

Complexity and Distrust in Sentencing Guidelines

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INTRODUCTION

The federal sentencing guidelines have taken some shots lately from federal judges, practitioners, and observers of the federal criminal justice system. One complaint rings out often in this shooting gallery: the guidelines are too complex.¹ There may be reasons, however, why reformers should hold their fire on this question. Given the forces at work on the Sentencing Commission during its original drafting process—forces I hope to describe in this article—complex rules were perhaps better than any significantly simpler rules the Commission might have adopted. Moreover, future simplifications may force judges to diverge ever further from sound past practices and moral intuitions. While some simplification of particular guidelines is surely possible and desirable, we may continue for the near future to face choices between complex guidelines and foolish guidelines.

This Article begins with the suggestion, put forward in Part I, that the federal sentencing guidelines are more complex in their particulars than in their overall architecture. The basic structure of the federal guidelines follows the outlines of many state systems. The federal system, however, is rightly perceived as being more complex than most—perhaps all—state sentencing systems.

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¹ See, e.g., 1 U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 108 (Dec. 1991) [hereafter 1991 IMPACTS STUDY]; Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99 (1988) (guidelines resemble "complex parlor game"); Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987); Alexander Wohl, *The Calculus of Rationality: Reviewing the Sentencing Guidelines*, A.B.A. J. 37, 39-40 (Jan. 1992).

The federal guidelines are longer and address more questions about the nature of the offense. In addition, the guidelines address many particular questions about the offender's criminal record and the selection among sentencing options in greater length and detail than state systems do. None of this complexity was inevitable.

Although complex sentencing guidelines are avoidable, it would be rash to hunt down and eliminate all forms of complexity in the guidelines. Complexity sometimes serves our purposes well. Thus, I attempt in Part II of this article to describe, by way of example, the circumstances that have typically led administrative agencies and other bureaucracies to adopt complex rules. Furthermore, I argue that many of these circumstances influenced the Sentencing Commission and made complex guidelines the most likely outcome, even though they were not inevitable.

The adoption of complex guidelines was not only highly likely, it was also highly revealing. By adopting an intricate set of guidelines, the Commission made some important, implicit decisions about the nature of the audience for sentencing guidelines. Intricate guidelines are addressed not to potential criminals, but to the judges, prosecutors, and other officials who administer the criminal justice system. Some of the guidelines' complexities represent an attempt to limit the influence of prosecutors over the final sentence imposed. Other complexities reflect the perception that the large and diverse federal judiciary would not apply simpler guidelines with enough uniformity. Thus, the choice of complex guidelines underscores the importance that the Commission placed on uniformity of sentences. Further, that choice shows the Commission's conviction that it could only succeed by keeping many important decisions out of the hands of prosecutors and judges.

Those advocating simpler guidelines, then, ordinarily desire something more than skillful drafting; they are also struggling with the larger issues linked to complexity, such as the proper audience to be addressed and the importance of uniformity relative to other sentencing values. Indeed, complaints about complex guidelines might amount to a question about the desirability of any binding guidelines at all.

Given the thoroughgoing distrust of sentencing judges by the Commission, any simplification of the guidelines would most likely end up restricting the range of information to be considered by the sentencing judges. I argue in Part III, therefore, that

any simplification of the guidelines should proceed slowly. A more healthy form of simplification could occur only if the Commission were to identify especially complex points in the guidelines process that result in relatively small changes in a sentence and return power over those points to sentencing judges. The Commission could address the issues through a simple and vague rule or authorize departures based on the factors, trusting the judges to interpret them. For the moment, however, the necessary trust does not exist, and may take a while to develop.

I. COMPLEXITY IS A CHOICE, NOT A FATE

Many structured sentencing systems, state and federal, share a few basic features. They ask the sentencing judge (and any support staff such as probation officers) to focus on the seriousness of the offense. Then the judge must consider the prior criminal record of the defendant. Based on these basic ingredients, the sentencing rules give the judge a range of sanctions from which to choose and a recommended length of sentence. Certain facts about the defendant's prior life history or conduct during the investigation and trial of the offense may become important in adjusting the sentence up or down.² When viewed from this distance, the federal system seems no more complex than many state systems.

Nevertheless, it was clear to anyone paying attention that the April 1987 federal sentencing guidelines were more complex than most existing state sentencing systems. The most striking differences dealt with the guidelines sections assessing the seriousness of the offense. Many state systems simply placed various statutory crimes into groups of crimes considered similarly serious. The charges against the defendant, in large part, determined the seriousness of the offense for purposes of sentencing. The federal system, by contrast, looked to all relevant offense conduct and not just to the conduct implicit in the criminal charges filed. Because the federal guidelines had to anticipate many different factual variations within a single crime, the guidelines describing offenses were much lengthier than comparable guidelines from state systems.³ Presently, the longest chapter in the bulky federal guide-

² See, e.g., N.C. GEN. STAT. § 15A-1340.4 (1991); WASH. REV. CODE ANN. §§ 9.94A.340-.390 (West Supp. 1991).

³ Compare MINNESOTA SENTENCING GUIDELINES, cmt. II.A.01 (1991) with

lines deals with offense characteristics.⁴ On this issue, the federal guidelines are more complex than state guidelines because they try to answer questions that the states did not ask.⁵

Apart from this major structural difference between the federal and state systems, many of the complexities of the federal system center on more specific issues. Here, the federal guidelines give long and detailed answers to questions that state guidelines asked and answered more simply. For instance, many state guidelines responded more simply to a range of issues, including past criminal conduct of offenders,⁶ the effect of a defendant's role within a criminal organization,⁷ and concurrent and consecutive sentences for multiple offenses.⁸ Moreover, the complexity of the federal guidelines does not seem to diminish over time. The 434 amendments to the guidelines enacted during their first 4 years are a continuing testimony to the complexity of specific provisions.⁹

UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.3 (Nov. 1991) [hereafter U.S.S.G.].

⁴ See U.S.S.G. §§ 2A1.1-2X5.1 (206 pages of 384 page guidelines).

⁵ Though it may seem improbable, the current federal guidelines are more simple and straightforward than they were in the beginning. The September 1986 Preliminary Draft of the guidelines was designed to sentence offenders based entirely on "real offense" conduct (as opposed to "charged offense" conduct) and to remove most important sentencing questions from the hands of sentencing judges. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, reprinted in KENNETH R. FEINBERG, FEDERAL SENTENCING GUIDELINES 334 (1987) [hereafter SUPPLEMENTARY REPORT]; *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121 (1987); Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987). The Commission abandoned its original draft, in part, because that draft was too complex. The April 1987 draft that the Commission and Congress ultimately enacted was an effort to rely on the charges in the indictment in order to simplify the calculation of a sentence, and to leave more sentencing issues in the hands of the sentencing judges. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-14 (1988); *Preliminary Observations of the Commission on Commissioner Robinson's Dissent*, 52 Fed. Reg. 18,133 (1987).

⁶ Compare MINNESOTA SENTENCING GUIDELINES §§ II.B.1-.6 (1991) (6 pages) with U.S.S.G. §§ 4A1.1-4B1.4 (16 pages).

⁷ Compare MINNESOTA SENTENCING GUIDELINES § II.D.2.a.(2) (1991) and OR. ADMIN. R. 253-08-002(a)(E) (1989) with U.S.S.G. §§ 3B1.1, 3B1.2.

⁸ Compare MINNESOTA SENTENCING GUIDELINES § II.F (1991) and DEL. CODE ANN. tit. 11, § 3901(d) (1991) with U.S.S.G. §§ 3D1.1-.5.

⁹ See U.S.S.G. App. C (1988-1991 amendments). Some amendments are

A primary architect of the federal sentencing guidelines, Chief Judge Stephen Breyer, attempts to explain differences between state systems and the federal guidelines on two grounds. First, he says, the federal criminal code applies to far more crimes than the typical state code. Second, "political homogeneity in individual states may have made it easier to achieve consensus" on such questions as prison capacity.¹⁰ These two factors may indeed justify some differences between the federal and state guidelines. They do not, however, adequately explain why one system is far more intricate than the others.

In the first place, even though the federal criminal code contains more crimes than the typical state penal code, large numbers of crimes do not necessarily spell complex guidelines. Guidelines can group various crimes together for purposes of sentencing and treat crimes within each group similarly. There would be nothing novel in this grouping exercise; it happens whenever a code contains classes of felonies and misdemeanors, and it occurs to some degree under the current guidelines.¹¹ Moreover, even though the federal system has more criminal statutes, the federal system typically deals with less true variety in the range of culpable conduct. State systems must address large numbers of offenses ranging from petty theft to murder; the federal system by-and-large does not deal with such disparate crimes.¹²

the result of complexity in the guidelines. All the amendments taken together are a cause of great complexity in the guidelines, since those applying the guidelines often must determine which version will control in their case. *See* U.S.S.G. § 1B1.10 (retroactivity of amendments).

¹⁰ Breyer, *supra* note 5, at 3-4.

¹¹ *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 4201, 4202 (Michie Supp. 1990); N.C. GEN. STAT. § 14-1.1 (1991); U.S.S.G. App. A.

¹² For instance, the crimes most commonly charged after arrests in North Carolina include forcible rapes, armed robberies, aggravated assaults, breaking and entering, and theft of property valued under \$50. N.C. DEPT. OF JUSTICE, CRIME IN NORTH CAROLINA: 1989 UNIFORM CRIME REPORT 194 (1989). While the federal criminal code does include crimes with a broad range of culpability, the most commonly charged federal felonies (apart from drug trafficking) are fraud, larceny, immigration, firearms, and embezzlement offenses. U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1989, at 504-05 [hereafter STATISTICAL SOURCEBOOK].

Admittedly, Congress did press the Commission towards small groupings of offenses in some settings. The Sentencing Reform Act requires a relatively small interval (25%) between the top and bottom of any prescribed prison terms for a particular group of offenses committed by a

The second factor Breyer points out to distinguish the federal from some state sentencing systems—the lack of a national consensus on certain sentencing questions—does not lead inexorably to complex guidelines either. Typically, a rule dealing with some topic upon which there is no consensus will rely on vague, sometimes self-contradictory statements.¹³ A sentencing commission that found no working consensus on some fundamental questions of sentencing policy could have adopted simple rules that gave substantial freedom to judges to address the controversial topics in whatever way they saw fit.

While a lack of consensus does not, standing alone, account for complex guidelines, it is the beginning of an explanation. The absence of consensus on certain sentencing issues ultimately contributed to the complexity of the guidelines. It did so when combined with certain choices the Commission made about its audience and about the proper relation between the Commission and sentencing judges. The remainder of this article examines the connection between these choices and complex guidelines.

II. WHY DO ORGANIZATIONS CHOOSE COMPLEX RULES?

If the Commission in some sense “chose” complexity, then it becomes worthwhile to ask why it did so. This Part will discuss why an administrative agency (or other bureaucratic organization) might reject simple rules, and will specify some of the conditions that make complex rules more tolerable. The experiences of other organizations can perhaps help uncover the implicit objectives of the Sentencing Commission when it endorsed complex guidelines.

A. *The Virtues of Complexity*

In an effort to understand some of the possible aims of complex

given type of offender. 28 U.S.C. § 994(b)(2) (1988). The Commission, however, created a sentencing grid that uses even smaller ranges than the statute required and increased the number of grid boxes by using overlapping ranges. Blocks in the grid below offense level 22 contain a range smaller than that required by statute. U.S.S.G. § 5A. Moreover, the number of boxes on the sentencing grid is only one among many features of the guidelines that contribute to their complexity.

¹³ See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (1988 & Supp. III 1991)) (“business necessity” as a defense to disparate impact claim in employment discrimination).

rules, let us consider a stylized rule-drafting process in which the drafter begins with a simple formulation of the rule and then consciously decides whether to move to some more complex formulation. The initial simple rule might be phrased in clear and specific language that readers could easily apply to the cases it covers: "imprison all offenders convicted of robbery for three years."¹⁴ Or the simple rule might instead be phrased in vague language, difficult for some readers to understand or to apply to particular cases without further information or judgment: "punish offenders only to the extent necessary to serve legitimate purposes of sentencing."¹⁵ The reasons a drafter might move toward a more complex rule will depend on whether the initial rule was closer to the pole of simple-and-specific or simple-and-vague.

Where the initial rule is simple-and-specific, those persons subject to the rule have notice about the future operation of the law and may adjust their conduct accordingly.¹⁶ Those who apply and enforce the rule can do so uniformly and with relatively little effort.¹⁷ Despite virtues such as these, the drafter may give up a simple-and-specific rule if it produces an undesirable result too often. For instance, three years would be an inappropriate sentence for many offenders convicted of robbery. Thus, as each new draft of the rule becomes more complex, it might create fewer "wrong" results, but will become less accessible to readers and will provide them with less notice.¹⁸ It may also become more difficult to enforce uniformly and cheaply. The omniscient drafter will continue the process until complexity seems to be

¹⁴ See generally Franklin E. Zimring, *Sentencing Reform in the States: Lessons from the 1970s*, in REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING 101, 111-12 (Michael Tonry & Franklin Zimring eds., 1983) (overview of determinate sentencing). See also Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4833 (1990) (mandatory minimum sentence for drug offense).

¹⁵ Cf. 18 U.S.C. § 3553(a)(6) (listing factors to be considered in imposing sentence); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 60-62 (1974) (overview of sentencing principles).

¹⁶ See 6 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 60-86, 508-85 (John Bowring ed., 1839); LON L. FULLER, *THE MORALITY OF LAW* 49-65 (2d ed. 1969).

¹⁷ See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE* (1969); 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 217-23 (Guenther Roth & Claus Wittich eds., 1978).

¹⁸ SUPPLEMENTARY REPORT, *supra* note 5, at 333-35; Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267-71 (1974).

adding more harm than good.¹⁹

A rule that begins simple-and-vague has less to commend it at first glance. Those subject to the rule cannot readily see how it might affect their plans.²⁰ Those who apply the rule must spend a great deal of effort along the way to clarify the rule if they hope to apply it similarly in similar cases.²¹ On the other hand, the rule that begins simple-and-vague might produce relatively few wrong outcomes. Because the simple-and-vague rule defers some of the hardest choices until a specific case arises, the rule will not compel the enforcer to reach decisions that are intuitively wrong.²² Hence, there would not seem to be much reason for a drafter to move from a simple-and-vague rule to a more complex rule (which would typically attempt to correct wrong outcomes). Only when the later elaboration of a simple-and-vague rule fails to produce "right" answers often enough will the drafter turn to more complex (and less accessible) rules.

B. When Audiences Are Suited to Complex Rules

The willingness of an organization to move from simple to complex rules is perhaps most dramatically affected by the type of audience that will read its rules. If an important part of the audience (say, those directly subject to a regulation) have some special expertise or shared experience, a rule that appears either simple-and-vague or dauntingly complex to other readers may have a relatively accessible meaning for them. In such a setting, there is little reason for an organization to tolerate the mistaken outcomes that go along with a simple-and-specific rule because specialized readers of the rule can manage with more complex or more vague rules.²³

¹⁹ See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 74-76 (1983); Ehrlich & Posner, *supra* note 18.

²⁰ See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 901-02 (1981).

²¹ See 1 C.F.R. § 305.71-3 (1992) (recommendation of Administrative Conference).

²² Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1696 (1976); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 173.

²³ For example, one category of rules, known variously as "secondary" rules or "internal" rules, always address such a specialized audience. See BENTHAM, *supra* note 16; H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961); Diver, *supra* note 19, at 76-77; Edward L. Rubin, *Law and Legislation in the*

The federal guidelines are, generally speaking, neither simple-and-vague nor simple-and-specific. These facts may reveal a few things about the Commission's basic attitude towards its audience. It suggests first that the guidelines were directed to judges, lawyers, and other professionals working in the criminal justice system, rather than to potential criminals. That is, a Commission that creates labyrinthine guidelines is probably not concerned above all with deterring potential criminals or giving them notice of the sanctions they may face. When the message is complex, it will often be lost on those pondering a crime.²⁴ That is not to say that complex guidelines can have no deterrent value. If, after all the intricacies have run their course, the guidelines notably increase or decrease punishment for certain types of cases, the public might get the general idea. Moreover, some potential white collar criminals may have ongoing access to legal counsel who will inform them about complex sentencing guidelines.²⁵ Nevertheless, a complex set of guidelines is some evidence of a commission not primarily concerned with the deterrent effect of sentencing policies or giving notice to potential defendants.

The complex nature of the federal guidelines may also point to a deep-seated mistrust between the rule drafters (the Commission) and the rule enforcers (the sentencing courts and prosecutors). To see the possible connection between complex rules and the Commission's adversarial relationship with the enforcers of guidelines, we can look to the use of internal rules²⁶ in other

Administrative State, 89 COLUM. L. REV. 369, 372-85 (1989) (characterizing most modern legislation as directives to administrators). These rules instruct the government agents who enforce other laws and do not address the "primary conduct" of the public. *See infra* notes 27-32 and accompanying text. One example of such a setting might be the rules that instruct agents of the SEC, who conduct investigations of potential wrongdoing. These rules tell agents when to allow interviewees to have counsel of their choice present. 17 C.F.R. § 203.7(b) (1991). Under the rule, the SEC agent may exclude counsel chosen by the interviewee when there is "concrete evidence" that the presence of counsel would improperly impede the investigation. *See SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976).

²⁴ Cf. William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1230-32 (1983) (discussing failure of rules governing administration of welfare benefits to communicate with citizens).

²⁵ *See, e.g., Sentencing Commission, Justice Said Committed to Tough Institutional Guidelines*, 47 Crim. L. Rep. (BNA) 1179 (May 30, 1990) (role of counsel in influencing structure of sentencing proposals applicable to corporate criminal defendants).

²⁶ *See supra* note 23 (explaining use of internal rules).

bureaucratic organizations.

Many bureaucratic organizations operate under internal rules that are simple-and-vague for a few reasons. First, the shared experience and training of the enforcers will lead them to interpret the rule in a relatively uniform manner, without undue effort. Second, the enforcers are typically part of an organizational structure that allows the drafters to monitor and control any efforts to apply the rule.²⁷

Sentencing statutes in many states fall into the category of internal or secondary rules, since they primarily address the enforcers of the criminal laws rather than the public itself. They are often simple-and-vague. The typical unstructured sentencing statute will classify crimes according to seriousness, provide wide ranges of possible sentences, and perhaps give the sentencing court a list of facts and perspectives to consider, such as characteristics about the crime and other past experiences of the defendant or certain objectives of criminal sentencing generally. The proper use of this material remains within the discretion of the sentencing judge.²⁸

There are times, however, when an organization will use complex internal rules despite the common training or culture of the rule enforcers. Complex rules, in these exceptional settings, are a signal that the common culture of the enforcers is not enough assurance that they will interpret the rules uniformly or consistently with the general objectives of the rule drafters. Take, for instance, the Social Security Disability program.²⁹ The program provides benefits for those whose "physical or mental impairment[s]" make them unable to engage in "substantial gainful work."³⁰ The statute tells Administrative Law Judges (ALJs) to consider a claimant's age, education, and work experience in determining whether the claimant is disabled.³¹ Prior to 1978,

²⁷ See 5 U.S.C. § 557(b) (findings of administrative law judge subject to reversal by agency).

²⁸ See, e.g., N.C. GEN. STAT. § 15A-1340.4 (1991); WASH. REV. CODE ANN. § 9.94A.390 (West Supp. 1991).

²⁹ Other examples of this phenomenon include the rules governing the administrators of the Aid to Families with Dependent Children Program, and the administrators of workplace safety rules. See 30 C.F.R. §§ 100.3-.4 (1991); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); Simon, *supra* note 24, at 1201-19.

³⁰ 42 U.S.C. § 423(d).

³¹ *Id.* § 423(d)(2)(A).

ALJs determined, with little or no guidance from the regulations, how to weight the three statutory factors. In 1978, however, the Social Security Administration (SSA) issued a complex “grid” rule. The grid lists several different subcategories of age (such as “closely approaching advanced”), education, and work experience (such as “skilled or semi-skilled—skills not transferable”). It then instructs ALJs as to which combinations of these subcategories would lead to a conclusion that the worker was “disabled.”³²

The grid rule grew out of the difficulty that the SSA had in monitoring and controlling the decisions of ALJs. Although the agency could review and reverse any ALJ decision, the large number of cases made the threat of reversal an ineffective tool for controlling the discretion of ALJs. The ALJs were geographically dispersed, with a training and tradition that made them fiercely independent.³³ Moreover, the Administrative Procedure Act eliminated most of the measures an agency might have taken to discipline an ALJ who continued to decide cases in a way that undermined agency policy.³⁴

Like the disability grid, the federal sentencing guidelines (with a complex grid of their own) reflect the Commission’s view that prosecutors and judges are not likely to implement vague guidelines at an acceptable level of uniformity—despite the similar training and experience shared within each group³⁵ and the existence of some mechanisms for monitoring their decisions.³⁶ Like the SSA, the Sentencing Commission must rely on a large group of enforcers, dispersed throughout the country. There are over two thousand federal criminal prosecutors,³⁷ and they have traditionally operated with little constraint on their power to select

³² See 20 C.F.R. pt. 404, subpt. P, app. 2 (1991).

³³ See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 18, 103-23, 145-68 (1983).

³⁴ See 5 U.S.C. §§ 5372, 7521.

³⁵ Their common training includes not only their legal education and the similar daily routines of the office; it also includes training provided by the Commission to prosecutors, judges, and judicial support staff. See 1991 IMPACTS STUDY, *supra* note 1, at 73-99.

³⁶ See 28 U.S.C. § 994(w); U.S. SENTENCING COMM’N, 1990 ANNUAL REPORT 27-31.

³⁷ See U.S. DEPT. OF JUSTICE, *LEGAL ACTIVITIES 1990-91*, at 2 (1990) (415 Criminal Division attorneys and 4275 attorneys in United States Attorney’s offices). Because many of these attorneys deal exclusively with civil matters, I have given the conservative estimate of over two thousand U.S. Attorneys who serve as prosecutors.

which criminal charges to file against defendants. The Commission's decision to punish all relevant criminal conduct rather than just the conduct contained in the charged offense was a self-conscious effort to limit the influence of prosecutors over the final outcome at sentencing.³⁸

Similarly, there are over 750 federal district court judges imposing sentences in criminal cases.³⁹ The problems of coordinating the decisions of this large group are overwhelming, since the judges were appointed at different times by different Presidents.⁴⁰ By comparison, the task of many state sentencing commissions has been more manageable: the Oregon guidelines are administered by fewer than 200 judges.⁴¹

For reasons such as these, the Sentencing Commission may have concluded that it could not rely on the judges' similar training and experience to create a predictable interpretive approach to guidelines issues. Although common training and experience has in other contexts led rule enforcers to give consistent meaning to simple-and-vague rules, the training and experience of federal judges had only cultivated a sense of independence and minimal accountability to legal principles when it came to sentencing criminal defendants.⁴² The judges signaled early to the Commission their lack of enthusiasm for binding sentencing guidelines not drafted by trial judges. The Judicial Conference had opposed the version of the sentencing bill creating the Sentencing Commission, and a remarkable number of judges ruled early in its existence that the Commission violated the constitutional separation of powers.⁴³ A number of early public com-

³⁸ See U.S.S.G. § 1B1.3.

³⁹ See ADMIN. OFFICE OF THE U.S. COURTS, 1990 ANNUAL REPORT 8 (575 active district court judges, 201 senior district court judges with staff).

⁴⁰ Ronald F. Wright, *Letters from Beyond the Regulatory State*, 100 YALE L.J. 825, 844 (1990) (reviewing CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990)).

⁴¹ OR. REV. STAT. §§ 3.011, 46.010-.025 (1991) (apportioning trial court judges). There are 242 trial court judges in Minnesota. MINN. STAT. § 2.722 (1992) (same).

⁴² See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 12-25 (1972); PIERCE O'DONNELL, ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* 1-3 (1977); STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* 23-25 (1988).

⁴³ See *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st

ments by judges took a critical tone.⁴⁴ The Commission may have concluded from these signals that its guidelines would not find a sympathetic audience, but would instead be applied by judges inclined to continue their individual approach to sentencing wherever possible.⁴⁵

The Commission also lacked formal controls over the past and future choices of judges. Obviously, federal judges are not employees of the Commission. Also, the Commission (unlike the SSA) cannot order new outcomes in cases where it believes the judge has erred.⁴⁶ There may even be limits on the ability of the

Sess. 638-64 (1983) (statement of Judge Gerald B. Tjoflat for the Judicial Conference); 1991 IMPACTS STUDY, *supra* note 1, at 85 (executive summary volume). I do not mean to suggest that there were not compelling arguments against the constitutionality of the Commission. But the willingness of courts to accept even the challenges based on the non-delegation doctrine—a doctrine that for all practical purposes has been defunct for 50 years—may indicate the hostility of some courts to the Commission's enterprise. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Guidelines*, 79 CAL. L. REV. 1, 25-28 (1991).

⁴⁴ See, e.g., Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94 (1989); *Atlanta Roundtable: Views from the Bench*, FULTON COUNTY DAILY REPORT, Nov. 18, 1988, reprinted in 1 FED. SENTENCING REP. 321 (1988); Weigel, *supra* note 1. Not every judicial comment on the Commission during its earliest months and years was critical, but judges did produce enough criticism to make a lasting impression on the Commission.

⁴⁵ See 1991 IMPACTS STUDY, *supra* note 1, at 85 ("considerable resistance continues on the part of some federal judges . . . to the need for and wisdom of the statutory scheme for sentencing reform Given the opposition of many judges to the idea of sentencing guidelines when the statute was being considered, it is encouraging that . . . so much of the initial resistance has dissipated. Nonetheless, so long as some number of judges resist this new guidelines system, the reduction of unwarranted disparity, the increased certainty and uniformity . . . will be less than would otherwise be achieved."). I do not suggest that the perceived hostility of judges is the only factor explaining complex guidelines. Nor do I argue that the Commission had no choice in this environment except to issue complex guidelines. Sentencing judges in many states were also initially hostile to structured sentencing, but careful persuasion and responsiveness on the part of the guidelines drafters ultimately created tolerance and respect for guidelines sentencing among the judges. See generally DALE G. PARENT, *STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES* 177-201 (1988) (detailing Commission's efforts to consider guidelines' impact on prison population).

⁴⁶ Compare 18 U.S.C. § 3553(a)-(b) (directing judges to impose sentence after considering purposes of sentencing and guidelines) with 20 C.F.R.

Commission to collect information to monitor the performance of sentencing courts.⁴⁷ Even though the sentencing statute now provides for appellate review of sentences,⁴⁸ the Commission exercises no more influence over the appellate courts than over the district courts imposing sentences. The Commission can issue new guidelines covering future cases, but the statute gives the sentencing court power to depart whenever a case presents some circumstance not “adequately taken into consideration” by the Commission.⁴⁹

Complex guidelines, then, may reveal an adversarial posture towards sentencing courts. Several perceived characteristics of the guidelines’ primary audience made it seem likely that a simple-and-vague set of guidelines would result in nonuniform sentencing. The question that remains unanswered, however, is why the Commission found uniform sentences important enough to bother creating a complex set of guidelines to confine judicial discretion. After all, many agencies recognize that their enforcers will reach different outcomes in different areas to account for local conditions, and this is considered either tolerable or desirable.⁵⁰ The next section will explore some of the reasons why the Commission committed itself above all else to uniform sentences, thereby embracing complex guidelines.

C. *Why the Commission Committed to Uniformity*

Often the rules describing how to sanction a violator of the law are simple-and-vague. For example, bank regulators now have great latitude in choosing the appropriate sanction to impose on a financial institution that violates a legal requirement.⁵¹ There are

§ 404.970 (1991) (SSA has authority to overrule factual and legal determinations of ALJs).

⁴⁷ Although a statute empowers the Commission to collect data from the courts, 28 U.S.C. § 995(a)(15), the Commission has encountered practical difficulties obtaining such information. See U. S. SENTENCING COMM’N, 1989 ANNUAL REPORT 25-26.

⁴⁸ 18 U.S.C. § 3742(a)-(b).

⁴⁹ 18 U.S.C. § 3553(b). See generally Wright, *supra* note 43, at 47-74 (overview of departure power).

⁵⁰ See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Choices*, 1 J. OF L. ECON. & ORGANIZATIONS 81 (1985) (advocating more independent role for administrators). See generally Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985) (reviewing several models of public administrator roles).

⁵¹ See Pub. L. No. 101-73, 103 Stat. 183 (1989) (Title IX); Stephen R.

several plausible explanations for choosing simple-and-vague rules in the administrative sanctions setting.

For instance, complex sanctions rules will often fail to anticipate an appropriate outcome because complex rules ignore the felt need for individualized treatment of administrative sanctions issues. The desired outcome of a sanction under many administrative regimes (such as banking regulation) is an improved *relationship* between the regulator and the regulated party, a relationship that will lead to better compliance in the future. The best sanction, one that anticipates a continuing relationship, must account for qualities of the regulated party. It must also account for any prior interactions between the violator and the government.⁵² In short, many administrative sanctions proceed with the idea that rehabilitation of offenders is possible. Rehabilitation is likely to be achieved only by deferring many sanctions choices until the time the offender is identified and the sanction is imposed.⁵³

Moreover, the cost to the government agency of choosing an erroneous administrative sanction in one case is either small or well-hidden. The typical government agency does not spend much of its resources carrying out the administrative sanctions it has selected.⁵⁴ The costs of unduly severe sanctions are also likely to remain hidden because a regulated party who has violated the law has arguably forfeited any claim to fair and equal treatment relative to others being sanctioned.⁵⁵

Federal criminal sentencing differs from administrative sanctioning in ways that make centralized control of the sanctioning process seem more worthwhile. The sheer number of violators plays a part in the perceived differences: the federal criminal jus-

McSpadden & John J. Byrne, *FIRREA Expands Civil Enforcement Powers of Regulators, Increases Penalties Allowed*, Banking Rep. (BNA) No. 53, at 427 (Sept. 25, 1989). For a general survey of the flexible sanctioning rules that govern administrative agencies, see Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435 (1979).

⁵² See, e.g., Lawrence Baxter, *Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators*, 59 FORDHAM L. REV. S193 (1991).

⁵³ See *Williams v. New York*, 337 U.S. 241 (1949).

⁵⁴ See, e.g., INTERSTATE COMMERCE COMM'N, 1986 ANNUAL REPORT 5, 89-95 (describing compliance activities).

⁵⁵ Cf. *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958) (court will question agency's decision to prosecute one among several violators of law only when it amounts to abuse of discretion).

tice system must process nearly 50,000 criminal defendants each year, far more offenders than the typical administrative agency must process.⁵⁶ The overwhelming number of cases, among other factors, precludes the idea that there will be an ongoing relationship between the government enforcers and the individual. The perception is that there is less to gain from individualized criminal sentences.

The high cost to the government of criminal sanctions also may have contributed to the perceived need to unify and control the decisions of sentencers. Prison space and probation officers are expensive.⁵⁷ Complex rules limiting the future discretion of sentencers would make it easier to predict the resources needed to run the system.⁵⁸

But these qualities of the federal criminal justice system, standing alone, are not enough to explain the Commission's emphasis on uniformity and its resulting complex guidelines. After all, state systems also deal with immense numbers of offenders and spend a large proportion of their total budgets on criminal corrections,⁵⁹ yet they have typically emphasized uniformity less than the federal guidelines and have produced less intricate sentencing structures.⁶⁰ Rather, the way that the Sentencing Commission read its statute and defined its task, combined with these conditions in the criminal justice system, made uniformity the key objective of the guidelines.

The Sentencing Reform Act, in both its text and legislative history, emphasized the importance of limiting "unwarranted disparity" in sentences.⁶¹ But the Commission was to do more than eliminate disparity; it was to modify past judicial practice where necessary to reflect the seriousness of certain offenses. The Com-

⁵⁶ Compare ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 39 (48,904 criminal filings in 1990); with FEDERAL TRADE COMM'N, 1983 ANNUAL REPORT 2, 13; RESOLUTION TRUST CORP., RTC REVIEW, SEPT. 1991, at 3 (563 closed thrifts from August 1989 through September 1991).

⁵⁷ See STATISTICAL SOURCEBOOK, *supra* note 12, at 7-13.

⁵⁸ See 28 U.S.C. § 994(g) (prison capacity must be taken into account when writing guidelines).

⁵⁹ See STATISTICAL SOURCEBOOK, *supra* note 12, at 519.

⁶⁰ See *supra* part I.

⁶¹ See 18 U.S.C. § 3553(a)(6); 28 U.S.C. § 991(b)(1)(B); S. REP. NO. 225, 98th Cong., 2d Sess. 38, 41-49, 52, 65 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3224-32, 3235, 3248. However, the Act also gave sentencing courts and appellate courts a considerable say over what sorts of disparities are warranted.

mission was also to participate in the ongoing development of sentencing principles and to create a way for sentencing courts to use and elaborate on these principles.⁶²

This was a tall order. The statute gave the Commission only the faintest impressions of what sorts of sentencing principles would be appropriate and what past sentencing practices required changes.⁶³ To make matters worse for the Commission, the statute gave very little time to complete an initial set of guidelines.⁶⁴ It should not be surprising, then, that the Commission emphasized the theme of uniform sentences in the statute and focused less on its role in developing sentencing principles or identifying areas for changing past judicial practice.⁶⁵ Similarly, the Commission downplayed the importance of rehabilitation and individual characteristics of an offender (apart from prior criminal record) in sentencing.⁶⁶ It could have dealt with these highly individualized influences on sentences only by adding another layer of complex rules to bind judges or by ceding these decisions to the judges who confront individual offenders.

Finally, the long and well-documented experience of judges in sentencing criminal offenders gave the Sentencing Commission a luxury not available to many agencies. Most agencies wishing to move beyond simple-and-specific rules that produce too many errors must make visible and controversial choices about the

⁶² See Marc Miller, *Purposes At Sentencing*, S. CAL. L. REV. (forthcoming 1992).

⁶³ See 28 U.S.C. § 994(m) (unspecified "current sentences" in many cases do not accurately reflect seriousness of offense); *id.* § 994(f) (Commission to "promote the purposes" of sentencing "with particular attention to" avoiding unwarranted disparities); *id.* § 994(h)-(k) (calling for enhanced punishment for career criminals and violent offenders, lessened punishment for first-time offenders, and excluding rehabilitation as purpose to justify imprisonment).

⁶⁴ See Pub. L. No. 98-473, 98 Stat. 2031 (1984) (requiring guidelines within 18 months); Pub. L. No. 99-217, 99 Stat. 1728 (1985) (extending deadline by 12 months).

⁶⁵ SUPPLEMENTARY REPORT, *supra* note 5, at 336-37.

⁶⁶ *Id.* at 337. While the statute states that rehabilitation is not an appropriate purpose for a sentence of imprisonment, 28 U.S.C. § 994(k), it still authorizes courts to consider rehabilitation in other sentencing decisions. See 18 U.S.C. § 3553(a)(2)(D) (referring to educational, vocational, or "other correctional treatment"). Some sentencing courts have been unwilling to treat rehabilitation as a legitimate purpose even in this limited area. See, e.g., *United States v. Sklar*, 920 F.2d 107, 115 (1st Cir. 1990); *United States v. Reed*, 882 F.2d 147, 151 (5th Cir. 1989).

rules' precise objectives. The Commission was able to fashion complex guidelines without such an effort; it took only a small investment to make sentencing guidelines more complex and therefore better able to control expensive corrections decisions. Drafting complex rules following past practice was in all likelihood more manageable than obtaining a consensus among the seven Commissioners about more simple-and-vague principles of sentencing.

III. SIMPLIFYING SLOWLY

I have attempted thus far to explain, in light of the political forces often at work on organizations such as the Sentencing Commission, how the guidelines got to be as complex as they are. Complexity was not inevitable. However, organizations often end up with complex rules when the rules address a large and diverse group of enforcers, with few mechanisms available to control the interpretations of the rules. Complexity is also more likely when there is a relatively painless way to generate complex rules and when individualized and divergent applications of simple-and-vague rules seem particularly costly. Each of these circumstances influenced the Sentencing Commission at the time it produced the 1987 guidelines.⁶⁷

The same dynamic that initially produced intricate guidelines may also shape the process of simplifying the guidelines, if such a process ever occurs. The current guidelines may become more simple-and-specific, more simple-and-vague, or both. Simple-and-specific guidelines might offer a body of law more accessible to the public, and one requiring less effort by judges and advocates. Nevertheless, it may prove to be a distasteful form of simplicity.

Only simple-and-specific reforms of the guidelines could still control the discretion of sentencing judges. At the same time, if sentencing rules are to become both simple and specific, they will need to exclude certain potentially relevant pieces of information. Among the simplest and clearest provisions in the current guide-

⁶⁷ Some of these forces were also at work as the Commission drafted guidelines for sentencing organizations (generally corporations) convicted of crimes. Although the limited experience of federal courts in sentencing corporations meant that the Commission had no painless way to create complicated guidelines, perhaps the complex format seemed inevitable in light of the existing complex guidelines for individual offenders.

lines are the policy statements declaring that many characteristics of offenders, such as age or family obligations, are “not ordinarily relevant.”⁶⁸ Yet this is not the sort of “reform” that many would rush to embrace.⁶⁹

If guidelines allow sentencing courts to consider a matter but insist that different judges consider it in the same way, complexity will inevitably follow. A listing of “relevant” factors, while simple, would remain too vague to provide any control over the enforcers. Hence, the rules will need to address when in the process a court should consider the matter, how it will interact with other factors, how much weight to attach to it, and so on. While this results in complicated guidelines, it seems preferable to the simple elimination of a factor that most would find important under some circumstances.

The most promising simplifying reforms lie instead in the direction of the simple-and-vague. These would involve a return of certain decisions to the sentencing judge, operating within general bounds set out in the guidelines. Arguing for this form of simplicity is just another way of arguing that the guidelines should be given less binding effect by controlling only the most commonly encountered sentencing issues and leaving important choices to the sentencing judge.⁷⁰

Comparison to the Social Security Administration may again be

⁶⁸ U.S.S.G. §§ 5H1.1-.6; 28 U.S.C. § 994(e) (guidelines and policy statements should reflect the “general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant” in recommending term of imprisonment or length of prison term). Note that the statute calls into question the relevance of several offender characteristics, but not age, mental and emotional condition, or physical condition.

⁶⁹ See *United States v. Rodriguez*, 724 F. Supp. 1118, 1120-21 (S.D.N.Y. 1989) (guidelines not allowing departures based on offender characteristics would conflict with statute); David I. Shapiro, Note, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051, 2055-56 (1991) (criticizing guidelines as discouraging departures for purposes of drug rehabilitation).

Another example of objectionable simple-and-specific sentencing rules can be found in statutes imposing mandatory minimum sentences for certain offenses. These statutes are widely considered to be destructive to a structured sentencing system. See U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

⁷⁰ See generally Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); WHEELER ET AL., *supra* note 42, at 180-87 (reviewing ideas for simple guidelines).

instructive. The “grid” regulation attempts to identify certain fact-sensitive questions for resolution on an individualized basis by the ALJ. The Sentencing Commission might use a similar strategy. It could identify areas that have produced much dispute over the meaning of complex guidelines provisions which translate into relatively small changes in the sentence. Perhaps the role-in-the-offense rules⁷¹ or the rules for grouping multiple convictions⁷² would qualify. Each of these rules direct the court to make many inquiries, findings, and calculations, with relatively few offense levels at stake.⁷³ The Commission might choose to recast such guidelines in more general terms while continuing to specify the number of offense levels at stake. It might also eliminate guidelines on such a subject altogether and specify such fac-

⁷¹ U.S.S.G. §§ 3B1.1-4. The “aggravating role” rules direct the court to add either two, three, or four levels to the offense if the defendant took a leading role in the offense. An “organizer or leader” of a criminal activity that involved five or more participants or was “otherwise extensive” will receive an increase of four levels. A “manager or supervisor” (*i.e.* a mid-level participant) of such an extensive criminal activity will receive +3, while others with an aggravated role will receive +2. The “mitigating role” rules call for an adjustment downward for “minimal” participants (−4 levels), or “minor” participants (−2 levels), or those in between. The application notes to these rules provide specific guidance in defining all these terms.

For the great majority of federal criminal defendants, all of these complicated rules regarding their roles in the offense do not affect the sentence very much. For instance, the sentence for a defendant in a drug case is influenced far more by the amount of drugs involved than by any calculation of aggravating or mitigating role. *See* U.S.S.G. § 2D1.1(c) (amount of heroin determines placement between offense levels 12 and 42).

⁷² U.S.S.G. Ch. 3, Pt. D. The “grouping” rules determine (1) whether the existence of multiple counts in a conviction will affect the final sentence and (2) if so, in what amount. The answer to the first question will have a great impact on the length of a prison term and deserves to be addressed with some explicit rules to attain some uniformity (as most state guidelines systems do by addressing the availability of consecutive or concurrent sentences). The amount of additional weight to give to additional counts, however, is another matter. The guidelines addressing this issue are intricate, *see* U.S.S.G. § 3D1.4, and for most offenders do not change the final sentence by a large percentage.

⁷³ One indication of the level of complexity of these provisions appears in the number of “hotline” calls the Commission receives regarding interpretive difficulties with the guidelines. During 1990, both the role-in-the-offense provisions and the grouping rules generated a large number of hotline calls. U. S. SENTENCING COMM’N, 1990 ANNUAL REPORT, at 105 (87 calls for role in offense, 124 for grouping rules).

tors as grounds for departure, perhaps suggesting an amount for the departure.

In the long run, however, simplicity will probably not spread too far into the guidelines. The nature of the Commission's relationship with sentencing judges and the forces leading it to emphasize uniform sentences will likely keep the guidelines complex. Nor is sentencing complexity an unusual administrative topic in this regard. The shelf space occupied by the Code of Federal Regulations suggests that complexity has not been easy to displace in other regulatory areas. But given the trouble that simplicity can bring, complexity may be the lesser evil.

