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in the context of charging decisions and plea offers? Would giving defendants these rights increase the perceived legitimacy of the criminal justice system? See Michael O'Hear, Plea Bargaining and Procedural Justice, 42 Ga. L. Rev. 407 (2008). Or would such requirements prove so cumbersome that prosecutors would evade them—moving decisions about charges and plea offers even farther into the shadows than they are now? Which safeguards are both required for fairness and workable in practice?

Administrative law suggests other caveats for plea bargaining. Judge Lynch observes that prosecutors essentially "adjudicate guilt and set punishments." If one takes seriously the notion that charging and bargaining are an administrative process, should criminal law follow the administrative-law principle that those who investigate a case should be barred from adjudicating—in this case, from deciding what to charge or what plea to accept? Some scholars argue that this is a workable means to police plea bargaining.[25] For additional institutional-design proposals, see Stephanos Bibas, Prosecutorial Regulation versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959 (2009).

2. The federal/state contrast. Judge Lynch focuses especially on the dynamics of charging and bargaining in federal prosecutions for white-collar crime. That setting has several distinctive features. First, although no prosecutor's resources are ever unlimited, the U.S. Attorney's Office, together with the federal agencies that investigate white-collar crime—for example, the Securities and Exchange Commission and the Environmental Protection Agency—have enormous resources at their disposal for investigating and trying cases. Second, the federal prosecutor has more freedom to set priorities and choose cases than her state counterpart does. Some white-collar cases (such as fraud) can be referred out for prosecution in the state courts, and nearly all cases can be downgraded to civil enforcement actions or dropped completely; in state courts, in contrast, much of the caseload consists of traditional crimes against persons and property that may be more difficult to disregard. Finally, the white-collar defendant in a federal case is typically represented by experienced, well-compensated counsel.

What safeguards would be appropriate to ensure that an "administrative" system functions properly when (as in more than 80 percent of all criminal cases) the defendant is represented by the public defender or by court-appointed counsel paid under a schedule of strictly limited fees?

C. SENTENCING

In no area of contemporary criminal law is there as much controversy, as much doctrinal movement, and as much diversity of approach throughout

25. E.g., Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009).

the country as there is in matters relating to sentencing. In historical perspective, this is a comparatively recent phenomenon. Until the 1970s, sentencing at the federal level and in almost all states took largely the same discretionary and indeterminate form. Trial judges could select any sentence within wide statutory boundaries, subject to few if any constraints. After the defendant had served some proportion of a sentence behind bars, parole officials could determine the ultimate release date. Regimes with these parole powers were deemed indeterminate sentencing schemes because defendants sentenced to prison did not learn their actual date of release until a parole board made its decision, usually many years later. Today, some form of discretionary sentencing scheme—with or without indeterminate powers in a parole board—remains in effect in more than half the American states.[26] But dissatisfaction with so much discretion from across the political spectrum triggered fundamental change in many places. Numerous jurisdictions have replaced their traditional systems with alternatives that limit—sometimes drastically—the discretion of the sentencing judge and parole officials.

In Chapter 2 we considered sentencing from a strictly substantive angle. We sought to examine the justification of punishment and to discuss which facts about an offender or his offense should be deemed relevant in determining the kind and degree of punishment imposed. We considered these issues as they would be confronted by any decision maker, in any legal setting, who was empowered to select an optimally appropriate sentence. Embedded in those issues, of course, is the problem of determining who the decision maker should be and what should be the constraints under which that decision maker operates. Accordingly, we touched briefly on recent developments that modify the traditional discretion of the sentencing judge. See pages 124-130 supra.

Here we examine these developments in depth. We consider the concerns that prompted them, the legal issues they have spawned, and their implications for the rule of law. Section C.1 examines the traditional discretionary approach and Section C.2 discusses the newer determinate systems, including the federal sentencing guidelines and the recent round of problems and reforms prompted by the Supreme Court's renewed attention to the relationship between the jury's role and sentencing.

1. Discretionary Sentencing Systems

WILLIAMS v. NEW YORK

Supreme Court of the United States
337 U.S. 241 (1949)

JUSTICE BLACK delivered the opinion of the Court.

A jury in a New York state court found appellant guilty of murder in the first degree. The jury recommended life imprisonment, but the trial judge

26. Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 741 n.74 (2005).

imposed sentence of death. In giving his reasons . . . the judge discussed in open court the evidence upon which the jury had convicted, stating that this evidence had been considered in the light of additional information obtained through the court's "Probation Department, and through other sources." . . .

The Court of Appeals of New York affirmed the conviction and sentence over the contention that . . . the controlling penal statutes are in violation of the due process clause of the Fourteenth Amendment . . . "in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." . . .

The evidence [at trial] proved a wholly indefensible murder committed by a person engaged in a burglary. The judge instructed the jury that if it returned a verdict of guilty as charged, without recommendation for life sentence, "The Court must impose the death penalty," but if such recommendation was made, "the Court may impose a life sentence." The judge went on to emphasize that "the Court is not bound to accept your recommendation."

About five weeks after the verdict of guilty with recommendation of life imprisonment, and after a statutory pre-sentence investigation report to the judge, the defendant was brought to court to be sentenced. [T]he judge . . . narrated the shocking details of the crime as shown by the trial evidence, [and] stated that the pre-sentence investigation revealed many material facts concerning appellant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury. . . . He referred to the experience appellant "had had on thirty other burglaries in and about the same vicinity" where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed "a morbid sexuality" and classified him as a "menace to society." The accuracy of the statements made by the judge as to appellant's background and past practices were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.

The case presents a serious and difficult question [concerning] the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant. Within limits fixed by statutes, New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants. . . . To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. The sentencing judge may consider such information even though obtained outside the courtroom from

persons whom a defendant has not been permitted to confront or cross-examine. . . .

Appellant urges that the New York statutory policy is in irreconcilable conflict with . . . the due process of law clause of the Fourteenth Amendment [and its requirement] that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses. . . .

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. . . .

In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. . . . Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced . . . by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. . . . Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-

judicial implementation has been accepted as a wise policy. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. [A] strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.

. . . Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork. . . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. [W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice. . . . We hold that appellant was not denied due process of law.

JUSTICE MURPHY, dissenting. . . . Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him. I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.

Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257, 276-277 (1952): The practical problem which is posed is not that of admissibility but the utilization of procedural devices to ensure accuracy and allow argument on the relevancy of the disclosed information to the particular circumstances of the case. The presentence probation report in *Williams v. New York* illustrates this problem. The probation department there concluded that Williams was a "psychopathic liar" whose ideas "revolve around a morbid sexuality," that he was "a full time burglar," "emotionally unstable," "suffers no remorse," and was deemed to be "a menace to society." His criminal record, confined to a charge of theft when he was 11 years old and a conviction as a wayward minor, did not support such generalizations. The conclusions of the probation department were apparently based upon (1) stolen goods found in his room, (2) identification of Williams by a woman whose apartment he allegedly burglarized and a seven-year-old girl he had allegedly raped, (3) allegations that he had committed "about 30 burglaries," and (4) ". . . information" that he had acted as a "pimp" and had been observed taking indecent photographs of young children. Aside from the truth or falsity of these statements or their adequacy as a basis for a death sentence, in this case life or death turned upon conclusions drawn by probation officers from hearsay and from unproven allegations. Such information is highly relevant to the question of sentence, but its accuracy depends upon the ability and fairness of the probation officer, who must weigh evidence, judge the credibility of the informants and be zealous in closely examining them. [A]t best this method of ascertaining facts has serious deficiencies because it relies for cross-interrogation and cross-investigation upon one "who has neither the strong interest nor the full knowledge that are required," and which usually only the defendant can provide.

NOTES

1. Developments in sentencing law after **Williams.** Some aspects of *Williams* have not withstood the test of time. In *capital* cases, *Williams* has in effect been overruled. In Gardner v. Florida, 430 U.S. 349 (1977), a jury recommended life imprisonment, but the judge, relying on a confidential presentence report, sentenced the murder defendant to death. The Court found the procedure constitutionally defective and vacated the death sentence. A plurality emphasized that constitutional developments since *Williams* now mandate heightened care in death penalty sentencing and rejected the state's argument that confidentiality was necessary to "enable investigators to obtain relevant but sensitive disclosures from persons unwilling to comment publicly." The Court has also since made clear that sentencing hearings must comport with many due process requirements; the defendant must, for example, be afforded the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128 (1967).

But in most particulars, the holding in *Williams* has proved durable. For non-capital cases, the central holding of *Williams*—that the federal Constitution does not bar reliance on confidential information at sentencing—remains undisturbed. And judges relying on such information continue to make critical factual findings that dictate a defendant's sentence.

Nonetheless, most states now allow felony defendants to review the presentence report, or at least most portions of it, prior to imposition of sentence. Federal practice affords less disclosure. Fed. R. Crim. Pro. Rule 32(d), guarantees the defense unrestricted access to a document called "the presentence report," (PSR) but it allows the judge to receive other information in a separate document that is not made available to the defense. The report supplied to the defendant "must exclude" three types of information that the judge receives confidentially: a diagnostic opinion that, if disclosed, might disrupt a rehabilitation program; "information obtained on a promise of confidentiality"; and "information that, if disclosed, might result in physical or other harm to the defendant or others." The defendant receives only the trial judge's summary of information excluded from the report. Rule 32 gives the defense an opportunity to comment on the report, and at the court's discretion, to offer evidence to rebut alleged factual inaccuracies. But in cases of factual dispute, the prosecution needs to prove its version only by a preponderance of the evidence. Moreover, the defendant usually is afforded no opportunity to confront or cross-examine those who may have provided adverse information. See Alan Michaels, Trial Rights at Sentencing, 81 N.C. L. Rev. 1771 (2003).

For a sense of what these rules can mean in practice, consider United States v. Weston, 448 F.2d 626 (9th Cir. 1971). The defendant was convicted of transporting 537 grams of heroin. The PSR asserted that federal agents "feel that she . . . has been the chief supplier to the Western Washington area," making trips to Mexico every two weeks and earning up to $140,000 in profit on each trip. Their source for these conclusions, presumably a confidential informant, was not disclosed. Defense counsel hotly denied the accusation, saying that he "had never seen Weston display any sign of wealth," and "can't conceive of what type of investigation I can do to come back and say that she isn't [a major dealer]." Nonetheless, the trial judge stated that, with nothing more than the defendant's vehement denial, he had "no alternative . . . but to accept as true the information [obtained from] the Federal Bureau of Narcotics." He then imposed the maximum sentence, 20 years' imprisonment. Was the judge's action justified, or should he have disregarded the accusation and treated Weston as a low-level dealer? Which approach runs the greater risk of an inappropriate sentence?

One solution, endorsed in the Second Circuit, has become known as the *Fatico* hearing. In United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979), the defendant had been convicted of conspiracy to possess stolen furs. The presentence report described him as an "upper echelon" figure in organized

crime. The FBI refused to identify its source, a confidential informant, "for the obvious reasons that both his life and usefulness as an informant would be jeopardized." The sentencing judge held an evidentiary hearing on the allegations but allowed the FBI agents to report the hearsay accusations only if the government also offered significant corroboration. Seven FBI agents testified that 17 informants had independently told them of Fatico's high-level involvement in organized crime, and the judge, accepting their testimony, imposed a sentence close to the applicable maximum. The court of appeals upheld this approach, confirming the district judge's discretion to hold such a hearing "where there is reason to question the reliability of material facts having in the judge's view direct bearing on the sentence to be imposed, especially where those facts are essentially hearsay." Id. at 1057 n.9 (1979). This approach, of course, falls far short of the evidentiary requirements for proving guilt at trial, and even this modest safeguard is left to the discretion of the trial court. In practice, judges often decline to take even this limited step towards assuring factual reliability.

Questions: Is the *Fatico* hearing too burdensome? Insufficient to protect against unreliable accusations? Both?

2. Discretion and the rationale of punishment. What purposes of punishment call for individualized sentencing and wide discretion for the decision maker? In *Williams*, the Court defends individualization on the ground that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation have become important goals." Indeed, the premise of indeterminate sentences, with broad discretion for judges and parole officials, rests on the aim of rehabilitation.

Indeterminate sentencing fell into disfavor in the 1970s both because of a concern with disparity and because of doubts that rehabilitation was effective and that parole officials could identify when a prisoner was, in fact, rehabilitated. See Tapia v. United States, 131 S. Ct. 2382, 2387 (2011); Michelle S. Phelps, Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs, 45 Law & Soc'y Rev. 33, 36-38 (2011). When Congress overhauled federal sentencing with the Sentencing Reform Act in 1984, it eliminated parole and cabined judicial discretion based on these concerns. And although judges are charged under 18 U.S.C. §3553(a)(2)(D) with considering what sentence will provide the defendant with "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," the Sentencing Reform Act also made clear that judges must "recognize[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). Thus, while rehabilitation may still be a goal of sentencing in the federal system, it cannot be used as a justification for imposing or extending a term of incarceration. *Tapia*, 131 S. Ct. at 2388-2389. Although the rhetoric around rehabilitation has changed over time, the amount of actual programming in prisons has stayed relatively modest and constant from the 1970s until today; its emphasis,

however, has changed from academic programs to reentry-related counseling. Phelps, supra, at 56-59. Sharon Dolovich argues that whatever benefit flows from the minimal rehabilitation programming that is offered in prison, it is outweighed by the harm to rehabilitation caused by the dehumanizing experience of incarceration itself. Sharon Dolovich, Foreword: Incarceration American-Style, 3 Harv. L. & Pol'y Rev. 237, 245-254 (2009).

Is rehabilitation the only theory of punishment that requires individualized determinations? If we understand retribution to mean punishment tailored to the culpability of the offender, doesn't retribution also require a highly individualized, discretionary judgment? Even if we understand retribution and deterrence to mandate a punishment set solely as a function of the seriousness of the offense, don't these goals still require a highly individualized, discretionary judgment about the nature of the offense in that particular case? Conversely, can a highly discretionary system *undermine* any goals of punishment? Consider the comments that follow:

Francis Allen, The Borderland of Criminal Justice 32-36 (1964): [The] rehabilitative ideal has been debased in practice and . . . the consequences . . . are serious and, at times, dangerous. [U]nder the dominance of the rehabilitative ideal, the language of therapy is frequently employed, wittingly or unwittingly, to disguise [a] fixation on problems of custody. . . . Even more disturbing [is] the tendency of the staff to justify these custodial measures in therapeutic terms. . . . Surprisingly enough, the therapeutic ideal has often led to increased severity of penal measures.

[A] study of criminal justice is fundamentally a study in the exercise of political power. No such study can properly avoid the problem of the abuse of power. The obligation of containing power within the limits suggested by a community's political values has been considerably complicated by the rise of the rehabilitative ideal. For the problem today is one of regulating the exercise of power by men of good will, whose motivations are to help, not to injure. . . . There is a tendency for such persons to claim immunity from the usual forms of restraint and to insist that professionalism and a devotion to science provide sufficient protection against unwarranted invasion of individual rights. . . .

Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element. . . . As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling reasons.

Marvin Frankel, Criminal Sentencing: Law Without Order 5, 9-11, 17-23, 98-102 (1973): [T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law. . . .

The ideal of individualized justice is by no means an unmitigated evil, but it must be an ideal of justice *according to law*. This means we must reject

individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others.

[S]weeping penalty statutes allow sentences to be "individualized" not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench. It is no wonder that wherever supposed professionals in the field—criminologists, penologists, probation officers, and, yes, lawyers and judges—discuss sentencing, the talk inevitably dwells upon the problem of "disparity." . . . The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes.

[T]he tragic state of disorder in our sentencing practices is not attributable to any unique endowments of sadism or bestiality among judges as a species. [J]udges in general, if only because of occupational conditioning, may be somewhat calmer, more dispassionate, and more humane than the average of people across the board. But nobody has the experience of being sentenced by "judges in general." The particular defendant on some existential day confronts a specific judge. The occupant of the bench on that day may be punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic. The vice in our system is that all such qualities have free rein as well as potentially fatal impact upon the defendant's finite life.

Such individual, personal powers are not evil only, or mainly, because evil people may come to hold positions of authority. The more pervasive wrong is that a regime of substantially limitless discretion is by definition arbitrary, capricious, and antithetical to the rule of law.

Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment 33 (1976): [T]he vagaries of sentencing—one convicted robber being sentenced to life and another placed on probation—have seriously affected the deterrent value of criminal sanctions. For many convicted offenders, there is what amounts to amnesty. And for other offenders, often undistinguishable from the first group in terms of past record, current crime, or future dangerousness, there is the injustice of the exemplary sentence. The judge, aware that most persons who commit the particular crime are not sentenced to prison, determines to make an example of this offender and thus sentences him to an unfairly long term. Such haphazard sentencing does little to increase the deterrent impact of the criminal law, since the potential criminal is likely to calculate his potential sentence by reference to what most similarly situated offenders receive.

2. *Sentencing Reform*

INTRODUCTORY NOTES

In response to the concerns raised by a broad range of critics—with those on the left decrying discrimination in sentencing (particularly against the poor and minorities) and those on the right arguing that judges and parole boards were using their discretion to undermine the deterrent and retributive purposes of criminal punishment by releasing offenders too early—many jurisdictions abandoned their traditional discretionary systems. Some states addressed the perceived injustice of indeterminate sentencing systems either by requiring the parole-release date to be fixed early in the prisoner's term or by abolishing parole altogether. This system provides certainty for the offender sentenced to prison but does nothing to make the critical decisions more uniform or predictable; indeed complete abolition of parole actually aggravates the problem of broad judicial discretion by removing the countervailing power of the parole board. More commonly, reform proposals have treated judicial discretion as the principal evil. Several distinct approaches to reform emerged.

1. Mandatory minimums. A solution increasingly popular with lawmakers has been enactment of mandatory minimum sentences for specified crimes. Congress introduced stiff mandatory minimums for drug offenses in 1956, but soon concluded that they were a failure, and in 1970, it repealed virtually all the drug mandatories. Among those supporting the 1970 repeal was Congressman George H.W. Bush (R-TX), who argued that mandatories were ineffective and unjust. See Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 200-201 (1993). Just as Congress was repealing its mandatories, New York turned to them, enacting long mandatory drug sentences (the so-called Rockefeller drug laws) in 1973. In 1984, Congress once more enacted severe mandatory minimums for drug offenses (as well as for certain firearms offenses), and has continued to pass statutes with mandatory minimum sentences on a regular basis ever since. More than one-quarter of offenders sentenced in federal court in fiscal year 2010 were convicted of an offense carrying a mandatory minimum penalty.[27] Most of these—more than 75 percent—are for drug offenses, and firearms offenses make up another 12 percent.[28] And roughly 40 percent of the offenders in federal prison as of 2010 were subject to a mandatory minimum penalty at sentencing.[29] The tide might be turning on mandatory minimums again, however, as several states (including New York) have repealed some of their mandatory sentencing laws in the wake of fiscal pressures. Marc Mauer, Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism, 26

27. United States Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 120 (Oct. 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. [hereafter cited as 2011 Report].

28. Id. at 122.

29. Id. at xxix.

Crim. Just. 27, 28 (Spring 2011). Still, many mandatory minimum laws remain on the books in the states, and Congress has done little to reform mandatory minimums at the federal level, with a notable exception being the repeal of the five-year mandatory minimum for possession of crack cocaine in the Fair Sentencing Act of 2010.

Although a major stated goal of mandatory minimum sentences was to eliminate discrimination on the basis of race, racial disparities have increased with the proliferation of mandatory minimum laws. Although it is difficult to pin down a direct causal link between the racial disparities in the prison population and these mandatory minimum laws, there are signs of a connection. In a 2004 report, the United States Sentencing Commission concluded that "[t]oday's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the [prior] discretionary system. . . ."[30] The Commission's 2011 report finds that black offenders make up 38 percent of the offenders convicted of an offense carrying a mandatory minimum penalty, even though black offenders represent 21 percent of the total offender population.[31]

One possible reason for this disparity is that mandatory minimum schemes are usually a misnomer. They are truly mandatory only when they require filing of the most serious charge and prohibit bargaining, or when they require judges to ignore the formal charge and base the sentence on the actual conduct, as revealed by a presentence investigation. Even if some jurisdictions—such as the federal system—espouse this view, in practice they fail to achieve it. A recent study of the federal mandatory minimums showed, for example, that among defendants who entered into plea agreements, almost half were sentenced below the mandatory level for which they appeared eligible, because they provided substantial assistance to the government or qualified for a statutory safety valve provision, or both.[32] This made an enormous difference in an offender's sentence, with "[o]ffenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty at sentencing receiv[ing] an average sentence of 139 months," compared to 63 months for those offenders who received relief from a mandatory penalty.[33] More disturbingly, the distribution of cases did not fall proportionately on all offenders. Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to it at the highest rate—65 percent of the cases—of any racial group.[34]

Most jurisdictions do not even claim to insist on the mandatory filing of available charges that carry a mandatory minimum. Far more common are

30. United States Sentencing Commission, Fifteen Years of Guidelines Sentencing 135 (2004).
31. 2011 Report, supra, at 124 tbl. 7-1.
32. Id. at xxviii.
33. Id. at 136.
34. Id. (white offenders followed at 53.5 %, and then Hispanic offenders at 44.3 %). This pattern replicates an earlier finding, United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress 58, 76-82 (1991).

mandatories that require a given sentence only in the event of conviction on a given charge. Such "discretionary mandatories" constrain judges but not prosecutors, who are sometimes perceived as less likely to be "soft on crime." As a result, in most places, the greatest impact of mandatory minimums is to give prosecutors a powerful bargaining chip for use in plea negotiation. Consider the following example:

United States v. Vasquez, 2010 WL 1257359 (E.D.N.Y.) Statement of Reason for Sentence (Gleeson, J.): [Roberto Vasquez had a troubled history that included sexual abuse by his older brother, drug addiction, and treatment for depression and bi-polar disorder. Aside from the drug trafficking at issue in this case, his only criminal history involved his ex-wife, Ingrid Melendez, with whom he had three children. When that relationship ended, Melendez would not let him see their children, and he reacted by menacing her with a knife. Six months later, he violated an order of protection by threatening to kill her. A year later, Vasquez once again showed up at Melendez's home, and as a result was convicted of harassment. Since 2005, he had a stable relationship with another woman, Caraballo, with whom he has a three-year-old daughter. But Melendez continued to deny Vasquez access to their three children, even though Vasquez was complying with his court-ordered child support obligations. Under the stress of this situation, he began using cocaine again. That development established the groundwork for his involvement in his offense of conviction.]

To support his expensive cocaine habit, Vasquez . . . personally assisted in the distribution of 300 grams of heroin. He was aware of the distribution of 350 additional grams by others, so he was responsible under the sentencing guidelines for 650 grams. . . . After his arrest, Vasquez tried to cooperate with the government. He provided information about two individuals, but it could not be corroborated. . . .

The government had it within its power to charge Vasquez with a standard drug trafficking charge, which carries a maximum sentence of 20 years. Instead, it included him in a conspiracy charge with his brother and three others and cited . . . a sentence-enhancing provision that carries a maximum of life in prison and a mandatory minimum of ten years upon conviction. During plea negotiations, the government refused to drop that charge unless Vasquez pled guilty to a lesser-included sentencing enhancement that carried a maximum of 40 years and a mandatory minimum of five years.

. . . Most people, including me, agree that the kingpins, masterminds, and mid-level managers of drug trafficking enterprises deserve severe punishment. But right from the start Congress made a mistake: it made a drug defendant's eligibility for the mandatory sentences depend not on his or her role in the offense, but on the quantity of drugs involved in the crime. Thus, if the crime involved one kilogram of heroin, five kilograms of cocaine, or only 50 grams of crack, every defendant involved in that crime, irrespective of his or her actual role, is treated as a kingpin or mastermind and must get at least ten years in jail.

If they want to, prosecutors can decide that street-level defendants like Vasquez—the low-hanging fruit for law enforcement—must receive the harsh sentences that Congress intended for kingpins and managers, no matter how many other factors weigh in favor of less severe sentences. The government concedes, as it must, that Vasquez played a *minor* role in his brother's modest drug operation, not the mid-level managerial role the five-year mandatory sentence was enacted to punish. . . . Yet, by the simple act of invoking the sentence-enhancing provision of the statute, the government has dictated the imposition of the severe sentence intended only for those with an aggravating role.

When the case was first called . . . I pointed out the obvious: the five-year mandatory sentence in this case would be unjust. The prosecutor agreed, and welcomed my direction that she go back to the United States Attorney with a request from the Court that he withdraw the aspect of the charge that required the imposition of the five-year minimum. . . .

[When the prosecutor returned, s]he reported that the United States Attorney would not relent. She offered two reasons. The first was that I might have failed to focus on the fact that Vasquez . . . was allowed to plead to the five-year mandatory minimum rather than to the ten-year mandatory minimum that he, his brother, and three other co-defendants were originally charged with. I think this means that Vasquez should be grateful the government did not insist on a ten-year minimum sentence based on additional quantities of cocaine it concedes he knew nothing about. . . . I suppose there is some consolation in the fact that the government did not pursue that absurd course. . . . But that hardly explains, let alone justifies, the government's insistence on the injustice at hand.

Second, the prosecutor suggested that I had failed to "focus" on the seriousness of Vasquez's crimes against his ex-wife, Melendez. Implicit in that assertion is the contention that even if Vasquez does not deserve the five-year minimum because he was not a mid-level manager of a drug enterprise, he deserves it because of his past crimes. This rings especially hollow. Those past crimes have been front and center at all times. . . .

I recognize that the United States Attorney is not required to explain to judges the reasons for decisions like this one, and for that reason I did not ask for them. But the ones that were volunteered do not withstand the slightest scrutiny.

As a result of the decision to insist on the five-year mandatory minimum, there was no judging going on at Vasquez's sentencing. . . . The defendant's difficult childhood and lifelong struggle with mental illness were out of bounds, as were the circumstances giving rise to his minor role in his brother's drug business, . . . the fact that he tried to cooperate but was not involved enough in the drug trade to be of assistance, the effect of his incarceration on his three-year-old daughter and the eight-year-old child of Caraballo he is raising as his own, the fact that he has been a good father to them for nearly five years, the fact that his prior convictions all arose out of his ex-wife's

refusal to permit him to see their three children. Sentencing is not a science, and I don't pretend to be better than anyone else at assimilating these and the numerous other factors, both aggravating and mitigating, that legitimately bear on an appropriate sentence. But I try my best . . . to do justice for the individual before me and for our community. In this case, those efforts would have resulted in a prison term of 24 months, followed by a five-year period of supervision with conditions including both other forms of punishment (home detention and community service) and efforts to assist Vasquez with the mental health, substance abuse, and anger management problems that have plagued him, in some respects for his entire life. If he had failed to avail himself of those efforts, or if, for example, he intentionally had contact with Melendez without the prior authorization of his supervising probation officer, he would have gone back to jail on this case.

The mandatory minimum sentence . . . supplanted any effort to do justice, leaving in its place the heavy wooden club that was explicitly meant only for mid-level managers of drug operations. The absence of fit between the crude method of punishment and the particular set of circumstances before me was conspicuous; when I imposed sentence on the weak and sobbing Vasquez on March 5, everyone present, including the prosecutor, could feel the injustice. . . .

Questions: How should we appraise the value and drawbacks of mandatory minimums? *(a)* For "discretionary mandatories," are the risks of unequal treatment and disproportionate punishment outweighed by potential deterrence gains? For that matter, are potential gains in deterrence dissipated by the uncertainty that these nominally mandatory sentences will actually be applied? For a discussion of the merits of mandatory minimum sentences and a proposal that judges be allowed to depart from them whenever the federal guidelines provide for a lower sentence than the statutory minimum, see Erik Luna & Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1, 10-17, 60 (2010).

(b) Should a jurisdiction try to avoid these difficulties by making its mandatory minimums truly mandatory, for prosecutors as well as for judges? Is there a way to ensure that prosecutors will fully comply with the requirements of a mandatory minimum? If they do comply, will the result be *too much* equality—equal treatment of offenders who committed their offenses under very different circumstances? Is Vasquez an example of too much equality, or were prosecutors correct to charge him as they did? If a mandatory minimum is truly mandatory, why would any defendant who commits one of the subject crimes ever be willing to plead guilty?

(c) In addition to their power to withhold charges that carry a mandatory minimum sentence, prosecutors often can enable a defendant to avoid the mandatory minimum by filing a motion with the court attesting to the defendant's cooperation. See, e.g., 18 U.S.C. §3553(e). In multi-defendant cases, will this just reward the defendant who gets to the prosecutor's office first? Luna &

Cassell, supra, at 15. For further discussion of the pros and cons of sentence reductions in return for cooperation, see page 1144 supra.

2. "Presumptive" and guideline sentencing. Given the drawbacks of mandatory minimums, no American legislature has attempted to extend that approach to all crimes; rather, legislatures have targeted selected crimes, such as drug distribution, firearms offenses, and sex offenses against children. To address the problems of sentencing discretion more generally, reformers have turned to more flexible techniques. California, for example, adopted legislation specifying within narrow limits the normal sentence for each offense and tightly restricted the trial judge's discretion to depart from the specified terms.[35]

Most states, unlike California, were not prepared to undertake the complex task of identifying appropriate sentences in detail and making the statutory revisions and refinements necessary to keep them current. Several jurisdictions therefore opted to create an expert body—a sentencing commission—charged with drafting guidelines that judges would be required or encouraged to follow in making sentencing decisions. The commissions are administrative agencies accountable to the legislature but insulated to some degree from immediate political pressures, and they are afforded the time and resources to deal with the complex array of sentencing problems. A 2006 study found that of 17 states with sentencing guidelines, nine use guidelines that are presumptively binding on the judge, and eight use guidelines that are voluntary. John F. Pfaff, The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines, 54 UCLA L. Rev. 235, 244 (2006). In its tentative draft of new sentencing provisions to the MPC, the American Law Institute has endorsed the view that the best approach is to have a sentencing commission adopt presumptive guidelines. Model Penal Code, Sentencing, Tentative Draft No. 1 (Apr. 9, 2007).

Developments in the federal system have received the most attention and generated the most controversy because Congress enacted a guideline system that is far less flexible than any of the systems used to control judicial discretion in the states. In 1984, in addition to abolishing parole, Congress created a United States Sentencing Commission charged with promulgating guidelines for judges to use in federal sentencing decisions. See 28 U.S.C. §§991-998. The Commission was directed to establish sentencing categories based on specific combinations of offense and offender characteristics and to identify a narrow range of authorized sentences (with no more than a 25 percent spread between maximum and minimum terms of imprisonment) for each category. See 28 U.S.C. §994(b). Except under restricted conditions, judges were required to impose a sentence within the authorized range. See 18 U.S.C. §3553:

35. See People v. Black, 113 P.3d 534 (Cal. 2005).

(a) *Factors To Be Considered in Imposing a Sentence.*—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission. . . .

(b) *Application of Guidelines in Imposing a Sentence.*—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an 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 should result in a sentence different from that described. . . .

The guidelines promulgated by the Commission took effect in 1987. This complex set of rules for calculating federal sentences runs over 400 pages, and for years it was amended annually. For a useful introduction, see Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon which They Rest, 17 Hofstra L. Rev. 1 (1988). In the article that follows, Professor Frank Bowman outlines the background of the federal legislation and provides an overview of the system it put in place.

FRANK O. BOWMAN, III, THE FAILURE OF THE FEDERAL SENTENCING GUIDELINES: A STRUCTURAL ANALYSIS

105 Colum. L. Rev. 1315, 1322-1328 (2005)

The SRA . . . created [a] Sentencing Commission for three basic reasons. First, the substantive federal criminal law is sprawling and unorganized. [L]egislators recognized that a body of experts was needed to draft reasonable sentencing rules. Second, Congress realized that the first set of rules would certainly be imperfect and would require monitoring, study, and modification over time. For this task, too, a body of experts was required. Third, creating sentencing rules requires not only expertise, but some insulation from the distorting pressures of politics. Thus, the Sentencing Commission was situated

outside both of the political branches of government and made independent even of the normal chain of command in the judicial branch in which it formally resides.

The federal sentencing guidelines are, in a sense, simply a long set of instructions for one chart: the sentencing table[,] a two-dimensional grid which measures the seriousness of the current offense on its vertical axis and the defendant's criminal history on its horizontal axis.[a] The goal of guidelines calculations is to determine an offense level and a criminal history category, which together generate an intersection in the body of the grid. Each intersection designates a sentencing range expressed in months. Most American sentencing guidelines systems use some form of sentencing grid [employing] measurements of offense seriousness and criminal history to place defendants within a sentencing range. The federal system, however, is unique in the complexity of its sentencing table, which has 43 offense levels, 6 criminal history categories, and 258 sentencing range boxes.

The criminal history category reflected on the horizontal axis of the sentencing table attempts to quantify the defendant's disposition to criminality. The offense level reflected on the vertical axis of the sentencing table is a measurement of the seriousness of the present crime. The offense level has three components: (1) the "base offense level," which is a seriousness ranking based purely on the fact of conviction of a particular statutory violation, (2) a set of "specific offense characteristics," which are factors not included as elements of the offense that cause us to think of one crime as more or less serious than another,[47] and (3) additional adjustments under chapter three of the guidelines.[48]

A unique and controversial aspect of the guidelines is "relevant conduct." The guidelines require that a judge calculating the applicable offense level and any chapter three adjustments must consider not only a defendant's conduct directly related to the offense or offenses for which he was convicted, but also the foreseeable conduct of his criminal partners, as well as his own uncharged, dismissed, and sometimes even acquitted conduct[51]

a. The table, as it currently stands, is reproduced immediately following the extract from this article.—EDS.

47. For example, the guidelines differentiate between a mail fraud in which the victim loses $1,000 and a fraud with a loss of $1,000,001. A loss of $1,000 would produce no increase in the base offense level for fraud of seven, while a loss of $1,000,001 would add sixteen levels and thus increase the offense level from seven to twenty-three. [Other "specific offense characteristics" for which the guidelines mandate upward adjustments of the offense level include the extent of a victim's physical injury, the quantity of drugs sold, and use of a firearm to commit the offense.—EDS.]

48. Chapter three adjustments include the defendant's role in the offense; whether the defendant engaged in obstruction of justice; commission of an offense against a particularly vulnerable victim; and the existence of multiple counts of conviction. A defendant's offense level may be reduced based on factors such as his "mitigating role" in the offense, or on "acceptance of responsibility."

51. See United States v. Watts, 519 U.S. 148, 155, 157 (1997) (finding that sentencing court was not barred from considering acquitted conduct because burden of proof at sentencing is preponderance of evidence, rather than trial standard of beyond a reasonable doubt).

undertaken as part of the same transaction or common scheme or plan as the offense of conviction. The primary purpose of the relevant conduct provision is to prevent the parties (and to a lesser degree the court itself) from circumventing the guidelines through charge bargaining or manipulation. . . .

Once a district court has determined a defendant's sentencing range, the judge retains effectively unfettered discretion to sentence within that range. However, to sentence outside the range, the judge must justify the departure on certain limited grounds. [Specifically, there must be "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."] Critically, both the rules determining the guideline range and those governing the judge's departure authority are made enforceable by a right of appeal given to both parties. . . .

In many important respects, the federal sentencing system fulfilled the objectives of its framers. First, the SRA abandoned the rehabilitative or medical model of punishment. . . . Second, the SRA [achieved] "truth in sentencing" by abolishing parole and requiring that federal defendants sentenced to incarceration serve at least eighty-five percent of the term imposed by the court. . . . Third, the SRA addressed the problem of unwarranted disparity. . . . The available evidence suggests that the guidelines have succeeded in reducing judge-to-judge disparity within judicial districts. On the other hand, researchers have found significant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country, and inter-district disparities appear to have grown larger in the guidelines era, particularly in drug cases. The question of whether the guidelines reduced or exacerbated racial disparities in federal sentencing remains unresolved.

Finally, the SRA and the guidelines brought law and due process to federal sentencing by requiring that sentencing judges find facts and apply the guidelines' rules to those findings, and by making the guidelines legally binding and enforceable through a process of appellate review. Not all forms of guidelines accomplish this end. Some states have voluntary guidelines systems in which judges need not apply the rules at all. Other states have advisory guidelines systems in which judges are required to perform guidelines calculations, but are not required to sentence in conformity with the result. In neither voluntary nor advisory guidelines systems is the judge's sentencing decision subject to meaningful appellate review. In theory, bringing law to sentencing makes sentencing outcomes more predictable and gives the parties a fair opportunity to present and dispute evidence bearing on legally relevant sentencing factors. Relatedly, bringing law to sentencing promotes transparency, such that one can ascertain from the record many, if not all, of the factors which were dispositive in generating the final sentence.

SENTENCING TABLE[b]
(in months of imprisonment)

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

b. For sentencing ranges in Zone A, the judge is authorized to grant probation without imposing any term of confinement. For sentences in Zone B, the judge is permitted to substitute for the minimum term of confinement an equivalent term of home detention or intermittent confinement. In Zone C, the judge may substitute home detention or intermittent confinement for up to six months of the minimum term, but must impose incarceration for the balance of that term. In Zone D, neither probation nor substitute sanctions are permitted; the judge must impose a prison sentence for at least the term at the low end of the guideline range. The zone applicable to each case is the one in which the case falls after taking into account any decision to depart upward or downward from the presumptively applicable guideline range.—EDS.

NOTES ON THE SENTENCING GUIDELINE APPROACH

From one perspective, sentencing guidelines appear to offer an ideal solution to the problems of unguided judicial sentencing discretion. The sentence must fall within a predetermined range that varies according to the specific details of the offense and the offender. At the same time, flexibility is preserved because the judge can depart from that range when unusual circumstances present themselves. Appellate review is available to ensure that the judge stays within these boundaries, takes the required factors into account, and departs (if she does) only for legitimate reasons. The governing principles become visible and can be tested and progressively refined through the time-honored common-law process. Is there any downside to this optimistic scenario? Is it too good to be true? The complicated dynamics of criminal law and criminal justice examined in previous chapters of this book, and especially in the previous sections of this chapter, should alert us to several potential sources of trouble. What could go wrong? Consider some of the possible dangers of the sentencing guidelines approach:

1. Is equity predictable? What, precisely, makes a sentence appropriate? Is it possible to identify all the relevant factors in advance, without squeezing out an essential but intangible human element? Recall that in capital sentencing, the Supreme Court has held it unconstitutional to "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind imposition of the penalty. . . ." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976), discussed at page 543 supra. The Court has not recognized this constitutional imperative outside the death penalty context. But if a guidelines system can indeed succeed in making sentencing wholly predictable, will the resulting process become so mechanical that the criminal law will lose some of its ability to communicate moral condemnation of the individual offender? Professor Erik Luna observes (Gridland: An Allegorical Critique of Federal Sentencing, 96 J. Crim. L. & Criminology 25, 28 (2005)) that "the language and practice of formulaic sentencing [now] reign in U.S. district courts[, resulting in] the purging of moral judgment in punishment." Do you agree? Does a largely mechanical process forfeit its moral credibility, or does it gain credibility by providing assurance of evenhandedness and consistency?

2. Are "soft" factors less important? Under the federal guidelines system, the guideline ranges are particularly narrow and the system attempts to make especially detailed provision for the diverse circumstances that a well-conceived sentencing system should take into account.[36] But can any system take into account all relevant factors? Because the variables that can legitimately influence the severity of a punishment are almost limitless, a sentencing commission inevitably must choose which ones will enter into

36. All of the state guideline systems adopted to date are considerably more flexible. See Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276 (2005).

the guideline calculus and which ones will not. In making this decision, factors that are easily quantified, like dollar losses and drug quantities, are especially attractive because it is easy to assign "points" to them on a continuous scale, and because it is relatively easy to ensure that different judges make the required computation in a consistent way. In contrast, factors that depend on subjective impression—like a defendant's previous contributions to his community or (in the other direction) the fact that he is known to have an explosive temper—are hard to integrate into a numerical calculation. And judges can easily manipulate these subjective considerations to reintroduce unwarranted disparities. To the extent that consistency is important, therefore, "soft" factors almost inevitably must be allowed less influence. Yet if such factors are excluded from consideration (or allowed little weight) in the interest of eliminating disparity, the guidelines would tend toward a *false* uniformity, with offenders receiving identical sentences when their circumstances were not truly comparable. See Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833 (1992). In determining a defendant's sentence, is it more important to know the exact value of a car that he stole or the circumstances that prompted the theft? How can a guideline approach eliminate *unwarranted* disparity without eliminating *justified* disparity as well? If we must choose, are we better off eliminating both forms of disparity or neither?

3. *Can visibility be dangerous?* Reconsider the federal sentencing grid at page 1176 supra. A simple robbery case would normally be assigned an offense level of 20,[37] so if the perpetrator is a first-time offender, his guideline range would be 33-41 months—a maximum of less than 3½ years. Does that severity level seem about right? Once Congress or a state legislature gets a look at a grid like this, will the legislators be tempted to change the numbers—and if so, in what direction? As William Stuntz, supra, has documented, when punishment levels are made highly visible and easily understandable, the political process generates strong pressure to push the levels upward, subject only to the haphazard constraints of a state's budget. That process has been especially marked in connection with the federal guidelines. See Bowman, supra, at 1328-1350. Is this phenomenon a good or a bad thing? Without "truth in sentencing," where you know the punishment clearly in advance of its imposition, punishment policies are obscured, which could allow criminal justice insiders to implement their own preferences, whether or not voters approve. Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911 (2006). Should greater visibility and accountability be counted as improvements? Or will the emotions attached to crime control politics and media coverage of criminal cases make highly visible sentencing policies worse than policies that remain obscure to the general public?

37. U.S.S.G. §2B3.1.

4. Can discretion increase in one part of the system when it is eliminated in another? Discretion so thoroughly pervades the criminal justice system that eliminating it *completely* cannot be considered an option. The only plausible goal of reform, therefore, is to tackle the extent of discretion and how it is allocated among different actors. Thus, sentencing reform typically seeks to control the discretion of sentencing judges and, perhaps, that of parole boards as well. If prosecutors retain their discretion over charging and plea-bargaining discretion, while the discretion of judges is eliminated, is it accurate to say that there is less discretion in the system? Or is there *more* discretion, because judges and parole boards have lost their ability to oversee and offset abuses of discretion by the prosecutor? For a discussion of this issue, see Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J. 1420 (2008).

Consider also the institutional environment in which discretionary decisions are made. If discretion *moves* from judges to prosecutors, should we expect the quality and consistency of the decisions to improve or deteriorate? If we have to choose between having largely unregulated discretion in the hands of either prosecutors or judges, which arrangement is preferable? Why?

One hope of sentencing reformers was to control the discretion of *both* judges and prosecutors. As Professor Bowman explains, the U.S. Sentencing Commission instructed judges to base their guideline calculations on all "relevant conduct," that is, on what is sometimes called the "real offense" as opposed to the charged offense. The expectation was that federal probation officers would become a "truth squad," providing judges with a complete picture of the crime, even if prosecutors agreed, in order to induce a plea, that they would withhold or fudge crucial details. The prosecutors, of course, could try to counter that check by dismissing most of the counts and accepting a plea to an offense that carried a low statutory maximum; whatever the guideline calculation might suggest, the judge could never impose a sentence greater than the statutory maximum for the offense of conviction. The Commission in turn attempted to neutralize that maneuver by instructing judges to reject any guilty plea when the terms of the proposed charge dismissal or plea agreement did not "adequately reflect the seriousness of the underlying offense behavior." U.S.S.G. §6B1.2.

Should judges reject a plea agreement if the inevitable effect of doing so would be to force compliance with a guideline sentencing calculation that all the parties consider too severe? Is it appropriate for judges to force the parties to go to trial on charges more serious than the prosecutor considers warranted? For one view, suggesting that such an action violates the separation of powers (and principles of efficient government), see United States v. O'Neill, 437 F.3d 654, 658, (7th Cir. 2006) (Posner, J., concurring). But if judges should not (or will not) reject plea agreements that are inconsistent with guideline calculations, does a guideline system really reduce discretion? Or, once again, does it simply transfer discretion from judges to prosecutors? And in the latter event, do the guideline reforms improve the sentencing process or make it worse?

To date, no state sentencing guidelines scheme has attempted to follow the federal "real offense" system. One reason states have rejected this approach is that it leaves important determinations that can affect a sentence to be made by a judge in the sentencing phase (by a preponderance of the evidence), rather than by a jury at trial (beyond a reasonable doubt). This worry is particularly pronounced when a jury acquits a defendant of a charge, but a judge nonetheless finds the conduct to have occurred by a preponderance of the evidence and therefore uses that conduct as a basis to increase a defendant's sentence. The use of so-called acquitted conduct to increase a defendant's sentence has been widely criticized, but it remains an accepted part of the federal "real offense" framework. United States v. Waltower, 643 F.3d 572, 577 (7th Cir. 2011).

5. Advisory versus mandatory guidelines. The Sentencing Reform Act specified that judges had to follow the federal guidelines whenever the case fell within the heartland of typical or ordinary cases on which the guidelines were based. Koon v. United States, 518 U.S. 81, 92-94 (1996). That constraint was substantially relaxed in 2005 when the Supreme Court held that it ran afoul of the jury trial guarantee because the Guidelines system allowed judges, as opposed to jurors, to find facts that "the law makes essential" to a defendant's punishment by mandating that they must increase a sentence in a particular way. United States v. Booker, 543 U.S. 220, 232 (2005). The Court distinguished facts that are *necessary* as a matter of law to authorize a new sentence from facts that have *no pre-determined legal significance.* Id. at 233. The remedy adopted by the Court was therefore to make the federal guidelines "advisory" and to allow an appellate court to set aside the decision of the sentencing judge, whether within the guideline range or not, only when the sentence was "unreasonable." For discussions of appellate review under the post-*Booker* federal regime, see Carissa Byrne Hessick & F. Andrew Hessick, Appellate Review of Sentencing Decisions, 60 Ala. L. Rev. 1 (2008); Lindsay C. Harrison, Appellate Discretion and Sentencing After *Booker*, 62 U. Miami L. Rev. 1115 (2008).

Many states also have advisory or voluntary guidelines, some with less appellate review than the post-*Booker* federal guidelines or even no appellate review at all. Are such guidelines likely to be effective in reducing disparity, or will judges ignore them? Empirical studies of voluntary and advisory guidelines show that judges follow these guidelines in roughly 75 percent of cases, a rate of within-guideline sentencing that is similar to the rate of within-guideline sentencing in mandatory guideline jurisdictions that allow for departures.[38] Why might judges sentence within the guidelines in advisory and

38. Professor Ronald F. Wright, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (Feb. 11, 2009); Virginia Sentencing Commission, 2008 Annual Report 16 (2008), available at http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf; National Association of Sentencing Commissions, The Sentencing Guideline 7 (Feb. 2009), available at http://www.ussc.gov/STATES/NASC_2009_02.pdf; Missouri Sentencing Advisory Commission, Using the New Sentencing Tools 5 (June 26, 2006), available at http://www.mosac.mo.gov/file/Using%2520the%2520New%2520Sentencing%2520Tools%2520-%2520SAR%2520Implementation%20Report%20June%202006.pdf.

voluntary regimes even if they do not face reversal for ignoring them? For a discussion, see Pfaff, supra at 238-239.

As for the federal guidelines, reports since *Booker* was decided suggest that most district judges continue to take the guidelines seriously, with judges initiating a departure in 19 percent of cases (2% of cases involve upward departures; 17% involve downward departures).[39] There is also evidence of increased inter-judge sentencing disparity in some districts. Amy Farrell & Geoff Ward, Examining District Variation in Sentencing in the Post-*Booker* Period, 23 Fed. Sent. Rep. 318 (2011); Ryan W. Scott, Inter-judge Sentencing Disparity After *Booker*: A First Look, 63 Stan. L. Rev. 1 (2010).

6. Adding it up. The foregoing Notes suggest some of the many risks that sentencing reform entails, but we should not lose sight of the possible benefits. How could the details of a guidelines system be fine-tuned to minimize the dangers? Are the potential gains worth the uncertainties and potential costs?

7. An example. In operation, any jurisdiction's guideline system is bound to raise dozens of distinct problems, all of them important to assessing the potential of the sentencing reform enterprise. The decision that follows illustrates several of the issues that can arise in the course of using guidelines—in this instance the federal guidelines—to determine the appropriate sentence in a concrete case.

UNITED STATES v. DEEGAN

605 F.3d 625 (8th Cir. 2010)

COLLTON, J. [Dana Deegan gave birth to a baby boy in her home on the Fort Berthold Indian Reservation. She fed, cleaned, and dressed the baby, and placed him in a basket. She then left the house, intentionally leaving the baby alone without food or a caregiver. When she returned two weeks later, she found the baby dead, placed his remains in a suitcase, and put the suitcase in a ditch, where it was later discovered. Pursuant to a plea agreement, she pled guilty to second-degree murder and was sentenced to ten years in prison, the bottom of the advisory guidelines range.]

[Deegan] urged the court to vary from the advisory guidelines and sentence her to probation or to a very short period of incarceration [because of] what she described as her "psychological and emotional condition" at the time of the offense, her history as a victim of abuse, and the fact that she acted impulsively. . . .

39. United States Sentencing Commission Preliminary Quarterly Data Report Through June 30, 2011, tbl. 1, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_3rd_Quarter_Report.pdf.

As support, she submitted a report prepared by Dr. Phillip Resnick, an expert in "neonaticide[,]" a term coined by Resnick to describe the killing of an infant within the first twenty-four hours following birth. The report addressed what Resnick viewed as an "extraordinary number of mitigating circumstances," and expressed the opinion that a prison sentence was not necessary to deter other women from committing neonaticide. The report concluded that Deegan suffered from an extensive history of abuse . . . [and] major depression and dissociation at the time of the homicide, acted impulsively in leaving her baby alone, presented a very low risk of reoffending, and did not merit a lengthy prison sentence, especially because other women convicted in state court of committing similar offenses were usually sentenced to no more than three years in prison.

. . . On appeal, Deegan argues that the sentence is unreasonable, because the advisory guideline for second-degree murder is not based on empirical data and national experience, and because the sentence imposed is greater than necessary to comply with the statutory purposes of sentencing set forth in 18 U.S.C. §3553(a)(2). . . .

In explaining why it chose a sentence of 121 months' imprisonment rather than a greater punishment, the court acknowledged that Deegan's life had not been "easy," and that it had been plagued with physical abuse and sexual abuse. . . . The court said that it "underst[ood] why [Deegan] took the steps that she did . . ." and that "under the circumstances," a sentence under the 2007 guidelines in effect at the time of sentencing, *i.e.*, 19.5 to 24.5 years' imprisonment, would not have been fair. But the court also thought a lesser sentence would not be sufficient, explaining that . . . it could not "ignore the fact that there was an innocent life that was lost."

. . . Where, as here, a sentence imposed is within the advisory guideline range, we typically accord it a presumption of reasonableness. The presumption "simply recognizes . . . that when the judge's discretionary decision accords with the Commission's view of the appropriate application of §3553(a) in the mine run of cases, it is probable that the sentence is reasonable." But even if we do not apply such a presumption here, on the view that Deegan's offense is not a "mine run" second-degree murder, the district court did not abuse its considerable discretion. . . .

The record . . . includes evidence in aggravation and mitigation. [A] court reasonably could view Deegan's offense as "unusually heinous, cruel, and brutal," and deserving of harsh punishment. . . . Deegan also presented evidence of her troubled personal history and family circumstances, and of course we share our dissenting colleague's condemnation of violence against American Indian women.

[W]e are firm in our view that the district court did not abuse its discretion by refusing to impose a more lenient sentence. Whatever the deterrent effect of this sentence, general or specific, and whatever Deegan's personal history, the court was entitled to consider the need for the sentence imposed to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §3553(a)(2)(A). . . .

. . . We disagree, moreover, with the dissent's contention that the district court should have considered the "disparity" between Deegan's sentence and the sentence that may have been imposed if Deegan . . . had been prosecuted in state court. [It is well-settled] that "the need to avoid unwarranted sentence disparities . . ." 18 U.S.C. §3553(a)(6), refers only to disparities among *federal* defendants. It would have been error for the district court to consider potential federal/state sentencing disparities under §3553(a)(6). . . .

BRIGHT, J., dissenting. [This case] represents the most clear sentencing error that this dissenting judge has ever seen. . . .

Ms. Deegan's life is marked by a history of extensive and cruel abuse. Her alcoholic father beat her on an almost daily basis. . . . Some of the beatings were so severe that her father kept her home from school to avoid reports to Child Protective Services. She and her siblings were eventually removed from her parents' house due to the abuse, placed in a variety of foster homes, and periodically returned to her parents' house. While in foster care, Ms. Deegan was separated from her siblings and experienced physical abuse from some of her foster family members. . . .

Ms. Deegan also suffered extensive and cruel sexual abuse. At five years of age, her father's drinking buddies began sexually abusing her. . . . At age eleven, the sexual abuse ended when Ms. Deegan finally disclosed the abuse to her mother. Her father responded by beating her for being a "slut and allowing it to happen." Ms. Deegan spent much of her childhood caring for and protecting her six younger siblings. . . . As an adult the abuse continued [and] her father [once] attacked her while she was pregnant with her second child. She jumped through a window to escape.

At age fifteen, Ms. Deegan began a relationship with Shannon Hale, the son of one of her foster parents. . . . She bore four children fathered by Mr. Hale, including the infant victim in this case.

After Ms. Deegan's third child was born, she became depressed. . . . Hale was physically abusing her two to three times per week, forcing her to have sexual intercourse with him, and refusing to care for their children. . . .

Despite the abuse, Ms. Deegan did not leave Mr. Hale permanently because he repeatedly assured her that he would reduce his drinking and stop abusing her. Ms. Deegan reported that she sometimes went to live with her parents when the abuse was most severe, but then her father would physically and verbally abuse her. Ms. Deegan also explained that she did not feel that she could leave Mr. Hale because [she] feared that if she left Mr. Hale, his mother, a prominent member of the Indian community, would acquire custody of her children. . . . Ms. Deegan's state of despair and depression was [aggravated by additional factors. She and Hale were unemployed, and she] lived in extreme poverty and isolation.. . . . When Ms. Deegan obtained any money, Mr. Hale took it and bought methamphetamine. . . .

Ms. Deegan's crime of neonaticide was . . . completely unlike the usual and ordinary killings that constitute second-degree murder under federal

law. . . . Only because this neonaticide occurred on an Indian reservation does this case become one of federal jurisdiction. . . .

Congress recognized that the goals of certainty and uniformity must in some instances yield to unique circumstances. . . . Despite the seemingly obvious fact that neonaticide is an unusual crime in federal court, the presentence report makes no mention that this is an "atypical" case. Even more distressing, the presentence report fails to indicate much in the way of the abusive circumstances Ms. Deegan faced during her childhood and at the time she gave birth to the infant victim. . . .

[In] Koon v. United States, 518 U.S. 81 (1996), the Court explained that the then-mandatory guidelines carve out a "heartland" of typical cases and the Court provided an approach for delineating which cases fall within that heartland. . . . Applying this rationale, whether Ms. Deegan's conduct fell outside the heartland . . . depends on whether her conduct significantly differed from the norm. "The norm" is certainly not what we have here—an American Indian woman so beset by the serious problems in her life she cannot cope with another child, cannot think with logic, and believes she has no alternative but to run away and abandon her newborn child. Tragic yes, typical no!

. . . To determine whether the Commission contemplated neonaticide . . . in its guidelines for second-degree murder, this writer inquired of the Sentencing Commission [and it responded that its records since 2006 contain no other case involving neonaticide.] Thus, a neonaticide case clearly falls outside the "heartland" for second-degree murder sentences. . . .

[The dissent then went through the §3553(a) factors. It relied on Dr. Resnick's testimony that incarcerating Deegan would not likely deter others from committing neonaticide, in part because, after Deegan committed her crime, all 50 states enacted safe haven laws allowing women to drop off a baby at a hospital or police station with no questions asked. Resnick also explained that Deegan is a low recidivism risk because she had a tubal ligation, so she won't have more children; she has no criminal record; no substance abuse history; and is remorseful. Moreover, a study of women who commit neonaticide found that most of them go on to be good mothers, suggesting, Resnick said, that "this is a crime based upon circumstances as opposed to bad character in the perpetrator." The dissent also considered Deegan's family ties:]

While the guidelines do not ordinarily consider matters such as family ties, such a consideration is permissible under §3553(a). . . . Deegan spoke of her children's needs for her. . . . Instead of the prosecutor acknowledging that the children's needs [their ages were one, two, and five] can play a role in reducing a federal sentence, he justified the guideline sentence saying, "[T]he punishment that comes to those siblings as well comes at the hand of the defendant. Basically her choice is what has caused all of this." . . . But what blame should be placed on Mr. Hale who did not support the children he fathered and consistently abused Ms. Deegan? And what about the failures of society to assist Ms. Deegan in her travail? . . .

[The dissent then addressed the need to avoid disparity:] A district court should consider . . . the need to avoid unwarranted disparity among defendants

who have been found guilty of similar conduct. 18 U.S.C. §3553(a)(2)(A) and (a)(6). [The record revealed another neonaticide crime in North Dakota, but committed off the Indian reservation and, thus, subject only to state law. That defendant was sentenced to three years' probation.] Dr. Resnick informed the court that women who plead guilty to neonaticide are "infrequently sentenced to more than three years in prison." These are all state sentences and, as observed by the majority, ordinarily state sentences are not germane to showing disparities in sentencing. But here, we ought to consider the difference in sentence between (1) Ms. Deegan, a woman living in North Dakota [but subject to] federal law because of her residency on an Indian reservation, and (2) a North Dakota woman who committed a neonaticide crime off the reservation. . . .

[The judge quoted a letter from Deegan's sister:] "The cultural deprivations and discriminations of our people merely because of our heritage has contributed to the psychological deficits that Dana, at that particular low time in her life, was unable to overcome. *I fear that these same cultural factors may also contribute to harsher penalties of an already oppressed woman.*"

Reading this letter should give us all pause. How many of us can really comprehend the misery of Ms. Deegan's situation as described in this record? None of these matters made any difference to the district court when sentencing under the guidelines. I ask what respect should be given to this guideline sentence? . . .

NOTES AND QUESTIONS

1. Guidelines and the purposes of punishment. As *Deegan* illustrates, under the current federal scheme, judges first determine the appropriate guideline sentence and whether a departure is warranted because a case falls outside the heartland. Next, judges are to determine whether the sentence is warranted under 18 U.S.C. §3553(a), which requires judges to consider, among other things, whether the sentence serves retributive and utilitarian goals of punishment. Will the consideration of these broad factors undercut the goals of the more specific and finely tuned guidelines? Is Judge Bright's approach to §3553(a) an example of how that approach can undermine those goals, or does his opinion illustrate the value of keeping the overall goals of sentencing in mind to determine which cases are, in fact, alike?

2. Family circumstances. The Sentencing Commission, when it promulgated the guidelines, concluded that family and community ties are "not ordinarily relevant." What justifies that conclusion? Is this factor ruled out because it is not relevant to penal law objectives or only because it is likely to be applied inconsistently? If the latter, is consistency important enough to trump the substantive objectives of punishment? Judge Bright thought family circumstances (the three preschool children whose mother would be taken away if she is sentenced to prison) could be relevant under §3553(a), even though those circumstances are not ordinarily relevant under the guidelines. Which of the §3553(a) factors is implicated by family circumstances? What

theory of punishment justifies a reduced sentence when a defendant's incarceration will harm third parties such as the defendant's children?

If the innocent victims of an offense are relevant third parties whose interests should be taken into account, does that mean the defendant's innocent family members should also have their interests factored into a sentence? One commentator argues that the children of incarcerated parents have First Amendment freedom of association and due process liberty interests at stake in sentencing determinations and that those interests should be considered. Chesa Boudin, Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship, 101 J. Crim. L. & Criminology 77, 92-97 (2011). For a general discussion, see Dan Markel, Jennifer M. Collins & Ethan J. Lieb, Criminal Justice and the Challenge of Family Ties, 2007 U. Ill. L. Rev. 1147, 1171-1178 (2007).

3. Other offender circumstances. Now that the federal guidelines are merely advisory, many judges have used their greater flexibility to sentence defendants below the applicable guideline range, in the manner urged by Judge Bright in dissent. The Sentencing Commission followed some of these cues and changed its course on certain offender characteristics. Before 2010, a defendant's age, mental and emotional conditions, physical condition, and military service were deemed "not ordinary relevant." Now the Commission's policy statement provides that these factors "may be relevant" in determining whether a departure is permitted—if these factors are "present to an unusual degree and distinguish the case from the typical cases." The Commission did not, however, change its views on family circumstances and community service. Was the Commission correct to distinguish between these two groups of offender characteristics? What might justify its approach? Why should military service be a factor in a defendant's sentence? Should it count only when the military service creates a condition—such as post-traumatic stress disorder—that is related to the criminal behavior? Or is service relevant even if it does not bear such a relationship, because it demonstrates prior good acts by the defendant? Every sentencing regime takes into account a defendant's prior bad acts (i.e., past criminal conduct) at sentencing; is there a principled reason for not taking into account prior good acts as well? See Carissa Byrne Hessick, Why are Only Bad Acts Good Sentencing Factors?, 88 B.U. L. Rev. 1109 (2008).

4. Culture. Judge Bright included an appendix to his dissent entitled "Lifting the Curtain on Assaults Against Women and Children in Indian Country." It quoted at length from Mark J. MacDougall & Katherine Deming Brodie, Strange Justice in Indian Country, Nat. L.J. (Sept. 28, 2009), which contains some sobering statistics, including the fact that one in three women living on reservations will be raped in her lifetime, a rate roughly double that found in surveys of American adult women generally.[40] Such statistics led Judge Bright

40. Justice Department surveys find that roughly 15 percent of American adult women have experienced one or more completed rapes in their lifetimes, and another 3 percent have been victims of attempted rape. See page 333 supra.

to conclude: "The violence against women and children on Indian reservations is a national scandal. . . . If the violence against Ms. Deegan had been stopped . . . and she had been given moral and societal assistance in raising the three children in her family, this crime of neonaticide might never have occurred." Id. at 664. How, if at all, should the prevalence of violence on reservations in general and in Deegan's life in particular affect her sentence? For the debate about the relevance of environmental deprivation to just punishment, see supra page 1026. How would Justice Thomas (page 1029 supra) assess the appropriate punishment for Deegan?

5. The defendant's personal experience. Should a sentencing court take into account how a particular defendant will experience his or her sentence? Consider State v. Thompson, 735 N.W.2d 818 (Neb. 2007). The defendant had sexually assaulted a child, and the trial court imposed a sentence of probation. One factor in that decision was the defendant's relatively small stature. Thompson is 5 feet 2 inches tall and weighs 125-130 pounds, and those facts led the trial court to observe: "I look at your physical size . . . and, quite frankly, I shake to think of what might happen to you in prison. . . . I am going to try to put together some kind of order that will keep you out of prison." Assuming that Thompson's physical size would increase his risk of being the victim of physical or sexual abuse in prison, was that an appropriate consideration in setting the sentence?

Should a defendant's *subjective* experience of punishment be relevant? For an argument that proportionality requires one to consider variations in how defendants experience the suffering associated with punishment, see Adam J. Kolber, The Subjective Experience of Punishment, 109 Colum. L. Rev. 182 (2009); John Bronsteen, Christopher Buccafusco & Jonathan Masur, Happiness and Punishment, 76 U. Chi. L. Rev. 1037 (2009). What are the dangers of a subjectivist approach? For critiques, see Dan Markel & Chad Flanders, Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice, 98 Calif. L. Rev. 907 (2010); David Gray, Punishment as Suffering, 63 Vand. L. Rev. 1619 (2010). Even if judges do not consider the subjective experience of punishment, should prison officials? For a probing, in-depth account of a special unit established in the Los Angeles County Jail to protect the personal security of gay men and trans women, see Sharon Dolovich, Strategic Segregation in the Modern Prison, 48 Am. Crim. L. Rev. 1 (2011).

NOTES ON THE JURY'S ROLE IN SENTENCING

1. The constitutional right to jury factfinding. As noted supra page 31, the defendant has a constitutional right to require the prosecution to prove every *element* of the offense to a jury beyond a reasonable doubt. But as *Williams v. New York*, supra page 1158, makes clear, judges can consider a wide range of factors, and reach judgments about what the facts were, when deciding how severe a sentence to impose. The line between offense elements and sentencing factors is therefore important for delineating the respective

province of the judge and the jury. In a series of cases, beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court has taken an active role in policing the line between the jury's province and that of the judge. The Court has held that "[o]ther 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." Id. at 490. The Court then concluded in Blakely v. Washington, 542 U.S. 296, 303 (2004), that "the '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 or admitted by the defendant*[,] . . . *without* any additional findings." The Court in *Blakely* held that the defendant's sentence, which Washington state guidelines made mandatory on the basis of facts determined by the sentencing judge, ran afoul of the Sixth Amendment. The Court required the trial judge either to sentence the defendant within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury.

2. The implications for sentencing under guidelines. In light of *Blakely*, a number of state courts—after holding their sentencing guideline systems unconstitutional—have required jury findings, beyond a reasonable doubt, for facts necessary to trigger a higher sentencing range. E.g., State v. Shattuck, 704 N.W.2d 131 (Minn. 2005); State v. Schofield, 876 A.2d 43 (Me. 2005).

A year after *Blakely*, the U.S. Supreme Court, as noted (page 1180 supra), held the federal sentencing guidelines unconstitutional as well, but adopted a different remedy. The Court simply made the federal guidelines "advisory" rather than mandatory, and allowed the court of appeals to set aside the sentencing decision of a lower court, whether within the guideline range or not, only when the sentence was found "unreasonable." The upshot is that the federal guidelines, though no longer mandatory, remain an important factor in the sentencing process. And on the heels of *Booker*, several states likewise adopted this approach, made their guidelines "advisory," and held that this step was sufficient to save their constitutionality. E.g., State v. Foster, 845 N.E.2d 470 (Ohio 2006); State v. Natale, 878 A.2d 724 (N.J. 2005). Some commentators view *Booker* as a welcome restoration of balance in a system that had previously tilted too heavily toward prosecutors. E.g., Paul J. Hofer, Has *Booker* Restored Balance? A Look at Data on Plea Bargaining and Sentencing, 23 Fed. Sent. Rep. 326 (2011). Others have argued that without stringent appellate review, trial judges will have too much discretion under *Booker*. See Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, Policing Politics at Sentencing, 103 Nw. U. L. Rev. 1371 (2009).

3. The implications for mandatory minimums. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), and Harris v. United States, 536 U.S. 545 (2002), the Supreme Court held that, although a jury must find any facts necessary to increase the *maximum* term of a sentence, the right to jury trial does not apply to facts that increase only the *minimum* term. Recall that the Framers viewed the jury as "in estimable safeguard against the corrupt or overzealous

prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, supra page 47. Can the jury adequately fulfill its function as a check against the government if it authorizes only the upper bound of a sentence? At least one court has held that the Sixth Amendment is violated when the facts triggering a mandatory minimum sentence (a particular quantity of drugs, for example) are neither admitted nor proved before a jury at trial but instead are established by a mere preponderance of the evidence at the sentencing hearing. State v. Barker, 705 N.W.2d 768 (Minn. 2005).

4. Problem. Where in the criminal justice system should sentencing discretion be located, and how should it be channeled? With or without mandatory minimums, how can a sentencing system simultaneously ensure consistency, effective deterrence, and punishments proportionate to individual culpability?