

# PURPOSES

## THE FUNCTIONS OF SENTENCING AND SENTENCING REFORM

Michael Tonry\*

INTRODUCTION.....	37
I. THE FUNCTIONS OF SENTENCING.....	43
II. OVERT FUNCTIONS.....	45
A. <i>Norms</i> .....	46
B. <i>Distribution</i> .....	47
C. <i>Prevention</i> .....	51
D. <i>Management</i> .....	57
E. <i>Communication</i> .....	59
III. LATENT FUNCTIONS.....	62
A. <i>Self-Interest</i> .....	62
B. <i>Ideological Expression</i> .....	63
C. <i>Partisan Advantage</i> .....	64
CONCLUSION: RECONCILING OVERT AND LATENT FUNCTIONS.....	64

### INTRODUCTION

Sentencing reform is in the eye of the beholder. When most federal district court judges, assistant U.S. Attorneys, and sentencing policy analysts recently would have said that the Federal Guidelines should be made less prescriptive, less severe, and less rigid, Congressman Tom Feeney introduced and won passage of a bill meant to make the Guidelines more prescriptive, more severe, and more rigid.<sup>1</sup>

“Sentencing reform” means very different things depending on whether the

---

\* Michael Tonry, Sonosky Professor of Law and Public Policy and Director, Institute on Crime and Public Policy, University of Minnesota Law School; Senior Fellow, Netherlands Institute for the Study of Crime and Law Enforcement, Leiden. I am grateful to Richard Frase and Kevin Reitz for helpful comments on an earlier draft.

1. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

proponent wants sentencing made softer, tougher, fairer, more consistent, more efficient, more economical, more transparent, or more effective at preventing crime.<sup>2</sup> Whether a proposed change counts in the eyes of others as a reform depends on what the proponent wants to accomplish and whether others think that a good thing.

The same observations apply to sentencing. Whether a sentencing system can be said to work well depends on its purposes, what it is supposed to do, and how well it does that. Generally, when theorists and lawyers refer to the “purposes” of punishment, they have normative rationales in mind. At a normative level, some people think the primary purpose of sentencing is to impose deserved punishments proportioned to offenders’ culpability, some that sentences should aim optimally to prevent crime, and most, probably, that sentencing should try to do both, to take account of crime-prevention goals while to a significant extent apportioning punishment to blameworthiness.<sup>3</sup>

Examination of normative purposes, however, is only the beginning of analysis of the effectiveness of a sentencing system. Practitioners and policymakers want sentencing to accomplish other things as well. These include efficiency, cost-effectiveness, public safety, and public confidence. They also sometimes want sentencing systems, and legislation affecting them, to advance personal, ideological, and partisan interests.

My subject is the functions of sentencing and sentencing reform.<sup>4</sup> I treat functions instrumentally, as if sentencing systems and policies are machines, and we need to figure out what we want them to do and whether particular models do whatever it is sufficiently well. Whether a machine can be said to work well depends on what it is supposed to do, and typical occupants of various institutional roles differ about that.

A distinction needs to be made between *overt* functions, the things we want a machine to do directly, and *latent* functions, collateral things we want from it

---

2. This was less clear in the 1970s when the modern sentencing reform movement began. The supporters of California’s Uniform Determinate Sentencing Law of 1976, the first major high-profile reconstitution of a state sentencing system, included liberals and conservatives, prisoners’ rights advocates and police unions, judges and corrections officials. In broad agreement in their critiques of California’s indeterminate sentencing system, only later did it become clear how groups varied in their visions of what should replace it. Sheldon L. Messinger & Phillip D. Johnson, *California’s Determinate Sentence Statute: History and Issues*, in DETERMINATE SENTENCING: REFORM OR REGRESSION? 13 (1978).

3. Richard Frase’s article in this Issue discusses normative purposes of criminal law, sentencing, and punishment; I discuss them only in passing. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (in this Issue).

4. In this Article, I focus on the functions of sentencing and sentencing reform. The criminal law I set aside, partly because its primary overt functions—to label as crimes some behaviors that violate important social norms, to proscribe them, and to discourage their occurrence—are relatively uncontroversial, and partly because sentencing and punishment can, only slightly artificially, be said to pose a self-contained set of issues and problems irrespective of the substantive content of the criminal law. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 12-13 (1968).

as byproducts. Here's a homely example. The principal overt function of an annual meeting of a scientific society is the advance of knowledge through presentation of papers and exchange of ideas. The latent functions include expanding networks of professional contacts, looking for new jobs, seeing old friends, visiting a new or favorite city, having a few days paid or tax-deductible holiday, and seeking social and sexual adventures.

Latent functions are more and less legitimate. Expanding professional networks may facilitate learning of new developments and participating in new projects, and thus may relate closely to the advance of knowledge. Visiting a new city and pursuing sexual conquests under propitious circumstances do not.

A good test of the legitimacy of latent functions, in this example, is whether they could be invoked with a straight face as a reason why an employer should underwrite an employee's cost of attendance. The overt functions of presenting papers and participating in organized scientific exchanges pass the straight-face test. So probably, in most people's eyes, do the latent functions of expanding professional networks and looking for a new job (if the employer is kindly disposed). Seeing a new city, having a paid vacation, or pursuing sexual conquests are seldom likely to pass the test.

In the real world, however, people seldom mention illegitimate latent functions when applying for funding to attend conferences. They cite overt functions and plausibly legitimate latent functions, whether or not those are their real motivations. Sometimes motivations are mixed—people want both to participate in scientific interchanges and to see new cities—and sometimes they are entirely cynical. Whatever they may have said to get their expenses covered, some people may have no interest in the conference itself. The invocation of science is disingenuous; new adventures and conquests are what is really wanted.

People setting sentencing policy or imposing sentences in individual cases also have diverse motives and pursue diverse objectives, and these may be more or less legitimate. The primary overt functions of sentencing are imposition of deserved punishments and prevention of crime. Judges may differ on how best to pursue those objectives, but they are palpably legitimate. In a particular case, a judge up for vigorously contested reelection might impose a much harsher sentence than he otherwise would, or than in his own mind can be justified, as a way to get favorable publicity. The latent goal of sentencing in that case would be the judge's reelection, and few would regard it as a legitimate reason to punish an offender especially severely only because he happened to be sentenced in too close proximity to an impending election.

If Congress seriously considers proposals for comprehensive reconstitution of the federal sentencing system,<sup>5</sup> those involved need to keep a close and unblinking eye on the functions the new system is meant to serve. Reasonable judges setting sentences in individual cases can differ on how best to pursue

---

5. I use the neutral "reconstitution" to avoid the inevitably ambiguous "reform."

overt functional goals. Reasonable policymakers likewise can differ over what overt functions should be specified for the sentencing system and how best they might be carried out.

Some latent functions, however, such as pursuit of personal self-interest, ideological purity, or partisan political advantage are as illegitimate in policymaking about sentencing or in setting sentences in individual cases as are pursuit of paid holidays and erotic adventures in seeking funding for conference attendance. The contested and controversial history of the U.S. Sentencing Commission<sup>6</sup> is a byproduct of failures to be clear about the Federal Guidelines<sup>7</sup> and the Commission's functions, and of policymakers' pursuit of latent goals only incidentally related to the overt goals originally envisioned for the Guidelines.

Nearly a decade passed between Senator Edward Kennedy's introduction of Senate Bill 2699<sup>7</sup> with bipartisan support from eight cosponsors including Senators John McClellan (Arkansas) and Roman Hruska (Nebraska), influential conservative senators with extensive involvement in crime-control legislation, and the eventual passage of the Sentencing Reform Act of 1984.<sup>8</sup> Senate Bill 2699 set out the basic and never-much-changed framework for the U.S. Sentencing Commission. The bill was based on a proposal by federal district judge Marvin Frankel,<sup>9</sup> as fleshed out in a series of seminars at Yale Law School.<sup>10</sup> The primary overt functions Judge Frankel had in mind for guidelines were achievement of greater consistency and procedural fairness, and reduction of sentencing disparities. The functions of the Sentencing Commission were to be development of specialized expertise and partial insulation of policymaking from direct and short-term political influence. Frankel believed that an independent administrative agency would be better able than Congress to develop and oversee implementation of sound sentencing policies.

None of the Frankel proposal, the Yale seminar elaboration, or Senate Bill 2699 was substantially focused on crime prevention, harsher punishments, or sentencing policy as a means to achieve personal or partisan advantage or promote ideological agendas. During the early 1970s, when the proposals were developed, crime and punishment were not galvanizing political issues.<sup>11</sup>

---

6. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998); MICHAEL TONRY, *SENTENCING MATTERS* 83-89 (1996).

7. S. 2699, 94th Cong. (1975).

8. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

9. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

10. PIERCE O'DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977).

11. Plenty of sentencing policy issues received attention. These included racial disparities and allegations of racial bias; unwarranted sentencing disparities; claims that judges and parole boards had overly broad discretion; and claims that rehabilitative programs were ineffective. See RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1-4 (Alfred Blumstein et al. eds., 1983). None of these issues during the 1970s were the subject of

Frankel's and the succeeding proposals shared the assumption that sentencing and punishment were nonpartisan issues best addressed by technocrats and professionals.

By the mid-1980s, few powerful Washington policymakers any longer shared that view. The Democrats' control of the Senate in the 1970s was displaced by Republican control in the 1980s, and Strom Thurmond succeeded Senator Kennedy as Chairman of the Senate Judiciary Committee. "Law and order" had become a galvanizing political issue, one of the wedge issues that Republicans used to undermine Democrats' support among white Southern and working-class voters.<sup>12</sup> The United States was a decade into its continuous, historically unprecedented quadrupling of the imprisonment rate. Legislatures in every state were toughening their sentencing laws in pursuit of both crime prevention and severer punishment.<sup>13</sup>

When the U.S. Sentencing Commission began its work, Frankel's aims for the Commission (political insulation and specialist expertise) and for the Guidelines (procedural fairness and reduced disparities) were no longer in vogue. Instead, the Sentencing Reform Act contained numerous provisions calling for harsher penalties,<sup>14</sup> and the Commission made no serious effort to insulate itself from political influence. In enacting the Anti-Drug Abuse Act of 1986, creating a slew of mandatory minimum sentences for drug crimes, the Congress undermined the Commission's autonomy and authority even before the initial Guidelines were promulgated.<sup>15</sup>

The Commission was caught in a time warp. Premised on one set of views about the goals of sentencing reform and the Sentencing Commission, the Commission was created and devised the Guidelines at a time when very different views influenced policymakers. Designed for an era of technocratic and rationalistic policymaking, it operated in an era of politicized and symbolic policymaking. Designed for a time when people in positions of political influence doubted that changes in punishment could have much effect on crime, it operated in a world in which many people believed that tougher penalties

---

vigorous partisan or ideological dispute.

12. See THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991).

13. See SANDRA SHANE-DUBOW ET AL., *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* (1985).

14. Section 994(h) of the Sentencing Reform Act provided that "the Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a violent crime or an enumerated drug crime and has two prior convictions for such offenses]." 28 U.S.C. § 994(h) (2005). Section 994(i) directed the Commission to assure that the Guidelines specified a "substantial term of imprisonment" for five broad categories of offenders. *Id.* § 994(i). Section 994(m) provided that, "The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." *Id.* § 994(m).

15. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. §§ 801-802, 841 (2005)).

could reduce crime rates through deterrence and incapacitation.

The Congress and the Commission can do better this time if they attend more closely to the overt functions the sentencing machinery is expected to perform and if they restrain themselves from use of sentencing and sentencing reform to pursue latent goals only incidentally related, or unrelated, to imposition of just and appropriately preventive punishments.

The importance of having sentencing policies that reflect widely shared views among practitioners about just punishments cannot be overstated. Experience with the Federal Guidelines demonstrated that policies that move too far away from a focus on just and appropriate sentences in individual cases are likely to be circumvented by prosecutors and judges. This is because practitioners, having human beings' fates in their hands, want to behave justly in light of the circumstances of the offense and the offender's life. They want to do this irrespective of whether they are Republicans<sup>16</sup> (as a majority of federal judges are) or Democrats, conservatives or liberals,<sup>17</sup> prosecutors or judges.<sup>18</sup> The legislative answer to this is not simply to make the Guidelines more restrictive and less deferential to judges. The U.S. Sentencing Commission tried to do that. Making rules that require practitioners to behave in ways that they believe unjust does not prevent circumvention. It drives circumvention underground, as centuries of experience show.<sup>19</sup>

Nor is the solution to appoint more conservative or strict constructionist judges to the bench. If it were, judges appointed by Ronald Reagan and the two George Bushes, or Republican judges generally, would have been more supportive of the Guidelines, and less likely to circumvent them. Appointing different kinds of people to judgeships cannot solve the problem. Prosecutors are at least as likely as judges to discover creative ways to arrive at appropriate sentences, and no one (to my knowledge) has accused recent Republican presidents of systematically appointing "lenient" U.S. Attorneys.

---

16. J. Lawrence Irving, the first federal district court judge to resign in protest over the Federal Guidelines, was a Reagan appointee. *See infra* note 36. More specifically federal evidence can be found in the sources cited in *infra* note 24.

17. As evidence of this assertion, 73.7% of district judges and 82.7% of circuit judges said that federal drug-trafficking sentences are inappropriately severe, which necessarily means that many judges appointed by Presidents Reagan, Bush (1), and Bush (2) held this view. U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES exhbs.II-4, III-4 (2003) [hereinafter ARTICLE III JUDGES SURVEY], <http://www.ussc.gov/judsurv/jsfull.pdf> (last visited Sept. 10, 2005).

18. Prosecutors not only are as complicit as judges in efforts to achieve what they see as just and appropriate sentences, but they generally take the initiative for doing so. *See infra* note 24. The U.S. Department of Justice has several times, without notable success, attempted to rein in U.S. Attorneys' Offices' circumvention of the Federal Guidelines. *See, e.g.*, Memorandum from John C. Keeney, Acting Assistant Attorney General, Criminal Division & Donald K. Stern, Chair, Attorney General's Advisory Committee of U.S. Attorneys, to All United States Attorneys and Federal Prosecutors (Apr. 7, 1997), <http://www.usdoj.gov/ag/readingroom/racenu2.htm> (last visited Sept. 11, 2005).

19. *See infra* notes 40-43 and accompanying text.

This Article consists of four Parts. The first, elaborating ideas about overt and latent functions sketched above, sets out a framework for identifying and assessing functions of sentencing and sentencing reform. The second, applying that framework, examines current knowledge concerning the overt functions of sentencing. The third examines latent functions. The last distills lessons honest policymakers might wish to consider.

Most of the latent functions are illegitimate, and inappropriate bases for enacting laws that deprive citizens of their liberty. Laws enacted not because they are believed to call for just punishments, or for punishments reasonably believed to be effective crime preventatives, but because their passage will help someone posture, get reelected, or “send a message,” often result in imposition of unjust punishments in individual cases. The starkest recent federal examples have concerned drug offenses. Most readers of this journal and most congressmen would think it unjust if they or a family member received a long prison sentence not because the offense inherently warranted it but because a law requiring that sentence was enacted for reasons having nothing to do with just punishment or crime control. The demographics of crime are such that few *Stanford Law Review* readers or congressmen or their family members are sentenced under such laws, but the injustice is the same when it happens to the typically poor and disproportionately minority offenders who do receive such sentences. Ethical practitioners and policymakers should be concerned mostly with achievement of overt functions associated with just punishments, safer streets, efficiency, cost-effectiveness, and public confidence.

### I. THE FUNCTIONS OF SENTENCING

High school students in a civics course might suppose that the functions of sentencing are obvious: punishment and crime prevention. By the time they take a college political science course on criminal justice, they will learn that sentencing policy has other functions, ranging from encouraging plea bargains and managing criminal justice budgets to reassuring the public and getting officials elected.

People concerned primarily with the word “justice” in “criminal justice” would identify the overriding function of sentencing to be the imposition of punishments that are just relative to prevailing normative rationales. To distinguish the question of what normative goals should be pursued from the question of whether laws have been fairly and consistently applied, I refer below to the first as a *normative function* and the second as a *distributive function*.

Immanuel Kant, the German idealist philosopher whose ideas are often regarded as marking the beginning of development of modern theories of punishment, argued that the only morally legitimate justification for punishment is that it is deserved and appropriately apportioned to the

offender's wrongdoing.<sup>20</sup> Crime-preventive effects as ends in themselves, he argued, could not justify punishment. Many people today disagree and believe that prevention of crime, fear of crime, and their consequences are important and legitimate functions of sentencing. These are the *preventive functions*.

Many practitioners, however, would also include efficiency, cost-effectiveness, and resource management among the goals of an acceptable sentencing system. Practitioners need to set and pursue substantive priorities, allocate personnel and resources, meet internal performance goals, and operate within their budgets. They also need to maintain good relations with other agencies and officials who can make their work easier or harder. These are *management functions*.

Some policymakers stress *communicative functions*. They urge that it is important to try to assure the public that its anxieties and preferences are being addressed, maintain confidence in the legal system, denounce wrongful behavior, and reinforce basic social norms.

All of those are *overt* functional goals (what sentencing "is supposed to do"), but practitioners and policymakers are also moved by personal, ideological, and partisan objectives. People sometimes make decisions or support policies because it is in their personal self-interest, because they want to bear witness to their ideological beliefs, or because they want to pursue partisan political advantage. These are *latent* functions of sentencing and sentencing reform. On the face of it, such functions do not relate to deserved punishments or crime prevention, but their achievement may be advanced by decisions about sentencing policy.

An important disclaimer needs to be made here. When I describe some latent functions as illegitimate, I do not mean to throw stones at public officials. Human beings sometimes behave unattractively and opportunistically, and there is little reason to suppose that criminal justice practitioners or policymakers are on average better or worse than the rest of us. Whether the incentive structures of political life create greater pressures toward unethical or self-interested behavior than do the structural settings of other occupations is an empirical question, to which the answer is not obvious, at least to me.

Honesty in policymaking and policy analysis requires, however, that we take account of the complexity of considerations that influence what policies are adopted and how they are implemented. Otherwise we analyze sentencing as if it were a two-dimensional phenomenon in a three-dimensional world.<sup>21</sup> In this Article, I try to look at sentencing policy in the round.

In the preceding paragraphs, I identified a number of functions of sentencing:

---

20. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS A SCIENCE OF RIGHT (W. Hastie trans., 1887) (1796).

21. Reflecting this, sociologist John Hogarth titled one of his books SENTENCING AS A HUMAN PROCESS (1971).



- Normative functions (purposes);
- Distributive functions (consistency, evenhandedness, and fairness);
- Preventive functions (crime, fear of crime, costs of crime, and consequences of victimization);
- Management functions (efficiency, cost-effectiveness, and resource management);
- Communicative functions (public reassurance, public confidence, denunciation of wrongful behavior, and reinforcement of basic social norms); and
- Latent functions (self-interest, ideological expression, and partisan advantage).

Normative purposes provide the ultimate criteria by which the justness of a punishment system should be assessed. The most important of the remaining functions are the distributive functions of doing justice and the preventive functions of minimizing crime and its consequences. These can be pursued effectively only if account is taken of the implications and constraints associated with the other overt functions and if ways are devised to limit pernicious influences of the latent functions.

## II. OVERT FUNCTIONS

One of the reasons the Federal Guidelines foundered was that judges and prosecutors cared more about sentencing's distributive functions than did policymakers in the U.S. Sentencing Commission, the U.S. Department of Justice, or the U.S. Congress. The best illustrations of this are the Congress's enactment in 1986 of mandatory minimum sentences for drug crimes that required sentences much harsher than were typically imposed for violent crimes,<sup>22</sup> and the Commission's decisions to incorporate even more severe drug-crime penalties into the Guidelines than the Congress specified.<sup>23</sup> These

---

22. For example, the Commission's congressionally mandated self-evaluation showed that prior to implementation of the Guidelines, mean average times served for bank robberies were 38.2 months (no weapon) and 47.49 months (weapon), while the means for first-time heroin (22.4 months) and cocaine offenses (20.60 months) were much lower, which accords with research commissioned by the Commission on public attitudes toward the comparative severity of offenses. See PETER H. ROSSI & RICHARD A. BERK, U.S. SENTENCING COMM'N, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES (1995), [http://www.uscc.gov/nss/jp\\_exsum.htm](http://www.uscc.gov/nss/jp_exsum.htm) (last visited Sept. 10, 2005). After the Guidelines took effect, times served for bank robbery declined a bit (43.77 and 36.87 months with and without a weapon, respectively) while those for first-time heroin (50.63 months) and cocaine (53.93 months) trafficking more than doubled to levels considerably higher than those for bank robbery. U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 46 tbl.83, 50 tbl.84, 53 tbl.85 (1991).

23. Legislation enacted in 1986, for example, required five-, ten-, and twenty-year mandatory minimum sentences for offenders convicted of a wide range of drug offenses.

decisions had the effect of making the Guidelines much more complicated and sentences much severer than they need have been to pursue sentencing's overt functions.

One might say, "So what? It's up to Congress and the Commission, not practitioners, to decide what's just," but that ignores something real. At the individual case level, judges and prosecutors see themselves as in the business of doing justice.<sup>24</sup> When laws or guidelines prescribe sentences that are much harsher than practitioners think reasonable or just, there is a problem.<sup>25</sup> When laws require that sentences be calculated by means of mechanical scoring systems, as the Federal Guidelines did, rather than by looking closely at the circumstances of individual cases, there is a problem. The Federal Guidelines placed judges in a situation where oaths they swore—to enforce the law and to do justice—pulled in different directions, and different judges reconciled the tension in different ways.

#### A. Norms

The overriding normative function of a sentencing system is to assure that individuals convicted of crimes receive the sentences that, in principle, they should. Preponderant views about the governing principles vary across time and space. For most of the twentieth century through the 1970s, utilitarian ideas about crime prevention through rehabilitation and incapacitation were predominant; they have not gone away, but in more recent decades they have been eclipsed by retributive and just deserts emphases on the desirability of apportioning the severity of punishment to offenders' blameworthiness. Interest in rehabilitation has revived in the early twenty-first century (through drug and similar courts offering individualized, treatment-based dispositions, a plethora of new treatment programs in institutions and in the community, the "prisoner reentry" movement) and may signal another shift in preponderant views.

---

Rather than simply provide that the affected offenders must be sentenced accordingly, the Commission exacerbated the legislation's effects in two principal ways: through the relevant conduct provisions, applying the mandatories to offenders not actually convicted of the predicate offenses; and by building intermediate steps between the mandatories so that, if five grams of crack triggered a five-year minimum and ten grams a ten-year minimum, amounts between five and ten grams triggered sentences between five and ten years.

24. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997).

25. The 2003 survey of Article III judges conducted by the Commission found that 73.7% of district court judges and 82.7% of circuit court judges reported that drug-trafficking sentences were "greater than appropriate." ARTICLE III JUDGES SURVEY, *supra* note 17, exhbs.II-4, III-4.

I say nothing more about these normative choices except that they must be made, that they have important ethical and moral dimensions about which reasonable people differ, sometimes fundamentally, and that a basic criterion of justice in a sentencing system is whether sentences imposed are justifiable in light of the governing normative principles.

### *B. Distribution*

Whatever the applicable normative purposes of a sentencing system may be, the principal distributive functions are consistency, evenhandedness, and fairness relative to those purposes. Imposition of punishment for crime is a paradigmatic instance of the conflict between individual liberty and collective interests. Sentencing is a process in which government actors are empowered to intrude on individuals' liberty and autonomy in order to prevent crimes and sanction wrongdoing. To be consistent with core values underlying constitutional notions of due process and equal protection, sentencing needs to respect offenders' rights to be treated as equals, to have decisions about them made deliberately and impartially, and to be dealt with under fair procedures.

I'd be surprised if many people disagree. A major challenge for sentencing policy, however, is that consistency, evenhandedness, and fairness look different when viewed from different places. To legislators, a ten-year mandatory minimum sentence, three-strikes, or 100-to-1 law is not necessarily inconsistent with those values. Nor, presumably, to members of the U.S. Sentencing Commission were the "actual-offense behavior" policies, drug-trafficking guidelines, or the decision to forbid judges to take account in sentencing of ethically important differences in individual offenders' circumstances. From the perspective of policymaking at the wholesale level, the policies were for Congress and the Commission to set and for judges and prosecutors, equably, evenhandedly, and fairly, to implement.

If literally applied in every case, however, those policies would have made practitioners complicit in imposing sentences in many cases that everyone directly involved believed to be substantively or procedurally unjust. Practitioners believe their sense of injustice is more valid than Congress's or the Sentencing Commission's because they see cases at first hand.<sup>26</sup> Problems appear simpler the farther away the point from which they are observed. District court judges, whether liberal or conservative, or appointed by Republican or Democratic administrations, for example, who saw living, breathing defendants, were much more hostile to the Federal Guidelines than were appellate judges who saw only written appellate briefs.<sup>27</sup> The same

---

26. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 135-38 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE]; see also *supra* note 17.

27. See TONRY, *supra* note 6, at 20 ("[Appellate courts,] seeing only lawyers and paper, are more comfortable than trial judges in treating people as stereotypes rather than as

generalization applies to lay people. The more detailed the information people are given about particular criminal cases, the less harsh and stereotyped the sentences they would impose become. As a result, as surveys in a number of countries show, the sentences lay people would impose for particular kinds of cases are often less severe than the sentences judges do impose.<sup>28</sup>

Legislators and senior executive branch officials, by contrast, deal in archetypes. Often, like citizens responding to polls, they think in terms of extreme cases, even when setting policies that will mostly be applied to run-of-the-mill ones. They are also more likely to think of sentencing policy in terms of its latent functions of self-interest, ideology, and partisanship, considerations that are much less likely to move practitioners when pondering an individual's fate. Nearly all judges and prosecutors—"officers of the court" in American legal systems—take their ethical obligation to do justice seriously. Policies that substantially obstruct their ability to do justice are likely to be resisted or undermined.<sup>29</sup>

The problems with the Federal Guidelines in the eyes of practitioners are well known.<sup>30</sup> There were four major ones. First, for many crimes, the sentences prescribed were too harsh, much harsher than those in state courts, and harsher than called for by public opinion, as a representative national Commission survey of public opinion showed.<sup>31</sup>

Second, the Guidelines were too mechanical. With forty-three levels of offense severity set out in a grid format like a road-mileage chart, and innumerable factors warranting shifts up or down the grid, calculating a

---

individuals. This may be one reason why federal trial judges have been much more vocal in their opposition to the mechanistic federal guidelines than federal appellate judges have been.”).

28. See JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 29-34 (2002); see also MICHAEL HOUGH & JULIAN ROBERTS, HOME OFFICE RESEARCH & STATISTICS DIRECTORATE, ATTITUDES TO PUNISHMENT: FINDINGS FROM THE 1996 BRITISH CRIME SURVEY (1998), <http://www.homeoffice.gov.uk/rds/pdfs/r64.pdf> (last visited Sept. 30, 2005).

29. See, e.g., FEDERAL COURTS STUDY COMMITTEE, *supra* note 26, at 138 (“[T]he rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor . . . . The result, it appears, is that some prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat.”). The sources cited in *supra* note 24 concur. Bowman and Heise show that the circumventions became steadily more common throughout the 1990s with the effect that average sentence lengths decreased continuously as practitioners struggled to ameliorate the severity of Guidelines widely believed to be too rigid and too severe.

30. See Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT’G REP. 355 (1992).

31. Sixty-nine percent said they would impose sentences for crack cocaine offenses that were shorter than the Guidelines prescribed, and nearly half said they would impose shorter sentences than those prescribed for bank robberies. U.S. SENTENCING COMM’N, JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES 3, 5 (1997), <http://www.ussc.gov/publicat/justpun.pdf> (last visited Sept. 10, 2005).

sentence resembled scoring a loan application, and that did not feel to judges or most anyone else like a deliberative process.

Third, the Guidelines were too rigid. They provided that many factors that practitioners consider relevant in setting appropriate sentences—defendants’ age, education and vocational skills, mental and emotional conditions, employment records, family ties and responsibilities, and community ties—were “not ordinarily relevant in determining whether a departure [wa]s warranted.”<sup>32</sup> They thereby ruled matters out of bounds that most people, and so far as I can tell judges everywhere, believe ought to be in bounds.

Fourth, the “relevant conduct” provisions that *Blakely*<sup>33</sup> and *Booker*<sup>34</sup> effectively struck down *required* judges to increase people’s sentences on account of crimes with which they were not charged, or which had been dismissed, or of which they had been acquitted. I say “effectively” because, though *Booker* did not invalidate the relevant conduct provisions per se, judges, after considering what sentence the Guidelines calculation would have prescribed, are now free to decide to explain why some other sentence is appropriate and to impose it. Insofar as the severity of sentences that the relevant conduct rules called for was in many cases objectionable to judges and other practitioners, it is unlikely judges will continue to impose those sentences under what is now a “voluntary” or “advisory” system.<sup>35</sup>

Together those four provisions often directed judges to impose sentences they believed to be unjust or inappropriate. In such circumstances, judges have three options—compliance, resignation, and circumvention. They can apply the Guidelines as written, but at the cost of behaving unjustly; most did this much of the time, occasionally after announcing that they felt they had no alternative but to impose an unjust sentence. They can announce that the Guidelines require them to impose an unjust sentence and, refusing to do so, resign. A few did this.<sup>36</sup> They can resolve neither to impose an unjust sentence nor openly to defy the law nor to resign, but together with counsel to engage in

---

32. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-5H1.6 (2004).

33. 124 S. Ct. 2531 (2004).

34. 125 S. Ct. 738 (2005).

35. An imponderable here is what the appellate courts will do, and that will only become known with the passage of time.

36. On resigning, in 1990, Federal District Court Judge J. Lawrence Irving, a Reagan appointee, said: “If I remain on the bench I have no choice but to follow the law. I just can’t, in good conscience, continue to do this.” *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, § 1, at 2. Federal District Court Judge John S. Martin resigned in 2003, over what he called “a sentencing system that is unnecessarily cruel and rigid.” John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 23, 2004, at A31. Richard T. Boylan’s statistical analyses concluded that the Guidelines’ unpopularity led judges to retire earlier. Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231 (2004). David M. Zlotnick offers detailed accounts of judicial complaints in court and in public. David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645 (2004).

circumventions designed to produce a sentence that everyone involved considered appropriate.<sup>37</sup> Many did this, and increasing numbers did so as time passed.<sup>38</sup> And they weren't alone in this: many prosecutors felt the same way.<sup>39</sup>

My personal experience working with judges and prosecutors instructs that most practitioners most of the time want to do justice in individual cases, to do the right thing, to achieve a just and appropriate sentence. When applicable laws make that difficult or impossible, they still feel powerfully moved to do so anyway.

This is human nature, and there is a lot of evidence for it, going back centuries. Between 1714 and 1830, the British Parliament created 156 new capital crimes punishable by death, many of them property offenses, but the number of executions fell by three-fourths. Why? Because juries refused to convict offenders or convicted them for offenses not punishable by death,<sup>40</sup> and judges created and narrowly interpreted technical rules that were to be followed if death was to be imposed.<sup>41</sup>

The American Bar Foundation in the 1950s and 1960s carried out major studies of criminal-court operations in several states. Prosecutorial and judicial circumvention of mandatory sentences was common in each court studied. Exemplifying this, Donald Newman described the application in Michigan of a fifteen-year maximum sentence for nighttime burglary (compared with a five-year maximum for daytime burglary): “[T]he frequency of altering nighttime burglary to breaking and entering in the daytime led one prosecutor to remark: ‘You’d think all our burglaries occur at high noon.’”<sup>42</sup>

Frank Remington, executive director of the nearly two-decades-long series

---

37. There were lots of ways to do this. *See supra* note 24. One was to agree to a plea bargain to an offense for which the statutory maximum was well below the sentence the relevant conduct provisions would otherwise prescribe. Another was for the prosecutor to announce that the defendant had provided substantial assistance to the government, filing a motion which had the effect of releasing the judge from any obligation to apply the Guidelines. A more blatant way was to approve a plea bargain calling for a sentence flatly inconsistent with the applicable Guidelines prescription. A more Byzantine way was for the judge to forbid the probation officer to include in Guidelines calculations any fact not included in counsels' stipulation of fact, thereby allowing counsel to “swallow” guns and drug quantities they did not want reflected in the sentence calculations.

38. *See* Bowman & Heise, *supra* note 24.

39. Even in the Guidelines' early years, prosecutors cooperated in manipulation of the Guidelines in at least twenty-five to thirty-three percent of cases. Nagel & Schulhofer, *supra* note 24, at 1285 & n.4. This was at the very beginning of the decade-long trend toward greater manipulation demonstrated by Bowman and Heise, *supra* note 24.

40. “In the case of a dwelling, where the theft of 40s. was a capital offense, even when a woman confessed she had stolen £5, the jury notwithstanding found that the amount was only 39s.” REPORT FROM THE SELECT COMMITTEE ON CAPITAL PUNISHMENT para. 17 (1930).

41. *See* Douglas Hay, *Property, Authority, and Criminal Law, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17 (Douglas Hay et al. eds., 1975).

42. DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 182 (1966).

of projects, summarized:

[L]egislative prescription of a high mandatory sentence for certain offenders is likely to result in a reduction of charges at the prosecution stage, or if this is not done, by a refusal of the judge to convict at the adjudication stage. The issue . . . thus is not solely whether certain offenders should be dealt with severely, but also how the criminal justice system will accommodate to the legislative change.<sup>43</sup>

Experience with the Federal Guidelines was to like effect. During the Guidelines' first decade, a plethora of Commission-sponsored studies showed that circumvention of the Guidelines' harshest and most rigid provisions was commonplace.<sup>44</sup> In recent years, Frank Bowman and Michael Heise showed that a wide range of circumvention techniques by prosecutors and judges resulted throughout the 1990s in continuously decreasing average sentence lengths in the federal courts.<sup>45</sup>

The problem isn't simply that willful judges are determined to frustrate the congressional will. Most are not. It's much more complicated than that. The Federal Guidelines were not well designed to carry out their distributive functions. Their rigidity made it difficult for practitioners to apportion punishment according to offenders' blameworthiness and, by driving many discretionary decisions underground, made it difficult to demonstrate that fair procedures were used. The circumvention they foreseeably invited produced stark differences in sentences for like-situated offenders, fundamentally frustrating achievement of the goals of fairness, evenhandedness, and consistency.

If the Guidelines system is reconstituted, the implications of experience to date are clear: overly rigid, overly detailed guidelines do not work well. Experience with state guidelines shows that guidelines can at the same time provide meaningful guidance on appropriate sentences for typical cases while allowing judges and counsel sufficient flexibility to adjust sentences to take account of particular ethically relevant circumstances in individual cases.

### *C. Prevention*

The preventive functions focus on crime, fear of crime, and reduction in their costs and consequences. For purposes of this Article, I assume that efforts to prevent crime will also lessen fear and reduce crime's costs and consequences; that is a reasonable assumption, even though a finer-tuned analysis would discuss different policy mechanisms for achieving each

---

43. ROBERT O. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE*, at xvii (1969).

44. These studies and others relating to the content of this and the several preceding paragraphs are summarized in some detail in TONRY, *supra* note 6, at 134-64. *See also supra* note 24.

45. *See* Bowman & Heise, *supra* note 24.

outcome.<sup>46</sup>

The preventive functions center on the collective interest in domestic tranquility, on enabling citizens to get on with their lives in security. These are core functions of the state and basic goals of the criminal law and punishment. If they are to be pursued effectively, policymakers need to take account of the considerable body of knowledge on the effectiveness of sanctions.

Precisely how crime prevention, fear reduction, and cost savings should be sought involves policy decisions about which reasonable people differ and depends in part on what normative purposes are deemed applicable. I assume though that most policymakers will regard crime prevention as among the justifiable normative purposes. That being so, knowledge of “what works,” and what doesn’t, is essential.

Writing to policymakers on this subject is a ticklish business because it’s probably generally assumed the writer has axes to grind that shape how the evidence is summarized. Perhaps surprisingly, however, there is broad agreement among academics of liberal<sup>47</sup> and conservative<sup>48</sup> political inclinations about conclusions to be drawn from research on the preventive effects of criminal sanctions and criminal justice interventions.

### 1. *Deterrence*

Current knowledge concerning deterrence is little different than eighteenth-century theorists supposed it to be: certainty and promptness of punishment are much more powerful deterrents than severity.<sup>49</sup> This does not mean that punishments do not deter. No one doubts that having a system of punishment has crime-preventive effects. The important question is whether changes in punishments have marginal deterrent effects, that is, whether a new policy causes crime rates to fall from whatever level they would otherwise have been at. Modern deterrent strategies, through sentencing law changes, take two forms: increases in punishments for particular offenses and mandatory minimum sentence (including “three-strikes”) laws.

Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels,

---

46. A harm-reduction approach to drug policy, for example, might imply different drug-policy approaches than are now common in the United States. Fear of crime can be addressed by things such as increased visible police presence on the streets and improved neighborhood conditions (e.g., more street lighting, prompt repair of vandalized public property, altered traffic patterns) that lie far beyond the reach of the sentencing judge.

47. *See, e.g.*, HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* (2003); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004).

48. *See, e.g.*, *CRIME: PUBLIC POLICIES FOR CRIME CONTROL* (James Q. Wilson & Joan Petersilia eds., 2002).

49. *See, e.g.*, CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (1764).



all appointed by Republican presidents,<sup>50</sup> reached that conclusion, as has every major survey of the evidence.<sup>51</sup> This is the belief, in my experience, of most experienced judges and prosecutors.

There are a number of good reasons for this widely held conclusion. First, serious sexual and violent crimes are generally committed under circumstances of extreme emotion, exacerbated by the influence of alcohol, drugs, and emotional disturbance. Detached reflection on possible penalties seldom if ever occurs. Second, most less serious crimes do not result in arrests or prosecutions, and most offenders committing them, naively but realistically, do not expect to be caught. Third, those who are caught almost always are offered plea bargains that break the link between the crime and the prescribed punishment. Fourth, when penalties are especially severe, they are often, albeit inconsistently, circumvented by prosecutors and judges. Fifth, even ignoring all those practical problems, the idea that increased penalties have sizeable marginal deterrent effects requires heroic and unrealistic assumptions about “threat communication,” the process by which would-be offenders learn that penalty increases have been legislated or are being implemented.

All those considerations apply to federal courts as much as they do to state courts, but there is an additional reason to doubt that changes in federal sentencing laws have significant marginal deterrent effects. Only five or six percent of criminal cases generally are prosecuted in federal courts; if changes or increases in penalties were capable of influencing criminal behavior, they would have to be changes to sentences imposed in state, not federal, courts.

Mandatory minimum penalties are no more than a specific instance of an attempt to deter crime through penalty increases. The clear weight of the evidence, not surprisingly given what we know about severity increases generally, is that they are seldom if ever crime preventatives. Besides the not inconsiderable problem that mandatory minimums often are circumvented by practitioners, and always will be, the best evidence suggests that they have no marginal deterrent effects, or have only modest effects that quickly waste away.<sup>52</sup>

The principal implications of current knowledge about deterrence are that certainty of punishment is more important than severity, that penalties that are too rigid or too severe result in widespread circumvention, and accordingly that

---

50. CRIMINAL CAREERS AND “CAREER CRIMINALS” (Alfred Blumstein et al. eds., 1986); DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978); UNDERSTANDING AND CONTROLLING VIOLENCE (Albert J. Reiss, Jr. & Jeffrey Roth eds., 1993).

51. See, e.g., ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (1999); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998).

52. TONRY, *supra* note 6, at 136-42.

mandatory minimums and three-strikes laws are ineffective and should be repealed.

### 2. *Incapacitation*

Incapacitative crime-control strategies have some potential if used discriminatingly.<sup>53</sup> Offenders in confinement necessarily are disabled from committing offenses in the free community. The principal difficulty is that current incapacitation policies often, and expensively, target the wrong people. There are four main problems. First, incapacitation strategies targeted on repeat serious offenders generally result in long sentences for older offenders, most of whom in any case would soon desist from crime. This is known as the problem of residual career length; most thirty- or forty-year-old offenders are unlikely long to continue as active offenders; there may be other justifications for locking up such an offender for an extended period but from an incapacitative perspective such sentences are expensive and largely ineffective. Second, strategies that target repeat offenders, in earlier times generally called “habitual-offender” laws and now called “three-strikes” laws, tend to ensnare socially inadequate, high-volume property offenders for whose prevented crimes lengthy prison sentences costing \$40,000 to \$50,000 per year are not a good investment of public resources. Third, for many offenses, including particularly drug sales, drug trafficking, and some gang-related crime, there is the “replacement” problem: offenders taken off the streets are quickly replaced by willing successors. Removing a seventeen-year-old drug dealer from a street corner is seldom likely to stop drug dealing at that corner. Fourth, there is the “false-positive” problem. For crimes of any significant seriousness, we aren’t very good at predicting which offenders will reoffend. For every “true positive” who will reoffend, three or four others predicted to reoffend do not do so.<sup>54</sup> From a cost-benefit perspective, locking up all those people is not an obviously good investment of public resources.

As with deterrence, the answer is not to forego efforts to incapacitate offenders, but to do so intelligently. This means working hard to develop strategies targeting particular kinds of serious offenders whose future behavior we can reasonably confidently predict and whose averted crimes save substantial suffering.

### 3. *Rehabilitation*

Prevention through rehabilitation looks a considerably more viable strategy

---

53. Daniel S. Nagin, *Deterrence and Incapacitation*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 345 (Michael Tonry ed., 1998).

54. John Monahan, *The Future of Violence Risk Management*, in *THE FUTURE OF IMPRISONMENT* 237 (Michael Tonry ed., 2004).

in the early twenty-first century than it did during the closing decades of the twentieth century. The view that “nothing works” was an important backdrop to the shift toward determinate sentencing that underlay creation of the Federal Guidelines.<sup>55</sup> If we don’t know how to reduce offenders’ prospects for later offending, it is hard to justify giving judges and parole boards broad discretion to individualize sentencing.

The prospects for rehabilitation, however, have changed radically. Evidence is accumulating from many sources—individual evaluations, meta-analyses, practical experience—that well-managed, well-targeted programs can reduce participants’ probability of reoffending. A wide range of programs, including drug treatment, anger management, cognitive-skills training, sex-offender treatment, and various educational- and vocational-skills programs, have been shown to reduce reoffending.<sup>56</sup> A report from the English Home Office, which underpinned a massive reorganization of the English criminal justice system mandated by the Criminal Justice Act of 2003, concluded, “A reasonable estimate at this stage is that, if the [treatment] programmes are developed and applied as intended, to the maximum extent possible, reconviction rates might be reduced by 5-25 percentage points (i.e. from the present level of 56% within two years to (perhaps) 40%).”<sup>57</sup> The proliferation of drug courts and prisoner reentry programs in the United States bears witness to the widely shared perception that some things work.

An important implication is that rigid sentencing policies obstruct efforts to prevent crime through rehabilitation of offenders. For drug and other treatment programs to work, they must be targeted to the characteristics and needs of particular offenders and this requires sentences to be individualized. With the fall of the nothing-works psychology goes much of the case for rigid sentencing standards.

#### 4. *Moral education*

Deterrence, incapacitation, and rehabilitation are not needed to restrain most adults from selling drugs, burglarizing houses, holding up convenience stores, or mugging passersby. Most people’s personal norms and values make predatory crime almost unthinkable. European scholars and theorists have long observed that the criminal law’s main function is to reinforce basic social norms that are learned in the home, the church, the school, and the neighborhood.<sup>58</sup> These primary socializing institutions must do the heavy

---

55. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

56. Gerald G. Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 361 (1999).

57. JOHN HALLIDAY ET AL., MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES 7 (2001).

58. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974); Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in

lifting—anything the criminal courts might do is too little and too late for the criminal justice system to serve as a primary socializing institution—but it is important that law and the legal system reinforce those norms and not undermine them.<sup>59</sup>

One implication, consistent with research findings on deterrence, is that it is more important that crimes have consequences than that the consequences be severe. Another, consistent with the research findings on rehabilitation, is that the choice of sanctions should be tailored to the circumstances of particular cases.

### 5. *Prevention under the former Federal Guidelines*

The Federal Guidelines were not well conceived to achieve their preventive functions. Their rigidity and severity produced a system that was often circumvented. Shorter sentences consistently applied would have offered better deterrent potential than long sentences inconsistently applied. Achieving incapacitation goals efficiently and cost-effectively requires close targeting, and rigid policies cannot do that. Achieving rehabilitative goals also requires close targeting of sanctions to offenders' circumstances and criminogenic needs. The Federal Guidelines gave little place to rehabilitative programs and allowed almost no latitude for tailoring penalties to offenders' needs. Finally, the Guidelines undermined moral education functions by breaking commonsense links between crime and punishment. When drug-trafficking crimes attract harsher penalties (median average sentence in fiscal year 2003: 57 months) than sexual abuse (41 months), racketeering (40 months), burglary and money laundering (each 24 months), manslaughter (21 months), and assault (15 months), it is hard to claim that sentencing policy reflects prevailing norms.<sup>60</sup>

---

SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 92 (Michael Tonry & Richard S. Frase eds., 2001).

59. That is why Scandinavian countries attach great significance to proportionality in punishment (so that the severity of sanctions acknowledges the comparative seriousness of crimes) and more frequently impose prison sentences (though shorter ones) and their equivalents than do most other countries (so criminal behavior has consequences). Scandinavian countries use sanctions other than imprisonment, but almost always they are sanctions such as day fines and community service that can easily and credibly be scaled, like imprisonment, to the seriousness of the crimes for which they are imposed. *See supra* note 58.

60. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13. I listed medians in the text rather than means since means are heavily affected by aberrantly long individual sentences. Of the seven offenses listed, drug-trafficking mean sentences are also longest: drugs (76.9 months), sexual abuse (73 months), racketeering (71.6 months), money laundering (45.3 months), manslaughter (33 months), assault (30.4 months), and burglary (24.7 months).

*D. Management*

The criminal justice system has limited material and manpower resources. Prosecutors, presiding judges, and corrections managers need to organize their offices and courtrooms to get the job done as efficiently and cost-effectively as possible while trying to achieve appropriate outcomes in individual cases.

Sentencing guidelines in some states have proven to be a useful tool in reconciling distributive, preventive, and management functions. These guidelines have achieved reasonable consistency in sentences imposed and have proven an effective tool for projecting the effects of alternate policy proposals and thereby managing corrections resources and controlling corrections budgets.<sup>61</sup> Although plea bargaining occurs everywhere, in the states with well-designed guidelines bargaining takes place in the shadow of the guidelines and has not been characterized by the widespread circumvention, and resulting disparities, that characterized the federal system.<sup>62</sup>

*1. Efficiency and cost-effectiveness*

Court dockets are crowded, treatment resources are scarce, and correctional programs including prisons are overcrowded and under-resourced. Managers have to figure out how to juggle their budgets and manpower to keep cases flowing, hold backlogs down, and prioritize their resource allocations so that the most serious and important cases receive the attention they deserve. Most courts and prosecutors' offices have monthly case-disposition and backlog targets; failure to meet them is interpreted as laziness or ineffectiveness. This is generally understood to mean that most cases must be resolved as quickly as can be by a guilty plea, trials should be avoided whenever possible, and bench trials are preferable to jury trials.

Plea bargaining is the mechanism for achieving most of those goals and requires that the State have something to offer the defendant to induce cooperation and that prosecutors, defense counsel, and judges get along. Generally, the parties do get along because most criminal-court practitioners work for extended periods in the same setting and soon learn the prevailing conventions ("going rates") and get to know the relatively small number of people in the courtroom where they work.<sup>63</sup> People who are oppositional or

---

61. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005); Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222 (Michael Tonry & Richard S. Frase eds., 2001).

62. Reitz, *supra* note 61, at 250-53.

63. James Eisenstein et al., reporting on research on how practitioners in local courts reach sentencing decisions, observe that sentences result from "accommodations among competing values and interests that support these values, accommodations that are superimposed on a common basic structure supported by broad consensus." JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 294 (1988).

uncooperative soon find that they receive little cooperation back and that they are felt by their colleagues to be unreasonable. Those are pretty effective sanctions for uncooperative behavior.<sup>64</sup>

Lawyers and judges become socialized into the local courtroom culture which, given that felony courts are usually staffed by people from the communities they serve, generally reflects prevailing community notions about right and wrong and the severity of punishment. People working in big-city courts tend to have somewhat different local cultures than do people working in suburban and small-town courts. Legal cultures vary from city to city and region to region. The U.S. Sentencing Commission-sponsored study of prosecutorial circumvention of Guidelines documented wide variations in legal culture in different federal district courts.<sup>65</sup>

What practitioners do largely depends on the prevailing courtroom culture. If sentencing statutes and guidelines set standards that are incompatible with local traditions and beliefs, local traditions often win out, with the acquiescence of everyone involved. Practitioners' needs to achieve management goals and the importance of local courtroom cultures together mean that local courts will do what's needed to operate efficiently and cost-effectively and to achieve outcomes that those involved consider appropriate and just. Sentencing standards that are too harsh, too lenient, or too mechanistic often will be circumvented, and plea bargaining often will provide a device for doing so.

The Federal Guidelines sought to facilitate efficient case processing. To reward and thereby encourage guilty pleas, judges could sentence offenders who "accepted responsibility" according to Guidelines levels two or three steps lower than their offense. That effort, however, was undermined by the Guidelines' relevant conduct provisions, which required judges to base sentences on the offender's "actual-offense behavior," whether or not he was charged or convicted for it.

In practice, the Federal Guidelines' severity and rigidity resulted in widespread circumvention by plea-bargaining lawyers. Reconstituted Federal Guidelines could be drafted in a less rigid, more open-textured way that would allow practitioners openly to balance management considerations with the need to achieve just and reasonably consistent sentences in individual cases.

---

They conclude of reforms imposed from outside, "The more radical a proposed change [e.g., the more dissonant with prevailing local values] the less likely is its adoption." *Id.*

64. *Id.*; JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977); ROY B. FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES (1992).

65. Nagel & Schulhofer, *supra* note 24, at 554 ("In each district, the contextual environment influences the degree of guideline circumvention—the jurisdiction makes a difference. Moreover, the . . . ethos of the jurisdiction is very much a function of the interrelationship of the attitudes and conduct of the key players—judges, U.S. Attorneys, federal defenders, AUSAs, and probation officers.").

## 2. *Resource management*

Governments and individual agencies need to get their business done within the resource constraints presented by their budgets. They need to be able to predict changes in their likely flow of work and to plan for resources they will need in the future. These things inevitably entail choices.

One of the great advantages of sentencing guidelines is that they are a proven tool for effective resource management.<sup>66</sup> States that adopted sentencing guidelines as a resource-management tool have successfully tailored their sentencing policies to their correctional budgets and programs. By making sentencing decisions predictable in the aggregate, guidelines enable policymakers to project likely future resource needs. If, for example, a jurisdiction contemplates doubling sentence lengths for sex crimes, it can project how many more prison beds will be needed. If current and planned facilities cannot accommodate the increased numbers, policymakers can respond in a number of ways. They can appropriate funds to build new facilities, revise sentences for other offenses downwards to free up the needed spaces, reconsider whether the sex-offender proposal is a good idea, or do some combination of these things.

These things were known when the Sentencing Reform Act of 1984 was adopted. Section 994(g) provides that the Guidelines “shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”<sup>67</sup> The U.S. Sentencing Commission has ignored this directive. At the time of writing, the federal prisons are operating at 139% of capacity.<sup>68</sup>

Sound resource management is a necessary characteristic of effective government and a primary rationale for sentencing guidelines systems. Its scope should extend to needs for nonincarcerative sanctions, availability of appropriately targeted rehabilitative programs, and effectuation of appropriately targeted incapacitation policies.

## E. *Communication*

Communicative functions are described briefly, not because they are less important than the other overt functions but because the basic propositions can be simply stated. Communicative functions interact in interesting ways with normative, distributive, and preventive functions. Legitimacy and public confidence depend in part on whether the law is seen to operate reasonably and in ways that are consonant with widely held ideas about justice (including, for

---

66. See, e.g., Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39 (2002).

67. 28 U.S.C. § 994(g) (2005).

68. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003, at 7 tbl.8 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf> (last visited Sept. 11, 2005).

example, that claims be fairly considered and that penalties be proportionate to the severity of crimes).

### 1. *Legitimacy*

Legitimacy is increasingly recognized as a key element in how people relate to government.<sup>69</sup> Whether people have confidence in, support, and cooperate with public institutions is influenced by the institution's legitimacy in their eyes. People are more likely to react positively to a police stop, or to accept an adverse decision by a court, if they believe they have been treated fairly, that decisions about them have been evenhanded and impartial, and that they have had a chance to have their say.<sup>70</sup> Sentencing policies that respect offenders' rights to be treated as equals, to have decisions about them made deliberately and impartially, and to be dealt with under fair procedures are more likely to be perceived as legitimate than policies that do not satisfy these requirements of procedural justice.

### 2. *Public reassurance*

Sometimes laws are enacted or policies are adopted to "send a message" that the public's views have been noted or that their anxiety, apprehension, or unhappiness have been noted. Sociologist David Garland argues that much recent crime-control policy in the United States and England was adopted primarily for "expressive" reasons, not because policymakers necessarily thought that new, tougher policies would reduce crime rates but because they wanted to reassure an anxious public that was fearful of rising crime rates and troubled by the uncertainties of the contemporary world.<sup>71</sup>

Legislators have long adopted symbolic policies meant primarily to acknowledge public anxiety. Senator Alfonse D'Amato of New York, for example, according to the *New York Times*, conceded that two amendments he successfully offered to federal crime legislation, "which Justice Department officials sa[id] would have little practical effect on the prosecution of crimes, might not solve the problem. 'But,' he said, 'it does bring about a sense that we're serious.'"<sup>72</sup> The seeming eighteenth-century English paradox that many more crimes were made punishable by death during a century when the number

---

69. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284-85 (2003).

70. *Id.* This empirical finding concerning procedural justice's power over distributive justice is well established in the literature. See E. ALLAN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3 (1988).

71. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

72. Gwen Ifill, *Senate's Rule for Its Anti-Crime Bill: The Tougher the Provision, the Better*, N.Y. TIMES, July 8, 1991, at A6.



of executions rapidly and substantially declined is generally explained in expressive terms; legislators were trying to stress the seriousness of the new death-eligible offenses, generally property crimes, even though there was little appetite for executing property offenders.

### 3. *Public confidence*

The English government has for nearly a decade explained major changes in criminal justice policy as parts of a larger effort to increase public confidence in the legal system.<sup>73</sup> The criminal justice system is believed by the English government to lack credibility in the eyes of voters, and measures meant to make punishments harsher and more certain and convictions more likely are portrayed as parts of a larger campaign to increase public confidence in the legal system and generally. This is in effect a collective, bystander's parallel to legitimacy. Public confidence in the legal system is likely to increase if it is seen effectively to be addressing problems that trouble citizens.

### 4. *Reinforcement of basic social norms*

This is the corollary of the preventive function of "moral education." That is why Scandinavian countries attach great significance to proportionality in punishment (so that the severity of sanctions acknowledges the comparative seriousness of crimes) and more frequently impose prison sentences (though shorter ones) and their equivalents than do most other countries (so criminal behavior has consequences).<sup>74</sup>

Conversely, if the law's treatment of crimes is incompatible with basic social norms, the effect will be to undermine the legitimacy of the legal system. At times, for example, when cannabis has been treated as a dangerous drug on par with heroin or crack cocaine, enforcement becomes lax and inconsistent, and the legal system is seen by many as being out of step with prevailing morality. Or when drug trafficking in small amounts is treated as being more serious than rape, manslaughter, or serious assault, it is clear that the legislature is out of step. Recent prosecutions and severe punishments in white-collar-crime cases offer an example of the system responding to a widespread public perception that it was unjust that corporate malefactors in crimes involving hundreds of millions of dollars often received milder punishments than less privileged citizens convicted of much less serious crimes.

A few strong inferences can be drawn from these observations about

---

73. HOME OFFICE, JUSTICE FOR ALL 13 (2002), ("We have an absolute determination to create a system that meets the needs of society and wins the trust of citizens, by convicting the guilty, acquitting the innocent and reducing offending and reoffending."), [http://image.guardian.co.uk/sys-files/Politics/documents/2002/07/17/Criminal\\_Justice.pdf](http://image.guardian.co.uk/sys-files/Politics/documents/2002/07/17/Criminal_Justice.pdf) (last visited Sept. 25, 2005).

74. See, e.g., Lappi-Seppälä, *supra* note 58, at 109-11.

communicative functions. First, they fit together: people expect legal institutions to be fair, consistent, rational, and in step with prevailing social norms. Second, public confidence and reassurance are likelier to be achieved by fair, consistent, and rational policies and practices than by expressive and symbolic policies that lack those qualities. It is hard to imagine, for example, that statutes that call for five-, ten-, and twenty-year minimum sentences for drug crimes, which are routinely circumvented and thereby lack legitimacy and fail to mirror prevailing social norms, have greater positive effects on public reassurance and confidence than would more moderate laws.

### III. LATENT FUNCTIONS

The latent functions of sentencing policy—using sentencing to achieve personal, ideological, or politically partisan goals—sometimes fundamentally obstruct performance of sentencing's overt functions. Many practitioners and policymakers hanker for more lucrative or powerful jobs. Elected officials want to be reelected. Prosecutors and judges sometimes call for or impose unusually severe punishments to win favor with voters or party leaders. Legislators propose and vote for new laws for those reasons. Many practitioners and policymakers have strong ideological beliefs and want to bear witness to their beliefs. Policymakers too want to advance their own careers, and they sometimes want to posture before ideological soulmates and make symbolic statements. Policymakers sometimes subordinate their personal beliefs to achievement of partisan political goals as many Democrats did when they followed Bill Clinton's strategic decision never to let the Republicans get to his right on controversial crime-control issues.<sup>75</sup>

#### A. *Self-Interest*

Purely personal ambitions and motives are illegitimate considerations in decisionmaking by prosecutors and judges about individual cases. Pursuit of the distributive, preventive, and communicative functions are all undermined when cases are dealt with in a particular way because an individual practitioner believes she will be likelier to gain a nomination, win an election, or obtain a new job. Retributive theories of punishment call for punishments to reflect the personal culpability and harm associated with an offense. Utilitarian and mixed theories call for punishments to be based on good-faith assessments of their likely crime-preventive effects. Decisions based on practitioners' personal self-interest are in effect whimsical or arbitrary and reconcilable with no prevailing theory of punishment.

The analysis is somewhat more complicated for legislators and other

---

75. See generally TED GEST, CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER (2001).

policymakers, primarily because the issues of self-interest are less clear. When a prosecutor or judge treats an offender distinctively to realize a purely personal goal, there is no arguable public benefit that could be said to outweigh or counterbalance the harm done the offender. When an entirely self-motivated legislator votes to support a particular policy for which there is little substantive justification, but claims in good faith to be trying to reassure the public or, more complicatedly, claims a need to vote in a particular way on this subject in order to win others' support for a vote on a more important subject, it is almost impossible to assess what the real motives are. The principle should, however, be the same as for a prosecutor or a judge—only disinterested motives are legitimate—and, as an ethical matter, legislators themselves know whether they are supporting a statutory change for legitimate or ignoble reasons.

### *B. Ideological Expression*

Crime-control policy in our time has become entangled in ideological conflict. Drug policy offers stark examples. The federal 100-to-1 law punishes people, mostly black, convicted of crack cocaine offenses as severely as people, many white, convicted of powder cocaine offenses involving amounts that are 100 times larger. The law was enacted in 1986, after the much-publicized death, generally attributed to a crack overdose, of Len Bias, a University of Maryland basketball player forecast to become an NBA superstar.<sup>76</sup> The law's role in exacerbating racial disparities in federal prisons soon became clear, and the U.S. Sentencing Commission proposed that the differential be eliminated. Both the Clinton White House and the Congress opposed any change, and none was made. In later years Attorney General Janet Reno, Drug Czar Barry McCaffrey, and the U.S. Sentencing Commission proposed that the differential be reduced. The Clinton and Bush II White Houses opposed all changes, and the differential remains. No one presumably wants federal sentencing laws to worsen racial disparities, but neither successive administration nor congressional leaders have been willing to risk being accused of condoning drug use or trafficking.<sup>77</sup>

---

76. Nearly half the members of the Black Congressional Caucus voted in favor of the law, *see* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 370 (1997), though when the law's role in worsening racial disparities in federal prisons became evident, *see, e.g.*, DOUGLAS C. McDONALD & KENNETH E. CARLSON, *SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER?: THE TRANSITION TO SENTENCING GUIDELINES, 1986-90* (1993), the Caucus called for the law's repeal and has maintained that stance ever since.

77. *See* Coalition Letter to the U.S. Sentencing Commission on the Disparity of Crack and Powder Cocaine Sentencing (Apr. 4, 2002), <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=10120&c=229> (last visited Sept. 11, 2005). The letter stated:

On March 19, 2002, Deputy Attorney General Larry Thompson testified before the Commission. He stated that the Justice Department believes current cocaine sentencing laws to be 'proper' and that if the Commission seeks to address the disparity between powder and crack sentences, the trigger quantities for powder cocaine should be lowered instead of those for crack cocaine being raised.

Lots of other examples can be given of laws that are ineffective at achieving their overt goals—mandatory minimum and three-strikes laws, for example—and sometimes like the 100-to-1 rule produce unintended consequences that no one wants.

### C. *Partisan Advantage*

Pursuit of partisan advantage is the most cynical of the latent functions. Ideological influences grow out of deeply held beliefs. Partisan influences sometimes result in the passage of laws that cannot be justified on the substantive merits and which foreseeably produce unjust results. California's three-strikes law is an example. It was enacted not because thoughtful policymakers really wanted decades-long prison sentences for people who stole pizza slices in schoolyards or a handful of compact discs from Wal-Mart, but because Republican Governor Pete Wilson and California Assembly leader Willie Brown played a game of chicken from which, in the end, neither backed down.<sup>78</sup> It was not, however, either of the players who got run over but tens of thousands of California offenders. Neither Wilson nor Brown was willing to propose refinements to Wilson's extreme initial proposal and thereby expose himself and his party to the other's accusation of softness. As a result California adopted the most far-reaching and rigid three-strikes law in the country.<sup>79</sup>

Latent functions and to a lesser extent communicative functions pose a formidable problem for principled policymaking. They are not primarily aimed at what goes on in courtrooms or on punishments imposed, crimes prevented, or efficiency enhanced, but on reputations developed, political goals achieved, and elections won.

### CONCLUSION: RECONCILING OVERT AND LATENT FUNCTIONS

In principle, only the overt functions should count. Thought of as machinery meant to produce something of value, a sentencing system's most important functions, most people would agree, are the imposition of deserved punishments and the prevention of crime. Political maneuvers and passions may sometimes result in the passage of laws that produce injustices, but it is hard to imagine that many people think that's a good way to make policy or

---

*Id.*

78. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

79. According to Zimring et al., Democratic legislators agreed to pass any proposal Governor Wilson proposed, in hopes "that he would back down from an unqualified 'get tough' stand or be politically neutralized if he persisted." *Id.* at 6. Wilson did not blink and the law was passed as proposed because both sides were "unwilling to concede the ground on 'getting tough' to the other side in the political campaign to come." *Id.*

that unjust outcomes in individual cases are a good thing. Even some of the overt functions—administrative concerns for efficiency, cost-effectiveness, and resource management—are regularly challenged on normative or policy grounds.<sup>80</sup> In practice, though, the latent functions always powerfully shape policy and sometimes shape practice.

That is the world we will continue to live in, but we can be more self-aware, intellectually honest, and transparent. At the federal level over the past twenty years, policymakers often have not been honest about it. A major reason why the Federal Guidelines were so inadequate was that the overt functions of the U.S. Sentencing Commission in its formative years became entangled in the personal ambitions of William Wilkins, the first chair (initially, unsuccessfully, to become FBI director, then successfully to become an appellate judge) and Stephen Breyer (successfully, to get to the Supreme Court). This meant that a major function of the Guidelines was to win favor with Strom Thurmond and his personal staff in the Senate in particular, with congressional Republicans more generally, and with Ed Meese's Justice Department.<sup>81</sup>

Given the multiple functions of sentencing and the sentencing system, what should the Congress do in the wake of *Booker* and *Blakely*? Strong cases can be made for two options. First, do nothing. Despite the excitement that the decisions caused, a case can be made that they have effectively eliminated one of the Guidelines' worst features, "real-offense" sentencing, ameliorated the problems of excessive rigidity and severity, and otherwise left federal sentencing policies intact. Guidelines still give starting points, based on offenses of conviction, for calculating sentences. Policies remain in place for encouraging guilty pleas and assistance to the government in prosecuting other crimes. Other policies set standards for taking account of offenders' prior records and personal circumstances. Taking account of all those provisions and

---

80. Plea bargaining, for example, though a much more efficient means of case disposition than a trial, has long been disparaged for its dishonesty—defendants often plead guilty to offenses less serious than those they actually committed—and for its coerciveness—a sufficiently attractive sentence bargain may lead a factually innocent but risk-averse defendant to admit to a crime he didn't commit. It is hard to distinguish in principle between a discount off the standard sentence in exchange for pleading guilty and penalizing those who do not agree to plead guilty for exercising their constitutional right to trial. Community penalties are often more cost-effective than imprisonment, but judges often fail to use them because they are not severe enough. Although prison beds are a scarce and expensive resource, many judges vigorously deny that they have any obligation to take resources into account when they sentence, insisting that it is their job to impose just and appropriate sentences and somebody else's job to provide the resources to carry them out.

81. For Wilkins, who had been a senior assistant to Thurmond, continued personal sponsorship was the need; for Breyer, the need was to maintain personal credibility with conservative Republicans in preparation for a possible time—which came—when he might again need senatorial confirmation. That Breyer had such credibility to lose among conservative Republicans is shown by his nomination and confirmation to the U.S. Court of Appeals for the First Circuit, at a time during the 1980 presidential campaign when Republicans had made it clear that none of President Carter's judicial nominations would be confirmed. TONRY, *supra* note 6, at 83-85.

their application in individual cases, judges can impose sentences they believe appropriate and explain why. Appellate sentence review remains available to sort out confusions.

The cases forbid imposition of sentences above the maximum Guidelines range applicable to the offense or offenses of which the defendant was convicted. "Upward departures," however, are in any case rare and prosecutors know how to obtain especially long sentences when on the merits they appear warranted: allege and prove facts that will produce convictions authorizing resort to higher Guidelines ranges or insist on plea bargains specifying the wanted sentence.

Once the dust settles, federal courts will adjust to the new regime. Elimination of mandated real-offense sentencing should increase the system's legitimacy in the eyes of defendants, practitioners, and bystanders. It is hard to see any reason why public confidence and public reassurance should be diminished. The key management functions of efficiency, cost-effectiveness, and resource management should not be affected. Prosecutors may need to adjust their charging and bargaining practices a bit, but prosecutors have always done that when sentencing statutes have changed. The post-*Booker* world is one in which federal sentencing should perform its distributive functions better. Much empirical evidence shows that well-managed guidelines systems make sentencing more predictable and consistent; elimination of anomalous sentences resulting from real-offense sentencing will make it more predictable and consistent.

The other option is a makeover of the Federal Guidelines. A quarter-century's experience with federal and state guidelines has shown how their multiple functions can be reconciled in ways that achieve broad support from practitioners and reasonably consistent patterns of sentences imposed while allowing jurisdictions to take account of valid management concerns including resource allocation. The key elements are the development of Guidelines that classify offenses and offenders in reasonable ways, that authorize sentences that accord with the sensibilities of most of the judges and prosecutors charged to apply them, and that allow sufficient flexibility for the individualization of sentences to take account of special circumstances and of applicable rehabilitative and incapacitative considerations.

The goal is a sentencing system that is fair, evenhanded, and consistent, that takes realistic account of key management interests, and that optimizes legitimacy, public reassurance, and public confidence. We know how to do that should the Congress wish it.