Bringing the Rule of Law to Criminal Sentencing: Judicial Review, Sentencing Guidelines and a Policy of Just Deserts

Peter A. Ozanne

Assist. Prof of Law, University of Oregon

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation


Available at: http://lawecommons.luc.edu/luclj/vol13/iss4/6

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
Bringing the Rule of Law to Criminal Sentencing: Judicial Review, Sentencing Guidelines and a Policy of Just Deserts

Peter A. Ozanne*

INTRODUCTION

One of the earliest proposals for legal reform of our penal system was the judicial review of criminal sentences. After evaluating sentences in light of the reasons given for them and by comparing sentences in similar cases, proponents of sentence review still contend that appellate courts are the best forum in which to regulate the broad discretion exercised by trial judges and parole boards. *

* Assistant Professor of Law, University of Oregon. B.A. 1967, University of Washington; J.D. 1971, Stanford University. The author thanks the graduate school of the University of Oregon for its financial assistance during the research of Oregon's sentencing system which underlies this article.

1. Some states, such as Connecticut and Massachusetts, have adopted special systems of judicial review in which panels of trial judges review sentences. An evaluation of the merits of these sentence review systems is beyond the scope of this article. It is assumed, however, that most jurisdictions will choose to integrate sentence review into their preexisting appeals processes in order to reduce cost, to avoid fragmenting appeals in individual cases, and to realize the benefits of the procedures already established by appellate courts. See STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 28-29 (1968) [hereinafter cited as STANDARDS].

2. Parole boards and trial judges are both considered “sentencers” for purposes of this article. The parole release decision is as important as the judge's sentence in the formal process of determining actual punishment in most felony sentencing systems. See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (1978) [hereinafter cited as SENTENCING GUIDELINES PROJECT]. "The working assumption became that when minimum sentences are short or indeterminate, the parole decision is, in effect, a deferred sentencing decision." Id. at 5.

There is an ongoing debate in sentencing law reform circles over which agency possesses the inherent institutional competence to make sentencing decisions. See, e.g., Alschuler, Sentencing Reform and Parole Release Guidelines, 51 U. Colo. L. Rev. 237 (1980); cf. Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 Hofstra L. Rev. 89 (1978) [hereinafter cited as Hoffman & Stover]. There seems to be increasing support for the abolition of parole and the transfer of all responsibilities to trial judges. See, e.g., Skrivseth, Abolishing Parole: Assuring Fairness and Certainty in Sentencing, 7 Hofstra L. Rev. 281 (1979). However, the particular distribution of sentencing responsibilities in any jurisdiction will probably be determined by historical practices, the attitudes of judges and parole boards toward sentencing regulation, and the political dimensions to the administration of criminal justice in that jurisdiction.

For present purposes, it is enough to assert that in penal systems where sentencing deci-
In the process of sentence review, appellate courts are expected to develop coherent sentencing policies and principles in order to reduce sentence disparity and to promote the equitable distribution of punishment and the rational allocation of corrections resources. Despite the arguments in favor of sentence review, most criminal sentences in this country remain immune from judicial review.\(^3\) Even in jurisdictions that have adopted some form of sentence review, the performance of appellate courts has not met proponents' expectations.

This article first reviews the reasons for the lack of acceptance and effectiveness of judicial sentence review. Next, determinate sentencing proposals viewed by many as alternative methods of regulating the exercise of discretion in sentencing systems are examined. Among the recent proposals to increase determinacy in sentencing are sentencing guidelines, which the article suggests best promotes a rule of law that structures sentencing discretion without eliminating the ability to vary punishment in individual cases. The article then demonstrates that judicial sentence review and sentencing guidelines can be complementary processes in a system designed to increase determinacy in sentencing. Sentencing guidelines can be used to determine the appropriate sentence in most cases and, under a carefully drafted sentence review statute,


The release decisions of parole boards are generally immune from review too. Parole release decisions are either formally exempt from judicial review by statute or are deferred to by appellate courts because they are "technical" decisions. See, e.g., 18 U.S.C. § 4218 (1981); Comment, Federal Parole Decisionmaking: Judicial Review for the Fortunate and Few, 85 DICK. L. REV. 501, 513 (1981). See infra note 127 and accompanying text.
appellate courts can be relieved of much of the burden of sentence review. At the same time, judicial sentence review can bring the force of law to a sentencing guidelines system in order to insure increased sentencing regulation and reduced sentence disparity. After examining the sentence review statutes in the guidelines systems of several states, this article suggests the features that will best promote the complementary relationship between judicial sentence review and sentencing guidelines.

Because the failure of judicial sentence review in the past has resulted in large part from the absence of coherent sentencing policies, the second part of this article urges legislatures to adopt a sentencing policy aimed at realizing the regulatory potential of judicial sentence review and sentencing guidelines. The article concludes that, among the recognized theories of criminal punishment, the retributivistic theory of just deserts provides the only basis for a policy to insure that judicial review will reduce disparities in sentencing and that administrators of sentencing guidelines systems will be accountable to the public through our governmental system of checks and balances.

THE FAILURE OF JUDICIAL SENTENCE REVIEW

Judicial review was an axiom of sentence law reform by the early 1970's. In fact, federal trial judges were themselves urging the adoption of measures, including appellate review, to regulate the sweeping and almost unfettered power possessed by the court in fashioning sentences. Judge Marvin Frankel, a federal trial judge, described the prevailing feature of our sentencing system as follows:

The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes “shall be any term the judge sees fit to impose.” A regime of such arbitrary fiat would be intolerable in a supposedly free society, to say nothing of being invalid under our due process clause. But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power.  

4. See, e.g., M. Frankel, Criminal Sentences: Law Without Order 5 (1972) [hereinafter cited as M. Frankel].
5. Id. at 8.
The legal establishment shared this concern. In 1968, for example, the American Bar Association (ABA) had already published a detailed set of standards for appellate review of sentences designed to regulate the discretion exercised by sentencing judges. According to the ABA, judicial sentence review could make substantial contributions to reducing sentence disparity in two ways: “First, it [could] level off the peaks by reducing the excessive sentences,” and second, it could “contribute to the development of sound sentencing principles and thus lead closer to the goal of approaching each defendant on the same basis.” The latter contribution was to be accomplished by requiring trial judges to set forth on the record their reasons for the sentences imposed and by directing appellate courts to write opinions that contained reasons for sentence modifications. Not only would this process reduce disparity, “but on a much broader scale it [could] also contribute significantly to the development of sound sentencing policy.”

Although there is substantial evidence that differences in sentences are as much a result of nonjudicial decisions, such as the charging decisions of prosecutors, the plea bargains between attorneys, and the presentence investigations of probation officers, it is not surprising that lawyers and judges would propose judicial sentence review as a primary means to reform criminal sentencing. Traditionally, judicial review has served as the legal mechanism to reconcile the myriad decisions of individual trial judges and to limit the exercise of discretion by formal decision-makers.

At the time it published its standards for appellate review, the ABA estimated that judicial sentence review was “realistically available” in fifteen states. In the next decade, only eight more states enacted sentence review statutes. In the jurisdictions that

6. STANDARDS, supra note 1, at 2.
7. Id. at 28-29.
8. Id. at 29. The American Bar Association rejected special systems of sentence review, such as special panels of trial judges, because it is “generally unsound to fragment issues in a single case and send each to a special court.” Id. at 4.
9. Id. at 30.
12. STANDARDS, supra note 1, at 13.
13. R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 115 (1979) [hereinafter cited as R. SINGER].
have adopted systems of sentence review, the performance of the courts in regulating sentencing decisions and reducing disparity has not been encouraging. One reason for the limited acceptance or effectiveness of judicial sentence review is obvious: appellate judges do not welcome additions to their already overwhelming caseloads. They see the call for judicial sentence review as the invitation to a flood of new appeals and they make this view known to their legislatures.

Yet proponents of sentence review point out that many appeals already result from excessive sentences, although the appeals are expressed in terms of other legal issues. Furthermore, studies in jurisdictions with judicial sentence review suggest that this specter of a flood of new appeals may be exaggerated. Nevertheless, many appellate judges remain convinced that substantive sentence review will overwhelm them with new appeals and many legislatures apparently agree.

14. One of the most thorough studies of sentence review systems made the following assessment:

Even where appellate review exists, it has not resulted in the development of a body of principles, which serves to articulate criteria for important corrections decisions. In decisions reducing sentences, no principle emerges that can be used as a guide for future action. In brief, judicial review of correctional decisions is likely to have a limited impact upon the daily operation of the correctional process.

R. Dawson, Sentencing 388-89 (1969). See also Dix, Judicial Review of Sentences: Implications for Individual Dispositions, 1969 L. & Soc. Ord. 369: "[A]lthough the body of case law has purported to deal with the problem of criminal sentencing, it has not taken any consistent or realistic approach to the problems involved. It is not surprising to find that the impact upon trial court sentencing has been minimal." Id. at 404-05; Thomas, Theories of Punishment in the Court of Criminal Appeal, 27 Mod. L. Rev. 546 (1964).

15. In the words of one prominent federal appeals court judge: "... I hope there will be enough good judgment in Congress to realize that adoption of [appellate sentence review] would administer the 'coup de grace' to the courts of appeals as we know them." H. Friendly, Federal Jurisdiction: A General View 36 (1973).


18. Many proponents of judicial sentence review respond by arguing that the increased judicial workload is an acceptable tradeoff for the equity and rationality that judicial review can bring to the sentencing process. See, e.g., Richey, Appellate Review of Sentencing: Recommendation for a Hybrid Approach, 7 Hofstra L. Rev. 71, 78 (1978); Kutak & Gottschalk, In Search of a Rational Sentence: A Return to the Concept of Appellate Review, 53 Neb. L. Rev. 463, 509-10 (1974).
The Absence of Legislative Sentencing Policies and the Jurisprudence of Sentencing

Another reason for the failure of judicial sentence review was recently outlined by the United States Supreme Court:

Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. Although the purposes of sentencing have often been defined as including deterrence, retribution, incapacitation, rehabilitation and community condemnation to maintain respect for law, legislatures have been silent regarding which purposes are primary and how conflicts among purposes are to be resolved.19

Legislatures have thus failed to develop a sentencing policy from the theories of punishment included within our "jurisprudence of sentencing" and the appellate courts have been unwilling to do so on their own. As a result, the nature and diversity of these theories of punishment have presented two obstacles to the reduction of disparity in and regulation of sentencing through judicial review. First, it is impossible to identify sentence disparity or determine its significance without knowing what theory of punishment is being pursued as a matter of sentencing policy. Second, without such policy guidance, sentencers in the first instance have no reliable standards under which uniform sentences can be imposed, and appellate courts have no standard by which to identify and measure disparate sentences upon review.

There is little disagreement that some variation in sentences for the same crime is inevitable in order to account for differences in the circumstances surrounding the commission of particular offenses. Treating everyone the same, as well as treating everyone differently, raises the claim of disparity.20 At some point, however, necessary sentence variation becomes unjustified sentence disparity.

When variations in sentences are caused solely by factors such as an offender's race or social status, for example, values more important than the prevention or the punishment of crime are at stake.


This basis for sentencing variation has been universally condemned. A less invidious but perhaps more pervasive form of sentence disparity occurs when two persons who are similarly situated are sentenced differently for the same crime. This form of disparity depends upon a threshold determination that two persons are in fact "similarly situated." This determination, in turn, depends upon a value judgment—the judgment of what theory of punishment should underly the sentencing policy in a penal system.

Under every recognized theory of criminal punishment, a unique set of factors is relevant to the sentencing decision. These factors determine who is "similarly situated" for the purpose of identifying sentence disparity. Under a retributivistic theory of "just deserts," for example, the factors are those circumstances of the crime that relate to its severity and any prior criminal record of the offender. Under a theory of rehabilitation, however, the characteristics of the offender and the offense reveal the offender's potential for rehabilitation. That these differences in relevant sentencing factors exist means that different offenders will be deemed similarly situated and different sentence variations will be considered disparate depending upon the theory underlying a particular sentencing policy.


22. SENTENCING GUIDELINES PROJECT, supra note 2, at 1.

23. See infra notes 157-59 and accompanying text.

24. One shortcoming of our "jurisprudence of sentencing" is the preternatural quality of the recognized theories of punishment in a world which demands that theories be translated into sentences of years, months, days and dollars. See B. Woorroon, CRIME AND THE CRIMINAL LAW (1963), for a thorough statement of the theory of rehabilitation. See also K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

25. For example, two offenders with identical criminal records are both convicted of felony theft of property valued at $1,000 and are both sentenced to one year in prison. Under a just deserts system, the offenders are similarly situated and the sentences are apparently not disparate. The fact that one offender has a third grade education and has been unemployed for three years, while the other has two Ph.D.'s and is the president of a university, would be irrelevant. If these socioeconomic factors had produced different sentences, then the difference would amount to sentence disparity in a just deserts system. On the other hand, in a rehabilitative penal system these offenders may not be similarly situated because the differences in their socioeconomic backgrounds are relevant to their potential for rehabilitation. Under a theory of rehabilitation, these two offenders should receive different sentences; imposing the same sentence in these cases would constitute disparity.
The peculiar substance of certain recognized theories of punishment may also frustrate efforts to reduce disparity when used to justify sentences. Rehabilitation, though never an exclusive justification for criminal punishment, has attained preeminence among the competing theories over the past fifty years. When rehabilitation is the justification for a sentence, however, it becomes virtually impossible to distinguish sentence disparity from acceptable sentence variation by comparing one sentence with another. It is not that the rehabilitation theory rejects the value of equal treatment for similarly situated offenders outright, rather, differences in sentences for offenders similarly situated might frustrate rehabilitative objectives. Once inmates compare their disparate sentences, they may become discouraged, cynical and resistant to treatment. Yet the theory of rehabilitation justifies the examination of a limitless array of individual characteristics, psychological needs and socioeconomic circumstances when determining an offender's rehabilitative potential. As a result, it is impossible to tell under this theory whether or not any two offenders convicted of the same crime are similarly situated.


A federal trial judge recently put the problem this way:

Perhaps the problem of a so-called "disparity of sentences" seems from a practical standpoint to be the biggest fallacy of all. It rests on the totally false assumption that nothing should determine the amount of sentence but the particular section of the criminal code found to have been violated. Not what the offender in fact did, not the circumstances of the violation, not the past record of the offender, not the physical, mental, or emotional character of the offender; none of these can be considered.

Our whole system of fingerprint identifications, ballistic examinations, handwriting analysis, and all kinds of micrographic testing is firmly based on the fact that there are, in nature, no two things that are absolutely identical. Why, then, do we pretend that there are identical offenses and identical offenders, who must be given identical sentences?

Id.

Moreover, because many of the factors relevant to a rehabilitative sentence are, at least in theory, dependent upon the direct observation and assessment of individual offenders, there is a compelling rationale to defer to, rather than question, these individualized sentencing decisions. When the agency chosen to review these decisions is an appellate court, its customary resistance to substituting its judgment for the judgment of any initial decision-maker with respect to questions of fact makes the rationale even more compelling.
Two other recognized theories of punishment present obstacles to reducing disparity. The utilitarian theories of general deterrence and incapacitation explicitly subordinate the value of equal sentencing treatment to the goals of crime prevention. Sentences that would otherwise be considered disparate are justified whenever they serve to reduce future crime. According to these theories, sentence variation is a necessary evil when it contributes to the prevention of the greater evil of future crime.

The exemplary sentence is a common cause of sentence variation under a theory of general deterrence. The following statement has probably been made, in one form or another, in every criminal court in this country:

Young man, I am sentencing you to prison for six months longer than I normally would in order to send a message to other young people who might be considering this kind of conduct that . . . the community is fed up and isn’t going to take it any more . . . [or, a person of your stature in this community can’t get away with this and they won’t either].

In other words, if particular criminal conduct is considered an acute and intractable social problem or the offender’s circumstances increase the likelihood that the deterrent message will be heard, then the utilitarian’s calculus justifies an otherwise disparate sentence if it deters the greater evil of future crime.

The theory of incapacitation also relegates uniform sentencing treatment to secondary status in an effort to protect society from dangerous offenders. Trial courts often invoke this theory when sentencing sex offenders, bad check writers, and alcoholics who

---

28.1. In the words of the foremost modern utilitarian, H.L.A. Hart:

[The injunction “treat like cases alike” with its corollary “treat different cases differently” has indeed a place as a prima facie principle of fairness between offenders, but not as something which warrants going beyond the requirements of the forward-looking aims of deterrence, prevention and reform to find some apt expression of moral feeling.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 172 (1968) [hereinafter cited as H. HART, ESSAYS].

29. Id.

30. Id.

31. Very often English judges have looked upon claims to equal treatment for different offenders in just this light. When a crime has become exceptionally or dangerously frequent judges have defended punishing an offender more severely than previous offenders on the ground that this step is necessary to check a major evil.

Id.
persist in driving with suspended or revoked driver's licenses.\textsuperscript{32} Parole boards usually consider this theory their "raison d'être."\textsuperscript{33} Incapacitative sentences produce variations in sentences which are unrelated to the blameworthiness of the criminal conduct. For example, on the basis of predicted recidivism, an alcoholic motorist may find himself sharing prison space with a rapist and the repeat property offender may remain in prison longer than a cellmate who killed in passion. Just two years ago, the United States Supreme Court upheld a mandatory life sentence imposed under a recidivist statute for the commission of three felonies over a nine-year period: fraudulently presenting a credit card with the intent to obtain approximately $80, passing a forged instrument in the amount of $28.36 and obtaining $120.75 by false pretenses.\textsuperscript{34}

Incapacitative sentences also produce suspect sentence variations due to the state of the art of predicting human behavior. As many critics of incapacitative sentencing strategies have pointed out, the devices used in the prediction of future danger and the selection of those needing to be restrained are fallible.\textsuperscript{35} Under any method for assessing danger, a number of offenders will be classified as dangerous who, if left alone, would not prove dangerous. Treating these nondangerous "false positives" in the same way as the truly dangerous is an injustice that even the incapacitative penologist would, all other things being equal, label as sentence disparity.\textsuperscript{36} However, there is a utilitarian justification for accepting a margin of error in predicting danger: the excessive punishment of false positives is a lesser evil in comparison to the future harm to society averted by the incapacitation of the truly dangerous.\textsuperscript{37}

Given the nature and diversity of the theories that make up our jurisprudence of sentencing, it is not surprising that appellate courts are unable to regulate sentencing decisions and reduce sentence disparity. Without a theoretically consistent sentencing policy to guide the system, each sentencer becomes an independent policy maker who is free to apply theories of punishment that disguise or condone disparate sentences. Each sentencer is also free to

\textsuperscript{33} See, e.g., Moule & Hanft, Parole Decision-Making in Oregon, 55 Or. L. Rev. 303, 316-17 (1976) [hereinafter cited as Moule & Hanft].
\textsuperscript{34} Rummel v. Estelle, 445 U.S. 263 (1980).
\textsuperscript{35} See infra note 137.
\textsuperscript{36} But see van den Haag, Punitive Sentences, 7 Hofstra L. Rev. 123, 133 (1978).
\textsuperscript{37} Id. See also E. van den Haag, Punishing Criminals (1975); and J. Wilson, Thinking About Crime (1975).
apply different theories of punishment in different cases. Moreover, in the absence of a legislative statement of sentencing policy or in the face of a laundry list of the recognized theories of punishment, appellate courts have been unwilling to develop their own sentencing policies. This is not an unreasonable response. In fact, where legislatures enact statutes to define crime, establish statutory procedures to prosecute crime, and set the ranges of punishment for crime, it is reasonable to expect the same branch of government to formulate a criminal sentencing policy.

When appellate courts are directed by statute to review sentences, they do not respond by categorically refusing to entertain sentence appeals. Instead, these courts usually respond by dil-

38. What should we expect appellate courts to do when called upon to review sentences for disparity which are based on different theories of punishment? Consider the earlier hypothetical of two offenders with identical criminal records who are convicted of the felony theft of $1,000 worth of property. See supra note 25. Assume that one offender is sentenced to one year in prison and the other to six months of unsupervised probation. In the first case, the trial judge's reason for the sentence is that "the sentence is proportionate to the seriousness of this offense and is similar to sentences for offenses of equal seriousness." In the second case, the trial judge reasons that "the defendant's prospects for rehabilitation are good and she has learned her lesson without spending any time behind bars." When confronted with a claim of disparity in one case in light of the other, should an appellate court choose to apply the set of factors relevant to sentencing under a retributivistic system or a rehabilitative system? The typical response of an appellate court in these circumstances is to defer to the "sound discretion" of the trial judge and uphold either sentence on review. See infra text accompanying notes 42-47.

39. See, e.g., Model Penal Code § 1.02. Oregon has adopted the following purposes in its criminal code:

(1) The general purposes of [the Oregon Criminal Code] are:
   (a) To ensure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.
   (b) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.
   (c) To give fair warning of the nature of the conduct declared to constitute an offense and of the sentences authorized upon conviction.
   (d) To define the act or omission and the accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault.
   (e) To differentiate on reasonable grounds between serious and minor offenses.
   (f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.
   (g) To safeguard offenders against excessive, disproportionate or arbitrary punishment.


40. See Hoffman & Stover, supra note 2.
igently undertaking "procedural" review of sentences to determine if they are imposed in conformity with established legal procedures. In cases where a sentencer fails to consider a presentence investigation report or to state reasons for the sentence on the record, for example, sentences will be reversed or modified.41

When an appeal calls upon these courts to even out disparities by reducing an excessive sentence, however, such "substantive" review is undertaken with great hesitancy.42 The typical response of an appellate court is to fashion a deferential standard of review that upholds sentences unless they are "clearly mistaken," are outside "the zone of reasonableness," or reflect an "abuse of discretion." If the substance of a sentence does not exceed the broad limits of the indeterminate sentence, it will usually be affirmed under these standards of review.43 Given the lack of intensity of substantive review, it is not surprising that "intuitive and hence vague Gestalt perceptions . . . inform the review process," "word-reasons [become] full explanations," and sentence disparity persists throughout most of this country's penal system.

This was not the response that the early proponents of judicial sentence review promised. By holding out the prospects of "sound sentencing principles" and a "sound sentencing policy," the ABA apparently expected the appellate courts to approach the thicket of our jurisprudence of sentencing, select from among the competing theories of punishment, formulate a coherent sentencing policy, and develop rules consistent with that policy. Perhaps out of fear of increased work loads, perhaps due to a healthy respect for the processes of representative government, few appellate courts have taken up the challenge.44

42. For example, Oregon's criminal appeals statute provides for sentence review when a trial court imposes a sentence that is "cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense." Or. Rev. Stat. §§ 138.040 & 138.050 (1981).
45. Campbell, supra note 3, at 386-88.
47. Id. at 933.
48. See supra text accompanying notes 7-9.
49. Campbell, supra note 3, at 386-88.
Proponents of sentence law reform have been quick to blame appellate courts for the lack of regulation and disparate decisions that characterize this country's sentencing systems. However, legislatures ought to share the blame. The appellate courts’ failure to undertake vigorous review of sentences is not just a reaction to the prospect of more work. By hesitating to develop a general sentencing policy, a necessary first step in applying standards to regulate decisions in a system of review, appellate courts are expressing a collective judgment that the formulation of a policy as important and controversial as criminal sentencing ought to be left to the public’s elected representatives.

A Future for Judicial Sentence Review: Enforcing the “Rule of Law” in a Sentencing Guidelines System Under a Policy of Just Deserts

The limited acceptance and effectiveness of judicial sentence review suggests that the role of chief sentencing regulator, policy maker and rulemaker originally envisioned for the appellate courts is an unrealistic one. This does not mean, however, that appellate courts should be excluded entirely from the process of regulating sentencing systems. Judicial sentence review is still a necessary condition for the regulation of sentencing practices and the elimination of sentence disparity.

To achieve these objectives, the first steps must be taken by the legislatures. Legislatures must make sentencing rules to structure the discretion of sentencers or, alternatively, establish administrative agencies to make these rules. Legislatures must also adopt a sentencing policy that provides standards to guide the overall operation of the sentencing system. Once these steps are taken, legislatures can enact judicial sentence review statutes with a reasonable expectation that appellate courts will perform essential functions to complement the regulatory effect of sentencing rules. With direction from a carefully drafted sentence review statute and with adequate resources, appellate courts can be expected to insure that sentencing rules are applied correctly and consistently.

Structuring Sentencing Discretion Under a Rule of Law with

50. See, e.g., Standards, supra note 1.
51. See supra text accompanying notes 7-9.
52. See infra text accompanying notes 94-116 & 15-18 supra.
Major changes in contemporary penology are increasing the likelihood that more legislatures will take steps to regulate the discretion exercised in their sentencing systems. First, a consensus has emerged among proponents of sentence law reform that the theory of rehabilitation should be abandoned as a primary justification for the nature and length of sentences. There is considerable evidence that indeterminate criminal sentences do not rehabilitate, at least with the resources that society is now willing to devote to the task. However, this is not the primary reason for rejecting the theory of rehabilitation. Most critics of the theory remain willing to provide programs that attempt to rehabilitate. Instead, their reason for abandoning the theory is that, as the primary justification for criminal punishment and the indeterminate sentence, it provides sentencing decisionmakers with too much discretion. Indeterminate sentences are, depending upon the critics' perspective, inequitably disparate, dangerously lenient, or oppressively harsh. In addition, in a rehabilitative system it is impossible to control the allocation of scarce corrections resources or the level of prison populations.

A second and related change taking place in contemporary penology is an increasing recognition that some form of the rule of law must replace unstructured discretion in our penal systems. Nearly fifteen years ago, Kenneth Culp Davis, a leading authority on administrative law pointed out that the structuring of sentenc-

55. See, e.g., H. Packer, The Limits of the Criminal Sanction 67 (1968) [hereinafter cited as H. Packer].
58. See, e.g., Moule & Haft, supra note 33, at 304, 342.
Rule of Law

Proposals to abolish parole and to adopt determinate, "flat-time" sentences represent the most radical means to regulate sentencing discretion under a rule of law.\(^1\) Such proposals, however, have several drawbacks. By precluding allowances for mitigating or aggravating circumstances in individual cases, the determinate sentencing system is markedly inflexible.\(^2\) The objective of a sentencing system should not be to eliminate all discretion, or even to impose the maximum amount of regulation possible. Instead, the objective should be to find the optimum balance between the structure of rules and the flexibility of discretion.\(^3\) Discretion in the penal system is like liquid in a hydraulic system: if all discretion is squeezed out of the sentencing process, it will reappear at other points in the system.\(^4\) Furthermore, as California's recent experience seems to indicate,\(^5\) a determinate sentencing system in which the legislature exercises the only formal sentencing discretion creates the likelihood of a distorted and incoherent scale of sentences. If the sentence set by the legislature is the sentence imposed by the judge, as it is in a flat-time system, then all sentencing hearings are, in effect, conducted on the floor of the legislature. It is not unusual for a legislature to respond to the voter's latest

\(^{61}\) See K. Davis, Discretionary Justice, supra note 19, at 133. See also id. at 126, for a discussion of the Parole Board's unstructured discretion.


\(^{63}\) See, e.g., K. Davis, Discretionary Justice, supra note 19, at 27-29; Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra L. Rev. 57, 60-63 (1978) [hereinafter cited as Bazelon].

\(^{64}\) K. Davis, Discretionary Justice, supra note 19, at 4, 19.

\(^{65}\) See Alschuler, supra note 10. Two of the most obvious points where the exercise of prosecutorial discretion can replace sentencers' discretion are in the decisions to charge and to plea bargain. See C. Silberman, Criminal Violence, Criminal Justice 295-96 (1978). For a proposal to regulate the prosecutor's contribution to sentence variation, see Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733 (1980). A common response from proponents of sentence reform, who recognize the significance of the exercise of prosecutorial discretion in the imposition of punishment, is a call for the adoption of measures to regulate formal sentencing decisions while the technically complicated and politically difficult task of finding the means to regulate prosecutorial discretion continues. See, e.g., Tyler, Sentencing Guidelines: Control of Discretion in Federal Sentencing, 7 Hofstra L. Rev. 11, 20 n.45 (1978).

perception of a crime wave or the most recent atrocity of a parolee by increasing sentences for particular crimes.67

Proposals to establish sentencing guidelines represent an alternative form of the rule of law that structures, but does not eliminate, sentencing discretion.68 A sentencing guidelines system can provide much of the determinacy of a flat-time system without the inflexibility and susceptibility to crime wave politics of flat-time sentences.

Sentencing guidelines provide an outline for sentencing practices by communicating to individual sentencers the sentencing norms for particular crimes.69 In legal terms, guidelines structure the exercise of discretion by those legally authorized to make sentencing decisions without eliminating all discretion. By assuring "... that similar persons are dealt with in similar ways in similar situations,"70 sentencing guidelines can promote consistent sentencing practices and reduce disparity.71

The key mechanical component in a typical set of sentencing guidelines is a matrix table upon which the universe of presumed sentence ranges appears. The matrix table is ordinarily derived empirically from the prevailing sentencing practices in the jurisdiction in question.


68. Although some of the early proponents of judicial sentence review suggested the importance of sentencing guidelines, see M. FRANKEL, supra note 4, at 118-23; Zeisel & Diamond, supra note 46, at 935, criminologist Leslie Wilkins and his colleagues deserve most of the credit for developing sentencing guidelines methodology. See SENTENCING GUIDELINES PROJECT, supra note 2. See also Gottfredson, Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, 21 CRIME & DELINQ. 34 (1975) [hereinafter cited as Gottfredson, Paroling Policy].

69. SENTENCING GUIDELINES PROJECT, supra note 2, at 4.

70. Id. at 5 (quoting Wilkins, Some Philosophical Issues—Values and the Parole Decision, in INTRODUCTON, SUPPLEMENTAL REPORT NINE (National Council on Crime and Delinquency Research, 1973)).

71. Id.
### Rule of Law

#### CRIMINAL HISTORY/RISK ASSESSMENT SCORE

<table>
<thead>
<tr>
<th>CRIMINAL HISTORY/RISK ASSESSMENT SCORE</th>
<th>11-9</th>
<th>8-6</th>
<th>5-3</th>
<th>2-0</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Good</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fair</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poor</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### OFFENSE SEVERITY RATING

(All ranges in Categories 1-6 shown in months)

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Base Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>6-10</td>
</tr>
<tr>
<td>6</td>
<td>10-14</td>
</tr>
<tr>
<td>6-10</td>
<td>14-20</td>
</tr>
<tr>
<td>10-16</td>
<td>22-32</td>
</tr>
<tr>
<td>16-24</td>
<td>32-44</td>
</tr>
<tr>
<td>30-40</td>
<td>56-72</td>
</tr>
<tr>
<td>44-56</td>
<td>90-130</td>
</tr>
<tr>
<td>60-80</td>
<td></td>
</tr>
<tr>
<td>22-32</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>8-10</td>
<td>13-16</td>
</tr>
<tr>
<td>10-14</td>
<td>19-24</td>
</tr>
<tr>
<td>14-19</td>
<td>24-life*</td>
</tr>
</tbody>
</table>

#### The axes of the matrix table determine the limits of the guidelines' sentence. One axis is composed of offense severity ratings, under which every offense in the criminal code has been graded. The other axis is composed of offender categories which are established by scoring a series of factors relating to the offender's background. The point on the matrix at which the axes intersect in a particular case determines the presumed sentence range for that case. Presumed ranges can be shifted up or down by a specified amount if particular aggravating or mitigating circumstances exist.

---

72. OR. ADMIN. R. 255-35-025, Exh. C. This matrix table is used by the Oregon Board of Parole to set parole release dates. It was adapted from the U.S. Parole Commissions Guidelines. See infra notes 128-30. See Blalock, Justice and Parole: The Oregon Experience, in JUSTICE AS FAIRNESS: PERSPECTIVES ON THE JUSTICE MODEL 100 (D. Fogel and J. Hudson ed. 1981); and Taylor, In Search of Equity: The Oregon Parole Matrix, 43 FED. PROB. 52 (1979). See also infra text accompanying notes 172-75.

73. See infra note 175.

74. See, e.g., OR. REV. STAT. 144.785(1) and OR. ADMIN. R. 255-35-035, Exhs. D., E.

#### EXHIBIT D

GUIDELINES MATRIX

MAXIMUM VARIATIONS FROM THE RANGES UNDER RULE 255-35-035

<table>
<thead>
<tr>
<th>CRIMINAL HISTORY/RISK ASSESSMENT SCORE</th>
<th>11-9</th>
<th>8-6</th>
<th>5-3</th>
<th>2-0</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXCELLENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GOOD</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FAIR</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>POOR</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### CRIME CATEGORY

<table>
<thead>
<tr>
<th>PANEL</th>
<th>CRIMINAL HISTORY/RISK ASSESSMENT SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3*</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>
The feature of sentencing guidelines that most obviously con-

| 5 PANEL | 4 | 6 | 6 | 8 |
| 6 PANEL | 5 | 6 | 10 | 12 |
| 7 FULL BOARD | 3 yrs** | 3 yrs | 3 yrs | 3 yrs |

* All numbers in categories 1-6 represent allowed panel variations in months. Board variations may be twice the panel variation.

** Crime category 7 is subject to full Board action only.

(August, 1980)

n. Panels are comprised of two members of the five member Oregon Board of Parole. Or. Rev. Stat. 144.005(1) & 144.035.

Exhibit E

Aggravation and Mitigation Under 255-35-035

<table>
<thead>
<tr>
<th>Aggravation</th>
<th>Mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Production or use of any weapon during the criminal episode.</td>
<td>-Victim provoked the crime to a substantial degree, or other evidence that misconduct by victim contributed to the criminal episode.</td>
</tr>
<tr>
<td>-Threat or violence toward witness or victim.</td>
<td>-Special effort on the part of the perpetrator to minimize the harm or risk.</td>
</tr>
<tr>
<td>-Knew or had reason to know the victims were particularly vulnerable (i.e., aged, handicapped, very young).</td>
<td>-Peripheral involvement in the criminal episode (e.g., passive accessory).</td>
</tr>
<tr>
<td>-Ability to make restitution or reparation and failed to do so.</td>
<td>-Sustained effort to make restitution or reparation.</td>
</tr>
<tr>
<td>-Violation of position of public trust or recognized professional ethics.</td>
<td>Cooperation with criminal justice agencies in resolution of other criminal activity.</td>
</tr>
<tr>
<td>-Degree of property loss, personal injury substantially greater than characteristic for the crime.</td>
<td>-Degree of property loss, personal injury or threatened personal injury substantially less than characteristic for the crime.</td>
</tr>
<tr>
<td>-There is a single conviction for a crime involving multiple victims or incidents.</td>
<td>-Evidence of withdrawal, duress, necessity or lack of sustained criminal intent.</td>
</tr>
<tr>
<td>-Concurrently imposed convictions not arising out of same criminal episode.</td>
<td>-Evidence of reduced responsibility or lack of mental capacity (e.g., mental retardation which is sufficient to constitute a defense, but is indicative of reduced culpability).</td>
</tr>
<tr>
<td>-Verified instances of repetitive assaultive conduct.</td>
<td>-Ordered to pay restitution after term of imprisonment.</td>
</tr>
<tr>
<td>-More than three trust violations in last five years as relates to Item D of Matrix computation.</td>
<td>-Successful period of community supervision, at least 24 months.</td>
</tr>
<tr>
<td>-Persistent involvement in similar criminal offenses.</td>
<td>-Effort to deal with problems associated with past criminal conduct (e.g., successful completion of treatment program,</td>
</tr>
</tbody>
</table>
tributes to the reduction of disparity is the normal or presumed sentence. This sentence represents the punishment that is expected in the majority of cases for a particular crime. The sentence appears as a narrow range, rather than a point on the guidelines scale of punishment.

Either out of fear that sentencers might reject mandatory guidelines or out of respect for the limitations of anticipating exceptional cases by written rule, guidelines are often advisory rather than binding. For similar reasons, lists of aggravating and mitigating circumstances may not be exclusive and sentences outside the guidelines' ranges may be permitted if recorded reasons accom-

abstinence from substance abuse).

- Repetition of behavior pattern which contributes to criminal conduct (e.g., return to drug or alcohol abuse).
- Criminal history more extensive or serious than reflected by History/Risk score.
- Pursuant to a Guilty or No Contest plea, other crimes were dismissed or not prosecuted.
- New criminal activity while on escape or reduced custody status.
- Persistent criminal misconduct while under supervision.
- Other.

75. The "presumed" or "presumptive" sentence is used here to mean the sentence determined to be appropriate under the sentencing guidelines in the majority of cases. Although guidelines sentences are sometimes distinguished from "presumptive sentences," the distinction is artificial. See, e.g., Report of the Michigan Felony Sentence Project, Sentencing in Michigan [hereinafter cited as Sentencing in Michigan], in C. Foote & R. Levy, Criminal Law: Cases and Materials 816 (1981). It is true that proposals for presumptive sentences have often been accompanied by calls for the adoption of just deserts sentencing policies and that the first sentencing guidelines were the result of empirical research. See A. von Hirsch, Doing Justice: The Choice of Punishments (1976) [hereinafter cited as A. von Hirsch, Doing Justice]; Twentieth Century Fund, supra note 59. Cf. Sentencing Guidelines Project, supra note 2. However, sentencing guidelines could also be derived from a policy of just deserts. See, e.g., A. von Hirsch & K. Hanrahan, The Question of Parole: Retention Reform or Abolition? 23 (1979) [hereinafter cited as A. von Hirsch & K. Hanrahan].

Operational differences between proposals for presumptive sentences and guidelines are basically a question of degree. For example, guidelines usually provide for the consideration of more factors in determining the normal sentence and variations from the norm than most presumptive sentence proposals. Again, this need not be the case. See, e.g., id. at 19-21.

76. Sentencing Guidelines Project, supra note 2, at 5; Sentencing in Michigan, supra note 58.
pany extraordinary sentences. 77

A legislature could make these sentencing guidelines rules and enact them into law as statutes. However, as the preceding description of the basic operation of a guidelines matrix table suggests, the rules need to be detailed and complex. In light of this need and the political pressures that are associated with the administration of a penal system, it is not surprising that guideline systems have relied upon "one of the greatest inventions of modern government"—administrative-rulemaking. 78 By establishing a sentencing guidelines commission to make the rules, a legislature can create an administrative agency with representatives from the criminal justice community and the public who have the interest and expertise to develop specialized sentencing rules and who are sufficiently distant from the body politic to design a rational and consistent system of punishment. 79

A sentencing guidelines system brings a "moderate version" of rule of law to the criminal sentencing process by preserving a realistic amount of discretion to vary sentences in individual cases. 80 If it is administered by a sentencing commission, the system also increases the likelihood that the sentencing rules will be based upon reason rather than crime-wave politics. These features explain why an increasing number of states are adopting sentencing guidelines systems. 81 The number of recent proposals for such systems and the favorable preliminary reports from jurisdictions that have adopted guidelines suggest that sentencing guidelines systems may be the wave of the future in sentencing law reform. 82

78. K. Davis, Discretionary Justice, supra note 19, at 65.
80. K. Davis, Discretionary Justice, supra note 19, at 50.
81. The legislatures of Illinois, Minnesota, Oregon, Pennsylvania, and Washington have enacted guidelines systems in the past few years. See R. Singer, supra note 13, at 137-66.

For a review of experiences under four parole release guidelines systems, see Arthur D.
The Role of Judicial Review in a Sentencing Guidelines System

Judicial sentence review, as a means of assuring fair and accurate individual sentencing decisions and as a check upon the discretion exercised in administrative rulemaking, is a natural ingredient in a sentencing guidelines system. Because of the nature of sentencing guidelines, the traditional obstacles to substantive sentence review can be substantially reduced, if not eliminated.

Sentencing guidelines relieve the appellate courts of the burden of creating specific rules in pursuit of a general sentencing policy. Instead, a legislature and its administrative agency, the sentencing commission, perform this task. Guidelines provide "operating rules that translate mitigating and aggravating circumstances into points on a sentencing scale." Instead of asking the sentencer to fashion the kind of sentence needed to blame, deter, incapacitate or rehabilitate the defendant within the wide ranges typically provided by legislatures, a guidelines matrix table directs the sentencer's attention to a narrow range on the scale of possible sentences. The framework of the guidelines also provides a means of establishing disincentives to appeal, thereby reducing the threat of a flood of new appeals.

With the addition of a provision for judicial sentence review, sentencing guidelines can be something more than an empirically derived feedback mechanism that communicates statistical norms to sentencers and encourages them to follow the norm. Guidelines can become the rule of law for a sentencing system. Necessary sentencing discretion can be preserved, but sentence variation without reason and sentencing rules without a basis in public policy can be minimized under a system of judicial review.

Appellate courts can perform three important review functions in a sentencing guidelines system. First, they can review sentences imposed within the ranges prescribed by the guidelines to determine if the guidelines were applied erroneously. This kind of error occurs, for example, when the sentencer incorrectly decides that aggravating or mitigating circumstances exist which justify varia-

---

83. Zeisel & Diamond, supra note 46, at 933.
84. See infra text accompanying notes 100-09.
tation from a presumed sentence. The task of identifying errors in applying a rule of law to a set of facts is one that appellate courts frequently perform. When that task is performed in a guidelines system, sentences that treat offenders the same when they should be treated differently are corrected and disparity is reduced.85

Second, extraordinary sentences outside the guidelines’ ranges can be reviewed by an appellate court to determine if the sentencer’s reasons justify an exception to the rule and if the circumstances of the offense and the terms of the sentence are comparable to other extraordinary sentences outside the guidelines.86 This function is important in order to prevent the exceptions from swallowing the rule in penal systems where sentencers are not always eager to have their discretion limited by rules and may want to impose sentences outside the guidelines’ ranges in the majority of cases.87 Appellate courts will face the same set of problems in re-

85. When the list of aggravating and mitigating circumstances is not exclusive and the sentencer gives a reason for a variation from the norm that is not set forth in the guidelines, the task for an appellate court is more difficult. The court faces the same difficulties that are involved in reviewing sentences outside the guidelines’ ranges.

86. See supra note 77.

87. There is substantial evidence of widespread judicial opposition to structuring or limiting sentencing discretion. See Robin, Judicial Resistance to Sentencing Accountability, 21 CRIME & DELINQ. 201 (1975); Zalman, supra note 79, at 284-85.

Professor Louis B. Schwartz has made an important point about the relationship between sentencing guidelines ranges, the potential incidence of sentences imposed outside these ranges, and the role of judicial sentence review:

In one of those recurring paradoxes of penology, the very narrowness of the guidelines ranges might lead ultimately to an expansion of the judicial role. It would cause many sentencing judges to assume the risks of going outside the guidelines and of subjecting their decisions to judicial review. A “common law” of punishment would grow out of a succession of appellate court decisions, and this common law might come to govern sentencing more than the guidelines. Schwartz, supra note 82, at 665.

This forecast reconfirms that the drafters of guidelines must strive to achieve the optimum balance between the structure of rules and individual discretion. It also suggests the importance of empirical research to determine how sentencers actually behave under the rule of sentencing guidelines.

There are several countervailing considerations that suggest that Professor Schwartz’s forecast may not become a widespread phenomenon. As Professor Schwartz points out, Schwartz, supra note 82, at 662, varying the area or scope of judicial review in relation to sentences inside and outside the guidelines ranges provides a strong incentive for sentencers to comply with the guidelines. See also infra text accompanying notes 101-05. Furthermore, the time pressures on sentencing judges and parole boards in most jurisdictions provide another incentive to impose the “presumptive” sentence without explanation in most cases. Finally, rather than assuming the burden of developing a “common law” of sentencing to replace the guidelines, most appellate courts are likely to give great weight to what the guidelines have declared to be the appropriate sentence in most cases and to create their own presumption against sentences outside the guidelines ranges in order to control their
viewing sentences outside the guidelines that they have traditionally faced in reviewing indeterminate sentences. For example, if the sentencer justifies a sentence that exceeds the upper limit of the guidelines range because “the prominence and respect that this offender enjoys among our youth provides the opportunity to send out a strong deterrent message,” how should the appellate court evaluate this sentence? Is the sentence excessive and therefore disparate? If appellate courts are expected to resolve these problems, legislatures will have to establish a sentencing policy to serve as an overriding sentencing standard.

The third function of appellate courts in a sentencing guidelines system is the review of the guidelines themselves to determine whether or not, as rules of an administrative agency, the guidelines comply with public policy. Under recognized principles of administrative law, an appellate court can serve as a “check” on a sentencing guidelines commission by holding the commission accountable to the policy under which the legislature delegated its authority to make sentencing law. Because a sentencing guidelines commission can create systemwide sentence variation under its rules, “checking and balancing” the implementation of the case loads. See supra text accompanying notes 15-18.

88. See supra text accompanying notes 19-49.
89. See infra text accompanying notes 157-67.
91. In reviewing a Public Utility Commissioner’s exercise of discretion in imposing administrative penalties, Hans Linde, now a justice of the Oregon Supreme Court, recently described the concept of agency accountability to legislative policy:

Administrative discretion is not a magic word. It is only a range of responsible choices in pursuing one or several objectives more or less broadly indicated by the legislature . . . under various circumstances pertinent to those objectives. This applies to a discretionary choice of sanctions just as to other delegated authority. If administrative penalties are to be distinguished from criminal punishment, one reason at least is that they are enacted as means toward some purposive policy. . . .

Judicial review of agency discretion is not a contest of adjectives. The commissioner’s order will be unlawful (apart from procedural shortcomings) if his policy reasons are inconsistent with or outside the range of those explicit or implicit in the statute. Dickinson v. Davis, 277 Or. 665, 673-74, 561 P.2d 1019 (1977).

With judicial review of sentencing commission rules and an explicit legislative policy statement of the objectives of criminal sentencing, a distinguishing feature of criminal punishment—that it is not, in the words of Justice Linde, “enacted as means toward some purposive policy”—can be eliminated.

Others have called for judicial review of sentencing guidelines at the time they are promulgated. See, e.g., Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 960 (1976).
guidelines may be the most important review function that an appellate court can perform in a sentencing guidelines system.\textsuperscript{92}

\textit{Designing a Sentence Review Statute}

Any legislature that decides to adopt a sentencing guidelines system as a means of reducing sentence disparity should, at the same time, adopt a special judicial sentence review statute designed to regulate guidelines' sentences. The Oregon legislature, having ratified an intricate set of parole release guidelines, failed to enact such a statute. Although the proponents of Oregon's parole guidelines system intended to provide for review,\textsuperscript{93} it took three years and some artful reinterpretation of existing review statutes by Oregon's appellate courts following the system's enactment before parole release decisions finally became subject to judicial review.\textsuperscript{94}

When legislatures have enacted a special sentence review statute, it sometimes appears to have been an afterthought. A review statute should explicitly state the relationship between the possible review functions of the appellate courts and the sentencing guidelines. It should not include the vague and elastic language traditionally substituted for meaningful sentence review in jurisdictions with sentence review statutes.\textsuperscript{95} After enacting a comprehensive sentencing guidelines system, Minnesota provided for sentence review with the following language:

An appeal to the [Minnesota] Supreme Court may be taken by the defendant or the state from any sentence imposed or stayed by the district court. . . .

On an appeal pursuant to this section, the Supreme Court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district courts.\textsuperscript{96}

This vague language, which fails to refer to Minnesota's sentencing guidelines, raises a number of questions. Should the Minnesota Supreme Court interpret this provision to mean that it is to review sentences that fall inside the guidelines' ranges, outside the guide-

\textsuperscript{92} See infra text accompanying notes 144-56 & 217-29.
\textsuperscript{93} House Bill 2013: Hearings Before the House Comm. on the Judiciary, 59th Or. Legis. Assembly (1977).
\textsuperscript{95} See Campbell, supra note 3, at 390-95.
\textsuperscript{96} Minn. Stat. § 244.11 (1978).
The court will review the guidelines' ranges, or both? Alternatively, is the court free to disregard the guidelines and use the traditional "abuse of discretion" standard, under which almost any sentence within the ranges provided by the legislature will survive review? If this latter interpretation is correct, Minnesota's review statute tempts an appellate court to continue a practice of upholding all but the most shocking or irrational sentence. In order for an appellate court to understand

97. After referring to Minn. Stat. § 244.10(a), the Minnesota Supreme Court could conclude that, by requiring a statement of reasons on the record for sentences outside the guidelines, the legislature intended it to focus on this kind of sentence. With straightforward statutory language, however, a legislature can avoid the need to resort to such methods of interpretation and the risk that a court will strictly limit its area and intensity of review.

98. See supra text accompanying notes 41-49.

99. From the perspective of those who designed Minnesota's guidelines system, it is fortunate that the appellate courts of Minnesota have given great weight to the sentencing guidelines in determining whether or not sentences are excessive, lenient, or disparate in spite of Minnesota's vague review statute. In the first sentence appeal after the guidelines system had been adopted, the Minnesota Supreme Court upheld an extraordinary sentence outside the guidelines. In so holding, however, the court said:

The stated purposes of the Guidelines are to reduce sentencing disparity and insure that sanctions following conviction of a felony are proportionate to the severity of the offense of conviction and the extent of the offender's criminal history. . . .

Underlying the Guidelines is the notion that the purposes of the law will not be served if judges fail to follow the Guidelines in the general case.


In State v. Bellanger, 304 N.W.2d 282 (Minn. 1981), the same court reversed an extraordinary sentence in a case in which the trial court had expressed the view that "there is a great deal too much made of regularity and conformity in sentencing" and concluded that a trial court's "general disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure." Id. at 283.

More recently, the Minnesota Supreme Court indicated that "it would be a rare cause which would warrant reversal of the [trial judge's] refusal to depart" from the guidelines.

State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981).

See also State v. Schantzen, 308 N.W.2d 485 (Minn. 1981) (remanding an extraordinary sentence because one of the aggravating factors was "too speculative." The extent of the departure from the guidelines was excessive based, upon a "collegial conclusion . . . that the sanction imposed was disproportional to the severity of the offense of conviction and the extent of the offender's criminal history." Id. However, a lesser departure from the presumptive sentence was justified by another aggravating factor); State v. Park, 305 N.W.2d 775 (Minn. 1981) (reversing the order making prison terms for multiple convictions consecutive because the circumstances specified in the guidelines as justifications for consecutive sentences were not present); State v. Cizl, 304 N.W.2d 632 (Minn. 1981) (remanding a case for resentencing because the factors used to mitigate the presumed sentence were not provided for in the guidelines).

Decisions since Schantzen indicate that the Minnesota Supreme Court has undertaken at least one of the functions of appellate review in a guidelines system—reviewing extraordinary sentences for disparity through the process of legal reasoning by analogy. See, e.g., State v. Hagen, 317 N.W.2d 701 (Minn. 1982); State v. Brigger, 316 N.W.2d 512 (Minn. 1982); State v. Johnson, 314 N.W.2d 22d (Minn. 1982); State v. Rott, 313 N.W.2d 574
clearly the extent of its reviewing responsibility in a sentencing

This support for the guidelines system, in spite of a vague review statute, may be due in part to the fact that an associate justice of the Minnesota Supreme Court is a member of Minnesota's Sentencing Guidelines Commission.

In the face of a review statute with similarly vague standards of review and which is also silent about its relationship to the guidelines system, the Illinois appellate courts appear to be undertaking a review of guidelines sentences with equal vigor. The Illinois review statute provides:

The defendant has the right of appeal in all cases from sentences entered on conviction of murder or any other Class of felony, however, in all such appeals there is a rebuttable presumption that the sentence imposed by the trial judge is proper. The court to which such appeal is properly taken is authorized to modify the sentence and enter any sentence that the trial judge could have entered, including increasing or decreasing the sentence or entering an alternative sentence to a prison term. However, the appellate court may increase a sentence only in instances where a defendant has filed a notice of appeal and raises the issue of the sentence on appeal.


As in Minnesota, Illinois' appellate courts are capturing the spirit of sentence review in a guidelines system despite vagueness in the letter of the review statute:

[T]he new law contains automatic guidelines for appellate review in the sentencing criteria established by the legislature. Add to this the specific inclusion of a provision authorizing appellate review of sentences and specifying the effect that the trial court's determination should have upon that review, and it is reasonable to conclude that the legislature intended to confer a broader standard of review on appellate courts than that previously existing under judicial definition.

. . . When faced with the issue of statutory interpretation, a court may examine not only the language used in the statute, but also the reason for the new law and the evil to be remedied, as well as the objectives and purposes of the statute. [Citations omitted]. Applying these principles, the fact that the legislature used the term "rebuttable presumption" rather than "abuse of discretion" in par. 1005-5-4.1 indicates that it intended to change the standard to be employed in reviewing sentences. This conclusion comports with the reason for the new law and the evil which it seeks to remedy by eliminating disparate sentences throughout the State for similar types of offenses. If appellate courts continued to defer to the discretion of trial courts whenever a sentence was within the statutory range without regard to whether or not it was appropriate under all the facts and circumstances, then the purpose of the new law would be defeated. Sentencing equality would not be curtailed, and the penalty would not be fashioned to the particular offender as well as to the offense.


These "exceptions to the rule" of judicial deference to sentencing decisions demonstrate that "punditry" on any topic of law is a risky business, and that extra-legal conditions such as judicial attitudes toward self-regulation, parole board practices and partisan politics can
guidelines system, a legislature should explicitly set forth in a statute the sentence review functions it expects the court to perform.

A comparison of Washington's and Pennsylvania's more explicit sentence review statutes demonstrates that the extent of sentence review will vary from state to state, depending upon a legislature's perceptions of the relative importance of efficiency and fairness in its sentencing system. Washington's recently enacted statute provides that:

1. A sentence within the standard range for the offense shall not be appealed.
2. If a sentence is outside of the sentence range for the offense, the defendant or prosecutor may seek review of the sentence before the court of appeals.

In contrast, Pennsylvania's new statute provides a broader area of judicial review:

Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

1. the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
2. the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable;
3. the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

determine the level of regulation in a sentencing system. However, as a general rule in this country, resistance to sentencing regulation seems to persist, either out of a judicial sense of personal prerogative that is associated with the popular election of judges or out of a desire for flexibility in pursuit of the "rehabilitative ideal." See supra notes 28 & 87. To increase the chances that appellate courts will seriously review guidelines sentences, in spite of this general rule, it is still advisable for legislatures to approach the mechanics of drafting a review statute with care. See infra text accompanying notes 100-17.


In contrast to the statutory schemes in Washington and Pennsylvania, the Uniform Law's Commissioners Model Sentencing and Corrections Act provides for all three functions of judicial sentence review, see supra text accompanying notes 85-91, in a single guidelines system:
The Washington legislature has gained the efficiency of fewer potential appeals at the expense of some fairness by precluding review for disparity within the "standard ranges" for guidelines sentences.\textsuperscript{102} Pennsylvania, on the other hand, accepted the potential cost of an increased volume of appeals in exchange for greater assurances of fairness by including sentences inside the guidelines within the area of review for disparity.\textsuperscript{103}

However, the sentence review statutes of both Washington and Pennsylvania represent an innovative use of the sentencing guidelines framework to reinforce the guidelines and, at the same time, to make sentencing review more attractive to the courts. By varying the access to sentence review in relation to sentences inside and outside the guidelines, the Washington legislature has created an additional incentive for sentencers to follow the guidelines and has eliminated a major practical objection to appellate review of sentences. Extraordinary sentences outside the guidelines' standard ranges carry the risk of reversal on appeal, while normal sentences within the guidelines, which would otherwise raise the specter of a flood of new appeals, are excluded from the area of judicial sentence review.

Pennsylvania's statute represents another way to strengthen sentencing guidelines and make sentence review more attractive; with-
out foreclosing the possibility of reducing sentence disparity inside the guidelines. Pennsylvania has attempted to produce variations in the intensity of sentence review by providing that the appellate court shall vacate and remand sentences within the guidelines if they are “clearly unreasonable” and sentences outside the guidelines if they are “unreasonable.” While such legal terms of art communicate differences in degree rather than kind, they can create variations in the likelihood that appellate courts will overturn sentences inside and outside the guidelines. This variation in the intensity of review establishes incentives to comply with the guidelines while at the same time providing disincentives to appeal sentences within the guidelines.

Other, more widely recognized terms of art could be used to increase this variation in intensity further. Appellate courts could be directed to take a deferential approach to the review of sentences inside the guidelines by a review statute that provides: The appellate court shall modify a sentence within the guidelines’ ranges if it concludes that the sentence is an abuse of discretion in light of the legislature’s statement of sentencing policy. On the other hand, directions to review sentences outside the guidelines more intensively could be communicated in the following terms: The appellate court shall modify a sentence outside the guidelines’ ranges to conform to the guidelines if it concludes that the sentence is clearly erroneous in light of the legislature’s statement of sentencing policy. “Clearly erroneous” is a test that appellate courts have developed in reviewing the finding of facts of trial judges sitting without juries. It has also become a term of art in administrative law to communicate a scope of review greater than “abuse of discretion,” though considerably less than “de novo” review. Ap-

105. With respect to one term of art to communicate the desired intensity of review, Professor Kenneth Culp Davis has observed: “Whatever impression a literal-minded reader may get from the words in the statute book, the plain reality is that the substantial-evidence rule as the courts apply it is a variable. It is made of rubber, not of wood.” K. Davis, Text, supra note 11, at 530.
106. See supra note 44 and accompanying text. See infra note 115 and accompanying text for a consideration of the grant of authority to modify sentences on review. See infra note 117-21 for a discussion of the central role of a statutory statement of sentencing policy in a system of sentence review.
107. K. Davis, Text, supra note 11, at 528.
108. The intensity of judicial review of administrative findings is measured in terms of the extent to which the courts will substitute their judgment about the facts for the judgment of an administrator.

If we could measure intensity of review of evidence and express the results numer-
plied to sentences outside the guidelines' ranges it would mean that "although there is evidence to support [the sentence], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."\textsuperscript{109}

Id. at 530.

Using Professor Davis's scale to measure intensity of review, the "abuse of discretion" standard now commonly used for substantive review of trial court sentences probably calls for zero to five percent of substitution of judgment. See supra text accompanying notes 44-49.

109. K. Davis, Text, supra note 11, at 528 (quoting from United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). "Substantial evidence," a more common standard of review in administrative law, "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 527-28 (quoting from Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). According to Professor Davis, the difference between the "clearly erroneous" and "substantial evidence" standards of review is that "[a] firm conviction of mistake is closer to substitution of judgment than a firm conviction of unreasonableness." Id. at 528.

If a legislature wishes to send an even clearer message concerning the variation in the scope of sentence review, it could adopt a "clear and convincing evidence" standard instead of the "clearly erroneous" standard:

The appellate court shall modify a sentence outside the guidelines' range to conform to those ranges unless it concludes from the facts contained in the record below that there is clear and convincing evidence to support the sentence.

Because the clear and convincing evidence standard ordinarily applies to trial proceedings, language such as "from the facts contained in the record below" should be added to the review statute to avoid a "de novo" review process in which appellate courts can take evidence and make their own findings of fact.

"Clear and convincing evidence" is a standard or level of proof that falls in between the "preponderance of the evidence" standard that a plaintiff in a civil suit must ordinarily satisfy and the "beyond a reasonable doubt" standard that a prosecutor must meet in a criminal case. In adopting the "clear and convincing evidence" standard for involuntary civil commitment proceedings, the United States Supreme Court recently conceded that such legal terms of art can only communicate a rough sense of the relative rigor with which jurors should examine relevant evidence and of the relative importance of their decisions:

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among [proof by a preponderance of the evidence, by clearly and convincing evidence and beyond a reasonable doubt] or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are not directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals through the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of
By varying the scope of review in relation to sentences inside and outside the guidelines, rather than limiting the area of review, a legislature can encourage conformity to the guidelines because sentencers will want to avoid the likelihood of reversal of extraordinary sentences on appeal. At the same time, this approach removes the threat of a flood of new appeals by reducing the chances of successful appeals in the majority of cases that fall within the guidelines’ sentence ranges. Although there may be more sentence appeals under this approach than under the Washington statute, there will also be a potential remedy for sentence disparity inside the guidelines. However, before concluding that the mechanics of statutory drafting will lead to actual remedies for errors in a sentencing system, it is important to keep in mind Kenneth Culp Davis’s observation about “word formulas” for judicial review.

The responsibility that courts . . . have for assuring that serious miscarriages of justice are corrected is likely to prevail over words that are written into statutes by legislators who did not have in mind the facts and circumstances of the particular case in which conscientious judges believe that they need to step in.

With this qualification in mind, a legislature can communicate the intensity of review it wants appellate courts to undertake through terms as clear as language and legal doctrines permit. Whether or not appellate judges will take the message seriously and act upon it will be influenced by, and may depend upon, their attitudes about the relative importance of equity and discretion, as well as the resources available to perform the functions of sentence clearing and convincing evidence.

---


This concession probably applies to appellate court judges as well. However, by comparing the “clear and convincing evidence” standard with the “abuse of discretion” standard, reviewing courts will understand that a legislature intended a relatively intense review of sentences imposed outside the guidelines’ ranges.

The “clear and convincing evidence” standard could be adopted for reasons similar to those of the Supreme Court in Addington: the standard recognizes “the value society places on individual liberty” and it “strikes a fair balance between the rights of the individual and the legitimate concerns of the state.” Id. at 426, 432. In other words, individual liberty is enhanced by requiring average or presumed sentences in the absence of clear and convincing evidence of extraordinary circumstances. On the other hand, the state’s law enforcement interests are preserved by permitting exceptional, aggravated punishment when there is clear and convincing evidence of extraordinary circumstances and by forbidding exceptional, mitigated punishment unless such evidence exists.

110. See supra note 100 and accompanying text.

111. K. Davis, Text, supra note 11, at 530.
Because of a recent United States Supreme Court decision, legislatures have yet another feature of a sentence review statute to consider. In *United States v. DiFrancesco*, the Court held that a federal statute which established extraordinary sentences for "dangerous special offenders" and provided for governmental appeal of those sentences did not violate the double jeopardy clause of the fifth amendment to the United States Constitution. Because the Court concluded that no double jeopardy problem arises when the government successfully appeals a sentence and the defendant's sentence is increased, *DiFrancesco* apparently clears the way for state legislatures to enact review statutes that provide for appeal by the prosecutor in all criminal cases.

The right to appeal sentences that the government considers too lenient furthers the logic of a sentencing system designed to reduce disparity. Under such a system, sentences at both the low and high ends of the sentencing scale can be modified. At the same time, however, an opportunity for government sentence appeals increases the potential workload of the appellate courts.

An alternative to government sentence appeals that still permits increases in overly lenient sentences, while adding another disincentive to frivolous sentencing appeals by defendants, can be established by a sentence review statute which authorizes appellate courts to increase or decrease sentences. Illinois' sentence review statute, for example, provides in part:

---

112. See supra note 18 and accompanying text.


Of course, a state constitution may bar government sentence appeals and subsequent increases in sentences.

Yet is the independent character of state constitutional rights only a matter of theory? Is it realistically conceivable that the nation might have more than one body of constitutional law? It is not only conceivable, it is so, as can be seen by examining the many state constitutional limitations that concern the protection of private and local interests other than those found in the federal Bill of Rights. The possibility of independent evolution is no different for those state guarantees that were duplicated by Madison's amendments—except, of course, insofar as the Fourteenth Amendment places a federal floor under that disregard of the national standards.


115. Authorizing appellate courts to modify sentences on review can also increase the efficiency of a sentence review system. See Campbell, supra note 3, at 389.
The court to which such appeal is properly taken is authorized to modify the sentence and enter any sentence that the trial judge could have entered, including increasing or decreasing the sentence or entering an alternative sentence to a prison term.\textsuperscript{116}

The attractiveness of such a provision, however, will depend upon a legislature’s perception of the current rate of sentencing errors on the side of leniency. If lenient sentences are common in a penal system,\textsuperscript{117} many of them will be left undisturbed by a statute like Illinois’ because they will not be appealed by defendants.

By designing a sentence review statute which varies the scope of review for sentences imposed inside and outside the sentencing guidelines’ ranges and which provides for appeals to remedy lenient as well as excessive sentences, a legislature can establish incentives for sentencers to conform to the sentencing guidelines as well as the legal means to enforce such conformity when the guidelines’ rules and sentencing policies require it. At the same time, a legislature can reduce the number of potential sentence appeals and the likelihood of frivolous appeals. Under such a statute, judicial sentence review can strengthen a sentencing guidelines system. Furthermore, the framework of the guidelines can provide a principled basis to remove a major obstacle to judicial sentence review—the threat of a flood of new appeals.

\textit{A Sentencing Policy of Just Deserts}

After considering the relatively mechanical means to promote the role of judicial review in a sentencing guidelines system by statute, a legislature still must address a basic reason for the failure of judicial sentence review to structure discretion or reduce disparity. Judicial review, or any other regulatory mechanism, can do little to tame the sentencing system unless the purposes of criminal punishment are identified and a coherent sentencing policy is established.\textsuperscript{118}

Sentence disparity can cause individual inequities and misallocations of resources in any sentencing system, including a guidelines system. This disparity can take three forms: first, the guidelines could be incorrectly applied to offenders; second, offenders who should be sentenced within the guidelines ranges may receive extraordinary sentences; and third, the guidelines administrators

\textsuperscript{117} \textit{But see infra} note 209.
\textsuperscript{118} \textit{See supra} text accompanying notes 19-50.
may make rules that categorize offenders similarly who should be treated differently. Judicial review can reduce all three forms of disparity and in the process promote the equitable distribution of punishment and the rational allocation of corrections resources. To deal with the latter two forms of disparity, however, appellate courts will need a clear statement of sentencing policy to serve as a standard for substantive review. This standard must allow the courts to evaluate the reasons for these extraordinary sentences and to compare them with other sentences outside the guidelines. To review the content of the guidelines' rules, the courts will need to know the level of sentence variation that the system should tolerate as a matter of policy. Legislatures should communicate this level of tolerable sentence variation to the appellate courts through a statutory statement of sentencing policy.

For the legislatures that recognize this need for sentencing policy, the policy options are limited. Of the theories that comprise our jurisprudence of sentencing, rehabilitation has been banished as unmanageable or unfair, and the deterrence theory has failed to provide the practical means to control disparity or to translate the desired deterrent effect into a workable scale of actual sentences. This means, as a practical matter, that legislatures intending to reduce sentence disparity must look to the theory of incapacitation or the retributivistic theory of "just deserts" for the basis of a sentencing policy.

Under an incapacitative sentencing policy, sentences must account for the personal characteristics of individual offenders. As a result, appellate courts may be as likely to defer to these sentencing decisions as they have to decisions made under the rehabilita-

---

119. See supra notes 85-88, 101-09 and accompanying text.
120. See supra notes 90-91 and infra notes 144-56, 217-29 and accompanying text.
121. See supra notes 20-39 and accompanying text.
122. See supra text accompanying notes 53-56.
124. One of the most persistent and prolific proponents of contemporary just deserts theory is Andrew von Hirsch. See supra note 75. For a brief summary of the view of Immanuel Kant, the originator of retributivism and an early opponent of the idea of imposing criminal punishment for utilitarian objectives, see A. von HIRSCH, DOING JUSTICE, supra note 75, at 47-49. See infra note 159 for a discussion of a major difference between Kantian retributivism and contemporary just deserts theory.
When a sentencing judge explains an extraordinary sentence as an attempt to protect society from an offender whom he has predicted to be dangerous and incorrigible, there is the same temptation on appeal to respect the judge's firsthand assessment of an individual's personality and the myriad other factors arguably relevant to predicting danger.

Under an incapacitative sentencing policy, the task of judicial review is further complicated by the technical nature of contemporary incapacitative guidelines methodology. There is a strong legal tradition of "unreviewability" when the decisions in question involve "specialized subjects which are beyond the range of legal training." As a result, appellate courts will probably accept the substance of incapacitative sentencing guidelines at face value, in spite of evidence that offenders who would otherwise be treated differently will be treated the same under these guidelines.

The United States Parole Commission's Guidelines demonstrate the nature of the problem that courts face in reviewing administrative decisions in an incapacitative guidelines system. The federal parole guidelines not only classify offenses in terms of severity and categorize offenders based upon prior criminal acts, they also

---

125. See supra notes 26-28 and accompanying text. In upholding the constitutionality of a death penalty statute that required a jury to predict whether or not there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," the United States Supreme Court recently displayed this kind of judicial deference to strategies of incapacitation:

"[T]he petitioner argues that it is impossible to predict future behavior and that the question is too vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judges prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities."


126. See supra note 28.

127. K. Davis, Text, supra note 11, at 523.


129. See supra notes 72-74 and accompanying text. The central feature of the U.S. Pa-
categorize offenders according to the statistical likelihood of their recidivism.\textsuperscript{130}

role Commission’s Guidelines is a two-dimensional matrix table with one axis composed of six classifications of offense severity, from “greatest” to “low,” and the other axis composed of four categories of offender from “very good” to “poor.” 28 C.F.R. § 2.20 (1981). By ranking the offense and rating the offender, the range of time which an offender will normally be incarcerated before release on parole appears at the intersection of the two axes on the matrix: the greater the offense’s severity or the worse the offender’s rating, the longer the period of incarceration. \textit{Id}. The structure of most guidelines matrix tables is the same. See \textit{supra} note 74 and text accompanying notes 72-74 \textit{supra}.

\textsuperscript{130} For the purposes of parole release, recidivism is measured by parole failure. Under the federal guidelines, an offender’s risk of parole failure appears on the offender related axis of the matrix table as a “parole prognosis.” See 28 C.F.R. § 2.20 (1981). The category of parole prognosis into which an offender is placed depends upon his rating on the “Salient Factor Score.” One of the early versions of the salient factor score is set forth below:

\begin{itemize}
  \item \textbf{Item A}
    \begin{itemize}
      \item No prior convictions (adult or juvenile) = 2
      \item One or two convictions = 1
      \item Three or more prior convictions = 0
    \end{itemize}
  \item \textbf{Item B}
    \begin{itemize}
      \item No prior incarcerations (adult or juvenile) = 2
      \item One or two prior incarcerations = 1
      \item Three or more prior incarcerations = 0
    \end{itemize}
  \item \textbf{Item C}
    \begin{itemize}
      \item Age at first commitment (adult or juvenile)
        \begin{itemize}
          \item 18 years or older = 1
          \item Otherwise = 0
        \end{itemize}
    \end{itemize}
  \item \textbf{Item D}
    \begin{itemize}
      \item Commitment offense did not involve auto theft = 1
      \item Otherwise = 0
    \end{itemize}
  \item \textbf{Item E}
    \begin{itemize}
      \item Never had parole revoked or been committed for a new offense while on parole = 1
      \item Otherwise = 0
    \end{itemize}
  \item \textbf{Item F}
    \begin{itemize}
      \item No history of heroin, cocaine, or barbiturate dependence = 1
      \item Otherwise = 0
    \end{itemize}
  \item \textbf{Item G}
    \begin{itemize}
      \item Has completed 12th grade or received GED = 1
      \item Otherwise = 0
    \end{itemize}
  \item \textbf{Item H}
    \begin{itemize}
      \item Verified employment (or full-time school attendance) for a total of at least 6 months during last 2 years in the community = 1
      \item Otherwise = 0
    \end{itemize}
  \item \textbf{Item I}
    \begin{itemize}
      \item Release plan to live with spouse and/or children = 1
      \item Otherwise = 0
    \end{itemize}
\end{itemize}

Total Score
A central objective of guidelines methodology is the accurate prediction of future sentencing decisions based upon information about past and present sentencing decisions. The accomplishment of this objective requires the collection and evaluation of data on prevailing sentencing practices, the construction of a sentencing matrix based upon the sentencers' use of factors relating to offenses and offenders, and the validation of the matrix in follow-up studies. These processes are complicated enough. However, in its salient factor score, the federal parole commission guidelines attempt to predict the future behavior of offenders as well. This objective requires the isolation, refinement and validation of predictive variables or categories of risk of recidivism and a mastery of the art and science of statistics. It is unlikely that most citizens, legislators, sentencers or appellate court judges will understand the complexities of this process. As a result, categoric risk prediction under incapacitative guidelines represents a decision making process that will be immune from review.

By acknowledging the desire of sentencers to incapacitate and by trying to refine the practice through categoric risk prediction, incapacitative guideline systems present a "joker in the deck" for reviewing courts. When questions are raised on appeal concerning the effect such categoric risk devices as the salient factor score have on the distribution of punishment, appellate courts will most likely respond with deference towards the technical decisions underlying the guidelines instead of subjecting these decisions to serious review.

There are two reasons why categoric risk prediction calls for the restraint, or check, that judicial review can provide. First, the limited predictive power of categoric risk prediction devices results in a sufficient number of offenders who are erroneously treated the same under incapacitative guidelines to raise questions about the equitable distribution of punishment and the rational allocation of corrections resources in an incapacitative guidelines system. Sec-

28 C.F.R. § 2.20 (1974). For a prototype of the salient factor score, see Gottfredson, Paroling Policy, supra note 68, at 42, app. A.

131. See Sentencing Guidelines Project, supra note 2, at 5, and Gottfredson, Paroling Policy, supra note 68.

132. Id.


134. See supra note 125.

135. For example, in the sample of offenders that Oregon parole authorities uses to vali-
ond, the construction of categoric risk prediction devices such as the salient factor score requires value judgments by sentencing researchers and administrators which can influence the levels of sentence variation and disparity throughout a penal system.136

Methods of predicting criminal behavior have frequently been assailed because of the number of "false positives," or persons incorrectly identified as recidivists, that are contained in categories of risk.137 In the case of the salient factor score, the predictive power at the high end of the score is significant. In an early follow-up study to validate the score, 91.2 percent of the offenders with scores of nine to eleven on the eleven point scale, a "very good" parole prognosis, were successful on parole.138 However, at the low date its categoric risk prediction device, the "Criminal History/Risk Score," the overall parole success to parole failure ratio is two to one. In other words, on the average, two out of three of these offenders succeeded on parole. By categorizing these offenders in terms of the "Criminal History/Risk Score" used by the Board of Parole until December 1980, hindsight reveals the following success-to-failure ratio by risk category.

<table>
<thead>
<tr>
<th>Criminal History/Risk Score</th>
<th>Ratio of Success to Failure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td>5.4 to 1</td>
</tr>
<tr>
<td>Good</td>
<td>2.7 to 1</td>
</tr>
<tr>
<td>Fair</td>
<td>1.9 to 1</td>
</tr>
<tr>
<td>Poor</td>
<td>1.3 to 1</td>
</tr>
</tbody>
</table>

Memorandum, Larry Travis to Ira Blalock, Subject: Comparison of History/Risk Scoring Devices, September 2, 1980 [hereinafter cited as Travis Memorandum].

While these categories tell the Oregon Board of Parole more about the chance of success of a particular offender than the overall average two-to-one success-to-failure ratio, a substantial number of errors occur by applying any particular category. Among six offenders receiving an "excellent" criminal history/risk score, for example, nearly one will fail on parole. In the "poor" category, one person will succeed for every person who fails.

136. To their credit, guidelines researchers and administrators have tried to eliminate blatantly invidious predictive factors like race in the course of developing instruments such as the salient factor score. Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 877 (1975). They have also tried to avoid making value judgments in constructing sentencing scales by grading offenses with reference to existing sentence practices. See, e.g., Gottfredson, Paroling Policy, supra note 68, at 38-50; Sentencing Guidelines Project, supra note 2, at 8. However, more subtle judgments of value have to be made in constructing a device like the salient factor score. See infra text accompanying notes 137-44.


end of the score, the success rate for offenders with scores of zero to three, a "poor" prognosis, was 55.4 percent.\textsuperscript{139} Does a rate of nearly one "false positive" for every two offenders in the latter predictive category justify treating offenders similarly for the purposes of aggravating punishment? This is as much a value judgment about fairness and sentence disparity as a technical decision about predictive efficiency.

A similar question arises from another aspect of the salient factor score's original validation study. The results of the study revealed that a prior criminal record alone was a powerful predictor of parole failure. 88.5 percent of the offenders without prior convictions were successful on parole, while offenders with two or more convictions had a parole success rate of 60.1 percent.\textsuperscript{140} In comparison to prior convictions alone, does the greater predictive power of the salient factor score justify consideration of such predictive variables as an offender's "age at first commitment" or his education and employment status—factors that are related to the race and socioeconomic status of offenders?

Other apparently technical decisions involved in constructing the salient factor score raise less obvious questions of value. For example, in order to validate the predictive power of the variables in the salient factor score, it was necessary to agree on a way to measure the relevant outcome, or dependent variable.\textsuperscript{142} In the case of incapacitative parole release guidelines, the dependent variable is success or failure on parole. A decision must be made to choose a standard to measure success or failure on parole in a validation study. The standard chosen to validate the salient factor score included parole revocation for "technical" violations, such as failure to report to a parole officer, as well as revocation for new criminal convictions.\textsuperscript{143} This decision to ignore obvious differences in culpability and to account for the relatively subjective judgments that result in technical parole violations raises questions about the equity as well as the predictive efficiency of the salient factor score.\textsuperscript{144}

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 197.
\textsuperscript{141} See supra note 130.
\textsuperscript{142} Hoffman & Beck, supra note 133, at 196.
\textsuperscript{143} Id. at 196.
\textsuperscript{144} It is no doubt easier to count all parole failures the same for the purposes of measuring the dependent variable. However, "technical" violations that lead to revocation may be an unreliable basis for measuring parole failure because of biases that can influence the
The basic question is not whether these particular decisions of federal parole guidelines researchers and administrators are correct; the question is whether the underlying value judgments which balance fairness against efficiency ought to be left to the discretion of researchers and administrators who do not have the popular mandate of elected officials or the detachment from their enterprise as do appellate judges. Under our system of government, the answer should be no. Appellate judges and legislators should be the arbiters of the appropriate balance between efficiency and fairness in a system that values the institutional restraints of checks and balances.\textsuperscript{145}

In the face of claims of excessive punishment based upon arguments that incapacitative guidelines treat offenders similarly who should be treated differently, reviewing courts must pierce the veil of expertise that surrounds the methodology of categoric risk prediction and address the fundamental questions of value upon which judgments of sentence disparity and excessiveness depend. Once this occurs, appellate courts will have to answer questions such as how many false positives in a particular category of risk are too many and whether or not more accurate but more expensive statistical methods should be used to construct devices like the salient factor score. Unfortunately, rather than confronting these questions, it is all too easy for appellate courts to defer to the judgments of the guidelines administrators about questions of value. As a result, the level of regulation of key sentencing decisions in an incapacitative guidelines system will probably approach

\begin{itemize}
  \item exercise of discretion to "violate" a parolee. See Gottfredson, \textit{Assessment and Prediction Methods in Crime and Delinquency}, in \textit{Task Force on Corrections, President's Comm. on Law Enforcement and Admin. of Just. Task Force Report: Juvenile Delinquency} 171, 173 (1967). Furthermore, if parolees who commit armed robbery and parolees who fail to report to their parole officers are both counted as parole failures, even a utilitarian penologist should wonder if the right empirical phenomena are being measured in an effort to protect society.
  
  Hoffman and Beck recognized the problem and made an implicit value judgment:
  
  Since only persons released to parole (or mandatory release) supervision are liable for return to prison for technical violations, the classification of such cases as having unfavorable outcome means that those persons released under supervision are subject to greater risk of being included in the unfavorable outcome category than those released without supervision. On the other hand, if technical violators were classified as having favorable outcome, parolees would be subject to less risk of being classified as having unfavorable outcome than unsupervised releasees. In the opinion of the researchers, the first alternative appeared as the most desirable for the purpose at hand.

  Hoffman & Beck, supra note 133, at 205 n.6.

  \textsuperscript{145} See supra notes 49-51, 83-92 and accompanying text.
\end{itemize}
the lack of regulation that prevails in indeterminate sentencing systems under rehabilitation theory.146

There are two reasons why appellate courts are likely to defer to important sentencing decisions in an incapacitative guideline system. First, the statistical methods associated with construction of categoric risk prediction devices create an aura of expertise around decisions which affect the distribution of punishment. Most appellate courts will be tempted to regard these decisions and their accompanying value judgments as "technical" and to defer to the "sound discretion" of the experts in categoric risk prediction.147 Second, under a formal sentencing policy of incapacitation, the implicit acceptance of errors in prediction in pursuit of the utilitarian objective of crime prevention provides appellate courts with an independent justification for refusing to review the decisions of guidelines administrators despite increases in sentence disparity.148

In response to complaints that the salient factor score aggravates and mitigates punishment on inequitable and discriminatory grounds, the Parole Commission has eliminated a number of "status" items in the score.149 This response to public criticism, after

<table>
<thead>
<tr>
<th>Item A: Prior Conviction(s)/adjudications (adult or juvenile).</th>
</tr>
</thead>
<tbody>
<tr>
<td>None ........................................................................... = 3</td>
</tr>
<tr>
<td>One ........................................................................... = 2</td>
</tr>
<tr>
<td>Two or Three ......................................................... = 1</td>
</tr>
<tr>
<td>Four or More ................................................................ = 0</td>
</tr>
<tr>
<td>Item B: Prior commitment(s) of more than 30 days (adult or juvenile).</td>
</tr>
<tr>
<td>None ........................................................................... = 2</td>
</tr>
<tr>
<td>One or Two .................................................................... = 1</td>
</tr>
<tr>
<td>Three or More ................................................................ = 0</td>
</tr>
<tr>
<td>Item C: Age at current offense/prior commitments.</td>
</tr>
<tr>
<td>Age at commencement of the current offense:</td>
</tr>
<tr>
<td>26 years of age or more .............................................. = 2***</td>
</tr>
<tr>
<td>20-25 years of age ..................................................... = 1***</td>
</tr>
<tr>
<td>19 years of age or less ............................................... = 0</td>
</tr>
<tr>
<td>Item D: Recent commitment free period (three years).</td>
</tr>
<tr>
<td>No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense.</td>
</tr>
</tbody>
</table>

146. See supra notes 26-28, 56-61 and accompanying text.
147. See supra note 127 and accompanying text.
148. See supra notes 35-36 and accompanying text.
149. See, e.g., 46 Fed. Reg. 35,637 (1981). The most recent salient factor score is set forth below:

<table>
<thead>
<tr>
<th>Name</th>
<th>Register Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item A: Prior Conviction(s)/adjudications (adult or juvenile).</td>
<td></td>
</tr>
<tr>
<td>None ........................................................................... = 3</td>
<td></td>
</tr>
<tr>
<td>One ........................................................................... = 2</td>
<td></td>
</tr>
<tr>
<td>Two or Three ......................................................... = 1</td>
<td></td>
</tr>
<tr>
<td>Four or More ................................................................ = 0</td>
<td></td>
</tr>
<tr>
<td>Item B: Prior commitment(s) of more than 30 days (adult or juvenile).</td>
<td></td>
</tr>
<tr>
<td>None ........................................................................... = 2</td>
<td></td>
</tr>
<tr>
<td>One or Two .................................................................... = 1</td>
<td></td>
</tr>
<tr>
<td>Three or More ................................................................ = 0</td>
<td></td>
</tr>
<tr>
<td>Item C: Age at current offense/prior commitments.</td>
<td></td>
</tr>
<tr>
<td>Age at commencement of the current offense:</td>
<td></td>
</tr>
<tr>
<td>26 years of age or more .............................................. = 2***</td>
<td></td>
</tr>
<tr>
<td>20-25 years of age ..................................................... = 1***</td>
<td></td>
</tr>
<tr>
<td>19 years of age or less ............................................... = 0</td>
<td></td>
</tr>
<tr>
<td>Item D: Recent commitment free period (three years).</td>
<td></td>
</tr>
<tr>
<td>No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense.</td>
<td></td>
</tr>
</tbody>
</table>
notice of an intent to change the rules and the receipt of formal comment from interested parties, lends support to the claim that administrative rulemaking is "one of the greatest inventions of modern government."\textsuperscript{150}

Nevertheless, this kind of response does not eliminate the need for judicial review as a check on administrators in an incapacitative guidelines system. The federal parole system's salient factor score still contains predictive items that make a significant difference in punishment and that depend upon implicit tradeoffs between fairness and predictive efficiency. A twenty-six year-old offender, for example, can still gain a two point advantage over his nineteen year-old counterpart and an earlier parole release date because "age at commencement of the current offense" is retained for its predictive utility.\textsuperscript{151} An offender who is found to have "heroin/opiate dependence" still loses one point on the salient factor score for the same reason.\textsuperscript{152} Furthermore, although the development of categoric risk prediction devices represents the work of a close-knit group of empirical criminologists who are sensitive about making value judgments beyond their technical competency,\textsuperscript{153}

\begin{verbatim}
Otherwise ............................................ = 0
Item E: Probation/parole/confinement/escape status violator this time.
Neither on probation, parole, confinement, or escape status
at the time of the current offense, nor committed as
a probation, parole, confinement, or escape status
violator this time.                       = 1
Otherwise ............................................ = 0
Item F: Heroin/opiate dependence
Otherwise ............................................ = 0
Total score ..........................................

*** Exception: If five or more prior commitments of more than thirty
days (adult or juvenile), place an 'x' here ___ and score this item = 0.


Compare this version of the salient factor score with the 1974 version cited supra note 130. The commission has dropped the following factors from its salient factor score: "age at first commitment," "commitment offense did not involve auto theft," "has completed 12th grade or received G.E.D.," and "verified employment (or full time school attendance)."

150. See supra note 78 and accompanying text.
151. See supra note 149.
152. Id. The possibility of invalid classifications based on unreliable judgments of "dependence" is also increased by the retention of this factor. See supra note 144.
153. See supra note 136. U.S. Parole Commission administrators and researchers have worked closely with their Oregon counterparts in the development of both guidelines systems. See, e.g., Testimony of Dr. Peter Hoffman, Hearing on H.B. 2013, Or. House Comm. on Judiciary, Mar. 21, 1977; and Exh. D; Blalock, supra note 72, at 102. See also supra notes 135, 149 and infra note 175.
\end{verbatim}
these conditions may change as incapacitative guidelines systems proliferate.\(^{154}\) The present cadre of guidelines researchers and administrators will expand to include persons who may not exhibit the same self-restraint and responsiveness to concerns about equity.\(^{155}\) Finally, state guidelines rulemaking processes may not be subject to the same level of public scrutiny as the federal parole system.\(^{156}\)

Appellate courts cannot be expected to address the "de facto" disparity caused by categoric overprediction and the underlying tradeoffs between predictive efficiency and fairness unless a legislature outlaws incapacitative strategies altogether by adopting a sentencing policy based upon just deserts theory. Under a just deserts sentencing policy, sentencing guidelines focus on past events to establish ranges of sentences based upon the seriousness of offenders' criminal behavior.\(^{157}\) Punishment should be proportionate or commensurate to the seriousness of the criminal behavior and offenders who are responsible for similar criminal behavior should receive the same punishment.\(^{158}\) In determining the seriousness of an offender's behavior under a just deserts sentencing policy, sentencing rulemakers and sentencers who wish to depart from the guidelines' ranges may only consider the severity of the current offense and the number and severity of the offender's previous convictions.\(^{159}\)

---

154. The Oregon Bd. of Parole member who initiated the board's development of parole release guidelines recently reported that the popularity of the just deserts theory is declining among corrections administrators, and that incapacitation has once again become their primary concern. Testimony of Ira Blalock, Task Force on Sentencing of the Joint Interim Comm. on the Judiciary of the Or. 61st Legis. Asa'y (Apr. 3, 1982). The author is a member of the task force.

155. See supra note 33 and accompanying text.

156. The author has attended eight meetings of Oregon's Advisory Commission of Prison Terms and Parole since its creation in 1977. Because this body is responsible for proposing guidelines rules for adoption by the Bd. of Parole, OR. REV. STAT. 144.780, its meetings would be an obvious place for interested parties to express their views. In fact, the commission usually invites public comment at its meetings. However, few members of the public or representatives of the criminal justice community, aside from parole board staff and corrections division employees, attend these meetings.


158. Id. See also A. VON HIRSCH & K. HANRAHAN, supra note 75, at 15; and infra notes 223-26 and accompanying text.

159. Under classical principles of retributivism developed by Kant, desert was solely a function of the conduct involving the current offense. See supra note 124. Consideration of an offender's prior convictions in determining proportionate punishment is a principle of the modern theory of just deserts. See G. FLETCHER, RETHINKING CRIMINAL LAW 459-66 (1978) [hereinafter cited as G. FLETCHER].
In the process of "reworking the apparatus with which we think about criminal liability," Professor Fletcher has criticized Professor von Hirsch's argument that punishment ought to be inflicted according to desert and that a prior criminal record increases desert. G. Fletcher, supra this note, at xxi, 460. He concludes that "[t]hough undoubtedly made in good faith, this argument carries particularly insidious implications both for the practice and theory of criminal law." Id. at 460.

Professor Fletcher first observes that by appealing to justice and desert to justify increased punishment, von Hirsch "insulates his theory against empirical attack." Id. at 461. "If the argument were that recidivists were particularly dangerous and punishment ought to be inflicted in proportion to the offender's dangerousness, we could at least try to argue against the proposition on empirical grounds." Id. at 462. For example, "[t]he wrongdoing of homicide is causing human death; the dimension of wrongdoing is not affected by provocation or diminished capacity. Yet the actor's culpability for the wrongdoing is reduced in these cases and therefore the punishment is properly mitigated." Id. However, in Fletcher's view, "the thesis that added culpability justifies greater punishment for the same act of wrongdoing . . . is foreign to our experience of crime and punishment." Id. at 463. As a result, prior convictions, just like "nasty motives," should not "make a voluntary, intentional act . . . more culpable in some persons than in others." Id. Finally, Fletcher believes "rebellion against authority is what . . . underlies von Hirsch's argument that a second offense deserves greater punishment than the first." Id. at 465.

Perhaps contrite offenders are punished more leniently, but should proud offenders be punished more severely? Is it a personal wrong to the legislature, to the courts, or to law enforcement personnel for an offender either to threaten or to commit repeat offenses? In raising this issue, we come close, in my mind, to an important difference between a liberal society, based upon the rule of law, and one species of totalitarian society, based upon the cult of personal leadership. In a liberal society, based upon the rule of law, authority is not charismatic, but formal. Legislators, judges and law enforcement personnel occupy legally defined offices: they are not entitled to react to a "persistent" criminal as though their personal authority were challenged.

Id. at 465.

Professor von Hirsch has responded directly to Fletcher's criticisms by reasserting his claim that prior criminal misconduct should be used to determine blameworthiness, or desert, but not to predict dangerousness. von Hirsch, Desert and Previous Convictions, supra note 67, at 597-600. In von Hirsch's view, the blameworthy quality of prior convictions is derived from society's treatment of misdeeds in everyday life. Id. at 597. People, in general, attempt to reduce the blame for misdeeds by pleading that their misconduct was uncharacteristic of their past behavior. "I'm sorry, I don't know what got into me: it's not been like me to do that kind of thing" is the plea that just deserts theory affords first-time criminal offenders to account for both the wrongdoing of the criminal act and the culpability of the actor. Id. To the criticism that this rationale amounts to incapacitation in disguise, von Hirsch responds:

The fact that the plea refers to the act's being "uncharacteristic" of the actor does not make it a prediction. Speaking of behavior as 'characteristic' or "uncharacteristic" has two distinct uses: one use is predictive; the other serves the quite different, retrospective purpose of supporting judgments about an actor's deserts. (Consider the assertion that Professor Z is characteristically or habitually late for class. This assertion has a predictive use—as when a student tells others
courts will be able to derive workable standards to regulate ex-

that they therefore needn't hurry to arrive at his classes on time. But the assertion may also be used in making judgments about Z's deserts: If a University faculty committee is considering candidates for a teaching prize or award, Z's habitual lateness can be cited as reason why he has not earned the prize. In this latter context, his future conduct may be irrelevant. The issue may arise even after Z has retired, and thus would not be expected to be late for class again.)

Id. at 599-600. (See also id. at 617-629 for von Hirsch's illustrations of the practical differences between the use of prior convictions under the theory of just deserts and under the theory of incapacitation.)

Furthermore, rather than increasing maximum levels of punishment because of prior convictions, von Hirsch argues that just deserts theory reduces the maximum punishment for first time offenders because of their conviction-free records. Id. at 597-98.

Finally, von Hirsch asserts that imposing the "full measure of blame" on the repeater has nothing to do with "rebellion against authority." Id. at 600. "[Fletcher's] argument is mistaken, I believe, for a reason that should be obvious: censure or reproof is not a species of command, and is not restricted to relationships of authority." Id. To illustrate this point, von Hirsch cites the example of a friend or colleague who responds to his thoughtless or selfish act:

If this was the first occasion, I may plead that the act was uncharacteristic of my past behavior; and if he believes me, he may reduce the degree of his disapproval somewhat. If I then repeat the act and he responds more sharply, his complaint will not be that I am a refractory subordinate who has flouted his directives. Rather, he will contend that the act was wrong on its merits; that I should have altered my behavior when he previously confronted me because the conduct was wrong; and that, having failed to change my behavior, I can no longer claim to deserve less blame because such misconduct is "out of character" for me. His claim is one about wrong and blame, not about disobedience.

Id.

Aside from the obvious impact on the structure of a sentencing guidelines matrix (see, e.g., infra note 175 and accompanying text), the outcome of the Fletcher-von Hirsch debate can affect the practical potential of a just deserts sentencing policy in two ways. First, without the possibility of considering prior convictions in the imposition of criminal sentences which now exists in every American penal system, a just deserts sentencing policy has little chance of being enacted by popularly-elected legislatures. Second, if the justification for considering prior convictions is the utilitarian objective of crime prevention rather than just deserts, then a principled basis may no longer exist to distinguish the use of prior convictions and other offender-related characteristics that are currently used to incapacitate offenders under the methodology of categoric risk prediction.

In addition to the problem of determining whether just deserts theory is increasing punishment for redivists or decreasing punishment for first-time offenders, Professor Fletcher has uncovered a basic weakness in the theoretical justification for considering prior convictions in determining an offender's just deserts. The justification relies heavily upon the retributivistic premise that human beings are autonomous moral agents who freely choose between wrongdoing and law-abiding behavior. In Fletcher's view, the reliance on this premise is too great:

Might we not at least have some doubts about the extent to which repeated offenders are in control of themselves? I am willing to concede that absent a valid excuse, a second offense is voluntary and the actor is accountable and should be punished again. But von Hirsch wants more than that. He claims that the second offense is even more culpable, as though somehow it were more "voluntary" than the first offense.
traordinary sentences in a guidelines system. The just deserts principle of proportionate punishment provides a standard by which appellate courts can apply the traditional method of legal reasoning by analogy to the problem of determining whether a sentence outside the guidelines is justified. This determination is made by comparing the extraordinary sentence under review with other extraordinary sentences previously reviewed and upheld. Analogy to earlier sentences is possible under just deserts theory because the factors relevant to the sentencing decision are limited to mitigating and aggravating circumstances in the present offense in question and the nature and extent of the offender's criminal record.

This does not mean, however, that the task of reviewing

G. Fletcher, supra this note, at 464 [footnote omitted].

Fletcher concludes that “contemporary pressure to consider prior convictions . . . reflects a theory of social protection rather than a theory of deserved punishment.” Id. at 466.

Professor von Hirsch, on the other hand, presents compelling practical arguments for considering prior convictions under the theory of just deserts. First, he points out that the use of prior convictions in sentencing accurately reflects the way in which we all treat prior wrongs in “everyday blaming-judgments.” von Hirsch, Desert and Previous Convictions, supra note 67, at 595-604. Second, von Hirsch argues that prior convictions can be taken into account without opening the door to consideration of other offender-related factors with predictive utility.

Any inquiry into prior criminal record, by definition, concerns only the defendant’s criminal behavior—conduct that has been proscribed by law, and for which the defendant’s guilt has been established by a recorded conviction. The criminal record is distinct from the defendant’s noncriminal past: his history of legally permissible choices and his past attitudes and preferences.

Id. at 608 [emphasis in the original].

...Why should the sentencing process avoid inquiring into . . . noncriminal behavior? It is, in my view, for essentially the same reasons that the substantive criminal law should not criminalize such conduct. The sentencer ought not review [an offender’s] entire past . . . since much of this history concerns matters that should be none of the state’s business.

Id. at 610-11.

If social protection through incapacitation is the only valid theoretical justification for considering prior criminal records, as Fletcher claims, but prevailing notions of blameworthiness and distinctions between criminal and noncriminal conduct can confine this inquiry in practice, as von Hirsch argues, then just deserts theory represents an uneasy alliance between two conflicting theories of punishment. However, such an alliance is not unlike the partly utilitarian, partly retributivistic “mixed-models” of punishment that have emerged within the contemporary jurisprudence of sentencing. See, e.g., H. Hart, Essays, supra note 28; N. Morris, supra note 137; and H. Packer, supra note 55. From this perspective, the positions of Fletcher and von Hirsch can be reconciled by viewing the theory of just deserts as a “mixed model” in which retributive limits are incorporated to restrict the logical extent of unfettered utilitarian punishment.


161. See supra notes 157-59 and accompanying text.
sentences outside the guidelines will be an easy one. There will still be "apples and oranges" problems in determining whether sentences are proportionate. For example, does a robber with ten prior robbery convictions who obtains property by verbal threat deserve the same extraordinary sentence as a first time offender who shoots a robbery victim? The answer depends in part on subjective evaluations and, as a result, determinations of proportionate punishment cannot be precise. However, this is the kind of question that appellate courts are accustomed to dealing with in the process of developing, refining and applying general rules to resolve specific cases. Over time, cases will be sifted and sorted by the appellate courts into categories of similarity. The limited number of factors relevant to just deserts and the commonly-shared, if rough, sense of what constitutes serious behavior, makes this task of review possible. In contrast, the nearly infinite variety of factors that can justify individual predictions of future behavior under sentencing policies of incapacitation or rehabilitation makes reasoning by analogy impossible.

The just deserts theory "prohibits raising or lowering a particular offender's punishment because of his predicted likelihood of recidivism or his supposed need for treatment." The relatively bright line that this theory establishes between past criminal conduct and predictions of future conduct provides another standard for the appellate courts to use in reviewing the rules of guidelines administrators, as well as extraordinary sentences. Instead of evaluating idiosyncratic sentencing decisions and the technical judgments underlying categoric risk prediction, appellate courts are directed to identify decisions that disregard the seriousness of past behavior. Such decisions are presumed to be contrary to a just deserts sentencing policy. The appellate courts' burden of uncovering the value judgments of guidelines administrators under a policy of incapacitation is, in effect, replaced by a burden on guide-

162. See G. Fletcher, supra note 159, at 461.
163. The appellate courts of Minnesota and Illinois have recently undertaken the task of regulating sentences through reasoning by analogy under a just deserts guidelines system. See supra note 99.
164. See supra note 28 and text accompanying notes 28 and 126 supra.
165. A. von Hirsch & K. Hanrahan, supra note 75, at 18. Within the narrow guideline ranges of presumed sentences, sentencing decisions to aggravate or mitigate based upon considerations unrelated to deserts would be permissible in some just deserts guidelines systems. See, e.g., infra note 203.
166. See supra note 159.
lines administrators to justify rules that cause sentence variations apparently unrelated to the seriousness of past behavior. As a result, a legislature can reasonably expect a reduction in the amount of sentence variation in a penal system and an increase in the public accountability of sentencing administrators under a policy of just deserts.

Twenty years ago, Herbert Wechsler, a leader in the field of criminal law, offered this assessment of the administration of criminal justice:

[O]ne of the major consequences of the state of penal law today is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law—and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.167

John Coffee, one of the most articulate and perceptive commentators on sentencing guidelines, exposed the threat of guidelines administrators immune from review and posed the question: “But who will guard the guardians?”168 As he thoroughly demonstrated, the answer is “the guardians,” unless the checks and balances which are traditional features of our system of government are built into a sentencing guidelines system.169

---

169. Id. Professor Coffee views the contemporary just deserts version of retributivism as a predictable response to the widespread concern for sentence disparity. Id. at 1075. However, he also considers the theory “somewhat clanking [and] mechanical,” a dogmatic justification for the existence of criminal punishment and a “Pandora’s Box” that will release popular desire to punish for the sake of vengeance and spite. Id. at 1077-78. As an alternative, Professor Coffee “attempt[s] to sketch a countermodel... that turns elsewhere than retribution for an adequate critique of the utilitarian justification for punishment.” Id. at 1080.

Borrowing from John Rawls’s critique of utilitarianism in A Theory of Justice (1971), Coffee outlines a theory of punishment “that is both egalitarian and forward-looking.” Id. Applying Rawlsian principles of justice to the institution of criminal punishment, he concludes that punishment is a social value like “liberty and opportunity, income and wealth” which must be “distributed equally unless an unequal distribution is to everyone’s advantage.” Id. at 1084 (quoting J. Rawls, A Theory of Justice 62 (1971)).

However, when Professor Coffee announces operational principles to guide a sentencing system, his innovative adaptation of Rawls’s ideas seems to lead us to limiting principles that are undistinguishable from those of just deserts theory:

[W]e need only observe a side constraint that rejects the use of status as a means
Although checking, balancing and providing legal guidance to the other branches and agencies of government are traditional functions of judicial review, appellate courts are no more likely to perform these functions in an incapacitative guidelines system that is clothed in the methodology of categoric risk prediction than they have been in our current indeterminate sentencing systems. As a result, a legislature's choice between a policy of incapacitation and of prediction. Other factors have predictive validity, and most prediction tables are already primarily based on indicators such as prior convictions and incarcerations, which relate to culpability. The conflict between predictability and fairness can be avoided by turning to prediction systems based on prior criminal conduct rather than social or economic status.

Coffee, supra note 168, at 1091. Cf. supra notes 159-65 and accompanying text and infra note 203.

Professor Coffee's preference for the "Rawlsian model" is based upon two objections to the theory of just deserts. First, the imperative that those who commit crimes deserve punishment is a "tautological argument" and a more tortuous route to the discovery of limits on utilitarian punishment than "the principle of justice that we claim reasonable men, blind to their position, would be forced to choose." Coffee, supra this note, at 1077, 1093. Under Rawlsian principles of justice "reasonable men" would reject incapacitation based on status conscious predictive factors because the cost imposed to "worst-off" groups is unacceptably high and because there are alternatives to risk prediction strategies based on socioeconomic factors that can generate a comparable degree of social protection. Id. at 1086. However, as Professor Coffee's heuristic examples of the workings of his Rawlsian model reveal, the assumed behavior of reasonable men, blind to their social status, is by no means a well-worn path for sentencing administrators to follow either. Id. at 1080-93.

Professor Coffee's second objection to the just deserts theory, and a greater cause for concern, is his claim that the idea of retribution is a "Pandora's Box" which will release popular forces to increase both this country's exceptionally long average sentences and its large prison populations: "[l]ike training wheels on a bicycle, [the principle of parsimony borrowed from Norval Morris by the proponents of just deserts theory] may be discarded by subsequent users." Id. at 1078. See also Orland, infra note 224. The simile is arresting, but Professor Coffee's elaboration on his own "forward-looking" model suggests that his theoretical apparatus may also suffer from practical implementation. For example, Professor Coffee states that "[a]ny loss in predictive efficiency caused by the elimination of variables unrelated to relative blameworthiness can be compensated by raising the average sentence." Id. at 1091-92. Furthermore, it is difficult to see why utilitarian systems that rely upon the retributivistic concept of culpability for "side constraints" on incapacitative strategies, such as the American Bar Association's recent sentencing proposal which Professor Coffee helped to develop, are any more immune to pressures to raise sentences across the board than just deserts systems. See Task Force on Sentencing Alternatives and Procedures, Sentencing Alternatives and Procedures (1979); and von Hirsch, Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Sentencing, 33 Rutgers L. Rev. 772, 776-79 (1981) [hereinafter cited as von Hirsch, Utilitarian Sentencing].

The answer to the question "how much is too much" may never be found in our jurisprudence of sentencing. However, while jurisprudentialists of Professor Coffee's caliber work on the problem, we will probably have to depend upon the taxpayer's unwillingness to provide additional resources for prisons and corrections programs and the courts' interpretations of constitutional restrictions on prison overcrowding for limitations on excessive and vindictive punishment. See infra notes 184, 211-12 and accompanying text.
a policy of just deserts will not only affect the levels of sentence variation and sentence disparity in a sentencing guidelines system, but will also determine whether sentencing administrators or appellate courts will oversee the distribution of punishment and allocation of resources in a guidelines system.

If the purpose for adopting sentencing guidelines is to minimize the inequitable distribution of punishment and the irrational allocation of resources, then a legislature should choose the theory of just deserts as the basis for its sentencing policy. The idiosyncratic nature of incapacitative sentencing decisions and the technical nature of empirically derived, incapacitative guidelines make it unlikely that appellate courts will be able or willing to distinguish between unacceptable sentence disparity and acceptable sentence variation. Instead, it is likely that they will defer automatically to incapacitative guidelines in the same way that they have deferred to rehabilitative sentences. On the other hand, the just deserts principle of proportionate punishment, with its presumption against sentence variation and its limitations on the number of factors that can justify variations in sentences, provides reviewing courts with a comprehensible basis for comparing sentences outside the guidelines and for questioning the apparently technical decisions of researchers and administrators in the development of sentencing guidelines.

Appellate courts will function no more effectively under a recent variation of a just deserts sentencing policy that attempts to reconcile the conflicting theories of incapacitation and just deserts than under a sentencing policy of incapacitation. Oregon's parole

170. See supra notes 28, 44-47 and accompanying text.

171. A philosophically neutral sentencing policy that includes the admonition to "treat like cases alike" will not insure that judicial review contributes to the reduction of guidelines disparity either. The 1979 Report of the Michigan Felony Sentencing Project proposed such a policy:

[T]here is now in America a great legal and penological debate that has been stated in polar and philosophical terms: shall the basis for sentencing decisions by the concept of positivistic rehabilitation or just deserts? However, this may not be the most fruitful way of seeing the matter. . . . The goal of a sentencing guidelines system . . . is not to direct ongoing sentencing practice toward one philosophy or another. Rather, it is designed to establish a system whereby the decisions of diverse trial judges throughout the state can be translated into a method that has the greatest probability of providing equity in sentencing without sacrificing reasoned flexibility. . . . We perceive sentencing guidelines as a neutral tool insofar as penal goals are concerned.

Sentencing in Michigan, supra note 75, at 817, 824.

Guidelines, taken at face value, treat like cases alike by punishing all offenders in the
guidelines system, is governed by the following statutory policy statement:

(2) The ranges [of duration of imprisonment] shall be designed to achieve the following objectives:

(a) Punishment which is commensurate with the seriousness of the prisoner's criminal conduct; and

(b) To the extent not inconsistent with paragraph (a) of this subsection:

(A) The deterrence of criminal conduct; and

(B) The protection of the public from further crimes by the defendant.

(3) The ranges, in achieving the purposes set forth in subsection (2) of this section, shall give primary weight to the seriousness of the prisoner's present offense and his criminal history.178

The Oregon parole release guidelines system was originally presented to the legislature as a just deserts system.173 But its pro-

---

same category equally: in other words, they present the "appearance of regularity." People v. Cox, 77 Ill. App. 3d 59, 396 N.E.2d 59 (1979). The important question concerning the "probability of providing equity" is whether or not predictive categories, by classifying offenders as equal risks, cause an underlying and unacceptable variation in sentences between those who will in fact realize the risk and those who will not. It is this kind of sentence variation behind the appearance of regularity that judicial review must address if sentence disparity is to be kept to a minimum in a guidelines system. Once again, such questions of equity and disparity are value judgments that depend upon which theory or philosophy of punishment a penal system chooses to pursue. See supra notes 22-35 and accompanying text.

Appellate courts will defer to the guidelines' appearance of regularity under a policy directive to treat like cases alike, just as they now defer to any sentence that has a basis in our current jurisprudence of sentencing. Without knowing which theory of punishment a sentencing system is pursuing, the court will have no independent basis to distinguish acceptable sentence variation from sentence disparity or equity from inequity. A philosophically neutral system, in effect, grants administrators discretion to pursue any of the recognized purposes of punishment. The predictable response of an appellate court will be to defer to the judgments of the experts and the level of sentence variation and de facto disparity will then be determined exclusively by the guidelines' administrators.

Furthermore, the Report of the Michigan Felony Sentencing Project proposes the same set of conditions that will frustrate efforts to regulate sentencing practices and reduce disparity under a sentencing policy of incapacitation:

Perhaps because they entered the public arena at a time when the rehabilitation ideology and parole release have come under attack, guidelines have been erroneously connected solely with a retributive or "just deserts" philosophy. But all guidelines systems yet devised seek to assess both offense and offender characteristics in discovering sentence norms. There is no reason why explicitly predictive factors could not be built into the offender axis, although the questionable ability to predict dangerousness fairly suggests caution.

Sentencing in Michigan, supra note 75, at 824.


173. See Hearings on House Bill 2013 Before the House Comm. on the Judiciary, 59th
ponents have since referred to the Oregon scheme as a "modified" just deserts system because of provisions in the policy statement for utilitarian objectives of punishment.\textsuperscript{174} Although the Oregon Board of Parole has acknowledged that its policy gives primacy to just deserts, it has interpreted the statutory language "protection of the public from further crimes by the defendant," "the seriousness of the offense" shall be given "primary" rather than exclusive weight, and "criminal history" rather than criminal record as justification for retaining predictive factors other than prior convictions in the offender-related dimension of its guidelines matrix.\textsuperscript{175}

Andrew von Hirsch, the leading proponent of the modern theory

\textsuperscript{174} \textsc{Or. Legis. Ass’y} (April 21, 1977) (testimony of Ira Blalock, Chairman, Or. Bd. of Parole).

\textsuperscript{175} A. \textsc{von Hirsch} & K. \textsc{Hanrahan}, \textit{supra} note 75, at 93.

The following form is Oregon's "Criminal History/Risk Assessment Score," which the parole board adapted from the U.S. Parole Commissions salient factor score. \textit{See supra} note 72 and text accompanying notes 128-44 \textit{supra}. 
### Criminal History/Risk Assessment

<table>
<thead>
<tr>
<th>ITEM</th>
<th>SCOPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A)</td>
<td>No prior felony or misdemeanor convictions as an adult or juvenile:</td>
</tr>
<tr>
<td></td>
<td>One prior conviction: 2</td>
</tr>
<tr>
<td></td>
<td>Two or three prior convictions: 1</td>
</tr>
<tr>
<td></td>
<td>Four or more prior convictions: 0</td>
</tr>
<tr>
<td>(B)</td>
<td>No prior incarcerations (i.e., executed sentences of 90 days or more) as an adult or juvenile: 2</td>
</tr>
<tr>
<td></td>
<td>One or two prior incarcerations: 1</td>
</tr>
<tr>
<td></td>
<td>Three or more prior incarcerations: 0</td>
</tr>
<tr>
<td>(C)</td>
<td>Verified period of 3 years conviction free in the community prior to present incarceration: 1</td>
</tr>
<tr>
<td></td>
<td>Otherwise: 0</td>
</tr>
<tr>
<td>(D)</td>
<td>Age at commencement of behavior leading to this incarceration:</td>
</tr>
<tr>
<td></td>
<td>26 or older and at least one point received in items A, B or C: 2</td>
</tr>
<tr>
<td></td>
<td>26 or older and no points received in A, B or C: 1</td>
</tr>
<tr>
<td></td>
<td>21 to under 26 and at least one point received in A, B, or C: 1</td>
</tr>
<tr>
<td></td>
<td>21 to under 26 and no points received in A, B or C: 0</td>
</tr>
<tr>
<td></td>
<td>Under 21: 0</td>
</tr>
<tr>
<td>(E)</td>
<td>Present commitment does not include parole, probation, failure to appear, release agreement, escape or custody violation: 2</td>
</tr>
<tr>
<td></td>
<td>Present commitment involves probation, release agreement, or failure to appear violation: 1</td>
</tr>
<tr>
<td></td>
<td>Present commitment involves parole, escape or custody violation: 0</td>
</tr>
<tr>
<td>(F)</td>
<td>Has no admitted or documented heroin or opiate derivative abuse problem: 1</td>
</tr>
<tr>
<td></td>
<td>Otherwise: 0</td>
</tr>
</tbody>
</table>

**TOTAL HISTORY RISK ASSESSMENT SCORE:**

---

**OR. ADMIN. R. 255-35-015. Exh. B.**

Since the Oregon Board of Parole adopted parole release guidelines in 1976, under the leadership of Parole Board Chairman Ira Blalock, the board has dropped most of the non-desert predictive factors in its criminal history/risk assessment score. Compare the form, above, with the salient factor score cited supra note 130. These changes were implemented before similar changes were adopted by the U.S. Parole Commission. See supra note 149.
of just deserts,176 has identified and perhaps understated the problem that a "modified" just deserts policy will present to a reviewing court:

Limited variations in punishment of equally deserving offenders would be permitted for the purpose of enhancing the incapacitative, rehabilitative or deterrent usefulness of the sanction. . . .

The deviations permitted in the Modified Desert Model would, however, have to be modest. . . . The notion of "modest" deviations is worrisomely plastic: How can moderate reliance on nondesert factors in sentencing decisions be distinguished from reliance that is too extensive to satisfy minimal requirements of justice? It will not be easy to draw a principled demarcation.177

Professor von Hirsch, no doubt, had the concept of "retributive limits" in mind:178 relatively narrow ranges of punishment should be determined by the retributivistic principle of proportionate punishment and then other utilitarian factors can be used to fix specific sentences within these ranges. However, instead of fixing points within the ranges of punishment set by the principle of proportionality, incapacitative considerations can change the limits of the ranges under Oregon's parole release guidelines.

For example, under a recent version of Oregon's parole guidelines, a twenty-six year-old offender with an extensive criminal record who is convicted of criminal mischief in the first degree, a "category I" crime on the "offense severity rating" axis of the matrix, could serve six to ten months in prison.179 By comparison, a nineteen year-old offender with the same criminal record who commits "criminal mischief I" under identical circumstances could remain in prison for twelve to eighteen months.180 If the crime in question was manslaughter in the first degree, a "category VI" crime, the difference between these two offenders' prison terms

176. See supra note 75 for Professor von Hirsch's recent contributions to our jurisprudence of sentencing. See also supra note 124.


178. Id. at 18. See N. MORRIS, supra note 137, at 76-78. Because Dean Morris shares H.L.A. Hart's utilitarian view of punishment and the secondary importance of equal sentencing treatment, there is some doubt about the extent to which his concept of retributive limits would permit different sentences for similarly situated offenders. See von Hirsch, Utilitarian Sentencing, supra note 169, at 772, 784.


180. Id.
would be sixty to eighty months and ninety to 130 months. These differences are caused by an incapacitative factor, "age at commencement of behavior leading to this incarceration," which is included in Oregon's "Criminal History/Risk Assessment Score" because of its power to predict parole failure.

Are these hypothetical deviations from the theory of just deserts "modest?" Under the language of a statutory policy statement like Oregon's, a reviewing court will have to ask itself if such incapacitative strategies are "not inconsistent with" the objective that punishment be "commensurate with the seriousness of the prisoner's criminal conduct." The reviewing court could regard this attempt to resolve inherently conflicting sentencing policies as a message from the legislature that the guidelines' administrators are free to pursue any incapacitative strategy they choose.

Oregon's recent experience with prison overcrowding demonstrates the kind of de facto disparity that will remain unchecked by judicial review under a sentencing policy of "modified" just deserts. Faced with a federal district court finding that the conditions in its state prison violated the federal Constitution prohibition against cruel and unusual punishment, the court's order to reduce the prison's population by 500 on December 31, 1980 and by another 250 on March 31, 1981, and the voter's rejection of a bonding measure to remedy the situation, the Oregon Advisory Commission on Prison Terms and Parole Standards met on November 21, 1980 to consider reducing prison population by changing the parole release guidelines. The Commission, which is Oregon's version of a sentencing guidelines commission, cannot be faulted for its decision to respond to the problem of prison overcrowding. The Oregon legislature has never clearly assigned official responsibility for controlling prison populations. As a result, the task has been tacitly assigned to the parole system. This is not an unreasonable assignment of responsibility; Oregon's parole release

181. Id.
182. Id.
183. See supra text accompanying note 172.
guidelines provide the structure under which prison populations could be reduced openly and with a semblance of order.

After discussing alternative changes in the guidelines matrix that would reduce the prison population, the Advisory Commission proposed to the Board of Parole and the board later adopted a rule changing the Criminal History/Risk Assessment Factor, “Age at first commitment of 90 days or more” to “Age at commencement of behavior leading to this commitment.”186 The explanation for this change offered by members of the Advisory Commission at its November 21, 1980 meeting was that such action represented “sound corrections policy.”187 By resorting to incapacitative factors

<table>
<thead>
<tr>
<th>History/Risk Score</th>
<th>Current Score</th>
<th>Proposed Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td>5.4:1</td>
<td>4.2:1</td>
</tr>
<tr>
<td>Good</td>
<td>2.7:1</td>
<td>2.4:1</td>
</tr>
<tr>
<td>Fair</td>
<td>1.9:1</td>
<td>1.4:1</td>
</tr>
<tr>
<td>Poor</td>
<td>1.1:1</td>
<td>.85:1</td>
</tr>
</tbody>
</table>

(Overall success to failure ratio 2:1)

Travis Memorandum, supra note 135.

Because most prison inmates have “fair” or “poor” History/Risk Scores, the change may have represented a significant increase in the predictive power of the History/Risk Score—keeping in mind that, among offenders classified as “poor” risks, for example, nearly one would still succeed on parole for every one who failed. However, this was not the reason provided by the Advisory Commission when it initiated this change. See infra note 187 and accompanying text.

187. The author was personally present at the November 21, 1980 meeting of the Advisory Commission on Prison Terms and Parole.

Together with the deletion of the factor “no admitted or documented alcohol problem” which was unsupported by empirical evidence, this change had the following effect on the prison terms of inmates, by class of offense:

[Of the 436 cases where prison term reductions were granted:

Class A felons [20 year statutory maximum sentence] 202 or 46%
Class B felons [10 year statutory maximum sentence] 80 or 18%
Class C felons [5 year statutory maximum sentence] 154 or 36%

Minutes of the Advisory Commission on Prison Terms and Parole (undated
in the guidelines matrix as a means to address prison overcrowding, Oregon's parole administrators succeeded in substantially reducing the prison population. At the same time, however, they caused variations in parole treatment which raised valid concerns about sentence disparity. Oregon's incapacitative guidelines originally provided for lower Criminal History/Risk Assessment Scores if an offender is twenty-one to twenty-five years old instead of twenty-six, or under twenty-one instead of twenty-one to twenty-five. By changing the relevant date for measuring age, many inmates suddenly became older for the purpose of scoring risk and received a better Criminal History/Risk Score. As a result, many older inmates were given an earlier parole release date. Oregon's Corrections Division estimated that this change would immediately reduce Oregon's prisons population by 368 people.

This change, however, presented the possibility of a twenty-six year-old inmate, imprisoned for his third burglary conviction after first being incarcerated at nineteen, receiving a new and earlier parole release date. On the other hand, his nineteen year-old cellmate, serving his first term for burglary, would receive no adjustment in his prison term.

The action of the Oregon Advisory Commission on Prison Terms and Parole Standards in reducing population by adjusting the method of scoring the incapacitative factor of age under its guidelines, raises three troublesome implications concerning the application of a modified just deserts sentencing policy. Before using Oregon's modified just deserts policy as a model, a legislature should consider these implications carefully. First, although sentence reductions under any sentencing policy may inevitably benefit more serious offenders because of the particular characteristics of a prison's inmate population, such reductions must still be explained to the public. In Oregon's case, the marginal increase in predictive power that its parole release guidelines administrators can show for the change in the Criminal History/Risk Score may not be a

---

188. See supra note 175.
189. See supra note 187.
190. The Advisory Commission and the Parole Board also changed Item E of the matrix which provides: "Has no admitted or documented heroin or opiate derivative abuse problem, or has no admitted or documented alcohol problem" by deleting the reference to alcohol. See supra note 187. A representative of the State's Correction Division estimated at the Commission's Nov. 21, 1980 meeting that this change would reduce the state's prison population by 80. Id.
compelling justification for a choice of methods to reduce prison population which conflict with common notions of deserved punishment.\textsuperscript{191} Second, even if an appellate court is required to review this decision under a sentence review statute, its probable response will be to defer to the judgment of the guidelines' administrators because Oregon's statement of parole policy provides an uncertain basis for reversing the administrators' decision to manipulate a predictive factor in the guidelines.\textsuperscript{192} The appellate court will likely leave to the "sound discretion" of the guidelines administrators the determination of whether the methods used to reduce prison population are "not inconsistent with" the statutory objective that punishment be "commensurate with the seriousness of the prisoner's criminal conduct."\textsuperscript{193} Third, as an extension of the second implication, this crucial determination by guidelines' administrators, employing suspect criteria that cause suspect sentence variation, will be final.\textsuperscript{194}

Minnesota's new sentencing guidelines system demonstrates that the regulatory benefits of guidelines may be preserved without the incapacitative strategies which will baffle the public and the appellate courts and without the threat of a kind of sentence disparity which is immune from judicial review. The Minnesota guidelines system operates under the following policy statement:

The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history. Equity in sentencing requires (a) that convicted felons similar with respect to relevant sentencing criteria ought to receive similar sanctions, and (b) that convicted felons substantially different from a typical case with respect to relevant criteria ought to receive different sanctions.

\textsuperscript{191} See supra note 186.
\textsuperscript{192} See supra text accompanying notes 172-83.
\textsuperscript{193} See supra text accompanying note 172.
\textsuperscript{194} See supra notes 186-90 and accompanying text. The suggestions of the mischief that incapacitative guidelines can cause is not meant to disparage the pioneering work of the penologists who develop sentencing and parole guidelines or the efforts of the administrators who have adapted and refined them. Sentencing guidelines represent the single most important contribution to the regulation of sentencing practices and the elimination of disparity. However, by accounting for and refining the historic practices of incapacitation in guidelines such as those of the U.S. Parole Commission and the Oregon Board of Parole, sentencing administrators have developed decision-making systems which will be accountable to the public through established processes of government such as judicial review.
The sentencing guidelines embody the following principles:
1. Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons.
2. While commitment to the Commissioner of Corrections is the most severe sanction that can follow conviction of a felony, it is not the only significant sanction available to the sentencing judge. Development of a rational and consistent sentencing policy requires that the severity of sanctions increase in direct proportion to increases in the severity of criminal offenses and the severity of criminal histories of convicted felons.
3. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.
4. While the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist.¹⁹⁵

With relatively straightforward language, Minnesota’s sentencing policy provides standards to reduce disparity and promote equity based on the theory of just deserts. However, as the rules and commentary that follow this policy statement indicate, Minnesota’s system preserves the essence of guidelines methodology. In developing the guidelines, data on prevailing sentence and release practices were compiled and analyzed and a set of relevant sentencing factors were developed to structure the sentencer’s discretion without totally eliminating it.¹⁹⁶

The two determinants of a just deserts sentence, the seriousness of the current offense and the number and seriousness of crimes for which the offender was previously convicted, appear as the two axes of Minnesota’s sentencing matrix table:

**SENTENCING GUIDELINES GRID**

**Presumptive Sentence Lengths in Months**

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

<table>
<thead>
<tr>
<th>SEVERITY LEVELS OF CONVICTION OFFENSE</th>
<th>CRIMINAL HISTORY SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Unauthorized Use of Motor Vehicle</td>
<td>12*</td>
</tr>
<tr>
<td>Possession of Marijuana</td>
<td></td>
</tr>
<tr>
<td>Theft Related Crimes ($150-$2500)</td>
<td>12*</td>
</tr>
<tr>
<td>Sale of Marijuana</td>
<td></td>
</tr>
<tr>
<td>Theft Crimes ($150-$2500) III</td>
<td>12*</td>
</tr>
<tr>
<td>Simple Robbery</td>
<td>18</td>
</tr>
<tr>
<td>Assault, 2nd Degree</td>
<td>21</td>
</tr>
<tr>
<td>Aggravated Robbery</td>
<td>24</td>
</tr>
<tr>
<td>Assault, 1st Degree</td>
<td>43</td>
</tr>
<tr>
<td>Criminal Sexual Conduct, 1st Degree</td>
<td>41-45</td>
</tr>
<tr>
<td>Murder, 3rd Degree</td>
<td>97</td>
</tr>
<tr>
<td>Murder, 2nd Degree</td>
<td>116</td>
</tr>
<tr>
<td></td>
<td>111-121</td>
</tr>
</tbody>
</table>

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*one year and one day

[Rev. Eff. 8/1/81]"
The matrix table, or “Sentencing Guidelines Grid,” includes presumed ranges for prison sentences, as well as a “dispositional line” that creates a “presumption in favor of execution of the sentence” for cases falling below and to the right of the line and a “presumption against execution of the sentences” for cases falling above and to the left of the line. In other words, the Minnesota sentencing guidelines not only regulate decisions setting the length of incarceration, they also regulate decisions to incarcerate—the “in/out” decision.

Under the “Criminal History/Score,” the extent and severity of an offender’s criminal record is categorized in detailed grades of blameworthiness, including the custody status of the offender at the time of the current offense, the number and kind of criminal convictions and his juvenile record. By adopting the just deserts principle that an offender’s previous criminal convictions are relevant to assessing the blameworthiness of his current offense, Minnesota’s guidelines retain a factor that also happens to be one of the most powerful predictors of recidivism. However, predictive factors that are unrelated to desert and that increase the potential for disparity, such as “age at first commitment,” “admitting or documented heroin or opiate derivative abuse problem,” or “verified employment or full-time school attendance for six-months during the two-year period prior to commitment,” are explicitly rejected by the guidelines.

198. Id. at 11.
199. See supra notes 73-74 and accompanying text.
200. SENTENCING GUIDELINES PROJECT, supra note 2, at 1.
201. Minnesota Guidelines, supra note 195, at 3-10.
203. Minnesota Guidelines, supra note 195, at 13. See also supra notes 130, 159 and 175.

Minnesota’s guidelines system could be criticized on the ground that it will permit covert and unregulated incapacitative strategies under the guise of just deserts. See, e.g., G. FLETCHER, supra note 159, at 459. To a limited extent, this is true. Within the narrow ranges of Minnesota’s presumptive sentences, incapacitative strategies in fixing specific sentences would be tolerated. But when presumptive sentences are aggravated or mitigated, or when extraordinary sentences are imposed outside the guidelines ranges, these sentences would not be upheld on review unless they were supported by reasons based upon the policy of just deserts. See supra note 99.

Furthermore, the fact that a desert factor also has predictive power, as in the case of prior criminal convictions, would not be a basis for objecting to its use. As Leslie Wilkins, Don Gottfredson and Peter Hoffman, have noted in accepting the validity of a guidelines system such as Minnesota’s:

It seems that there may be little conflict between two apparently quite different options in model building. We know that the weightings and methods for deriving
Three other features of Minnesota's guidelines are worth noting. First, the term “criminal history” is used in Minnesota's guidelines policy statement to refer to the offender-related deserts dimension in its guidelines matrix. The Sentencing Guidelines Commission has interpreted “criminal history” to refer only to prior felony and misdemeanor convictions, juvenile adjudications that would have been felonies if committed by an adult, and an offender's custody status at the time of the present offense. However, some guidelines administrators who are more resistant to a policy of just deserts have interpreted these same words to include predictive factors unrelated to just deserts. Oregon's parole administrators, for example, justify consideration of “admitted or documented heroin or opiate derivative abuse problem” in their guidelines matrix as part of a “criminal history.” In addition to the question of whether or not it is fair to vary sentences based upon this factor, it will be difficult for sentencers to obtain reliable information to support a finding that such a factor exists. It is difficult enough to obtain accurate information on an offender's criminal and juvenile records and his present custody status. For these reasons, a statement of sentencing policy should clearly restrict itself to desert factors by using language such as “the number and seriousness of crimes for which the offender was previously convicted, or would have been convicted if the offender had been an adult,” instead of the vague term “criminal history.”

Second, Minnesota's guidelines policy takes an important practical step in dealing with a crucial sentencing issue involving both

equations do not seem to make much difference to the power of prediction. We know also that equations that have different sets of items included provide equally good predictive performance—there is no particular set of items or weights which is clearly optimum in terms of predictive power. It is, therefore, highly probable that equations could be found that reflected only the just-deserts theory, and that, at the same time, proved equally as predictive of success or failure as did equations that utilized items that were not justified by this theory. In operational terms, this could mean that the distinction between a predictive model and a just-deserts model could be moot! Clearly, those who would advocate the just-deserts approach could not find any reasonable grounds to reject a set of guidelines merely because the means for quantifying the prior criminal record happened to be predictive.

204. Minnesota Guidelines, supra note 195, at 1.
205. Id. at 3.
206. See supra notes 172-75 and accompanying text.
207. See supra note 175.
208. See supra notes 179-90 and accompanying text.
equity and resource allocation. This country's relatively high rates of incarceration, long prison terms and overcrowded prisons are the direct reflection of our current criminal sentencing practices.\textsuperscript{209} However, these practices may also reflect a desire on the part of the public to punish criminal offenders that is exceeded only by its unwillingness to pay for more prison space and corrections programs. No theory of punishment supplies a practical answer to the question "how much is too much?"\textsuperscript{310} Principles of "parsimony" or the "least restrictive alternative" represent a valid concern about excessive punishment and prison overcrowding without providing practical limitations.\textsuperscript{311} The Minnesota legislature has addressed part of this problem by directing its Sentencing Guidelines Commission to "take into substantial consideration . . . correction resources, including but not limited to the capacities of local and state corrections facilities."\textsuperscript{212} Given the amount of corrections resources provided by Minnesota's taxpayers, the legislature has assigned the responsibility for monitoring the rates and lengths of prison sentences and for controlling prison populations to the commission, which must develop guidelines with these fiscal realities in mind, and to the courts, which must justify and review departures from the guidelines in light of these realities. It has also provided the outer limits under which the guidelines system can begin to distribute punishment equitably among offenses and offenders and to allocate resources rationally among programs and facilities.

The overall level of punishment in Minnesota's penal system may still be too high, or perhaps too low. However, the legislature's directive to the sentencing commission recognizes and regulates an activity at the front end of the criminal system that has already been taking place informally at the back end: sentences are short-

\textsuperscript{209} This country probably has the longest average prison sentences in the "western world." See P. O'Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System 54-55 (1977); M. Frankel, supra note 4, at 58.

\textsuperscript{210} See, e.g., supra note 169.

\textsuperscript{211} See, e.g., N. Morris, supra note 137, at 61.

\textsuperscript{212} Minn. Stat. § 244.09 subd. 5(2). Cf. Washington's Sentencing Reform Act of 1981, Wash. Rev. Code 9.94A.040(6) which provides:

[The sentencing guidelines] commission shall conduct a study to determine the capacity of correctional facilities and programs which are or will be available. While the commission need not consider such capacity in arriving at its recommendations, the commission shall project whether the implementation of its recommendations would result in exceeding such capacity. If the commission finds that this result would probably occur, then the commission shall prepare an additional list of standard sentences which shall be consistent with such capacity.
ened through parole release decisions to control prison population. It may be cynical public policy, but it is also realistic public policy to acknowledge that the taxpayers' pocketbooks, together with the humanity of corrections' authorities and the constitutional interpretations of the court, in addressing prison overcrowding, actually determine the quantity and quality of punishment that our penal systems generate. Under such a policy, sentencing guidelines can then be used to distribute this punishment in a fair and rational way.

Finally, although Minnesota's statement of sentencing policy serves as a model for a just deserts sentencing guidelines system regulated by judicial review, the process by which the statement was written ought not to be copied. Minnesota's statement of sentencing policy was not written by the legislature, but by its Sentencing Guidelines Commission. The Minnesota legislature enacted statutes that created the commission and directed it to establish sentencing guidelines.\textsuperscript{213} However, aside from specifying the limits in terms of current correction resources,\textsuperscript{214} the legislature left it up to the sentencing commission to develop a specific sentencing policy, subject to review and ratification by the legislature within a specified period of time.\textsuperscript{215}

This legislative oversight approach to sentencing policy-making provides an insulation from partisan politics that simplifies the task of deciding how to punish.\textsuperscript{216} There are several reasons, however, why a legislature should formulate a sentencing policy and adopt it in statutory form. First, a legislature may never get around to a serious review of the sentencing policy formulated by an administrative agency given the controversial nature of the subject and the lengthy agenda of most legislatures.\textsuperscript{217} Second, the questions of equity and resource allocation that are resolved by the policy decision to rehabilitate, incapacitate, deter or blame offenders ought to be resolved in the open by the public's elected repre-

\begin{footnotesize}

213. \textit{Minn. Stat.} § 244.09.

214. \textit{Minn. Stat.} § 244.09 subd. 5.

215. \textit{Minn. Stat.} § 244.09 subd. 12.

216. See \textit{supra} notes 78-79 and accompanying text for the advantages of insulation in developing guidelines' sentencing ranges.

217. In spite of a provision requiring submission of Oregon's parole release guidelines to the legislature, \textit{Or. Rev. Stat.} 144.755(8) (1977), the Oregon legislature has failed to review the content of these guidelines. A legislature may never get around to permitting a specific set of guidelines to go into effect either. See \textit{supra} note 101.
\end{footnotesize}
sentatives.\textsuperscript{218} Third, courts are likely to give a policy developed by
the legislature more weight in fashioning sentences at the trial
level and in reviewing those sentences and the rules made by the
guidelines' administrators on appeal. Finally, a legislative state-
ment eliminates the possibility of administrative actions which
change sentencing policies when one theory of punishment proves
ineffective or loses its luster. To insure that sentencing guidelines
are respected and enforced, a guidelines system needs the political
legitimacy and the force of law that a statutory policy statement
provides.

In adopting a sentencing policy based upon just deserts, a legis-
lature does not have to conclude that the only justification for
criminal punishment is the taking of "an eye for an eye, a tooth for
a tooth."\textsuperscript{219} It is simply deciding that sentences which take an eye
for a tooth, with the prospect of protecting society, are impermissi-
ble. Instead of settling the affirmative case for retributivistic pun-
ishment once and for all, a sentencing policy based upon just
deserts forbids the practice of determining the nature and extent
of actual sentences on the basis of elastic utilitarian concepts such
as deterrence, incapacitation or rehabilitation.\textsuperscript{220} The policy is "a
handy tool left lying around by the retributionists that can be used
to advance certain goals of the criminal law: not those that have to
do with preventing antisocial behavior, but those that have to do
with limiting the damage done to other important social values as
the criminal law goes about its inevitable but ambiguous
business."\textsuperscript{221}

\textsuperscript{218} Cf. supra note 79 and accompanying text.

\textsuperscript{219} See supra note 124.

\textsuperscript{220} The search for retributivistic limits to utilitarian punishment includes the work of
leading jurisprudentialists in this country and England. See, e.g., H. Hart, Essays, supra
note 28; N. Morris, supra note 137; H. Packer, supra note 55; Dershowitz, Preventive Con-
finement: A Suggested Framework for Constitutional Analysis, 51 Tex. L. Rev. 1277
(1973); Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955). Professor Margaret Jane
Radin has pointed out that this search has taken us full circle since "[h]istorically, utilita-
rian justifications for punishments were put forward to limit retributivism." Radin, The
Jurisprudence of Death Involving Standards for the Cruel and Unusual Clause, 126 Penn.
L. Rev. 989 (1978). The jurisprudential search for limits to criminal punishment seems to
lead to a set of doctrinal checks and balances under which the logical extremes of one theory
of punishment are offset by countervailing features of another theory. See supra note 159.

\textsuperscript{221} H. Packer, supra note 55, at 112-13. Herbert Packer's observation concerned the
notion of punishing only those who are blameworthy in his defense of such retributivistic
concepts as "mens rea" and culpability. Packer considered the just deserts concept of
"blameworthiness" to be an important "limiting principle" which controls the power of the
state to punish its citizens. Id. at 66. The same claim is made here for the just deserts
principle of proportionate punishment.
The purpose of a just deserts sentencing policy is not to provide the sole justification for the imposition of criminal sentences. Instead, it provides the allocation principle of proportionate punishment by which criminal sanctions can be distributed fairly and rationally. Legislatures need not reject the idea that sentences protect the public because they deter some and incapacitate others. Corrections programs can continue to operate in prisons and communities in the hope that some offenders will be rehabilitated. These objectives will continue to be important by-products of criminal punishment even under a sentencing policy based on just deserts.

A just deserts sentencing policy will not tell us if our criminal sentences are too high or too low across the board. Rates of incarceration and the length of sentences will probably continue to be determined primarily by the willingness of taxpayers to pay the price and, to some lesser extent, by judicial interpretations of the constitutional limits on prison overcrowding. A just deserts policy also carries the risk that it will be interpreted as a mandate for vengeance and longer prison sentences. Furthermore, because of a metaphysical quality to the concept of proportionate punishment, some disparity will survive out of disagreements over what aggravates or mitigates and by how much.

What the just deserts concept of proportionate punishment does offer is a manageable guide to the construction of a scale of actual sentences in which sentence variation is kept to a minimum. More importantly, in the hands of a reviewing court the concept of proportionate punishment becomes a limiting principle that checks the power of the state to punish its citizens and increases the likelihood that punishment will be distributed fairly and rationally.

222. See A. von Hirschi & K. Hanrahan, supra note 75, at 15. Because a just desert sentencing policy accepts proportionate punishment only as a principle for allocating punishment and rejects retribution as the sole justification for punishment, adoption of the policy does not imply support for death as a legal form of punishment. See Kanter, Dealing with Death: The Constitutionality of Capital Punishment in Oregon, 16 WnL. Rev. 1 (1979) for a comprehensive analysis of the retributivistic rationale for contemporary death penalty laws.

223. See supra note 55 and accompanying text.


225. See supra notes 162-63 and accompanying text.
Given the limits on our knowledge about the effects of criminal punishment, perhaps the equitable distribution of punishment and rational allocation of resources is all that we should expect from any criminal sentencing policy. At a minimum, efforts to reform our penal systems should begin with recognition of the validity of a recent observation by Norval Morris:

The public has been led to expect too much from the criminal justice system, and certainly too much from sentencing. The criminal justice system controls the largest power the government exercises over its citizens and is of essential constitutional importance, but its reform, if consonant with a due respect for human rights, will make no more than relatively small differences to the incidence of crime and delinquency. Those phenomena respond to deeper social, cultural, economic and political currents beyond the substantial influence of the criminal justice system.226

CONCLUSION

The plea for a legislative sentencing policy based upon the theory of just deserts demonstrates again that the reduction of sentence variation depends ultimately upon judgments of value about the proper objectives of criminal punishment. Even with a full array of procedural safeguards, sentence disparity will continue to be a prominent feature of our penal systems unless theories of punishment that condone or conceal variable sentencing treatment are excluded from their sentencing policies. No amount of judicial review can eradicate sentence disparity in a system which openly pursues the crime prevention strategies of deterrence theory at the expense of equal sentencing treatment as a matter of sentencing policy; nor will sentence review assure that like cases will be treated alike in rehabilitative or incapacitative systems where sentences are based upon idiosyncratic decisions allegedly made by firsthand observation or expert judgment.

This plea for a just deserts sentencing policy is also based upon

226. Morris, Conceptual Overview and Commentary on the Movement Toward Determinacy, in Determinate Sentencing: Reform or Regression?, supra note 62, at 1, 5. Dean Morris did see some promise for sentencing reform:

[W]e can reasonably expect a small reduction of crime and juvenile delinquency and, of at least equal importance, we can also reasonably expect the emergence of a principled, even handed, effective yet merciful Common Law of Sentencing, consistent with human rights and freedoms, competent to the deterrence of crime, the adumbration of minimum standards of behavior and the better protection of society against its in-group predators.

Id.
the premise that the methods chosen to administer a sentencing system should be consistent with our representative form of government. The decision-making process in a sentencing guidelines system should be legitimated by public understanding and by governmental checks and balances. If a guidelines system is to accomplish its regulatory function, the criminal justice community and the public must understand the methods it employs and feel confident that the system is being held in check by the processes of government. This is the primary significance of a legislative sentencing policy based upon a theory of just deserts.

Despite doubts about the affirmative case for taking an eye for an eye and a tooth for a tooth, the just deserts concept of proportionate punishment provides a standard that the public can comprehend and that reviewing courts can apply. The concept admittedly lacks precision. However, it grounds a sentencing system in the historical facts of offenses and prior criminal records which can be understood by the average citizen and verified and evaluated by the appellate courts.

By comparison, an incapacitative guideline system focuses on propensities for future criminal conduct and employs a technology that is becoming increasingly incomprehensible to citizens and courts alike. The methodology of categoric risk prediction makes it likely that, without a degree in criminology and a mastery of statistical science, the average citizen will view the allocations of punishment it produces as incoherent and unfair and the average appellate judge will regard the value judgments it requires as technical and final. Such a system presents the prospect of guidelines administrators, without the electoral mandate of legislators or the institutional detachment of judges, making the final, controversial, and unchecked decisions of what is a fair distribution of punishment and a rational allocation of corrections resources.

Adoption of a sentencing guidelines system represents the single most important step in regulating sentencing practices and reducing disparity. The administrative structure of the system, with a sentencing commission as the centerpiece, supplies the same insulation from political whim that has made the parole system a sometimes useful if covert mechanism to standardize sentences. However, this kind of insulation also represents a lack of political accountability that has increasingly proved fatal to systems of pa-
The workings of a guidelines system, with its matrix tables of severity ratings and criminal history scores, too easily conjure up images of the therapeutic state in *A Clockwork Orange* or *1984*, and give rise to claims of "sentencing by computer," to ignore demands for political accountability. If a sentencing guidelines system is to survive amidst the political pressures and competing objectives of a penal system, it needs the popular support that a comprehensible legislative sentencing policy can bring and the institutional checks that the appellate courts can provide. This kind of political accountability is the ultimate value that a sentencing policy of just deserts and judicial sentence review can promote in the regulation of criminal sentencing.

---

227. Maine has abolished parole. California, Indiana and Illinois have abolished parole release. Several other states have recently considered these options. See A. von Hirsch & K. Hanrahan, *supra* note 75, at 1.

