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Book Review

Rules for Sentencing Revolutions

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Fear of Judging: Sentencing Guidelines in the Federal Courts. By Kate Stith^{*} and José A. Cabranes.^{**} Chicago: University of Chicago Press, 1998. Pp. 276. \$44.00 (cloth), \$17.00 (paper).

Federal sentencing experienced a revolution fifteen years ago, and many are now convinced that this revolution has become a Reign of Terror. The Thomas Paine of this sentencing revolution—the enthusiastic advocate of a revolution to replace traditional injustice with a new order based on human reason¹—was a federal judge, Marvin Frankel. In his 1973 book, *Criminal Sentences: Law Without Order*,² Frankel delivered a persuasive indictment of criminal sentencing at that time, which gave great discretion to the sentencing judge: “[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and

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1. Paine’s *Rights of Man* offers a classic defense of principles over tradition: “[A]s government is for the living, and not for the dead, it is the living only that has any right in it. That which may be thought right and found convenient in one age, may be thought wrong and found inconvenient in another.” THOMAS PAINE, *Rights of Man, Being an Answer to Mr. Burke’s Attack on the French Revolution*, in COLLECTED WRITINGS 433, 441 (Eric Foner ed., Library of Am. 1995) (1791); see generally JOHN KEANE, TOM PAINE: A POLITICAL LIFE 282-333 (1995) (describing the development of the *Rights of Man* and its reception in America and in Britain).

2. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973). Frankel was one among many who hoped to bring consistency and transparency to criminal sentences. See, e.g., Seminar and Institute on Disparity of Sentences for Sixth, Seventh and Eighth Judicial Circuits (Oct. 12-13, 1961), in 30 F.R.D. 401 (1961); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 23 (1967); Frederick J. Gaudet, *The Differences Between Judges in the Granting of Sentences of Probation*, 19 TEMPLE L.Q. 471 (1946); Constance Baker Motley, “Law and Order” and the Criminal Justice System, 64 J. CRIM. L. & CRIMINOLOGY 259 (1973).

intolerable for a society that professes devotion to the rule of law.”³ He argued instead that a “Commission on Sentencing” should pass rules to govern criminal sentences⁴ and that judges should apply those rules just as they apply legal rules in all other contexts.⁵ Judge Frankel’s ideas became the basis for the Sentencing Reform Act of 1984,⁶ which transformed federal sentencing and created the United States Sentencing Commission.

Now, over a decade after the creation of federal sentencing guidelines in 1987, a Yale law professor and a second federal judge, Kate Stith and José Cabranes, have taken the role of Edmund Burke in this revolution.⁷ Their new book⁸ surveys the excesses of the sentencing revolution and traces those excesses to a naive trust in human reason. The traditional function of the sentencing judge, they say, is incapable of reduction to rules drafted in the abstract. Stith and Cabranes have written a judicious book aiming to restore the judge to the center of criminal sentencing.

Like Frankel’s book twenty-five years ago, this thoughtful book by Stith and Cabranes voices a prevalent view about sentencing and could become the catalyst for a “new cycle of reform.”⁹ The authors aim for a wide audience: They give enough background about the complicated federal sentencing system to engage readers who are not experts in the field. At the same time, they offer enough specific criticisms and concrete proposals for change to convince those who know the system well. Their proposals for change include some politically realistic amendments, along with more ambitious proposals for a redesign of federal sentences.

While Stith and Cabranes call for a return of sentencing discretion to federal judges, they insist that they do not envision a simple return to unreviewed judicial discretion as it operated before 1987. This is not, they say, a counter-revolution. And they are correct that the sentencing system they have in mind differs in major ways from pre-1987 federal sentencing. Stith and Cabranes would allow judges to sentence without “bureaucratic”

3. FRANKEL, *supra* note 2, at 5.

4. *Id.* at 119.

5. *See id.* at 118-24.

6. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C. (1994)).

7. Burke distrusted abstract principles not grounded in particular social institutions and experience:

When I see the spirit of liberty in action, I see a strong principle at work; and this, for a while, is all I can possibly know of it . . . I should therefore suspend my congratulations on the new liberty of France, until I was informed how it had been combined with government; . . . with morality and religion; with the solidity of property; with peace and order; with civil and social manners.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 90-91 (Conor Cruise O’Brien ed., Penguin Books 1969) (1790).

8. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

9. *Id.* at 2.

rules.¹⁰ They would scale back—indeed, almost eliminate—the influence of government officials other than judges in the design and operation of a federal sentencing system.

A system that gives judges nearly exclusive authority over sentencing, such as the one Stith and Cabranes propose, would fail just as completely as the current one already has. It would demand tasks of judges that they should not—and often cannot—perform. It is true that the current federal sentencing system has become intolerable, for the reasons that Stith and Cabranes ably identify. It is also true, as they argue, that the needed changes are not likely to come from the United States Sentencing Commission. But federal sentencing does not need its downtrodden judges to rise up and exile the other contributors to sentencing policy. Instead, it needs more interaction between judges and other sentencing institutions. Judges must find a place within an institutional fabric, a place that combines their case-specific insights with the system-wide perspectives of others.

In Part I of this Book Review, I summarize Stith and Cabranes's argument and highlight the role of tradition in their view of the current federal sentencing system. In Part II, I describe the almost-forgotten tradition of the sentencing jury in the United States. The historical practices of sentencing juries bring into focus exactly what individual judges contribute to sentencing. Sentencing juries remind us of the need to combine individualized judgments with coordination and planning for sentences in the aggregate. Judges can, under the right conditions, combine these functions in ways that sentencing juries do not. In Part III, I review the critical coordinating functions that individual sentencing judges cannot perform. The Review closes with a few ideas for integrating the wisdom of sentencing judges into a well-coordinated sentencing system.

I. A TRADITION OF JUDGING WITHOUT RULES

The federal sentencing guidelines, according to Stith and Cabranes, were bound to fail because they contradict deep traditions in the federal system. With the advent of guidelines, they say, “two centuries of sentencing practice in the federal courts came to an abrupt end.”¹¹ While they exaggerate the extent of judicial sentencing authority over the years, Stith and Cabranes do show that the 1987 sentencing guidelines changed federal sentencing practice far more than the Sentencing Commission has ever admitted.

10. *Id.* at 84, 95, 103.

11. *Id.* at 1.

A. *Two Centuries of Judicial Supremacy?*

In the standard rendition of sentencing history in the United States, legislatures dominated sentencing in the colonies. They passed laws linking crimes with specific punishments (such as fines, whippings, or execution) and judges merely imposed the designated sentence post-conviction.¹² Then, after the Revolutionary War, many states revised their criminal codes to provide more often for imprisonment rather than execution or corporal punishments.¹³ For most of the nineteenth century, judges chose the length of prison sentences, staying within ranges that the legislature designated. No other institution adjusted that sentence.

The conventional historical account identifies a major shift in sentencing practices by the end of the nineteenth century with the appearance of parole and probation. These practices, it is said, increased the importance of rehabilitation as a purpose of sentencing and decreased the overall sentencing power of the judge. Although judges still decided who would serve a prison term and who would be supervised while on probation, they lost much of their control over the length of prison terms. Parole boards could now release offenders well before the end of the prison term that the judge announced.¹⁴

Stith and Cabranes track the common historical wisdom for the first half of the nation's history, but they put a new spin on the story for the twentieth century. Their reinterpretation of sentencing history enables them to portray the federal sentencing guidelines as a more complete break with the past.

12. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 48-52 (2d ed. 1990). In many cases, however, the laws gave judges discretion to select among a range of specified punishments. See *id.* at 49.

13. See FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 83-85 (1976) (consisting of a background paper by Alan M. Dershowitz, relying primarily on Massachusetts statutes); ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 57-59 (1992) (describing statutes in the early Republic, shifting from corporal punishments to incarceration); ROTHMAN, *supra* note 12, at 52-56, 59-72, 247-51 (describing sentencing in the colonial period, the post-Revolutionary embrace of prison terms, and sentencing practices in the Jacksonian period).

14. See DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 5-7, 75-77 (1980) (describing the abrupt shift to the use of parole and probation); Walter J. Dickey, *Sentencing, Parole, and Community Supervision*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 135, 136-46 (Lloyd E. Ohlin & Frank J. Remington eds., 1993) (recounting penological justifications for parole and probation); Comment, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400, 407-08 (1950) ("Probably the [sentencing scheme] . . . most consistent with modern theories of individualized punishment would be to take the sentencing power completely away from the courts and to confer the authority to fix punishments on the same agency which has control of paroles. A step in this direction has been taken in those jurisdictions where statutory provision has been made for indeterminate sentences.").

Stith and Cabranes trace the roots of judicial sentencing discretion back to the earliest federal criminal laws, which usually stated only a maximum term of years and a maximum fine. Eighteenth-century federal criminal statutes gave high maximum terms of imprisonment for a few crimes (such as treason or piracy), shorter maximum terms for other crimes, and allowed the judge to choose any term within the statutory range. Mandatory minimum penalties attached to only a few crimes, and the terms were not severe.¹⁵

The authors find evidence that the rehabilitation of offenders was a major purpose of sentencing in the federal system from the beginning, but rehabilitation took different shapes over time. While the sentences that judges handed down in the first part of the nineteenth century were presumed to reform offenders through the atoning power of hard work, the concept changed by the end of the century. Rehabilitating an offender implied a need for ongoing evaluation of the person. Non-judge experts could best determine when an offender had improved enough to warrant release. As a result, in 1910 Congress established the federal parole system.¹⁶

Stith and Cabranes argue, however, that parole only cut marginally into the traditional sentencing power of federal judges. They point out that federal judges retained influence over the length of a sentence served, even after parole appeared. Parole only applied to defendants sentenced to incarceration (about half of all federal cases between the 1950s and 1980s). Furthermore, the judge's nominal sentence set the maximum time that could be served, and the defendant was not eligible for parole until he or she had served at least one-third of the nominal sentence. Federal judges made parole available immediately in less than twenty-five percent of all prison cases.¹⁷

In their effort to portray recent events as a break with a single continuous tradition, Stith and Cabranes have slighted federal parole. They are correct to point out that federal judges retained more sentencing power under the federal parole system than the sentencing judges in a few states, where the parole board could release offenders before they had served one-third of the judicially-imposed minimum sentence.¹⁸ But federal parole mattered in the cases where the stakes were highest. The most serious

15. See STITH & CABRANES, *supra* note 8, at 9-11.

16. See Act of June 25, 1910, ch. 387, 36 Stat. 819, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1987, 2027.

17. See STITH & CABRANES, *supra* note 8, at 18-22.

18. See Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1147-49 (1960) (listing nine jurisdictions authorizing parole at any time, eight authorizing parole after the expiration of a certain fraction of the sentence imposed by the judge, and nine authorizing parole after the expiration of a certain number of years regardless of the sentence served).

crimes did result in active prison terms, and control over prison terms had the most severe consequences for the liberty of the offender and for the public resources devoted to corrections. For this most expensive and important class of cases, federal parole operated as a major constraint on judicial sentencing power.¹⁹ The great majority of federal prisoners were eligible for parole before the end of their terms. Although Stith and Cabranes are correct that most federal prisoners were not immediately eligible for parole, the parole authority did start to matter before the end of most active prison terms. During the 1970s and 1980s, the United States Board of Parole exercised parole authority and determined the release date for most offenders who served active prison terms.²⁰

Thus, federal parole cut into judicial sentencing discretion more deeply than Stith and Cabranes admit. There may have been times in the federal system (especially during the nineteenth century) when judges acted more or less alone to determine sentences and sentencing policy. But surely this judicial domination of sentencing was part of the distant past. The current federal sentencing system subtracts from judicial sentencing authority in some ways, but it does restore some of the judge's control over sentences

19. In the federal system during the mid-1980s, judges imposed active prison terms in about half of all their sentences. *See* 2 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 373-78 (1991). Prison sanctions (and thus the parole authority) are present in a larger proportion of criminal cases in the federal system than in the state system. In state systems, a large proportion of criminal offenders would not serve an active prison term and therefore would not be subject to the state parole authority. In North Carolina, for instance, state courts in 1997 sentenced about 30% of felons and 2% of misdemeanants to active prison terms, with another 13% of the misdemeanants sentenced to shorter jail terms. *See* NORTH CAROLINA SENTENCING & POLICY ADVISORY COMM'N, REPORT FOR MISDEMEANORS: JANUARY THROUGH DECEMBER 1997, at 8 (1998); NORTH CAROLINA SENTENCING & POLICY ADVISORY COMM'N, REPORT FOR FELONIES: JANUARY THROUGH DECEMBER 1997, at 9 (1998).

20. For instance, the United States Parole Commission conducted "initial hearings" to determine parole eligibility in 10,608 cases between October 1984 and September 1985. *See* U.S. PAROLE COMM'N, U.S. DEP'T OF JUSTICE, REPORT OF THE UNITED STATES PAROLE COMMISSION, OCTOBER 1, 1984 TO SEPTEMBER 30, 1985, at 15 (1986). For roughly the same period (calendar year 1985), federal district courts sentenced 20,605 offenders to prison. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 1980-90, at 15 (1992). Thus, the number of initial hearings amounted to about half the number of offenders sentenced to prison. Prisoners who received minimum prison terms of ten years or more were not eligible for initial parole hearings immediately after their arrival in the federal prison system, but those prisoners did receive a parole hearing during the month before completion of the minimum term. During 1985, federal district courts sentenced about half of all convicted offenders to active prison terms. *See id.* Comparable figures for 1982 show 8745 initial parole hearings, *see* U.S. PAROLE COMM'N, U.S. DEP'T OF JUSTICE, REPORT OF THE UNITED STATES PAROLE COMMISSION, OCTOBER 1, 1983 TO SEPTEMBER 30, 1984, at 21 (1985), and 17,481 offenders sentenced to federal prison, *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 1982-93, at 15 (1996).

actually served, because the parole commission no longer exists to adjust sentences after the fact.²¹

While Stith and Cabranes may have oversold the preeminence of judges in federal sentencing before the 1980s, they correctly argue that federal sentencing today looks very different than in the recent past. The 1984 statute and the 1987 sentencing guidelines placed unprecedented controls on sentencing judges and made them part of a more centralized administrative system.

B. *Distrust of Judges in 1984*

Congress debated several different versions of sentencing reform between 1975 and 1984, and a leading theme of the debates over the years was the problem of “unwarranted disparity” in sentencing.²² Disparate sentences occurred when judges imposed different sentences in cases that were alike in all relevant ways. In a time when many were beginning to doubt whether rehabilitation was an attainable purpose of sentencing, it was harder to justify apparently disparate sentences by arguing that each offender required a different “treatment,” depending on his or her progress over time.²³ As sentences came to be viewed more as a pronouncement about the past crime rather than as a prediction (or an ongoing treatment) for the criminal’s future, disparate sentences became harder to justify.

Concern about disparate sentences created an odd political coalition favoring sentencing reform: Senators Kennedy, Biden, Hatch, and Thurmond sponsored the bill in the Senate.²⁴ When liberals saw disparity, they pictured sentencing judges who discriminated on the basis of race, class, and gender; when conservatives saw disparity, they pictured judges who imposed overly lenient sentences.²⁵ Their shared distrust of judges was

21. See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 689 (1993) (arguing that sentencing guidelines coupled with the abolition of parole in state systems return sentencing authority to judges).

22. S. REP. NO. 98-225, at 41-46 (1983); see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227-30 (1993).

23. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 18-41 (1995) (describing the decline of the rehabilitative ideal). The federal parole board’s practice, starting in the 1970s, of declaring a “presumptive release date” based on the same information available to the judge at the time of sentencing further undermined the idea that continuous adjustments to a rehabilitative sentence were necessary. The federal “parole guidelines” were among the first examples of the use of administrative rules to specify criminal sentences.

24. See STITH & CABRANES, *supra* note 8, at 48.

25. See *id.* at 38-39.

a major influence (but not the only influence)²⁶ in the passage of the 1984 legislation.

At every turn, Stith and Cabranes challenge the idea that federal judges actually created “unwarranted disparities” in their sentences before the passage of the 1984 statute. First, they point out, it is impossible to identify “unwarranted disparity” among sentences in cases that are alike in every relevant sense until one knows what is “relevant” to a sentence.²⁷ If a judge chooses deterrence as the purpose of the sentence, a particular factor might be relevant; if the judge instead chooses incapacitation as the purpose, the same factor might not be relevant. Thus, different sentences—even for offenders with similar records who have committed similar crimes—might be proper if the sentencing judges pursue different purposes, or even if they select the *same* purpose and some factor relevant to that purpose is present in one case and not in the other.²⁸

Second, even if disparity is a meaningful concept, Stith and Cabranes cast doubt on whether it existed at all before the guidelines, and whether the

26. A second leading theme of the legislative debates (one that undercuts Stith and Cabranes’s thesis about the limited impact of federal parole) was the “uncertainty” caused by the authority of the federal parole board to change release dates months or years after the judge first announced a sentence. S. REP. NO. 98-225, at 46-50 (citing the uncertainty created by parole as one of two major flaws in federal sentencing). The legislation abolished federal parole in an effort to eliminate this uncertainty. The effort to create this type of certainty now rides under the banner of “truth in sentencing” and has become a major influence in sentencing reform in the states. See BRIAN J. OSTROM ET AL., SENTENCING DIGEST: EXAMINING CURRENT SENTENCING ISSUES AND POLICIES 14-21 (1998).

Another prominent theme in the legislative debates was the continuing importance of the sentencing judge’s power to “individualize” the sentence to match the offense and the offender in a particular case. The Senate Report puts it this way:

The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.

S. REP. NO. 98-225, at 52-53. Although Professor Stith has dismissed statements such as this one about individualized sentences as meaningless gestures, see Stith & Koh, *supra* note 22, at 257, 272-73 (characterizing such statements as “soothing assurances”), the power of the sentencing judge to impose an individualized sentence was always a major concern of House members who favored sentencing reform. See H.R. REP. NO. 98-1017, at 32, 42, 99 (1984) (expressing the importance to reform supporters of protecting judicial discretion to impose individualized sentences). In light of the opaque language of 18 U.S.C. § 3553(b) (1994), which instructs sentencing judges when they can “depart” from the guideline sentence, and § 3553(a) (1994), which calls on sentencing judges to consider all the purposes of sentencing before imposing sentence in a particular case, House members may have taken very seriously the Senate pronouncements about individualized sentencing when they cast their votes for the Senate bill in 1984.

27. STITH & CABRANES, *supra* note 8, at 121-26.

28. This idea has received thorough treatment in the literature. For discussions of this concept, see MICHAEL TONRY, SENTENCING MATTERS (1996), which summarizes research on disparity; Kevin Cole, *Deference, Tolerance, and Numbers: A Response to Professor Wright’s View of the Sentencing Commission*, 31 SAN DIEGO L. REV. 651 (1994); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336 (1997); and Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

guidelines have improved matters. They question the reliability of studies that supposedly established the existence of sentencing disparity in the 1970s and 1980s.²⁹ Further, they argue that there is no proof that guideline sentences have reduced sentencing disparity in a meaningful sense.³⁰ The Sentencing Commission's 1991 self-study on disparity concluded that guidelines had achieved "significant reductions" in disparity, but that study was badly designed and self-serving. The study ignored one of the primary equalizing forces in pre-guidelines sentences (parole) and one of the primary forces for unequal sentences under the guidelines (departures from the guidelines to reward defendants who give "substantial assistance" to prosecutors in other cases).³¹

Congress, however, harbored none of these doubts about the disparity problem when it passed the Sentencing Reform Act of 1984. The Act contained many features designed to control the judge's sentencing choices. It created the United States Sentencing Commission, a permanent administrative agency, and instructed the Commission to create sentencing guidelines that would designate, for each category of offense and offender, a small range of sentences from which the sentencing judge would usually select the sentence to impose. If the judge imposed a sentence outside the guidelines (but within the statutory minimum and maximum) or if the judge misapplied the guidelines and chose a sentence from the incorrect guideline range, the statute authorized appellate review of the sentence. A sentencing judge could "depart" from the guideline sentence if the case involved a sentencing factor "of a kind, or to a degree, not adequately taken into consideration" by the Commission when it formulated the guidelines.³² While the statute restricted judicial sentencing discretion through these features, it increased judicial sentencing power in one sense: It abolished parole, which meant that the offender would serve the sentence more or less as the judge announced it.

29. See STITH & CABRANES, *supra* note 8, at 31-32, 106-12. They point out that many of the disparity studies focused on state, rather than federal, judges. Among the federal studies, some only compared inter-district average sentences without controlling for criminal record or any other factors. Others asked different judges to impose hypothetical sentences based on the same case files. Hypothetical exercises may not create an accurate picture of the sentences that judges would impose in real cases demanding their full attention. While these criticisms of the disparity studies do not render them worthless (hypothetical sentences surely bear some relationship to actual federal sentences), Stith and Cabranes are correct that the studies were oversold at the time.

30. See *id.* at 112-21.

31. See STITH & CABRANES, *supra* note 8, at 113-14; see also U.S. GEN. ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 42-43 (1992) (explaining the need to account for parole); Michael Tonry, *GAO Report Confirms Failure of U.S. Guidelines*, 5 FED. SENTENCING REP. 144, 147 (1992). Although parole contributed to the uncertainty of sentences at the time of the sentencing hearing, it did make the actual time served by different defendants more uniform by reducing the longest sentences imposed by judges.

32. 18 U.S.C. § 3553(b) (1994).

C. *Compounded Distrust of Judges in 1987*

While the Sentencing Reform Act made it clear that federal sentencing practices would change, the extent of that change was not apparent until the Sentencing Commission completed its first set of sentencing guidelines in 1987. The rules directed judges to calculate the seriousness of the offense (an "offense level") and the extent of the defendant's criminal history (a "criminal history category"). The offense level determined a location on the vertical axis of a sentencing grid, while the criminal history category determined the location on the horizontal axis. The point of intersection on the grid between the pertinent offense level and applicable criminal history category revealed to the judge the "guideline range," a range of months (say, from thirty to thirty-seven months) from which to choose an active prison sentence, unless the judge decided to "depart."

Although the guidelines contained detailed instructions for sentencing judges, the Commission described those rules as a continuation of past sentencing practices. The introductory chapter of the guidelines and a "supplementary report" issued in 1987 both underscore the "empirical" and "descriptive" nature of the guidelines. The Commission claimed that the guidelines basically tracked the past sentencing practices of federal judges, as embodied in over 10,000 cases in the Commission's database.³³

Stith and Cabranes explain how this "descriptive" strategy was a wise one. For one thing, it allowed the Commission to sidestep the age-old philosophical problems of choosing among the competing purposes of sentencing or finding a way to combine those purposes into a single coherent approach.³⁴ If the guidelines simply followed and unified the decisions of sentencing judges, there would be no need to choose among rehabilitation, deterrence, incapacitation, and just deserts for the leading principle of sentencing.

The descriptive strategy also relieved the Commission of the duty to explain in detail each of the punishment levels it assigned to different crimes or offenders. In every case, the explanation was basically the same: The guidelines adopted this level because this was how federal judges, on

33. See U.S. SENTENCING GUIDELINES MANUAL § 1A3 (1987) (policy statement) ("[T]he Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point."); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 15-19 (1987) [hereinafter "Supplementary Report"].

34. See STITH & CABRANES, *supra* note 8, at 51-60; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 630-34 (1992); cf. Alfred Blumstein, *The Search for the Elusive Common "Principle,"* 82 NW. U. L. REV. 43 (1987) (developing a structure for choosing between the competing purposes of sentencing).

average, sentenced these sorts of cases in the past.³⁵ Finally, the descriptive approach was helpful as a political device to gain judicial acceptance of rules that took away some of the judges' old sentencing discretion. Although the sentencing guidelines told judges what to do, this was more palatable because the guidelines directed judges to continue sentencing as judges (on the average) had sentenced in the past.

This strategy had many virtues; unfortunately, honesty was not one of them. The Commission actually relied on past judicial practice less than it claimed. As Stith and Cabranes point out, the Commission made a series of decisions that pushed the guidelines away from past sentencing practices.³⁶ The Commission lengthened the prison sentences for most violent crimes and drug crimes, in part to make all these sentences consistent with a handful of new statutory mandatory minimum sentences, and in part because the Commission was "convinced that [past sentences] were inadequate."³⁷ The commissioners also increased the severity of sentences for white-collar offenses. Moreover, the guidelines ignored the impact of personal characteristics of offenders (such as military service, age, or education) on past sentences.

Both the Commission and its early critics said that the guidelines were essentially based on past practice; changes to those past practices were exceptional adjustments, needed to modify or "rationalize" anomalies in the patterns of past sentences.³⁸ Stith and Cabranes demonstrate, however, that change from past practice was the rule rather than the exception. The categories of crimes in which the Commission increased sentencing severity (white-collar offenses, drug offenses, and violent offenses) comprise the majority of federal criminal defendants. Judges sentencing under the guidelines imposed probation sentences in less than fifteen

35. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 67-69 (1991).

36. See STITH & CABRANES, *supra* note 8, at 60-65.

37. Supplementary Report, *supra* note 33, at 19.

38. The Supplementary Report stated that the "guidelines represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to current sentencing practices." *Id.* at 17. It argued that the guidelines would reduce the amount of deviation both above and below the past average sentence. *See id.* The report then described changes in a few discrete crimes, such as efforts to make robbery and bank robbery sentences more consistent with one another. *See id.* at 18-19.

Early critics of the Commission and its guidelines often pointed to the "descriptive" nature of the guidelines as one of their greatest failings. *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 315-18 (1989); Dissenting View of Commissioner Paul H. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,046, 18,121 (1987). One reason that observers could think of these 1987 guidelines as "descriptive" is that they are indeed *more* descriptive than the draft guidelines they replaced.

percent of all cases, while federal judges before the guidelines had selected probation in almost half the cases.³⁹

Stith and Cabranes argue further that the break with tradition represented in the guidelines has made federal sentencing ineffective and unjust. Sentencing rules created by a distant bureaucracy, they say, can never account for all the morally relevant factors that make each case unique.⁴⁰ The sentencing guidelines fail in this regard despite their great length and complexity. The guidelines fail because rules will inevitably fail. Rules lack the power that a human being has to pass moral judgment. In this sense, they argue, rules are at odds with judging:

By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all. We process individuals according to a variety of purportedly objective criteria. But genuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories.

... [I]t is in the nature of moral and juridical principles that they must be informed by a particular set of facts before they can be applied. Only a person can perform this task.⁴¹

This argument is central to Stith and Cabranes's vision of sentencing: Rules are undesirable because they cannot adequately replace the "practical wisdom" or "prudence" of a sentencing judge.⁴²

D. *More Restrictive Rules Since 1987*

While the original guidelines placed new and complex restrictions on the federal judges, over time they have become even more restrictive. For instance, it has become clear that judges have powerful incentives to ignore their statutory power to "depart" from the guidelines in particular cases. Within a few years, federal appellate courts had concluded that a sentencing judge's decision *not* to depart was *not* appealable, while any departure (upward or downward) could be appealed.⁴³ This rule gave the sentencing

39. See STITH & CABRANES, *supra* note 8, at 62. The Commission's 1991 Self-Study attributes some of the decrease in the use of probation to statutory changes in drug sentences that supplemented the effects of the guidelines. See *id.* at 64.

40. See *id.* at 169-70.

41. *Id.* at 82.

42. *Id.* (quoting ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2, 4 (1993)).

43. See, e.g., *United States v. Chabot*, 70 F.3d 259 (2d Cir. 1995).

judge a powerful reason to remain within the guidelines.⁴⁴ Appellate courts also were stingy in their approval of grounds for departure. While the rates varied from circuit to circuit, some federal appellate courts overturned departures far more often than they affirmed them.⁴⁵

The Sentencing Commission itself contributed to the restrictive features of the guidelines. At least until recently, the Commission regularly amended the guidelines to place off-limits various grounds for departure that had survived appellate review.⁴⁶ An astonishingly large majority of the 589 guideline amendments to date have added features mandating that judges increase the severity of sentences.⁴⁷

Stith and Cabranes attribute many of the detailed restrictions of the sentencing guidelines to the rules about “relevant conduct” and “real offense sentencing.”⁴⁸ Some state guidelines are essentially “charge conduct” systems, in which the judge imposes a sentence based on the conduct as charged and adjudicated.⁴⁹ For instance, if the prosecutor charges robbery rather than armed robbery, but the state sentencing judge is convinced that the defendant used a gun, she can only enhance the sentence to a limited extent. Under the “relevant conduct” rules of the federal guidelines,⁵⁰ however, the sentencing judge often must consider the “real offense” of the defendant rather than the offense that the prosecutor charges. If the federal judge is convinced that the defendant used a gun, she

44. See STITH & CABRANES, *supra* note 8, at 72-76.

45. See U.S. SENTENCING COMM’N, 1997 ANNUAL REPORT 36-37 (1998); Daniel J. Freed & Marc Miller, *Contrasting Approaches Toward Guidelines and Departures in Six Circuits*, 5 FED. SENTENCING REP. 243, 244-45 (1993); Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 336-51 (1996).

46. For examples of such amendments, see U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 386 (1998), which bars departures based upon physical condition and employment history; and *id.* at amend. 466, which bars departures based upon lack of guidance as a youth. For a discussion of the Commission’s approach to amending the guidelines, see William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63 (1993).

47. A full analysis of all 589 amendments must wait for another day. The 1998 amendments, however, are a useful illustration. Of the 14 amendments adopted that year, 7 unambiguously increase the severity or availability of penalties. Several of these increases were dictated by Congress. See U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 576, 577, 578, 580, 581, 587, 588 (1998). Two amendments (586 and 589) make no substantive changes. Two amendments (584 and 585) give the sentencing judge more flexibility to increase or decrease sentences. Two amendments (579 and 583) reject the most restrictive interpretations by appeals courts and allow—but do not require—sentencing judges to mitigate sentences on particular grounds. Only 1 of the 14 amendments (amendment 582) makes it more difficult for a sentencing judge to increase a sentence.

48. STITH & CABRANES, *supra* note 8, at 66-70; see also Wright, *supra* note 34, at 619-22 (stating that the federal system looks to all relevant offense conduct in sentencing, making the guidelines complex and lengthy).

49. See MINN. STAT. ANN. § 244 cmt. IL.D.103 (1992); FLA. R. CRIM. P. 3.701(d)(11); State v. McAlpin, 740 P.2d 824, 829 (Wash. 1987).

50. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1998).

should sentence him as an armed robber regardless of whether the charge is robbery or armed robbery.

The real-offense feature of the federal system has become a powerful engine for ever more detailed and restrictive guidelines. The guidelines must account not only for the proper treatment for each federal crime. They must also anticipate the many varieties of "real offense conduct" that judges will confront and specify the required adjustments to a sentence that each variation in conduct will produce.

This collection of restrictive sentencing rules, Stith and Cabranes argue, has also altered the balance of power in the courtroom.⁵¹ They endorse the oft-repeated argument that the guidelines have increased the power of prosecutors relative to sentencing judges and other actors.⁵² There is a lot of truth to this proposition: The guidelines give prosecutors exclusive power to seek a downward departure for those offenders who provide "substantial assistance" in prosecuting other criminal cases. Substantial assistance departures are far and away the most common ground for departure in the federal system. Nineteen percent of all federal cases nationwide resulted in a departure on this ground; all other downward departures combined amounted to approximately twelve percent of the cases.⁵³

On the other hand, the federal sentencing guidelines do give the judge the obligation to adjust a sentence based on factors other than the prosecutor's selection of charges, and the probation officer provides the court with a more independent source of information about uncharged facts. The guidelines make mandatory and routine many of the techniques that judges used before the guidelines to check the prosecutor's charging and

51. Because the presence of particular facts will now result in a measurable and mandatory change in the sentence, the prosecution and the defense attorney who have reached a plea bargain have strong incentives to deceive the judge about what actually happened in the case to influence the sentence. The practice has come to be known as "fact bargaining." The guidelines themselves contain some very general instructions to sentencing judges, calling on them to scrutinize plea agreements before accepting them. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (policy statement) (1998); *id.* § 6B1.4 (policy statement). Judges have not yet fashioned these general statements into more specific or vigorous controls on plea bargains.

52. See STITH & CABRANES, *supra* note 8, at 130-42; see also *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) ("The sentencing statute has largely replaced the traditional role of judges . . . by vesting most sentencing decisions in prosecutors . . ."), *rev'd sub nom. United States v. Doe*, 934 F.2d 353 (D.C. Cir. 1991); David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196 (1995) (arguing that discretion of parole boards and judges has been constrained, whereas prosecutors have been left with a free hand); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 151-52 (1995) (arguing that prosecutors have greater discretion, and citing statistical evidence of prosecutor-driven departures from the guidelines).

53. See U.S. SENTENCING COMM'N, 1997 ANNUAL REPORT 36-37 (1998) (noting that substantial assistance departures account for 19.2%, other downward departures account for 12.1%, upward departures account for 0.8%, and 67.9% of all sentences were within the guidelines).

plea bargaining decisions.⁵⁴ The guidelines have mostly changed the certainty attending those techniques. While the pre-guidelines judge could keep a prosecutor in doubt about whether or how much she would adjust a sentence in light of various facts, the guidelines now take away the uncertainty. To the extent that guidelines have made sentences easier to predict, they have increased the relative power of prosecutors.

Stith and Cabranes's most profound indictment of the sentencing guidelines is that they are unexplained—and therefore lawless. This is the ultimate irony for a system designed to meet Marvin Frankel's charge that discretionary sentencing was a lawless enterprise. The Sentencing Commission, as an administrative agency, was supposed to follow the ordinary process for the creation of administrative rules. This process includes a requirement that the agency explain its choices in a "concise general statement of their basis and purpose."⁵⁵ In most cases, the Commission has fallen far short of the normal expectations for a federal administrative agency. Its explanations for the guidelines have alternated between terse and nonexistent.⁵⁶

Because the guidelines are typically unexplained, judges have not been able to develop a meaningful body of cases to harmonize or elaborate any basic principles contained in the guidelines. When a judge does not know what purposes the Commission hoped to accomplish, she cannot say whether a sentence in a particular case will accomplish that purpose. When a judge does not know what the Commission considered to be a typical or "heartland" case, he cannot say whether the case at hand falls outside the heartland and therefore qualifies for a departure. Sentencing jurisprudence has become trivial, the authors argue, because it is not possible to respond in a principled way to Kafkaesque pronouncements from an inaccessible administrative body.⁵⁷

Stith and Cabranes offer two paths out of the wilderness of unexplained rules. First, recognizing that sentencing guidelines are likely to stay in place because of the number of judges and prosecutors who have now invested in learning the new system, they suggest ways to amend the existing guidelines. The Judicial Conference, they say, should use its committee

54. See Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1400-12 (1997) (stating that the federal sentencing guidelines allow judges to control prosecutorial choices on the "back end" at sentencing rather than at the "front end" of charging decisions).

55. 5 U.S.C. § 553 (1994); see also 28 U.S.C. § 994(x) (1994) (making 5 U.S.C. § 553 applicable to the U.S. Sentencing Commission).

56. See Wright, *supra* note 35, at 55-69 (arguing that the Commission should explain its decisions in more detail, perhaps with empirical data). As an example of an explanation for a guideline, consider U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 311 (1998), where the entire explanation for extensive restructuring of attempted murder and assault guidelines is that the amendment increases the offense level "to better reflect the seriousness of this conduct."

57. See STITH & CABRANES, *supra* note 8, at 84, 93-103.

process under the Rules Enabling Act⁵⁸ to create procedural rules to apply at sentencing.⁵⁹ Stith and Cabranes are especially persuasive when they argue that the defendant should receive more information about the sentence at a guilty-plea hearing, including a “notice of sentencing allegations.”⁶⁰ The rules should also address the reliability of evidence received at the sentencing hearing, although Stith and Cabranes remain coy about the form those rules should take.

The Sentencing Commission, for its part, should declare more grounds available for departures.⁶¹ One of Stith and Cabranes’s most ambitious proposals would strengthen the departure power across the board. It would allow the sentencing judge to decide for herself whether to adjust the sentence in light of mitigating or aggravating facts that the prosecution did not prove as a necessary part of the charge of conviction.⁶² Giving the judge discretion over these “relevant conduct” adjustments would convert many guideline provisions from binding to advisory rules.

One seemingly modest proposal would transform guideline sentencing more completely than any of the others. Stith and Cabranes propose that the guidelines be amended to allow the sentencing judge to impose a non-guideline sentence as specified in a plea agreement “where the judge finds that such a sentence would achieve the purposes of criminal punishment at least as well as a sentence prescribed by the Guidelines.”⁶³ Given that over ninety percent of all federal cases are resolved by guilty pleas (and most of these cases involve plea agreements),⁶⁴ this exception would give trial judges, in coordination with prosecutors and defense counsel, the power to sentence outside the guidelines more often than not. This use of plea agreements at sentencing epitomizes a common theme in many of the Stith and Cabranes reforms. Their reforms decentralize sentencing. They give power to parties most familiar with a particular case (the trial judge and the litigants) and cut back on the authority of supervisors (appellate courts or

58. 28 U.S.C. § 2072 (1994).

59. See STITH & CABRANES, *supra* note 8, at 153, 159-63.

60. *Id.* at 159.

61. See *id.* at 146.

62. See *id.* at 147-48. These facts not proven as elements of the offense are known as “relevant conduct.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1998).

63. STITH & CABRANES, *supra* note 8, at 165; see also William Stafford, *Settling Sentencing Facts at the Guilty Plea Hearing: A Time-Saver for the Trial Court*, 3 FED. SENTENCING REP. 214 (1991) (suggesting that the facts relied upon by judges in sentencing should be determined by the time of the hearing required by Rule 11 of the Federal Rules of Criminal Procedure).

64. In 1996, 48,196 of the 52,270 convicted federal defendants (92.2%) pled guilty or nolo contendere. Of the remaining defendants convicted, 461 were convicted by the court and 3613 by the jury. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996 (1997), at 448 tbl.5.27. An “open plea” is a guilty plea that a defendant enters unilaterally (hoping to reduce the sentence imposed) without entering any agreement with the prosecutor about the charges filed or the sentence that the prosecutor will recommend.

commissions). Some of the most abstruse reforms—such as the use of “relevant conduct” or plea agreements as grounds for departing from the guidelines—would have the most powerful decentralizing effects.

Stith and Cabranes also describe a second path out of the wilderness, a path they consider more desirable (though less realistic) than any amendments to the current guidelines. They would repeal the current guidelines, repeal the statute, abolish the Sentencing Commission, and start afresh.⁶⁵ This ideal world without sentencing guidelines would start with a simple new statute. The statute would require sentencing judges to state their reasons for the sentences they choose and would provide for appellate review of sentences. Appeals courts would overturn any sentence outside the statutory boundaries for the crime involved and any “unreasonable” sentence within those boundaries. Appeals courts would review for any “abuses of discretion” in sentences much as they now review for abuses of discretion in the decisions of trial courts to admit or exclude evidence under Rule 403 of the Federal Rules of Evidence after balancing the evidence’s probative and prejudicial value. This mechanism operating alone, they say, will over time develop the flexible principles of sentencing that are missing from the current guidelines: “Slowly but surely, a federal common law of sentencing would be created.”⁶⁶ This more comprehensive version of sentencing reform has much in common with Stith and Cabranes’s more incremental reforms. It pushes even further in the direction of a decentralized sentencing system. Thus, the authors’ proposals for “starting afresh” highlight the basic impetus behind their short-term reform package.

It is easy to see that judges occupy the center of Stith and Cabranes’s ideal sentencing system. It requires only a bit more reflection to see just how peripheral a role other institutions play. The first priority in sentencing reform, they say, is to pay close attention to the selection of judges. The people who will exercise individualized judgment are more important than any rules to structure that judgment.⁶⁷ Their new sentencing statute would not recreate the parole board or anything like it.

Stith and Cabranes do propose that the Judicial Conference select a new “sentencing committee.”⁶⁸ However, judges would dominate this committee just as they now control committees appointed under the Rules Enabling Act, operating under the auspices of the Judicial Conference. The committee that Stith and Cabranes have in mind would only hasten and reinforce judicial development of sentencing principles on a case-by-case basis. It would create “advisory” guidelines that “seek to use judicial

65. See STITH & CABRANES, *supra* note 8, at 172-74.

66. *Id.* at 170.

67. *See id.*

68. *Id.* at 174.

knowledge and experience, rather than to suppress or replace judgment by judges.”⁶⁹ The new committee would also serve as a sponsor for research and training, and it could become a clearinghouse for sentencing data.⁷⁰ But nothing this committee does would bring an extra-judicial voice to sentencing; it would only reinforce the control of judges.

As for Congress, Stith and Cabranes anticipate that it will have the “final authority to approve the committee’s proposed guidelines.”⁷¹ The proposal would place Congress in the passive role it typically plays in approving procedural rules that the Judicial Conference generates under the Rules Enabling Act. In sum, in the post-guidelines world that Stith and Cabranes describe, judges are supreme, and judging displaces rules rather than rules displacing judgment.

II. JURIES AND JUDGES AT SENTENCING

Stith and Cabranes’s prescription for federal sentencing calls for judges to sentence based on their intuitive insights. To the extent that there are constraints on those judgments, they come from “general principles” of sentencing that judges themselves develop in an inductive fashion. Through a common-law process, judges might refine, explain, or reconsider those principles.⁷² Ultimately, a set of rules might codify some of those judicial principles. But the heart of sentencing, the authors say, lies in the individual case. It is very difficult for anyone who does not know the particular case in all its uniqueness to articulate or to understand the justice of the sentence.

If most critical sentencing choices are indeed to take place at the level of the individual case, with few constraining legal rules, perhaps we should ask why it is *judges* who should make sentencing judgments in the first place. Judges, we tell ourselves, have the power to interpret and enforce the law. In the common-law tradition, judges may add to an existing set of principles. But that common-law tradition is thought to work incrementally or interstitially—common-law judges either build slowly on existing law or operate where statutes or other sources of law do not set a boundary.⁷³ Moreover, the amount of unbounded territory in which a common-law

69. *Id.* at 175.

70. *See id.* at 175-76; cf. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 941-49 (1991) (advocating the development of binding “normal case” sentencing guidelines).

71. STITH & CABRANES, *supra* note 8, at 175.

72. *See id.* at 81-83.

73. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 22-23 (1949); cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 169-83 (1962) (describing techniques to promote incremental decisionmaking in constitutional law). A lawyer from the civil-law tradition, with its emphasis on the limited role of judges as interpreters of the law, would find this view of the sentencing judge very puzzling.

judge may roam has been shrinking steadily in the United States as the amount of statutory law increases.⁷⁴ In an age of statutes, judges must routinely fit their common-law judgment within a framework of rules that other institutions create. But none of these forms of judging places as much trust in the individual judge as do Stith and Cabranes. It is hard to justify an expanded common-law autonomy for judges at sentencing when that autonomy is compromised everywhere else.

Why should a judge impose a sentence if the sentence is not bounded in a serious way by articulable and generalizable rules of law? Stith and Cabranes find one answer in American tradition. Discretionary judicial sentencing, they argue in Burkean fashion, is a traditional American practice. There is a competing American tradition, however, that might lead us to give case-specific sentencing power to the *jury* rather than the judge. I raise the sentencing jury as an alternative to the sentencing judge because it brings into focus exactly what individual judges can and cannot accomplish in a sentencing system. Stith and Cabranes emphasize the power of the judge to individualize a sentence. Juries are in some ways better suited to accomplish these case-specific sentencing judgments. Where judges hold an advantage over sentencing juries is in their power to combine insights about individual cases with some understanding of the system as a whole. Sentencing juries remind us that the power to *coordinate* the work of sentencers in individual cases deserves our full attention. This vital component of a sentencing structure remains at the edges of Stith and Cabranes's proposals.

A. *A Historical Sketch of Sentencing Juries*

In many American jurisdictions, juries at criminal trials served at one time as the primary sentencing institutions. Statutes in as many as half of the states during the nineteenth century granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case.⁷⁵ Statutes in other jurisdictions allowed the jury to recommend a sentence to

74. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-7 (1982); see also Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 566 (1997) (book review) (arguing that evaluations of common-law thinking in the current age of statutes "would do well to come to terms with the realities of the modern state, prominently including the large role of regulatory agencies" in statutory interpretation).

75. See Edward A. Linden, Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 969 n.2 (1967) (listing Alabama, Arkansas, Georgia, Indiana, Kentucky, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Tennessee, Texas, and Virginia as jury-sentencing states); Comment, *supra* note 14, at 405 n.21 (adding Illinois). The sentencing jury flourished at the same time that sentencing judges had their greatest sentencing authority relative to legislatures and parole authorities. The federal system did not provide for sentencing juries.

the court, and a robust case-law developed to govern what the court could tell the jury about the binding effect of its recommendation.⁷⁶

Jury sentencing first appeared in this country in the colonial period, even though the practice at English common law was for judges rather than juries to impose sentences.⁷⁷ By the middle of the nineteenth century, the practice was well-entrenched. Most of the states that used sentencing juries in non-capital cases allowed the jury to set the sentence in any felony or misdemeanor case, although a few states limited jury sentences to selected crimes.⁷⁸ Enthusiasm for sentencing juries grew out of an American passion for juries as the institution that best enabled citizens to participate in their own government. This conviction was never stronger than during the early nineteenth century.⁷⁹

It was early in the twentieth century when states started to limit or abandon jury sentencing and to give judges the power to set the initial sentence in every case.⁸⁰ The growth of guilty pleas and plea bargaining was one force reducing the influence of the sentencing jury. An increasing volume of cases changed criminal jury trials from the norm into the exception early in the twentieth century.⁸¹ Where there was no jury to determine guilt or innocence in a non-capital case, there was no jury to impose sentence.

A second force working against the sentencing jury was the appearance of parole boards. The parole authority could adjust a jury's sentence just as it could adjust a judge's sentence. Nonetheless, it was difficult to integrate juries and parole. Courts struggled over how much to tell the jury about parole eligibility rules (such as eligibility for parole after serving one-third of the maximum sentence), for fear that the jury would inflate or discount its sentence in an effort to tie the hands of the parole authority.⁸² The very

76. See Comment, *supra* note 14, at 401-05.

77. See *The King v. Bunts*, 100 Eng. Rep. 368 (K.B. 1788) (stating the common-law practice of presentation of evidence at a sentencing hearing before a judge).

78. See G.L. Gullette, Note, *Should the Jury Fix the Punishment for Crimes?*, 24 VA. L. REV. 462, 463-64 (1938) (tracing jury sentencing in Virginia to 1846 for felonies generally and to the colonial period for some misdemeanors); Linden, *supra* note 75, at 972 n.14 (noting that all but one of the states with jury sentencing intact in 1967 had jury sentencing in their original criminal codes); *id.* at 969 n.2 (listing four states with jury sentencing only for specific crimes).

79. See FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 235-40 (1859); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272-76 (J.P. Mayer ed. & George Lawrence trans., Doubleday 1969) (1848); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182-99 (1991).

80. Cf. NATIONAL COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 23-28 (1931) (a "Wickersham Commission" report) (noting the high cost of jury trials and the decrease in the use of juries in criminal cases).

81. See Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & SOC'Y REV. 247, 248 (1979); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 598, 607-10 (1986-87).

82. See, e.g., *Sukle v. People*, 111 P.2d 233, 235 (Colo. 1941); *Houston v. Commonwealth*, 109 S.W.2d 45, 46 (Ky. 1937); *State v. Barth*, 176 A. 183, 185 (N.J. 1935); *Massa v. State*, 175

reason for adopting parole was in tension with jury sentencing. States creating parole authorities hoped that experts in corrections would gather a full profile of each offender, supplemented over time, to craft an individualized sentence to rehabilitate the offender. Sentencing juries were incompatible with this vision of expertise.⁸³

The practice of jury sentencing has all but disappeared now. Eight states continue to recognize jury sentencing for at least some non-capital crimes.⁸⁴ But given the low proportion of cases resolved by jury trials and the number of defendants willing to waive a sentencing jury, this institution has become an anomaly in most places, for most crimes.

B. *The Viability of Jury Sentencing*

Is jury sentencing worth reviving? The sentencing jury is intriguing because it could perform very well the case-specific sentencing that Stith and Cabranes have in mind. Surely a jury, like a judge, considers the specifics of an offender and an offense and can apply any binding legal rules when instructed. The authors' proposal to return to minimal legal rules at sentencing (and to do so without reviving parole) makes jury sentencing all the more plausible.⁸⁵

Stith and Cabranes consider "moral reckoning" to be central to sentencing.⁸⁶ Juries can do this at least as well as judges.⁸⁷ Like the judge, a jury faces the defendant personally and pronounces a judgment about the defendant's specific case. One of the primary functions of a jury is to

N.E. 219, 221-22 (Ohio Ct. App. 1930); *see also* Comment, *supra* note 14, at 406-07 (collecting cases).

83. *See* Linden, *supra* note 75, at 978-79. The atrophy of sentencing juries was also consistent with concurrent efforts to limit the role of juries in many different contexts, based on the idea that juries did not have the expertise to handle the complexities of modern public administration. *See* Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 481-500 (1992).

84. *See* ARK. CODE ANN. §§ 5-4-103, 16-90-107 (Michie 1987); KY. REV. STAT. ANN. § 532.055(2) (Michie 1990); MISS. CODE ANN. §§ 97-3-67 (1972); MO. ANN. STAT. § 557.036 (West 1997); OKLA. STAT. ANN. tit. 22, §§ 926-928 (West 1986); TENN. CODE ANN. §§ 40-20-104, 40-20-107 (1997); TEX. CODE CRIM. P. ANN. art. 37.07 (West 1981); VA. CODE ANN. § 19.2-295 (Michie 1995); KY. R. CRIM. P. 9.84(1).

85. For a spirited defense of jury sentencing, *see* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. (forthcoming May 1999).

86. STITH & CABRANES, *supra* note 8, at 82.

87. Although Stith and Cabranes do not consider sentencing juries in any detail (because they focus on the federal system, which has not used sentencing juries), Professor Stith has expressed views about the jury elsewhere that recognize its compatibility with the sentencing functions described in this work. *See* Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 145 (1995) (arguing that the "jury's greatest contribution may be precisely that it tempers [modern values of equality, rationality, and accountability] with the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy").

express the moral sentiment of the community in applying the law.⁸⁸ In this regard, juries have better access to relevant information (such as current community views on punishment) than do sentencing judges. Juries are also thought to be well-suited for decisions that are difficult to articulate through general principles. When we cannot resolve fundamentally antagonistic ideals in an abstract way, we place the decision into the black box of the jury room.⁸⁹ We also opt for juries over judges for decisions (such as findings of negligence in a tort case) that require application of a single abstract legal standard to a wide variety of specific settings.

There have been consistent objections to jury sentencing over the years. It is worth reviewing some of the objections here, to note how many of the problems might be resolved through the use of sentencing structures that are now common in the United States. To a surprising extent, the strengths and weaknesses of sentencing juries track the strengths and weaknesses of individual sentencing judges. Each can contribute an important component—but only a component—of a wise sentencing system.

One objection to jury sentencing is the disparity among sentences that different juries might impose. The available evidence shows that sentencing juries impose a wider range of sentences than judges in state courts, and those sentences are on average higher than what judges would impose in similar cases.⁹⁰ A factor contributing to this disparity is the information unavailable to a sentencing jury. Historically, sentencing juries have imposed or recommended sentences without knowing anything about the

88. For an insightful account of the jury's function in applying the law as a special form of statutory interpretation, see Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998). The jury's ability to draw on community norms in applying and interpreting law is central to the judgment of many states that juries should recommend or determine the sentence in capital cases. See *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

89. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 75-96 (1978); cf. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 177-82 (1994) (describing tradeoffs in choosing juries or legislatures or administrative agencies to set damages).

90. See James P. Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. KAN. CITY L. REV. 299, 303-04 (1951-52) (citing data on jury sentences from Missouri); Charles Kerr, *A Needed Reform in Criminal Procedure*, 6 KY. L.J. 107, 109-10 (1918) (describing cases involving similar crimes in which juries fixed widely varying sentences); Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 226 (1960) (providing data on jury sentences from Texas); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 33 (1994) (providing data on jury sentences from Texas). There are no sentencing juries at the federal level and therefore no data comparing judge and jury sentences in this system. One public opinion survey suggests that at least in certain types of cases, the federal guidelines impose longer sentences than most members of the public would choose. See U.S. SENTENCING COMM'N, *JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES* (1997). Disparity remains a concern whether juries impose higher or lower sentences than judges.

defendant's criminal record⁹¹ or about the usual sentence imposed and served in similar cases.

Juries could, however, receive enough guidance to control this disparity among sentences. The parties could submit to the jury, after conviction, any relevant criminal history. Just as the probation officer can conduct an investigation and prepare a pre-sentence report for the judge, she could prepare a similar report to the jury about the defendant's background. Timing could be difficult in some cases, because the report would have to be ready by the end of the criminal trial. But the trial jury could be excused for the days or weeks necessary for the probation officer to prepare the report, or a separate jury might hear a summary of the evidence before imposing a sentence.⁹²

Sentencing juries could also routinely learn about the ordinary sentence imposed in similar cases. A standard report could inform jurors of the average sentence imposed for persons convicted of the same crimes as the defendant, and for persons who have a similar criminal record. The report could even describe the distribution of sentences for that category of offense and offender. It is easy to imagine that such information about normal sentencing patterns would hold great sway with a sentencing jury, perhaps even more than with a sentencing judge.

Even if sentencing juries started to receive such information, they might very well continue to impose more disparate sentences than judges. But does this make the sentencing jury any less desirable as the institution to impose individualized sentences? The apparent disparity among sentences that different juries impose might simply reflect the presence in one case of a relevant fact (other than the charged offense and the criminal record) not present in the other. Similarly, the different outcomes might reflect the different sentencing purposes that each jury was trying to accomplish: One jury might have been trying to incapacitate a dangerous offender, while another might have been trying to respond proportionally to the crime as charged.⁹³

91. See AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE std. 18-1.1, at 18-16 (2d ed. 1980) (stating that the jury "necessarily receives less information than the court"); H.M. LaFont, *Assessment of Punishment—A Judge or Jury Function?*, 38 TEX. L. REV. 835, 837-42 (1960) (discussing the jury's lack of information regarding the accused's criminal record); Comment, *supra* note 14, at 408-09 (singling out only a few jurisdictions that allowed jury consideration of criminal records).

92. Cf. Colleen P. Murphy, *Jury Factfinding of Offense-Related Sentencing Factors*, 5 FED. SENTENCING REP. 41 (1992) (proposing that factual issues relevant to sentencing be submitted to the jury after a guilty verdict).

93. Different jury sentences might also reflect different priorities and values from one community to the next within the same jurisdiction. See Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 FED. SENTENCING REP. 306 (1993) (arguing for sentencing flexibility to account for differing local concerns).

Because Stith and Cabranes give highest priority to individualized sentences, the jury could accomplish much of the task they would assign to a sentencing judge. The jury can create an individualized judgment, based on information comparable to what the judge sees. It can do so while holding a stronger democratic pedigree than a sentencing judge.

Although sentencing juries are a plausible replacement for sentencing judges when it comes to individualized sentences, I do not endorse juries over judges at sentencing. I suspect that most people familiar with sentencing, including Stith and Cabranes, would take the same position. The best reasons to favor sentencing judges over sentencing juries, however, do not involve the power of the judge to individualize a sentence. Instead, judges gain an advantage over juries because they are better able to *coordinate* a sentence in one case with sentences in other cases. We might expect coordination among different sentencers at any given time, giving us some assurance that similar offenders and offenses will receive similar sentences. We might also expect sentencers to coordinate their work over time: Sentencers could learn from experience, notice developing problems or trends, and improve their sentences over time. Judges have a greater capacity to coordinate their sentences than juries do. Because judges sentence regularly, they might find ways to become more consistent with other judges and to impose better sentences tomorrow than they did yesterday.

Like individualized sentences, coordinated sentences have their virtues. Some coordination among judges (and, inevitably, coercion of individual judges) is necessary to achieve genuine equity among cases. Coordination is also valuable for resource planning, a government interest that Stith and Cabranes ignore. Prisons and corrections programs cost a great deal. Years of advance planning are necessary to build prisons and establish programs. Without some way to control the sentences that judges impose (either by limiting sentencing options *ex ante* or by adjusting the sentence later), it is difficult to know how many prison beds and other corrections resources to purchase and operate. Coordinated sentencing rules have enabled many states to plan quite precisely the resources to devote to prison construction and corrections personnel.⁹⁴

But this critical coordinating function is precisely what remains underdeveloped in the Stith-Cabranes model of sentencing. To be sure, they do point to three coordinating devices: explanations by sentencing judges, appellate review, and the creation of sentencing procedures and advisory

94. See, e.g., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 238-46 (Alfred Blumstein et al. eds., 1983) (describing the need to project the corrections impact of sentencing rules); Ronald F. Wright, *Managing Prison Growth in North Carolina Through Structured Sentencing* (visited Nov. 16, 1998) <<http://www.ncjrs.org/txtfiles/168944.txt>>.

rules that “seek to use judicial knowledge and experience, rather than to suppress or replace judgment by judges.”⁹⁵ But none of these devices, as Stith and Cabranes describe them, have enough centralizing force to create a coordinated sentencing system over time.

Explanations can form the basis for coordination, but explanation alone does not produce coordinated sentences. Explanations only create evidence that sentences are departing from whatever rules or norms might apply to sentences; they do not themselves create those norms.

The brand of appellate review that Stith and Cabranes describe will also fail to coordinate the work of judges with each other or over time. Appeals courts, under their ideal statute, would only reverse trial judges when they select “unreasonable” sentences. While Stith and Cabranes do call for trial judges to apply—and thereby to develop—some “common principles” of criminal sentencing,⁹⁶ they do not describe the source of those original principles to apply and develop. In light of their skepticism about a meaningful concept of disparity, and their view that each judge must select sentencing objectives tailored to the case at hand, they would probably prefer the appellate courts to tolerate many competing approaches to sentencing among trial judges. They would not encourage appellate courts to announce detailed “benchmark” sentences for trial courts to treat as the presumptive sentence for various classes of cases.⁹⁷ Each trial judge would be free to apply her own chosen principles, in her own reasonable way.

Thus, explanations and appellate review for reasonableness (at least as Stith and Cabranes envision them) are not strong enough devices to coordinate the work of sentencing judges. They are not enough to give sentencing judges much of an advantage over sentencing juries. Let us return, then, to the idea of “formal rules” that Stith and Cabranes resist so mightily.⁹⁸ Are there ways to integrate the work of sentencing judges into rules that will ultimately coordinate their work? Can rules simultaneously respect individualized judgments and place some of those judgments off-limits?

95. STITH & CABRANES, *supra* note 8, at 175.

96. *Id.* at 83.

97. Appellate courts in England have announced “benchmark” sentences for sentencing courts to impose in all ordinary cases for some categories of crimes and offenders. For instance, the courts have announced, in the course of resolving an appeal of the sentence of one narcotics offender, the ordinary sentences for various narcotics offenses. *See Regina v. Aramah*, 76 Crim. App. 190, 192-93 (Eng. C.A. 1982). Alaska has also experimented with such appellate benchmark sentences. *See State v. Wentz*, 805 P.2d 962 (Alaska 1991) (reversing the appeals court’s reduction of a sentence, so as to avoid inconsistency with the state’s non-statutory 10-year benchmark).

98. STITH & CABRANES, *supra* note 8, at 169.

III. JUDGES AND SENTENCING COORDINATION

Coordination of sentences is unlikely to happen without binding sentencing rules.⁹⁹ For this reason, I believe that Stith and Cabranes propose the wrong response to the failed revolution in federal sentencing. They are suspicious of sentencing rules generally, and they reject any rules that reflect a sharing of power and responsibility between judges and other institutions. The sentencing rules that would develop over the long run in their system would emerge as a judicial consensus. The rules might arise out of a judicially-dominated committee that proposes procedural rules, or they might emerge out of patterns in the individual sentences of judges. These rules would articulate judicial views, not contradict them.

It is true that the federal sentencing revolution has failed. But that failure does not demonstrate the need to abandon sentencing rules or the need to concentrate all sentencing authority in the hands of judges. The real problem with the federal sentencing guidelines is not the fact that they sometimes compel the sentencing judge to impose a sentence she would rather not impose. Instead, the real problem is that the guidelines have developed without enough respect for the work of sentencing judges.

The original guidelines, as Stith and Cabranes show, were based less on past judicial practices than the Commission implied. The Commission also amended the guidelines over their first decade without deferring to the work of sentencing judges, typically without paying attention to their work at all. This has remained true as different sets of commissioners (appointed by both Republican and Democratic presidents) have served on the Commission. While the lack of respect for sentencing judges may be partly a function of commissioner attitudes, it also flows from the absence of institutional structures that treat sentencing judges as an important source of guideline changes. Judges are not simply one more constituency to mollify in the political process of drafting new guidelines; they are indispensable to the creation of guidelines based on experience.¹⁰⁰

Nevertheless, judicial experience is not sufficient to create a sustainable sentencing system. Individual sentencing judges have no incentive to consider total prison capacity. Each judge will hope to use as much as

99. Those norms might carry a binding effect because there are legal consequences for failure to follow them, or because a tradition develops that convinces a judge to follow the norm even when it is not what the judge would have chosen to do. Many states have adopted "voluntary" guidelines that achieve high rates of compliance by judges. *See* OSTROM ET AL., *supra* note 26, at 10-11 (describing various levels of binding effect among state guideline systems).

100. The Sentencing Reform Act makes sentencing judges central to the amendment process, and something more than a constituency to consult. *See* Marc Miller & Ronald Wright, *Teaching Holistic Sentencing*, 10 FED. SENTENCING REP. 338 (1998).

possible of the common resource of prison and corrections slots.¹⁰¹ Judges may also put more emphasis on some aspects of a case (such as prior criminal record) than society is prepared to accept in principle. For reasons such as these, most states creating sentencing guidelines have used judicial practices as a starting point, but have altered those practices in key respects. Minnesota, for instance, adopted guidelines that reduced the influence of prior criminal records and sentenced fewer of those convicted of property crimes to active prison terms.¹⁰²

A. *Judicial Experience and Coordinating Rules Coexisting*

The key is to create guidelines that depart cautiously and honestly from judicial experience. It is then equally important to create regular opportunities for judicial experience to play a part in the amendments to the guidelines, alongside the legitimate need for coordinated sentencing rules. Numerous devices are available to involve judges in the development of a sentencing system. Many are now at work in the states or in foreign countries. One possibility is to create rules that take some options away from the sentencing judge, while still leaving broad zones of unstructured discretion for the judge. Most state sentencing guidelines have adopted this strategy.¹⁰³

For instance, North Carolina leaves the judge substantial room to maneuver within the bounds set out in centralized sentencing rules, even though these rules have some of the strongest binding features among state guideline systems. The sentencing judge in North Carolina must calculate the offender's relevant criminal history and combine that history with the charge of conviction to determine the relevant box on a sentencing table.¹⁰⁴ The box usually dictates the disposition of the case (that is, it tells the judge to impose an active prison term, an intermediate sanction such as residential drug treatment, or a community sanction such as probation or fines).¹⁰⁵ It also sets some limits on the proper duration for the sentence. The box indicates a presumptive range of durations, along with "aggravated" and

101. See STEPHENS H. CLARKE, *FELONY SENTENCING IN NORTH CAROLINA, 1976-1986: EFFECTS OF PRESUMPTIVE SENTENCING LEGISLATION* 9-22 (1987) (documenting judicial increases in sentences, above presumptive terms).

102. See DALE G. PARENT, *STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES* 89-92 (1988) (describing Minnesota guidelines that aimed to reduce the percentage of property offenders sentenced to prison from 15.2 to 5 percent by reducing the importance of the defendant's prior criminal record for offense seriousness levels 1, 2, 4, 5, 7-9).

103. See Richard S. Frase, *Lessons of State Guideline Reforms*, 8 *FED. SENTENCING REP.* 39 (1995).

104. See N.C. GEN. STAT. §§ 15A-1340.14, 15A-1340.17 (1997).

105. There are a large number of "border" boxes that give the judge a choice between two or three different dispositions. See *id.* § 15A-1340.17.

“mitigated” ranges. For instance, an offender convicted of a Class E felony (such as assault with a deadly weapon inflicting serious injury) with a Prior Record Level III (such as one previous serious felony conviction, or two less serious felonies) would face an active prison term. The judge could choose a sentence within the presumptive range of 27 to 34 months, the aggravated range of 34 to 42 months, or the mitigated range of 20 to 27 months.¹⁰⁶ The judge must give an adequate reason for moving into the mitigated or aggravated ranges, but the list of acceptable reasons is lengthy and the prospects for reversal on appeal are slim.¹⁰⁷ Thus, the range of choices available to the sentencing judge, without any real fear of appellate reversal, is 20 to 42 months. A comparable box in the federal sentencing grid designates a range of 27 to 33 months.¹⁰⁸

The North Carolina sentencing rules constrain the judge: They have shifted away from the traditional judicial practice of using active prison terms for some minor property offenses. Yet coordination and judicial experience coexist in these rules. They still allow more room for individualized choices than the federal sentencing guidelines offer to the sentencing judge.

Admittedly, this strategy of leaving room for individual judgment is incomplete. Standing alone, it does not truly involve judges in the development of a sentencing system over time. It simply leaves some areas for rules (created by non-judicial institutions) and other areas for individual judgment (dominated by the trial court). At first glance, the state sentencing systems and the federal guidelines differ only in the amount of discretion left to judges, not in the *use* of individualized discretion to develop the sentencing rules. The boundaries on individualized sentences may be more generous (as in North Carolina) or more restrictive (as in the federal system), but does the individualized judgment of sentencing judges help *determine* where the boundaries will be placed? Can individualized judgment be linked to coordination, or at best do the two values simply coexist?

106. *See id.*

107. *See id.* § 15A-1340.16. For an analysis of different appellate review standards for sentencing, see Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997).

108. This is the range for offense level 16, criminal history category III. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A, sentencing tbl. The top of the federal range is 122% of the bottom of the range; the top of the North Carolina range is 210% of the bottom of the range. Although the federal judge (unlike the North Carolina judge) has the power to depart from the guidelines, federal sentencing judges are reluctant to use their departure power for all the reasons that Stith and Cabranes explore. *See* STITH & CABRANES, *supra* note 8, at 72-77, 92-103. Most state sentencing guidelines also allow the trial court to depart from the presumptive sentence as designated under the guidelines.

B. *Judicial Experience Linked to Coordinating Rules*

There are already signs that it is possible to link the spheres of coordination and individualized judgment in sentencing. To begin with, appellate judges can serve as the coordinators for sentencing judges. Stith and Cabranes sound this theme when they call for the development of a “common law of sentencing.”¹⁰⁹ Appellate courts take the lead in common-law development. They identify trends, extrapolate general principles from the patterns they discern in particular cases, and require courts in their jurisdiction to adopt the chosen principles over other (perhaps equally sensible) competing principles. If other sentencing rulemakers leave enough room for appellate courts to operate, they could add a judicial component to the coordinating rules of sentencing.

This is not to say that any and all efforts to strengthen the appellate courts will integrate the two spheres. In the federal system, as Stith and Cabranes point out, appellate judges have made themselves the “enforcers” for the Sentencing Commission.¹¹⁰ Too often they have kept the realm of individualization as small as possible; they have devoted all their attention to promoting compliance with the guidelines.¹¹¹ Federal appellate courts have not become an independent voice, announcing sentencing principles based on the sentencing patterns they observe, rather than on Commission-set boundaries.

Instead, federal appellate courts should take their cue from the appellate courts in some states that have created an independent judicial voice in the creation of sentencing rules. Appellate courts in Minnesota, for instance, have taken the lead to announce rules for the use of uncharged conduct in setting sentences.¹¹²

The attitudes of appellate courts toward “departures” from the guidelines will be a key factor as judges become an independent force in the coordination of sentences. Appellate courts must not only tolerate departures, but treat them as an opportunity to identify experience-based sentencing principles. Where many sentencing judges have departed from

109. STITH & CABRANES, *supra* note 8, at 170. This proposal draws on a rich tradition in the sentencing literature. See Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 269 (1977) (expressing hope for “the emergence of a principled, evenhanded, effective yet merciful common law of sentencing”).

110. STITH & CABRANES, *supra* note 8, at 99.

111. See *id.* at 75-76, 100-03; see also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1727-40 (1992) (detailing efforts by federal appellate courts to restrict departures or innovations by sentencing judges).

112. See Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL’Y 279, 288-90 (1993); Reitz, *supra* note 107, at 1484-88 (documenting creation by the Minnesota appellate courts of controls on the availability and size of departure sentences, especially large upward departures).

the guidelines, an appellate court should use that fact as a clue that it should develop sentencing principles on the subject—principles that legitimize and reinforce the departure decisions, rather than treating the departures as a rebellion to be squelched. Unlike the Stith and Cabranes proposal for appellate review, which calls for appellate judges to affirm any reasonable sentence within statutory boundaries, this proposal calls on appellate judges to select certain patterns they notice in trial court decisions, and to cultivate those sentencing practices at the expense of others.

If this is to happen, the federal courts will need to rethink and refine their views on the statutory departure standard. The Supreme Court has begun this process in *Koon v. United States*,¹¹³ by announcing that the appellate standard of review for departures should be more forgiving than it has been in the past.¹¹⁴ The trend needs to go much further. As Stith and Cabranes point out, some federal courts now state that the Commission has “adequately” considered a sentencing factor (making the factor unavailable as a departure ground) whenever the Commission has *mentioned* the factor explicitly or implicitly in the guidelines or the commentary.¹¹⁵ But this is not a necessary reading of the departure statute, and it is not even the best reading.¹¹⁶ Stith and Cabranes may have conceded too much and too early

113. 518 U.S. 81 (1996). The *Koon* Court changed the appellate standard of review in departure cases. An appellate court now must ask whether the sentencing court abused its discretion in departing from the guidelines. *See id.* at 97-100. The old standard of review consisted of three levels: It allowed de novo review on the question of whether the Commission had adequately considered a factor, clearly-erroneous review on factual findings regarding the presence of the factor in a given case, and abuse-of-discretion review as to the extent of the departure. *See United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989). The new standard requires abuse-of-discretion review for all departure questions, although the application of that “unified” standard is likely to vary depending on the nature of the question involved. *See* Mark D. Harris & Douglas A. Berman, *The Koon Case: Departures and Discretion*, 9 FED. SENTENCING REP. 4 (1996); Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1 (1997). If the guidelines do not mention a factor, the sentencing court must decide whether the factor is sufficiently unusual to warrant a departure. According to *Koon*, these questions that call for a comparison among cases are best handled by the district courts rather than the appellate courts. *See Koon*, 518 U.S. at 97.

114. *See Koon*, 518 U.S. at 113.

115. *See* STITH & CABRANES, *supra* note 8, at 100-03; *see also* *United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996) (“Only rarely will we conclude that a factor was not adequately taken into consideration by the Commission.” (quoting *United States v. Jones*, 18 F.3d 1145, 1149 (4th Cir. 1994))).

116. The departure statute appears in Title 18 and addresses the sentencing judge. It permits the judge to depart from the guidelines if a factor is present in the case that the Commission did not “adequately take[] into consideration” in the creation of guidelines. 18 U.S.C. § 3553(b) (1994). The same statute directs the judge to consult the guidelines themselves and accompanying commentary when determining if a factor was adequately considered. *See id.* It is a strained reading of this language to suggest that a guideline failing to mention some factor reflects “adequate” consideration of the factor, or that the Commission can declare its own consideration of a factor to be “adequate.” The legislative history of this provision is cryptic and conflicted. *See* Wright, *supra* note 35, at 58-59. But none of the legislative history indicates that Commission silence can amount to adequate consideration.

on this point: There are hints in the case law that courts are sometimes willing to judge for themselves whether the Commission has “adequately” considered a sentencing factor.¹¹⁷ With a revitalized use of the departure standard, appellate courts can both develop and defend a place for judicial experience in the creation of sentencing rules.

A willingness among appellate courts to highlight and generalize from patterns of departures among district courts could make the Sentencing Commission itself listen more carefully to sentencing judges. When the appellate courts insist that sentencing judges comply with every implied limitation within the guidelines, the Commission has little incentive to treat departures seriously.¹¹⁸ But what if the appellate courts were to draw general principles out of patterns of departures, and then make it difficult for the Commission to ignore or revoke those departure grounds without truly “adequate” consideration? The Commission might then treat judicial experience as a lead rather than a leak.

Seeking guidance from appellate courts is not the only possible way to use judicial experience when creating and changing the coordination rules of sentencing.¹¹⁹ If sentencing judges in the trial court could see for themselves the relevant patterns in the decisions of sentencing judges everywhere, the collective logic of individual judges might start to emerge and attract an ever-larger following. Right now, individual sentencing judges know very little about what other judges do when they face a discretionary sentencing choice. Appellate courts may be exposed to a larger number of cases, but their view is incomplete and impressionistic. At the federal level, the Sentencing Commission has statistical data on federal sentences, but that data is not typically in front of the sentencing judge as

117. See, e.g., *United States v. Nolan-Cooper*, 155 F.3d 221, 236-44 (3d Cir. 1998); *United States v. Core*, 125 F.3d 74, 76-77 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 735 (1998); *United States v. Mendoza*, 121 F.3d 510, 513 (9th Cir. 1997); *United States v. Brock*, 108 F.3d 31, 33-34 (4th Cir. 1997); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993); see also Robert H. Smith, Note, *Departure Under the Federal Sentencing Guidelines: Should a Mitigating or Aggravating Circumstance Be Deemed “Adequately Considered” Through “Negative Implication?”*, 36 ARIZ. L. REV. 265, 275-84 (1994) (reviewing early cases deciding whether Commission silence can be the basis for “adequate” consideration).

118. The Commission has already relied on judicial experience to give direction to guideline amendments in one setting. Where the Commission has initially created a general or ambiguous guideline and some courts have interpreted the guideline favorably for defendants, the Commission has sometimes ratified this pro-defendant reading. This is virtually the only setting where the Commission has amended guidelines to make sentences less severe; the judiciary may give the Commission the political insulation necessary to make such a move. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 518 (1997) (adopting the view of those courts refusing to count the weight of moisture in unusable wet marijuana); *id.* at amend. 582 (discussing sentences for defendants who lie to their probation officers about using drugs while on pre-trial release); *id.* at amend. 583 (discussing sentences for individuals of diminished capacity).

119. As Stith and Cabranes emphasize, the committee process for drafting procedural rules within the judicial branch also holds promise, especially for issues dealing with procedures at sentencing. See STITH & CABRANES, *supra* note 8, at 154-63.

she makes the limited choices available to her under the guidelines. In this setting, how can the individual sentencing judge begin to notice and follow patterns in the decisions of other sentencing judges?

Consider an alternative system now operating in Scotland. Court administrators have developed computer software to help sentencing judges recognize for themselves any patterns in the decisions of their fellow judges. A sentencing judge in Scotland has access to a database recording key facts about all sentences imposed in recent years. When the time arrives to impose a sentence, the judge asks the database to display information about cases that resemble the case at hand in all relevant ways. Here is the critical point: The judge herself determines which aspects of the case are "relevant" for purposes of comparison. She selects the category of crime (such as robbery or sex offenses). Then, if the judge chooses, she can specify several offense characteristics from one menu (type of victim, injury, weapon, and so forth) and offender characteristics from a second menu (previous convictions, guilty plea, sex, and age). The database then informs the judge about the sentences imposed in past cases with comparable features, including information about the distribution of the sentences imposed. The judge hands down a sentence within the legal boundaries, drawing on the pattern of sentences in past cases for guidance.¹²⁰

In this system, trial judges themselves (without the oversight of a commission or the unifying efforts of an appellate court) can discern patterns in their own collective decisions and can change standard practices over time. A system that encourages or requires judges to remain within a range of "normal" sentences for "similar" cases could provide part of the coordination the system would need. Yet the judges themselves would determine over time what is normal and what cases are to be considered similar to one another.

IV. CONCLUSION

Change is coming to the federal sentencing system. The changes are not likely to arrive soon, but there is no money in betting against change in criminal sentencing. Stith and Cabranes have written an especially valuable book for this environment, where there is dissatisfaction but no sense of impending crisis. They have explained our current predicament more completely and persuasively than anyone else. They also point in a

120. This description of the Scottish sentencing database is based on a presentation by Neil Hutton at a conference on international sentencing. *See* Neil Hutton, Presentation at the University of Minnesota School of Law (Apr. 30-May 3, 1998) (PowerPoint slides on file with author).

basically healthy direction by arguing for the return of sentencing power to the sentencing judge.

But judicial sentencing authority should not be as solitary as Stith and Cabranes suggest. Individualized sentences are only a partial virtue. A system that ignores the need for coordination will prove just as unstable as a system that places tight controls on individualized sentences. The need for coordinating rules was a central feature of the 1984 sentencing revolution, and the insight remains valid. While judges can help create those coordinating rules, other institutions will bring their own information and priorities to the task. Thus, different institutions should remain in creative conflict and should create a system that expresses the different needs of society. This is not a naive or technocratic appeal to reason. Rather, sentencing rules of this sort are an appeal to tradition. As Edmund Burke put it:

These opposed and conflicting interests, which you considered as so great a blemish in your old and in our present constitution, interpose a salutary check to all precipitate resolutions; they render deliberation a matter not of choice, but of necessity; they make all change a subject of *compromise*, which naturally begets moderation; they produce *temperaments*, . . . rendering all the headlong exertions of arbitrary power, in the few or in the many, for ever impracticable.¹²¹

121. BURKE, *supra* note 7, at 122.

