conversely, if the judge believed it fifty-five percent likely that each of the upward adjustments should apply, then the defendant's offense level would be increased by twelve, even though,

---

323. *Id.* at 7.

324. *See id.* at 8.

325. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (U.S. SENTENCING COMM'N 2014).

326. *See id.* § 2A2.2(b)(1)–(3), 5.

327. Again, this assumes that the evidence for each adjustment is independent. *See* Porat & Posner, *supra* note 281, at 5 n.1.

aggregating the probabilities, the odds that at least one of the adjustments was wrongly applied would, again, be over ninety percent (in other words, that at least one of the triggering facts was not actually true).

Probabilistically disaggregated rules produce outcomes that contradict their relevant background principles. For example, if there are four factually triggered upward adjustments that might apply to a case, and each adjustment is supported by evidence establishing that the relevant fact is forty-five percent likely to be true, then none of the adjustments will apply, and the defendant will receive no increased punishment. Treating each sentence enhancement individually, this outcome seems simpatico with the § 3553(a) principles: In no case did the evidence establish that the aggravating circumstance had occurred, and therefore no increased punishment should be imposed. But if we conducted an overall evaluation of the case, we would find it over ninety percent likely that at least one of the adjustments should have applied, and accordingly, that the unenhanced sentence was contrary to the § 3553(a) sentencing standard. Conversely, if the evidence establishes with fifty-five percent certainty that each of the four upward adjustments should apply, then all four will apply. Yet when considered in aggregate, the odds are less than ten percent that the defendant will actually merit the full increase in his or her prison term that will result. The § 3553(a) standard, if applied to the situation as a whole, would favor a shorter sentence than the one the Guidelines will recommend.

Rules with value-based triggers are normatively disaggregated, and face a similar problem.[328] This time, imagine a defendant for whom the sentencing judge finds that the facts almost satisfy—just barely fall short of satisfying—the following normatively triggered Guidelines' provisions: the defendant's crime targeted a "vulnerable" victim (two-level increase),[329] the defendant was a "leader" in the commission of the crime (two-level increase),[330] the defendant "obstructed justice" with respect to the investigation and prosecution of the crime (two-level increase),[331] and the defendant "recklessly created a substantial risk of death or serious bodily injury to another" while fleeing from a law enforcement officer (two-level

328. Professors Porat and Posner identify a few additional types of aggregation puzzles. These include "cross-element factual aggregation," "within-element factual aggregation," and "cross-person aggregation." *See id.* at 5–7.

329. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM'N 2014).

330. *Id.* § 3B1.1(c).

331. *Id.* § 3C1.1.

increase).[332] Considered separately, none of these upward adjustments will apply, even though, if their normative weights were aggregated, their combined weight might be enough to merit an increase in the defendant's offense level. Conversely, if the judge finds that the normative threshold for each of the four upward adjustments has just barely been satisfied, then the defendant's offense level will increase by eight levels even though, if we aggregated the normative weights, they would not seem to justify such a significant increase.

Normatively disaggregated rules, then, produce outcomes in tension with the background principles they are intended to implement. For instance, if the evidence falls just short of satisfying the normative threshold for four separate two-level upward adjustments (say, vulnerable victim, leader in offense, obstruction of justice, and reckless flight),[333] none of the enhancements will apply, and the defendant will suffer no increased punishment. Yet considered in the aggregate, the crime is clearly quite serious, and the § 3553(a) factors would counsel in favor of a longer sentence. Conversely, if the evidence just barely crosses the normative threshold for all four enhancements, then the defendant's offense level will be increased by eight, and his recommended sentence significantly increased, even though an overall evaluation of his wrongdoing would show that his conduct was not quite so bad. The § 3553(a) sentencing standard, once again, would favor a more lenient sentence.

b. Disaggregation in the Law of Sentencing

The law of sentencing gives judges some limited power to reject the Guidelines' recommendations when they pose problems of normative bumpiness, but not of probabilistic bumpiness. This is a concern, especially for cases involving particularly numerous—and thus particularly disaggregated—sentence adjustments. In such cases, judges should vary from the Guidelines and instead sentence based on the § 3553(a) standard, which allows them to conduct an overall evaluation of the probabilities and norms at issue in the case.

The Guidelines' provision that concerns departures based on multiple circumstances partially allows judges to correct errors caused by normatively disaggregated rules. The provision reads as follows:

---

332. *Id.* § 3C1.2.

333. *See id.* §§ 3A1.1(b)(1); 3B1.1(c); 3C1.1; 3C1.2.

> The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if . . . such offender characteristics or other circumstances, taken together, make the case an exceptional one; and . . . each such offender characteristic or other circumstance is . . . present to a substantial degree; and . . . identified in the guidelines as a permissible ground for departure.[334]

Here, the Guidelines recognize the problem posed by normative disaggregation and provide a limited solution to it. According to the provision, when a judge confronts a case in which multiple identified grounds for departure are each present to a "substantial degree," but none of which are sufficiently satisfied to justify a departure on its own, he or she may combine their normative weight and use that aggregated evaluation of the case as a ground for departure. This recognition of normative disaggregation, however, is quite limited. First, it does not apply to offense-level adjustments or criminal history calculations, but only to grounds for departure. Second, it does not account for probabilistic disaggregation—in other words, if a judge were forty-five percent sure of the facts supporting several different grounds for departure, the provision would not permit him or her to depart on that basis.

The law of sentencing can and should expand judges' authority to depart or vary from the Guidelines in order to correct for problems caused by probabilistically and normatively disaggregated rules. It should start with cases involving the most sentence enhancements since these present the most extreme disaggregation. Imagine, for instance, a case involving ten different two-level sentence enhancements. Even if the sentencing judge is ninety percent confident that all ten enhancements should apply, the overall odds that the resulting twenty-level increase is justified will be less than forty percent.[335] Imposing such a substantially increased punishment based on such a low overall level of certainty risks a significant formal error. Unfortunately, it is difficult to predict what kinds of cases feature the largest number of sentence adjustments. Every case is different, and the Guidelines provide such a broad

---

334. *Id.* § 5K2.0(c).

335. If the odds that each enhancement has been properly applied are .9, then, again, assuming that the evidence for each adjustment is independent, *see* Porat & Posner, *supra* note 281, at 5 n.1, the odds that all ten will have been properly applied are .910, which equals approximately .35 or thirty-five percent.

array of sentence adjustments, both offense-specific[336] and general,[337] that any given set of facts might trigger a number of different possible adjustments. The Sentencing Commission, moreover, although it publishes an impressive set of data regarding federal sentencing, does not make information available on the number of sentence adjustments applied in each case. Therefore, this is an important area for further study.

District courts have the authority under *Booker* to vary from Guidelines' recommendations when they involve a particularly large number of sentence adjustments.[338] When a judge sentences a defendant based on the application of multiple sentence adjustments, the recommended sentence will either fail to reflect an overall evaluation of the strength of the evidence in the case (probabilistic disaggregation) or the normative weight of that evidence (normative disaggregation). The Guidelines' recommendation will therefore fail to capture the principles of sentencing set out in § 3553(a). Accordingly, under *Booker*, the sentencing judge will have the authority to vary from the Guidelines and instead perform a qualitative analysis of the case under the § 3553(a) sentencing standard, which will allow him or her to aggregate the totality of the evidence and norms presented by the case and impose a more accurate sentence.[339] On a policy level, Congress and the Sentencing Commission should reform sentencing law to take account of problems caused by disaggregated rules. To make offense-level calculations less disaggregated, for example, policymakers could limit the number of sentence adjustments that may be applied in each case in order to ensure that recommended sentences do not skew too far from an overall assessment of the case. Alternatively, to account for the most disaggregated cases, they could add a departure to the Guidelines for cases involving a particularly large number of sentence enhancements.

---

336. *See generally* U.S SENTENCING GUIDELINES MANUAL ch. 2 (U.S. SENTENCING COMM'N 2014) (providing that each offense "may have one or more specific offense characteristics that adjust the offense level upward or downward").

337. *See generally id.* ch. 3 (providing for adjustments based on the following factors: (1) characteristics of the victim; (2) the defendant's role in the offense; (3) whether the defendant obstructed or impeded the administration of justice; (4) whether the defendant committed multiple counts; and (5) whether the defendant accepted responsibility for the offense).

338. *See* United States v. Booker, 543 U.S. 220, 265 (2004).

339. *See id.*

CONCLUSION

There are two basic ways to decide punishment: determinate sentencing and indeterminate sentencing. Determinate sentencing means that the legislature sets a defined punishment for each crime. Indeterminate sentencing means that a judge has discretion to select an appropriate punishment for each individual offender. Debates over sentence determinacy have centered around three main questions: Who should decide punishment? What makes punishment fair? Why do we punish wrongdoers? In this Article, I asked a new, fourth question: How should we decide punishment? I then explored the role that rules and standards play in sentencing decisions. In particular, I demonstrated how the federal law of departures and variances is intended to correct the inevitable errors that result from rule-based decision-making, although it is primarily focused on substantive, rather than formal, errors.

Exploring the intersection between sentence determinacy and legal form can teach us much on both fronts. First, the federal Guidelines comprise an extremely rule-intensive decision-making process, and both the Sentencing Commission and the judiciary have expended considerable time and attention on identifying and resolving the errors that sometimes result from that process. The law governing departures and variances from the Guidelines thus reflects the collected work and wisdom of countless policymakers and judges attempting to identify and rectify the errors that occur when rules are applied in the real world. By examining where and when the law allows judges to reject Guidelines' recommendations, we can learn more about all the ways that rule-based decision-making sometimes fails, not only in sentencing, but across the board. Second, the study of rules and standards provides a consistent conceptual framework through which to view the law of sentencing. By thinking about criminal punishment in this way, we can discover connections, inconsistencies, and areas for improvement that we may not have seen before.

Substantive and formal errors, as well as incomplete, incorrect, bumpy, and disaggregated rules, are not unique to sentencing. They are present any time legal decisionmakers use rules to resolve disputes. Because policymakers cannot always have flawless foresight or judgment, all rules will eventually commit the occasional substantive error, either because they are incomplete or incorrect. Even if policymakers could design perfectly complete and correct laws, moreover, the binary and atomized structure of rules makes them inherently bumpy and disaggregated, meaning that they will inevitably commit formal errors. Remaining aware of these errors is therefore vital not just in the law of sentencing, but in all areas of our justice system.