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PERSPECTIVES ON THE FEDERAL SENTENCING GUIDELINES AND MANDATORY SENTENCING: Article: The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines

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**LEXISNEXIS SUMMARY:**
... *A. Finding and Using the Federal Philosophy of Sentencing* ... We believe that departure is best justified when it is used to achieve the goal of the SRA--elimination of disparity through adoption of a uniform sentencing philosophy--and to assure that the Guidelines are achieving *their own* purposes: proportionate punishment and appropriate incapacitation. Judges should review offense level calculations in every case by asking: "Is the harm caused by this offense greater or lesser than the harm caused by the offenses these Guidelines were written for? Is this offender's culpability greater or lesser than the offenders these Guidelines were intended for?" The criminal history score should be reviewed by asking: "Is this offender's risk of recidivism greater or lesser than other offenders in this criminal history category?" ... The importance of harm in the Guidelines' model of just desert is demonstrated by the very "cornerstone" of the Guidelines, section 1B1.3, i.e., the "relevant conduct" rule, which specifies the scope of conduct for which the defendant is to be held accountable in setting the offense level. ... The purpose of this guideline is the same as other Chapter Two guidelines: proportionate punishment based on the harm of the offense and the culpability of the offender. ...

**TEXT:**
[*20] I. INTRODUCTION

*A. Finding and Using the Federal Philosophy of Sentencing*

The Sentencing Reform Act of 1984 was intended to eliminate unwarranted sentencing disparity by establishing a "comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served."

n1 As described in the exhaustive legislative history that accompanied the Act n2 (the SRA), Congress believed that "for the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy. Further, each participant in the system will know what purpose is to be achieved by the sentence in each particular case." n3 Despite this seemingly clear mandate, a common complaint about the primary product of the SRA, the federal sentencing guidelines (the Guidelines), is that it fails to express a coherent philosophy of punishment. The United States Sentencing Commission was created to develop the Guidelines, n4 and was given the job of establishing sentencing priorities and deciding how the tensions among the four purposes of punishment listed in the [*21] federal statutes should be resolved. n5 But members of the Commission could not agree on which purposes were most important. In the end, they explicitly declined to articulate a philosophy of sentencing that could explain the Guidelines' priorities and which purpose of sentencing should control in cases where the purposes conflict. n6

Given the Commission's silence regarding purposes, judges applying the Guidelines are given only a few unsatisfactory options. If the relevant guidelines are unambiguous, judges can apply the rules mechanically, even if it is unclear what purpose, if any, justifies the sentence. n7 Obviously, this is an uncomfortable form of judging, from which many have rebelled, particularly when the sentence required by the Guidelines conflicts with the judge's own sense of justice. n8

Mechanical application of the Guidelines also neglects a crucial component of [*22] the Guideline system: the judge's departure power. The SRA provides for departure from the recommended Guideline range if the judge finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." n9 The original Commission recognized that the Guidelines were not perfect n10 and anticipated that judges would sometimes need to depart from them, even in cases where a rule "linguistically applies." n11 Mechanical judging fails to subject the rules to the ongoing critical scrutiny needed when applying them to the particular circumstances of individual defendants.

Alternatively, judges might decide that because the Commission failed to articulate a sentencing philosophy, it is up to judges to decide which purposes should be served on a case-by-case basis. For example, in a 1998 opinion, one of the federal bench's leading jurists reviewed theories of punishment from Immanuel Kant to Jeremy Bentham and concluded that the Guidelines did not implement any of them. Judge Jack B. Weinstein wrote that "since the Sentencing Commission did not say how competing rationales should shape individual sentencing decisions, courts are left to make that judgment." n12 After deciding which purpose is most important in the case at hand, Judge Weinstein believes judges should depart if necessary to pursue their favored penal goal. n13

The problem with this approach is that deciding sentencing priorities case-by-case and judge-by-judge cannot be reconciled with the SRA's primary aim: to eliminate unwarranted disparity by establishing a consistent sentencing philosophy for the entire federal system. As one court of appeals has noted, in the Guideline era "[sentencing determinations] must be based on policies found in the guidelines themselves rather than the personal penal philosophy of the sentencing judge." n14 This constraint on judicial discretion was deemed necessary by the drafters of the SRA, who were familiar with empirical research establishing that differences among judges in sentencing philosophies were the leading causes of [*23] unwarranted disparity in the pre-Guidelines era. n15 Evaluations of sentencing under the Guidelines have demonstrated that this source of unwarranted disparity has been reduced. n16 But without a *shared* philosophy of federal sentencing to replace the varied views of individual judges, these personal differences can re-emerge and lead to disparate treatment of similar offenders. n17

But how can judges implement a consistent sentencing philosophy when the Commission failed to articulate one? This Article aims to demonstrate that, despite the Commission's silence, the Guidelines already have a sentencing philosophy, which can be identified using a normal method of judicial interpretation. Furthermore the Guidelines' philosophy has important implications for the Commission and for judges. The philosophy provides a standard for deciding how the Guidelines should be evaluated and when they need to be changed. Most important, once recognized, the Guidelines' philosophy should affect how judges apply the Guidelines and when judges should depart from the Guidelines.

We call the interpretive method we use "rational reconstruction," but the technical name should not suggest that the approach is unusual or especially difficult. It is one of several widely-accepted methods of judicial interpretation. For reasons discussed in Part II, we believe it is the best method for understanding the Guidelines. To apply the method, we start by examining what Congress and the Commission said about the purposes of the Guidelines. Then we compare the content and structure of the actual guideline rules with what we would expect if the Guidelines were

specifically designed either to rehabilitate, to incapacitate, or to deter offenders, or to punish them proportionate to the seriousness of their offense. [*24] The best understanding of the Guidelines is the one that best fits the content and structure of the existing rules.

In Part III we apply this method and conclude that, while containing occasional anomalies, the vast majority of the federal sentencing guidelines clearly implement a philosophy of punishment commonly called "modified just desert." Strikingly, this is roughly the same philosophy adopted by every state sentencing commission that has issued sentencing guidelines. n18 It appears to be emerging as the dominant philosophy of sentencing in America today.

Under the modified just desert approach, the greatest weight in determining sentences is given to matching the severity of punishment to the seriousness of the present offense. The seriousness of an offense depends on both (1) the harm it causes, and (2) the offender's personal culpability for that harm. Almost all of the provisions in Chapters Two and Three of the *Guidelines Manual*, which determine each offender's "offense level," can be seen to measure harm and, to a lesser extent, culpability.

The next important factor in a modified just desert system is the need to incapacitate for longer periods the more dangerous offenders, as measured by their risk of recidivism. To minimize the tension between the goals of just desert and incapacitation, the Commission chose to measure recidivism risk based only on an offender's criminal history, on the theory that past offenses also increase an offender's culpability. The number of criminal convictions and the length of sentences that were imposed are translated into a "criminal history score." Together, the offense level and criminal history score determine the sentencing options available for each offender and the range of sentence lengths recommended for those who are imprisoned.

In Part IV we explore the implications of the Guidelines' philosophy for the work of the Commission, Congress, and judges. Some of the criticism directed at the Guidelines can be seen as criticism of the particular philosophy the Guidelines represent rather than criticism of the guideline system per se (although some judges would object to any reduction of their discretion). Even accepting that modified just desert is an appropriate sentencing philosophy, the Guidelines can be criticized for the manner in which they implement it. For example, the Guidelines require a potentially false precision in the measurement of some offense harms, notably drug quantity, while undervaluing the importance of individual offender culpability in the proper assessment of offense seriousness. Congressional directives and mandatory minimum sentences have contributed to the difficulty of achieving a fair and proportionate sentencing system.

[*25] We conclude Part IV by arguing that understanding the Guidelines' philosophy can have real implications for how judges should apply the Guidelines and when they should depart from them. The debate over departures has centered on whether judges have too much or too little discretion. The departure case law parses ambiguous phrases, such as each Guideline's "heartland," which has shed little light on the most important question: "When is departure justified?"

We believe that departure is best justified when it is used to achieve the goal of the SRA--elimination of disparity through adoption of a uniform sentencing philosophy--and to assure that the Guidelines are achieving *their own* purposes: proportionate punishment and appropriate incapacitation. Judges should review offense level calculations in every case by asking: "Is the harm caused by this offense greater or lesser than the harm caused by the offenses these Guidelines were written for? Is this offender's culpability greater or lesser than the offenders these Guidelines were intended for?" The criminal history score should be reviewed by asking: "Is this offender's risk of recidivism greater or lesser than other offenders in this criminal history category?"

Granted, these questions do not always have clear answers. It would help if the Commission better explained its intentions and better described the types of cases to which each Guideline was meant to apply. But we believe departure analysis can become better focused than under current law n19 or proposed alternatives n20 if we recognize that the vast majority of the guidelines fit clearly within the Commission's overall approach of modified just desert. Through judicial interpretation of the Guidelines, reasoned departures, appellate review, and Commission study and amendment of the Guidelines, a clearer understanding of the rules and of the federal philosophy of sentencing will emerge.

Some judges may object to this focusing as a further constraint on the circumstances that warrant departure. But recognizing the Guidelines' philosophy can liberate judges from the worst of the rules: those that are poorly crafted to achieve the Guidelines' own purposes. Any rules created by a centralized authority and necessarily cast in fallible human language are bound to miss their mark when applied in some particular situations. Departure in cases where

the Guidelines result in disproportionate punishment, or inadequate or excessive incapacitation, [*26] provides feedback to the Commission about which guidelines are most in need of revision. Far from leading to unwarranted disparity, departures to achieve the Guidelines' own purposes are needed to ensure similar treatment of offenders who are similar in the ways most relevant to federal sentencing today.

*B. How the Guidelines' Philosophy Got Lost*

In this section, we start by reviewing the chorus of criticism generated by the Commission's refusal to articulate an explicit sentencing philosophy. We trace the root of the Commission's philosophical impasse to the SRA's own indeterminacy over which sentencing purposes should have priority. The Commission's struggles with various models of sentencing are reviewed, along with the Commission's ultimate turn to an empirical examination of past practice as a basis for the Guidelines. The role of congressional interventions is also discussed.

*1. The Critics Speak*

The original Commission's refusal to articulate an explicit rationale for the Guidelines was met with a torrent of criticism. Professor Andrew von Hirsch, a leading scholar closely identified with the "just deserts" school of sentencing, n21 wrote shortly after the Guidelines were promulgated that "The U.S. Sentencing Commission . . . paid little attention to defining a sentencing rationale. . . . The Commission's conclusion can be summarized thus: since people disagree over the aims of sentencing, it is best to have no rationale at all." n22 Professor Marc Miller, a prolific Guidelines commentator and former editor of the Federal Sentencing Reporter, wrote that "the federal sentencing guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing. . . . The failure of the Commission and the courts to incorporate and advance these purposes underlies many of the system's critics' strongest complaints." n23

Examples of such criticisms could be multiplied n24 and are certainly not limited [*27] to academics. Judges have criticized the Guidelines' lack of an explicit rationale, n25 and two of the original Commissioners resigned in frustration over what they saw as unprincipled policy development at the Commission. n26 Clearly, the question of the Guidelines' philosophy has been seen as important, but also difficult and controversial.

In light of this critical reaction to the initial Guidelines, one might expect that the situation would have improved by now, fifteen years after the Guidelines were promulgated. n27 The 562-page *Guidelines Manual* has been amended over 600 times, with the amendments themselves contained in a 672-page *Appendix*. n28 But in many cases, guideline amendments have only fueled the criticism. n29 Commentators complain that the Commission gives little explanation about why changes are needed or what the changes are intended to accomplish. Furthermore, the published "reasons for amendment" are seen as cursory and as failing to show how the amended guideline will be more effective. n30

In their 1998 book, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, Professor Kate Stith and the Honorable Jose A. Cabranes, after reviewing the first Commission's work and thirteen years of subsequent development, reached a discouraging conclusion:

> The Commission has made no further mention of the issue of sentencing philosophy since its general and superficial discussion of the purposes of criminal sentencing in 1987. Nowhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of [*28] the rationale for the particular approaches . . . adopted by the Commission. . . . As a result, in applying the Guidelines, the courts are often without information regarding the underlying policies or objectives that the Commission is seeking to achieve through its sentencing rules. n31

Here, a sitting judge reports that the Commission has failed to provide the tools judges need to apply the Guidelines successfully. Yet such criticism did not move the first or subsequent Commissions to articulate the policies and objectives that lie behind the rules.

It should be noted at the outset that many guideline amendments are not initiated by the Commission based on research identifying flaws in the existing rules. The Guidelines are often amended because Congress directs the Commission to increase sentences for a particular type of crime, often a crime that has received recent media attention. n32 For example, in 2000, Congress directed the Commission to increase penalties for trafficking in the "club drug" MDMA, commonly known as "ecstasy." n33 The Commission responded with an amendment doubling, and in some cases tripling, penalties. n34 Directives from Congress to amend the Guidelines are seen as preferable to enactment of mandatory minimum penalty statutes (which call for prison terms of at least a certain number of

years for every crime involving, for example, a certain quantity of drugs). n35 In both cases, however, the Commission must struggle with integrating the congressionally-required penalties with the [*29] overall Guideline structure. n36

*2. The Root of the Problem*

Most commentators blame the original Commission for failing to articulate a sentencing philosophy. n37 But before the Commission came the SRA itself and it lies at the root of the confusion. The SRA clearly establishes a cardinal principle for the Guidelines--similar treatment of similar offenders n38 --and mandates a comprehensive, hybrid philosophy that accommodates all four of the traditional purposes of sentencing. But the SRA does not specify priorities among these purposes or explain how the well-known tensions among them should be resolved. n39

As an example of these tensions, consider the sentencing of so-called "white collar" offenders. An accountant convicted of embezzling $ 150,000 from her company will likely suffer professional consequences, including removal from her position. If she accepts responsibility for her crime, has no prior criminal record, and has no apparent opportunity to commit another embezzlement, a judge may conclude that the likelihood of recidivism is low and that there is no need for imprisonment to protect the public. But imprisonment may still be justified if deterrence or just punishment for the crime already committed is the primary goal of sentencing.

The original and subsequent Commissions have sought to increase punishment [*30] for white collar crimes. n40 Research showed that prior to the Guidelines, simple probation was common in cases like this one. n41 But because other property crimes, like theft, involving similar amounts of money often resulted in imprisonment, the original Commission decided to require imprisonment for the embezzler and thief alike to ensure that similar cases are treated similarly. n42 The amount of economic harm done by the crime being sentenced was judged a more important factor than the likelihood of future crime by the offender. Clearly, the characteristics of the offense and the offender that are relevant, and the appropriate sentence, depend on which purposes of sentencing one is trying to achieve.

Examples like this embezzler convince many observers that tough choices must be made about sentencing philosophy. When it set out to draft the SRA, however, "Congress was ambivalent about prioritization of purposes and largely fudged the issue." n43 The SRA contains references to different purposes at different places n44 in a manner that appears balanced to some observers n45 but simply contradictory to others. n46 While certain philosophies of sentencing are discussed in the legislative history and rejected outright, n47 there is no indication of which philosophy Congress intended to endorse.

This indeterminacy of priorities among the purposes in the SRA was the source [*31] of much trouble for the early Commission. Several Commissioners--notably those from an academic rather than a judicial background--came to their positions with strongly-held ideas about what philosophy should underlie the Guidelines. For the first eighteen months of its existence, the Commission debated and drafted competing versions of the Guidelines, each built on fundamentally different philosophies. n48 Commissioner Paul Robinson developed a draft built largely on the deontological principles of just deserts. n49 Commissioner Michael Block worked with a team of economists on a utilitarian approach emphasizing "optimal penalties." n50 But none of these proposals gained sufficient support from outside reviewers or from a majority of other Commissioners to win acceptance.

The failure of the original Commission to come to a meeting of the minds on the Guidelines' rationale became painfully obvious, leading to a search for some sort of compromise. Commissioner Robinson ultimately dissented from promulgation of the initial Guidelines and resigned from the Commission, declaring that the Guidelines represented a "failure to provide a rational and coherent sentencing system" or to "provide sentences calculated to achieve the statutory purposes of sentencing." n51 Other Commissioners continued to serve, at least for a while, n52 but their competing visions were made plain in a series of sometimes-dueling law review articles. n53

[*32] The dilemma the Commission faced and the resolution it finally adopted was described in the introduction to the *Guidelines Manual*:

> A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. . . . Some argue that appropriate punishment should be defined primarily on the bases of the principle of "just deserts." Under this principle, the punishment should be scaled to the offenders' culpability and the resulting harms. Others argue that punishment should be imposed primarily on the bases of practical "crime control" considerations. This theory

> calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.
>
> Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In this passage, the original Commission admitted that it had not reached a meeting of the minds, but denied that the philosophical choices it faced were ultimately of much import.

This last claim--that in most situations different purposes of sentencing do *not* pull in different directions--has been the basis for much of the criticism. n54 It has failed to convince observers, schooled in familiar examples like the embezzler described above, who insist that choices among the purposes must be made before a philosophically coherent system can be developed. In Part III we demonstrate some truth to the Commission's claim: commonalities among the different purposes, and uncertainty about their exact requirements, can support rules that are consistent with several purposes at once in most situations. But first, we discuss how the Commission developed the Guidelines we have today once it abandoned the philosophical debate.

*3. The Original Commission's Compromises and Accommodations*

Instead of deducing the structure of the Guidelines from philosophical first principles, a majority of the Commission decided to use an empirical approach. Justice Stephen Breyer, then a Commissioner and a judge on the First Circuit Court of Appeals, described the dilemma and its resolution in a subsequent law review article:

> Faced, on the one hand, with those who advocated "just deserts" but could not produce a convincing, objective way to rank [the seriousness of] criminal behavior in detail, and on the other hand, with those who advocated "deterrence" [*33] but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice. n55

The absence of data that would illuminate how to implement either a just desert or crime control philosophy forced the Commission to turn to the one source of reliable data it had: data on the past practices of judges.

The Commission began with a statistical analysis of the sentences imposed on a sample of 10,000 cases sentenced in 1985. Based on information gleaned from presentence reports, the Commission determined the average sentences for various types of crime and the aggravating and mitigating factors that were significantly correlated with increases or decreases in the sentences, along with each factor's magnitude. n56 The Commission decided to base the "offense level" for each type of crime, which directly determines the sentencing range into which the offender will fall, on these average sentences unless a reason for a different result could be articulated that was accepted by a majority of the Commissioners. n57

The turn to data on past practices was clearly a crucial step in breaking the Commission's philosophical impasse, but the extent to which sentences under the Guidelines actually mirror past practice has been overstated. n58 The Guidelines that were ultimately promulgated actually departed from past practice for the largest share of defendants sentenced in the federal courts: white collar and drug trafficking offenders. Important considerations led the Commission away from the data. For one, the SRA itself required that the Commission provide "a substantial term of imprisonment" for certain categories of offender. n59 It directed the Commission to

> Insure that the guidelines reflect that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point . . . the Commission ascertain the average sentences imposed . . . prior to the creation of the Commission. . . . The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing . . .. n60

In the case of drug trafficking, which is the largest category of defendants [*34] sentenced under the Guidelines, n61 the Commission's actions were far from independent or based on consideration of past practice or the purposes of sentencing. In 1986 and 1988, before the Commission could complete its work, Congress intervened

through enactment of mandatory minimum penalty statutes, which tied the years of imprisonment required for various drug crimes to the type and quantity of drugs involved. n62 The congressional intervention severely constrained the Commission's approach, n63 but curiously, the dilemmas these statutes created are given little attention in the material the original Commission published to explain its work. n64 It was not until 1991 that the Commission published a major critique explaining how the mandatory minimums conflict with the finer-grained calibrations of the Guidelines. n65 Yet the consequences of mandatory minimums on the Commission's work can hardly be overstated and cannot be catalogued here. n66 One commentator has called mandatory minimums a betrayal of sentencing reform, and characterized Congress's actions as a legislative Dr. Jekyll and Mr. Hyde. n67 There is no doubt that at the inception of the Guidelines, the mandatory minimums profoundly affected overall penalty levels and the Commission's ability [*35] to fashion a coherent and proportional sentencing system. n68

The philosophical compromises among Commissioners, the turn to past practices, and the accommodation of congressional mandates resulted in Guidelines that are an amalgam of empirical results and explicit or implicit policy choices. This certainly raises difficult problems for Guidelines interpreters. How should our understanding of the rules be influenced by knowledge that certain provisions have their source in Congress and others in the Commission? How should the narrow intentions underlying a particular provision be reconciled with the general reasons that make best sense of the Guidelines as a whole? These are difficult problems, but they are hardly unique to the Guidelines. Furthermore, as we discuss in the next section, normal methods of judicial interpretation can be applied to these questions.

## II. THE PROJECT OF RATIONAL RECONSTRUCTION

Treating the Guidelines as rules without reasons creates many problems, while finding a philosophy for the Guidelines would bring many benefits. Of course, simply inventing a philosophy out of thin air is not legitimate. But a normal tool of judicial interpretation can be used to discover the Guidelines' philosophy even though the Commission has not chosen to articulate it.

In Part A of this section, problems are discussed that arise if we deny that the Guidelines have a philosophy. In Part B, the method of rational reconstruction is introduced and defended against other methods of understanding or criticizing the Guidelines. In Part C, the authoritative sources of the Guidelines' philosophy are reviewed, including the constitutional and statutory constraints within which any guideline philosophy must operate.

### [*36] *A. The Consequences of Philosophy-Free Guidelines*

The Guidelines are not the first laws to have been shaped by multiple agendas or to be marked by political accommodation and compromise. But there are some specific reasons why incoherence in the Guidelines creates special problems. In this section four such reasons are discussed, including (1) the impossibility of defining unwarranted disparity without a background theory that tells us which offender characteristics are relevant, and (2) the impossibility of properly evaluating the Guidelines without a clear understanding of what they are trying to accomplish. In this section, we also argue that the absence of clear principles underlying the Guidelines (3) weakens the rationality and independence of Commission decision-making, and (4) denies judges a crucial tool of legal reasoning.

#### *1. The Empty Idea of Disparity*

At the heart of the SRA lies the cardinal principle of justice: equal treatment for similar offenders. No issue received more attention from academics and legislators in the debates preceding the Act. n69 But the principle of equal treatment, while inspiring allegiance from virtually everyone, is also famously devoid of content. n70 Without a larger philosophy that defines which offense and offender characteristics are relevant, and which can be safely ignored, equal treatment and its inverse, unwarranted disparity, become empty formalisms. n71 No one believes it is important to treat redheads similarly, but some would argue we should treat equally serious offenses similarly, while others would argue we should treat equally dangerous offenders similarly (all other relevant things being equal). We need a larger philosophy to know how to implement formal justice.

This problem is especially acute in a guidelines system because sentencing reform was intended to rationalize the sentencing process. Sentencing commissions [*37] are given a task not faced by either courts deciding particular cases or legislatures deciding penalties for particular crimes. Specifically, commissions must take a *systemic* point of view and develop guidelines for *all* offenses and offenders and justify each of the distinctions drawn by the guideline rules. Sentencing philosophies like "just deserts" require comparisons among all types of offenses to ensure that the severity of punishment is proportionate to the seriousness of the crime. Without a

comprehensive theory explaining why the rules treat two offenders differently, the Guidelines risk drawing "distinctions without a difference." The Guidelines may treat different crimes differently, and may even emphasize different purposes of sentencing for different crimes, so long as there is a non-arbitrary *reason* for the different treatment that can be articulated and applied consistently. n72

This is a practical and political problem as well as a theoretical one. The Commission had a hard time justifying more lenient treatment for a white collar crime compared to a so-called "street" property crime when the economic harm caused by both was similar. Or to cite a more current example, since crack and powder cocaine are similarly harmful, imposing significantly harsher penalties on crack is seen as unfair, even though there are historical reasons related to the mid-1980s crack epidemic for the harsher treatment of crack. When it comes to moral *justification*, as opposed to historical *explanation*, creating exceptions or switching purposes from crime to crime can seem arbitrary and capricious. A *comprehensive* sentencing philosophy, applied to all offenders, supplies the necessary distinctions.

*2. Missing Criteria for Evaluation*

Without a clear understanding of what the Guidelines are trying to accomplish, we lack standards to evaluate the system. To paraphrase one Guideline critic, "if you don't know where you're going, you can't tell if you've arrived." n73 The SRA directs the Commission to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . .." n74 But to properly evaluate a system one must know the priorities among its various goals. Should we judge the Guidelines largely by how successfully they punish proportionately, how well they target the most dangerous offenders for incapacitation, or how successfully they provide offenders with the training or treatment they need? If many conflicting goals are in play, it may appear that evaluators can create a false impression of success by picking and choosing [*38] which results to highlight and which to ignore.

The lack of standards for evaluating the system also makes criticizing individual Guidelines more difficult. Any argument that a particular Guideline is anomalous, arbitrary, or "out of line" assumes a background understanding of what the Guidelines as a whole are trying to accomplish. One can define an anomaly only in contrast to an overall pattern of consistency. For example, Congress's recent directive to increase penalties for "ecstasy" resulted in an amended drug trafficking guideline that treats ecstasy more harshly than heroin on a dose-by-dose basis. n75 Many experts regard heroin as more harmful than ecstasy and argue that the amendment would lead to anomalously severe punishment for ecstasy. n76 But if the purpose of the guideline is to deter crime rather than to sentence proportionately, then evidence of a recent ecstasy epidemic might justify increased penalties to send a stronger deterrent signal. We cannot conclude that the ecstasy amendment created an anomaly unless we know the theory underlying the Guidelines as a whole.

*3. Weakened Rational Decision-making*

Articulating a comprehensive theory of the Guidelines would help to avoid ad hoc decision-making or post hoc rationalizations of decisions reached on other grounds. n77 The Sentencing Commission was created, at least in some people's minds, to act as a buffer against fleeting political passions or arbitrary decision-making divorced from deliberate consideration of how best to achieve our goals for sentencing. n78 A consistent theory of sentencing would help decision-makers [*39] highlight the important issues and resist the pressures of the moment. It can bolster policy makers' confidence in their decisions. Some have argued that the Commission's position *vis-a-vis* Congress is weakened because of the Commission's failure to explain the Guidelines' overall structure in a principled way. n79 For example, if there is little sense that the Guidelines have been carefully calibrated to punish proportionately to the seriousness of the crime, then Congress, or the Commission itself, feels less pressure to avoid actions that would distort this proportionality.

*4. Missing Tools for Legal Reasoning*

Without understanding the reasons for the rules, judges are denied a vital tool for interpreting ambiguous guideline provisions and applying the rules using instrumental reasoning. The Guidelines become a degenerate type of law: letter but no spirit. The importance of understanding the purpose of a rule is well recognized within jurisprudence. n80 Legislative intent and purpose form part of the canons of statutory construction. There is no reason to believe that the Guidelines can do without this vital tool of judicial decision-making.

We suspect that the absence of an understanding of the purposes underlying the Guidelines contributes to the feeling of many judges that sentencing under the Guidelines is mechanical and that judges' role is little more than that of an accountant. n81 Too often the rules seem empty and arbitrary, their purpose unclear, and the resulting

sentence seems unconnected to an overarching philosophy that could justify it. Judges complain that they have been reduced to computers or clerks, forced to engage in tedious and obscure fact-finding and mathematics. n82 They have little opportunity for more challenging types of legal reasoning or for ways to contribute to the development of sentencing policy. In Part IV we discuss how recognizing the Guidelines' philosophy can improve the experience and quality of judging under the Guidelines.

*B. The Method of Rational Reconstruction*

The solution we propose for the problems discussed above is to identify the [*40] Guidelines' philosophy using a routine and widely-accepted method of judicial interpretation. We call this method "rational reconstruction" n83 but it has many other names and is found in many different fields. n84 Rational reconstruction as an interpretive method was articulated in philosophy and the history of science and has only recently found its way into legal scholarship. But no one should think it is novel or idiosyncratic. Rational reconstruction is a general name for the method that has dominated accounts of judicial decision-making at least since H.L.A. Hart's description of the "internal" point of view for understanding law. n85 It resembles the interpretive methods of leading legal philosophers, such as Ronald Dworkin, n86 and it is the approach used by law professors who systematize a body of law and by judges who identify and extend the principles underlying a line of precedent or the purposes animating a set of regulations.

Rational reconstruction seeks to identify the general principles that best explain a body of work as if they were the coherent product of a single rational mind. n87 Rational reconstruction is a process of both discovery and creation. It involves discovery because it addresses an objective base of material and seeks to uncover the principles that lie latent within it, rather than the principles that the interpreter might prefer if writing on a clean slate. It involves creation because imagination is needed to find the principles that can unify and explain the particulars, and judgment is needed to decide which of several possible theories best fits the facts.

While rational reconstruction is well within the mainstream of English-American jurisprudence, it is not, of course, the only accepted basis for judicial decision-making. Also recognized within jurisprudence are methods that seek to discover the original intentions of the authors of a rule, or that instruct judges to decide cases according to a particular moral theory, such as natural law or the maximization of economic efficiency, regardless of whether the rule of the decision coheres with other decisions. n88 But both of these approaches seem poorly suited to interpretation of the Guidelines. As described earlier, the original Commission did not reach a meeting of the minds about the Guidelines' philosophy, [*41] so their original intent provides little guidance. n89 Similarly, instructing judges to decide cases based on the moral theory they personally favor would give reign to the individual and disparate judicial philosophies that the SRA was intended to curtail. What is needed is a *shared* understanding of the purposes of sentencing. Rational reconstruction seems the best hope for articulating the shared understanding lying implicit in the Guidelines' rules.

In the method of rational reconstruction, the ultimate test for choosing among competing theories is *coherence*. n90 The winning theory makes the best sense of the materials one is interpreting. The goal is to unify the rules with as few and as consistent a number of overarching principles or purposes as possible. The expectation is not that inconsistencies will be eliminated altogether, but that one will adopt the theory that maximizes coherence and minimizes anomalies as much as possible. n91

In Part III, we reconstruct an account of the Guidelines that we believe is coherent, but we also admit that some guideline provisions do not fit well with our overall account and must be considered anomalies. Others may disagree that our account is the best theory of the Guidelines, or that it is sufficiently coherent to qualify as a philosophy. Judgments about coherence are inherently contestable and partly subjective, since they depend both on the materials being interpreted and on the values and beliefs of the interpreter. n92 We hope those who disagree with our account will be challenged to argue for a different one they believe is more true to the Guidelines. n93

[*42] Some, however, may have deeper doubts about our project, and question whether it is even desirable to reconstruct the philosophy of the Guidelines. Rather than focus on the Guidelines' consistencies, critics will focus on the anomalies and argue that the Guidelines are fatally flawed. This view naturally will be favored by those who think that the best hope for improving federal sentencing is to destroy the Guidelines and to replace them with something else. Our preference for rational reconstruction over critical deconstruction grows from our commitment to the goals of the SRA and our belief that the Guidelines are likely to be with us for some time to come. Failing to develop a theory for the Guidelines leads to the intolerable consequences discussed above.

The account of the Guidelines offered in Part III has value even if one does not accept our strongest claim: that modified just desert *is* the Guidelines' philosophy, with real consequences for how judges should decide cases. Articulating the Guidelines' underlying principles makes it easier to debate the policy choices implicit in the rules and provides a standard for policy makers who want their decisions to be as consistent as possible with the current law. But some of the advantages of recognizing a philosophy for the Guidelines--for example, its implications for the theory of departure discussed in Part IV.C.--accrue only if one accepts that our account, or at least *some* account, of the Guidelines' philosophy has the force of law.

It should be made clear from the outset that our position at the time this Article was written as staffers with the U.S. Sentencing Commission grants no special authority to the interpretation of the Guidelines we offer. The Commission certainly has the power to declare or change its philosophy through the votes of a majority of its members, but we are not claiming to speak here for the Commission or for any individual Commissioners. n94 The point of our argument is that even without additional Commission action, the Guidelines *already have* a philosophy of sentencing. If this philosophy were to become better recognized by the courts, it would, of course, gain in legal force.

*C. Sources of the Guidelines' Philosophy*

The first step in a rational reconstruction is to define the scope of materials being interpreted. Because we want to find the interpretation with the greatest legal authority, all legally relevant texts must be included, and our interpretation must be consistent with the Constitution and with applicable statutes and precedents.

In this section, we review these materials, beginning with the SRA and the [*43] leading Supreme Court cases arising under it. We argue that in order to shed light on the reasoning underlying the Guidelines, judges are free to look beyond these materials and the text of the Guidelines, policy statements, and commentary to other supporting material, such as Commission reports. Finally, we caution interpreters not to accept at face value every reference to purposes found in Commission materials. A distinction must be drawn between general justifying aims, which the Commission may cite to explain the relevance of a particular consideration to sentencing, and the particular reasons that explain the content and structure of the actual Guideline rules.

*1. The SRA and* Mistretta

The SRA delegated Congress's power to establish sentencing policy to the U.S. Sentencing Commission. n95 In *Mistretta v. United States*, the U. S. Supreme Court upheld the constitutionality of that delegation. n96 The Court held that the SRA is constitutional because Congress provided, through the numerous directives in the Act itself, a sufficient "intelligible principle" to guide the Commission's work. n97 The Commission is not free to ignore unambiguous directives in the SRA. n98

The SRA does not, however, prescribe every detail of the Guidelines' philosophy. Congress "delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models . . . for carrying out the general policy and purpose of the [SRA]." n99 According to Justice Breyer, "the very nature of the [Commission's] task, along with the structure of the [SRA], indicates a congressional intent to delegate primarily to the Commission the job of interpreting, and harmonizing, the [*44] authorizing Act's specific statutory instruction. . . ." n100 Thus, the Commission has broad discretion to balance and refine the statute's complex and competing aims, and judges must defer to the Commission's decisions so long as the Guidelines do not violate the Constitution or a statute. n101

While the SRA gave the Commission significant discretion to refine sentencing policy, it places a constraint on the type of philosophy the Commission can adopt. The SRA requires a *hybrid* philosophy, one that accommodates in some manner all four purposes of sentencing. n102 Congress considered adopting a single-purpose approach, but expressly declined to do so. n103 The Commission is also required to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing[,]" which clearly indicates that the Guidelines are to address each of the four sentencing purposes. n104

Former Commissioner Paul Robinson has given the problem of hybrid theories of punishment more sustained attention than any other writer, and he provides several models for how a hybrid theory can be both rational and coherent. n105 The key to incorporating multiple objectives into a sentencing theory is to identify a meta-principle that guides how different objectives should be prioritized when [*45] they come into conflict. A hybrid theory is not simply an amalgam of multiple purposes; a hybrid theory illuminates the weight given to different purposes and clarifies which purpose controls when they cannot be pursued simultaneously.

In Part III we describe how the Guidelines accommodate all four purposes of sentencing and how they resolve conflicts among them. While not as fully rationalized as the ideal described by Professor Robinson, the Guidelines are not a mere hodgepodge. Close examination of the rules can convey a sense of the weight the Guidelines give to each purpose. Commentators who insist that just punishment and utilitarian goals are "incommensurable" and cannot be weighed on a common metric will not be satisfied with this resolution. n106 But as a matter of law the Guidelines do balance the need for just punishment against several utilitarian aims, n107 and a hybrid philosophy of this type is required by the SRA.

*2. The Guidelines and Commentary*

In addition to the Guidelines themselves, the Supreme Court has held that commentary "that interprets or explains a guideline" must be considered when applying it. n108 "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." n109 Furthermore, "the principle that the Guidelines Manual is binding applies as well to policy statements." n110 Thus, the text of the entire *Guidelines Manual*, including commentary, policy statements, and Appendix C, which gives reasons for amendments, should be considered when interpreting the Guidelines.

Concerning departure decisions, *18 U.S.C. § 3553*(b) states that "in determining [*46] whether a circumstance was adequately taken into consideration, the court shall consider *only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." This restriction was added to the statute in 1987 to prevent individual Commissioners or Commission documents from being subpoenaed to evaluate the adequacy of the Commission's consideration of matters that might be grounds for departure. n111 On its face, the restriction does not apply to contexts outside the departure decision, such as interpretation of an ambiguous guideline provision. And in practice, courts have felt free to rely on material outside the *Guidelines Manual*, even when deciding whether to depart. n112 Commission reports to Congress and law review articles by former Commissioners can all shed light on the Guidelines' theory. Of particular interest is the *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* issued by the original Commission in 1987 to explain the basis for the initial guidelines.

*3. General Justifying Aims Versus Specific Reasons*

Reconstructing the Guidelines' philosophy starts with reading what the Commission has written in the *Guidelines Manual* and elsewhere. But general discussions of the purposes of the Guidelines in these texts should not always be taken at face value. In many cases, the Commission offers only what H.L.A. Hart described as "general justifying aims" n113 for the Guidelines, that is, general explanations of what the criminal justice system is trying to achieve. But these generalities often [*47] do not explain the content and form taken by particular guidelines or how these rules justify a sentence imposed in a particular case. For example, Chapter Four of the *Guidelines Manual* begins by describing how criminal history can be relevant to all four statutory purposes. n114 But this general declaration contributes little to our understanding of why, for example, convictions are not counted under the rules in Chapter Four if they are more than fifteen years old.

Rather than rely on general explanations, interpreters must examine the content and structure of the rules themselves. In the words of Professor Frank Bowman, "the purposes and values behind a scheme of laws may be divined as well, or better, from an examination of the laws themselves than from reading what the lawmaker *said* about the laws. In the case of the Federal Sentencing Guidelines, the *combination* of the Commission's official explanations for its design in the Introduction to the Guidelines, the supplementary official and unofficial statements of individual commissioners in law reviews and elsewhere, *and an examination of the Guidelines themselves* produces an unusually clear picture of the purposes, objectives, and values undergirding the Guidelines system." n115

We believe courts should conduct this examination by comparing the content [*48] and structure of the particular guideline rules to what we would expect if the Guidelines had been written to implement a particular sentencing philosophy. The extensive literature on sentencing provides a range of models illustrating how a coherent sentencing system designed to implement various purposes would look. n116 Accordingly, these models can be used as templates to see which makes the best sense of the actual Guideline rules. The best-fitting model is the best interpretation of the Guidelines, even if the Commission nowhere articulates that particular theory in all its details.

*4.* United States v. Koon: *"The Structure and Theory of the Guidelines as a Whole"*

While judges need to understand the reasons underlying each particular Guideline rule, they cannot examine each rule in isolation. Often a rule's proper functioning can be understood only by seeing how it interacts with other guidelines to accomplish the goals of the system. In the words of the United States Supreme Court in *United States v. Koon*, judges must examine "the structure and theory of . . . the Guidelines . . . as a whole." n117

The decision in *Koon* is perhaps the most important for understanding how judges should approach sentencing under the Guidelines, but the decision has been criticized as contradictory and confused. n118 The Court seemed to expand the discretion of sentencing judges by characterizing as a factual question, subject to an abuse of discretion standard of review, whether a particular factor is a proper ground for departure. But a majority of the Court also rejected several of the sentencing judges' grounds for departure, declaring that the factors were within the "heartland" of the applicable guideline and thus unsuitable as a ground for departure.

As we discuss in Part VI.C.2, we believe the "heartland" concept as articulated in the *Guidelines Manual* and in *Koon* has proven to mean different things to different people and must be refocused. n119 But much of the Court's analysis in *Koon* remains vital. The Court emphasized the judiciary's responsibility to defer to [*49] the policy choices made by the Commission n120 and to discover those choices by constructing a theory of the Guidelines as a whole. The Court came close to identifying rational reconstruction as a proper method for constructing that theory (although not by that name). And all of the court's substantive conclusions, save one, are consistent with the theory that modified just desert is the federal philosophy of sentencing and that departures should be upheld when they are in pursuit of those purposes.

The facts of *Koon* are well known. The defendants were officers with the Los Angeles Police Department. They were tried initially in state court for assault and excessive use of force by a police officer in the arrest of Rodney King. Their acquittal in the state prosecution sparked the infamous Los Angeles riots. n121 The officers were retried and convicted in federal district court for violating King's constitutional rights under color of law. The sentencing range for this offense is based in part on the underlying criminal conduct, in this case aggravated assault, under U.S.S.G. § 2A2.2, which increased their offense level for the use of a dangerous weapon and the victim's bodily injury. With these increases, but given their lack of criminal history, the sentencing range was seventy to eighty-seven months' imprisonment. n122 The district court departed downward eight offense levels, however, to a sentencing range of thirty to thirty-seven months' imprisonment and sentenced the defendants to thirty months. n123 The court departed downward for five reasons: (1) because of the victim's misconduct of fleeing and resisting arrest; (2) because the defendants, as police officers, stood a high likelihood of being abused in prison; (3) because of the successive state and federal prosecutions of the defendants; (4) because the defendants would likely lose their jobs as a result of their convictions; and (5) because the defendants posed a low risk of recidivism. n124

The U.S. Supreme Court unanimously rejected the fifth ground for departure because Guideline commentary discourages departure in this circumstance. The Commission explains that "a departure below the lower limit of the Guidelines' range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." n125 Although not articulated by the Commission or the Court, the theory seems clear: the offense level measures the seriousness of the offender's present offense, and the imprisonment range required for offenders in Criminal History Category I is what the Commission has judged to be proportionate [*50] to the seriousness of that offense. A first-time offender's low probability of recidivism is already reflected in that range. This is how the Guidelines implement the two-dimensional modified just desert theory, as described more fully in Part III.

The majority of the Court also concluded that victim misconduct was an acceptable ground for departure. Guideline commentary again speaks to this factor, but in this case *encourages* departure "if the victim's wrongful conduct contributed significantly to provoking the offense." n126 Again, the Guidelines commentary is consistent with a modified just desert theory of the Guidelines. The seriousness of a crime depends on both the harm it causes and on the offender's personal culpability for that harm. A victim's provocation lowers the offender's culpability for the offense.

The majority of the Court also concluded that susceptibility to abuse in prison and successive state and federal prosecutions were appropriate bases for departure. On these two factors the Commission does not provide clear guidance in commentary. The sentencing court had determined that "the extraordinary notoriety and national media coverage of this case, coupled with defendants' status as police officers" n127 made these offenders unusually susceptible to abuse in prison and the Supreme Court accepted its determination. The Court also accepted the sentencing judge's determination that the toll of successive state and federal prosecution entitled these defendants to a downward departure because it "significantly burdened the defendants." n128 Though not clearly articulated by the court, the theory seems to be that susceptibility to abuse in prison and successive state and federal prosecutions

effectively increased the punishment being imposed on these offenders compared to typical offenders sentenced under the Guidelines. Downward departure is thus needed to keep the total punishment proportionate to the seriousness of their crimes.

Given this theory, it is curious that the Court rejected departure based on the career loss and the unusual public anguish and disgrace suffered by these offenders. The majority noted that public officials convicted of abusing their positions often lose their jobs and concluded that the Commission must have taken such collateral consequences into account when designing the guideline for civil rights violations. n129 It seems to us that speculation about which factors are included in the "heartland" of a guideline, or what the Commission can be presumed to have taken into account, are unreliable grounds for departure analysis. n130 A better focus would be the relevance of the factor to the purposes of the Guidelines. Loss of a career combined with exceptional public disgrace seem to us as relevant to the proportionality of punishment as susceptibility to abuse in [*51] prison or successive prosecution. n131

Regardless of this inconsistency, however, the Court in *Koon* began to identify an approach to the Guidelines that displays many of the characteristics of rational reconstruction. The justices presuppose, as we believe judges must, a "rational normative order" to the Guidelines. n132 They sought to identify a theory for the Guidelines as a whole. They examined the content and structure of individual Guidelines and the way that the offense level and criminal history category work together to determine an appropriate sentence consistent with modified just desert. They approved most departures when needed to achieve proportionate punishment and disapproved departure based on low risk of recidivism when that risk had already been taken into account by the Guideline rules. The court in *Koon*, while not fully articulating the method it was using or the philosophy it was implementing, began a process that can be continued by judges and other interpreters today to illuminate the reason behind the Guidelines rules.

In Part III we demonstrate that proportionate punishment is the primary principle underlying the Guidelines. The court in *Koon* began a process that can be continued by judges and other interpreters today to illuminate the reason behind the Guidelines as a whole.

## III. IDENTIFYING THE GUIDELINES' SENTENCING PHILOSOPHY

Having provided in Part II the methodology for identifying the philosophy underlying the Guidelines, in this Part we apply the method. After introducing our conclusion that the Guidelines represent a "modified just deserts" philosophy, we systematically review the four purposes of sentencing that the SRA requires the Guidelines to accommodate. We demonstrate that the content and structure of the rules is most consistent with a philosophy that gives the lowest priority to rehabilitation, secondary importance to incapacitation of higher risk offenders, and the highest priority to proportionate punishment. The way that the Guidelines accommodate deterrence as a side benefit of just punishment is also discussed.

### *A. Modified Just Desert*

The philosophy underlying the Guidelines turns out to be very similar to the [*52] theory underlying every other sentencing guideline system in the United States. n133 It is a hybrid philosophy that gives primary weight to proportionate punishment--matching the severity of punishment to the seriousness of the crime--and secondary weight to lengthening imprisonment for those offenders most likely to commit new crimes if left free. n134 In short, it is a blend of just punishment and incapacitation, which in academic writings is generally called "modified just desert." n135

The *Supplementary Report* that accompanied promulgation of the initial Guidelines states that the Commission viewed the Guidelines as incorporating a hybrid theory of this kind, and leading advocates for "limiting retributivism" and its subspecies "modified just desert" are explicitly cited in the *Supplementary Report*. n136 The Commission explained:

> Few theorists actually advocate either a pure just deserts or a pure crime-control approach. Crime control limited by desert, and desert modified for crime-control considerations, are far more commonly advocated. The Commission saw little practical difference in result between these two hybrid approaches; the debate is to a large extent academic. . . . The Commission's decision is consistent with the legislation's rejection of a single, doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing. n137

In this case, what the Commission said is matched by the content and structure of the guidelines it adopted, as we hope to demonstrate in this section. Rehabilitation and deterrence are accommodated within a modified just desert

model, in a way described in sections B and D below. n138 But the specifics of the Guideline rules are best explained by their primary emphasis on proportionate punishment and a secondary concern with the incapacitation of higher risk offenders.

There appears to be something of a consensus today that these two purposes of sentencing are the most important. The primary dimension of modified just desert is built into all criminal codes, which grade the seriousness of offenses from petty misdemeanors to aggravated felonies and assign a range of minimum and maximum [*53] penalties. n139 Criminal codes are also increasingly emphasizing the importance of incapacitation, through enactment of enhanced penalties for repeat offenders and in numerous other ways. n140 Every state guideline system incorporates these two dimensions, even some systems that began with a more one-dimensional approach. n141 For better or worse, unlike as recently as the mid-twentieth century, at the beginning of the twenty-first-century n142 modified just desert is our nation's reigning sentencing philosophy.

The federal system adopts a two-dimensional grid or "sentencing table," which gives visual expression to the two dimensions of the modified just desert theory. n143 The Guidelines measure the seriousness of an offense in Chapters 2 and 3 with an "offense level," made up of a "base offense level"--a beginning score assigned to each generic crime type--modified by "specific offense characteristics" representing aggravating and mitigating circumstances that increase or decrease the offense level along its range from zero to forty-three. Offenders' risk of recidivism is measured in Chapter 4 by a "criminal history score" determined by the number of prior convictions, the length of the sentences that were imposed for each, and how recently the offender was convicted or incarcerated for the prior offense. n144 Some state guideline systems include other factors that predict offenders' risk of recidivism. n145 However, regardless of what factors are used, the purpose of this second dimension is clear: to incapacitate more dangerous offenders for longer periods of time.

We can get a sense of the relative weight accorded incapacitation compared to just deserts by examining the Sentencing Table. n146 The offense level forms the vertical axis, and the prison terms associated with it range from zero months for levels one through eight, which permits a sentence of probation, to life in prison for the highest level, forty-three. n147 The criminal history score forms the horizontal [*54] axis. n148 As a general rule, moving across the six criminal history categories, a one-category increase affects the required prison term about the same as a one-level increase in offense level. n149 This results in about a doubling of the minimum prison term from the lowest to the highest criminal history category. Taking the table as a whole, offense level adds more to determining sentence length than does criminal history category.

Declaring that modified just desert is the philosophy of the federal sentencing guidelines is easy, but it will take more than mere *ipse dixit* to prove that it is so. The following sections show how the Guidelines accommodate each of the purposes of the SRA. We test alternative models that might explain the Guidelines' structure, and argue that no models fit the Guidelines as well as a particular harm-based version of modified just desert.

*B. Rehabilitation*

The SRA requires that the Guidelines accommodate the statutory purpose of providing the defendant "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . ." n150 The SRA also contains several directives that make clear that Congress meant to limit the role of rehabilitation in sentencing decisions. Section 994(k) of U.S.C. Title 28 directs that, "the Commission shall insure that the Guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." This directive reflects the concern among writers in the years before passage of the SRA that offenders should not be imprisoned for longer than they deserved in order to ensure their rehabilitation. n151 In addition, § 994(t) states that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for a sentence reduction under the sentence modification procedures found at *18 U.S.C. § 3582*(1)(A), which provides for compassionate early release for some prisoners. While some legislators may have advocated treatment for offenders, both the text and the legislative history of the SRA make clear that the goal of offender rehabilitation was secondary to other purposes of sentencing, particularly just desert. n152

[*55] Some commentators have argued that rehabilitation is essentially ignored by the Guidelines. n153 While the Federal Bureau of Prisons offers job training and drug and mental health counseling to inmates, the Guidelines do not condition whether an offender goes to prison, or the length of any prison term imposed, on an offender's need for these services. However, the Guidelines, as required by statute, do require judges to consider the offender's need for rehabilitation in every sentence imposed. n154 Offenders sentenced to probation may be required, as a condition

of their probation, to participate in rehabilitation programs. Offenders who go to prison are also given a term of "supervised release" upon their return to the community. (This has replaced the supervision offenders once received after their release from prison on parole.) Treatment, training, and drug testing conditions may be imposed during the period of supervised release if the judge determines that they are needed. n155

Other aspects of the Guidelines implement the statutory directives limiting the role of rehabilitation in sentencing decisions. For many judges, rehabilitation is especially relevant to the "in/out decision": whether to send an offender to prison or give him or her probation in the community. n156 It is noteworthy that in the introduction to the Guidelines governing probation sentences, the Commission states that:

> Probation may be used as an alternative to incarceration, *provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing*, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant. n157

Conspicuously absent from this list is the fourth purpose of providing the defendant with needed training and treatment. In this passage, the Commission makes its priorities crystal clear: rehabilitation may never be pursued through probation at the expense of the other purposes of punishment.

These same priorities can be seen in the rules governing "confinement conditions" for offenders who receive probation. n158 The Commission decided that only the least serious offenders--those falling in the lowest Zone A of the sentencing [*56] table--should receive "simple probation" and escape all forms of confinement. n159 More serious offenders in Zone B are required to spend some time in home detention or in a halfway house or community treatment facility. n160 Offenders in Zone C must serve at least half of the minimum term in prison, with the other half in one of these alternative forms of confinement. n161 The purpose of these rules is clear: to ensure that even offenders diverted from prison receive some form of punishment commensurate with the seriousness of their crime. Judges are even advised: "If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available." n162

The priority of modified just deserts over the other purposes of sentencing is clear in the Guidelines' approach to rehabilitation. Whether one agrees with this philosophy or not, it is simply impossible to make a case that the Guidelines rank rehabilitation as anything but the lowest priority among the four purposes of sentencing. This treatment of rehabilitation is completely consistent with the SRA and reflects the times in which the Guidelines were developed, when disillusionment with rehabilitation was widespread among both liberals and conservatives. n163

*C. Incapacitation*

The story is different when we turn to incapacitation, or the need to "protect the [*57] public from further crimes of the defendant. . . ." n164 This is the utilitarian purpose that "modifies" the principle of just desert and the Guidelines give it significant weight. The SRA exhibits significant concern with incapacitation where it directs the Commission's attention to offenders' "criminal history . . . and . . . degree of dependence upon criminal activity for a livelihood," n165 and where it mandates sentences "near the maximum term authorized" for repeat drug and violent offenders n166 and a "substantial term of imprisonment" for certain other categories of repeat and high-risk offenders. n167

Sentencing theorists continue to debate whether it is fair to lengthen an offender's sentence for acts they might commit in the future. Strict desert theorists, such as Richard Singer, argue that predictions should have no place in sentencing, and that sentences should be based solely on the seriousness of the current offense. n168 Andrew von Hirsch argues that reducing sentences for first time offenders (and thus increasing relative sentences for repeat offenders) can be justified within the strictures of the desert theory by the increased culpability of someone who re-offends after having been warned and punished. n169 Utilitarians, of course, believe that preventive detention can be justified if the harm prevented through incarceration is greater than the harm of incarceration itself. n170 The Commission's version of modified just desert permits sentences to be increased to incapacitate, but only in an interestingly limited way. The Commission's approach was intended to minimize the potential conflict between the principle of desert and the utilitarian goal of incapacitation.

The dimension of the Guidelines concerned with incapacitation is found largely in Chapter Four of the *Guidelines Manual*, which establishes the rules for assigning criminal history points. n171 In Chapter Five of the *Supplementary Report*, the Commission describes how the criminal history score was developed and explains why

the Commission adopted these particular rules. n172 The Commission recognized that targeting prison resources on the most dangerous offenders was an important goal of sentencing, but it also recognized the ethical dilemmas raised by basing punishment on predictions rather than on past conduct. n173 These dilemmas [*58] are heightened when the predictions are made using factors, such as age or employment history, over which an offender has limited control.

The Commission resolved the dilemma by basing predictions largely (although not exclusively) n174 on an offender's criminal record. "Primary reliance on criminal history to predict recidivism limits the tension between a just punishment and crime-control philosophy" because criminal history is both one of the best predictors of future criminality, and because leading just desert philosophers acknowledge that repeat offenders are more culpable. n175 The Commission wrote rules to determine the criminal history score taking into account the frequency, seriousness, and recentness of the offender's prior criminal convictions. "Because the elements selected are compatible both with a just punishment and crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished." n176

This general "double justification" for the use of criminal history, while reducing tension between the two purposes in theory, can lead to confusion in practice by raising questions about the specific purposes of the rules in Chapter Four. n177 For example, policy statement U.S.S.G. § 4A1.3, Adequacy of the Criminal History Category, discusses when a departure from the Guidelines is appropriate. Specifically, the policy statement provides that "if reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct *or* the likelihood that the defendant will commit other crimes," the court may depart either upward or downward. n178

This mixed signal muddies which aspects of the rules are important to each purpose. Do the Guidelines increase sentences for more recent crimes because they are more "serious" than older ones or because they are indicative of an active criminal career? The answer could be important to a judge considering downward departure for an offender with a run of recent crime motivated by drug addition, but who has established a new family and successfully completed drug treatment [*59] prior to sentencing. n179 Should the judge depart because the criminal history score overestimates the offender's current risk of recidivism, or is the guideline sentence required to reflect the offender's increased culpability? This and other confusion caused by the Commission's double justification have led commentators to call for realignment of the criminal history rules on pure incapacitation grounds. n180

Close reading of Chapter Four, however, suggests that incapacitation is already the best explanation of almost all of the rules governing the criminal history score. This can be seen by asking: "Would both desert theory and risk prediction use criminal history in precisely the same way?" Andrew Von Hirsch is the leading desert theorist who acknowledges that criminal history can be considered at sentencing and he is the theorist cited by the Commission itself in its explanation of the criminal history rules. n181 In his view, a lack of criminal history can justify a *discount* in punishment for first offenders. n182 But once warned, sentences for subsequent violations should reflect the full seriousness of the offense. Logically, Guideline rules that implement this theory should provide less severe punishment for first offenders, and more severe sentences for all repeat offenders, *as a class*. Nothing in Von Hirsch or other desert theorists' work justifies the particular rules in Chapter Four, which, for example, increase incarceration for offenders with more recent offenses or whose current offense was committed while they were under criminal justice supervision. n183 The rules make sense, however, in terms of incapacitation. For this purpose the rules should incorporate criminal history in whatever way *most accurately identifies the most dangerous offenders*. Various rules can be tested against the empirical data to determine whether they improve prediction, worsen it, or have no effect.

With a few arguably unfortunate exceptions, n184 the rules in Chapter Four are [*60] best explained as attempting to increase the accuracy of risk prediction. This is made plain in the *Supplementary Report*, which explains many details of the criminal history score by reference to incapacitation. n185 The report also promises that the rules will be refined as additional empirical evidence regarding recidivism becomes available. n186 The incapacitation rationale for Chapter Four is also made clear in the writings of Commission staff who developed these guidelines. n187 To a great extent, the rules were based on factors that were used by the Parole Guidelines to predict risk, factors that had been validated by previous empirical research. The totality of the available evidence leads us to agree with one commentator who concluded: "A brief look at Chapter Four suggests that crime control, not retribution, provides the core logic of these Guidelines." n188

This conclusion has important consequences for the Commission and for sentencing judges. It means the Chapter Four Guidelines should be judged by their effectiveness at identifying high-risk offenders and incapacitating them for sufficient lengths of time. n189 When interpreting ambiguous provisions, judges should search for the reading that will make the rules better predictors of recidivism. And when deciding whether to depart, judges should focus on whether an offender presents a greater or lesser risk of recidivism than does the average offender with the same criminal history score. The implications of understanding the purpose of a guideline for interpretation and departure will be discussed further in Part IV.

*D. Deterrence*

Deterrence figures prominently as a goal of the SRA. Besides its inclusion in the list of purposes of sentencing, deterrence is singled out in § 994(c)(6), which directs the Commission to consider "the deterrent effect a particular sentence may have on the commission of the offense by others." The Commission includes deterrence along with the other statutory purposes in its explanation of the [*61] Guidelines in Chapter One, and also cites it as the primary reason for several particular Guideline provisions. n190 There is good reason to think that the Guidelines support deterrence. Research has demonstrated that the criminal justice system as a whole provides a substantial deterrent effect and criminal sentencing is surely an important element in that system. n191 However, deterrence is best considered a general justification for the Guidelines; deterrence provides little guidance on what specific rules are needed.

Problems quickly emerge if one tries to use deterrence theory to draft specific guideline provisions. Under deterrence theory, *severity* is only one of three factors that affect a sanction's deterrent value; *certainty* and *celerity* (or swiftness of punishment) are equally, if not more, important. n192 To determine what severity level is needed for any particular type of crime under this theory, we need data on the likelihood of detection, prosecution, and conviction for that type of crime, so that severity levels can be adjusted to reflect the probability of receiving any punishment at all. As described in Part I, the original Commission made serious efforts to develop guidelines using an "optimal penalties" approach, which takes into account all of these considerations. But as the Commission summarized the problem in explaining its turn to past practice data: "Those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime." n193 The absence of data ultimately led the Commission to reject the optimal penalties approach.

Deterrence research has not yet yielded findings that can inform the design of specific guideline provisions. Part of the problem is methodological: the influences on crime rates are so diverse that isolating the effect of sanction levels is often impossible, particularly given that federal law enforcement affects just a small fraction of the crimes reported in national statistics. But part of the problem with designing guidelines to deter may lie with the mechanisms of deterrence itself. People may simply be unaware of the sanctions. For some types of crimes, the incentives are so great or the compulsions so irresistible that no amount of threatened punishment will control the behavior. Research on *specific* deterrence--the effect of a sanction on the person who receives it--suggests that even offenders [*62] who receive harsher penalties are not appreciably deterred. For example, David Weisburd compared recidivism rates between federal white collar offenders who were similar in many respects, except that some received probation and others received imprisonment. n194 Weisburd found that there was no difference in the recidivism rates between the two groups. He concluded that if a deterrent effect could not be found with this group of offenders, who are generally considered the most rational and calculating, finding such an effect for other types of crime is unlikely. n195

Given the current state of deterrence research, the original Commission correctly concluded that there was no practical conflict between deterrence and the other purposes of punishment, particularly just desert. Indeed, if one disregards certainty and celerity and accepts two common-sense propositions--first, that the most serious crimes need the most deterrence, and second, that the more severe the punishment, the greater the deterrence--the distribution of sentences under both theories is identical: the most serious offenses require the most severe penalties. Several considerations lead us to conclude that just deserts is the better account of the Guidelines, however, as we describe in the next section.

*E. Just Desert*

At the top of the list of the statutory purposes of sentencing is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." n196 Congress further directed the Commission to consider "the nature and degree of the harm caused by the offense" n197 and to

"insure that the Guidelines reflect the fact that, in many cases, current sentences do not adequately reflect the seriousness of the offense." n198 The Commission took these directives very seriously and included "proportionality" along with "honesty" and "uniformity" in its discussion of the three fundamental objectives of the SRA and the Guidelines in Chapter One of the *Guidelines Manual*. n199

In this section, we first describe the components of offense seriousness: harm and culpability. We then examine in detail provisions of Chapters 2 and 3 that measure these two components. We conclude that harm is given the most attention by the Guidelines, but that culpability is considered to a limited extent, clearly [*63] establishing that modified just desert is the best account of the Guidelines as a whole.

*1. The Components of Offense Seriousness*

Proportionality requires that offenses be ranked according to their seriousness. The literature on just deserts provides a range of models for how this might be done, but philosophers have not reached consensus on which model is correct or appropriate. n200 Some have argued for a rights-oriented approach that correlates the quantum of punishment deserved to the rights of victims that were violated, and thus forfeited, by the offender. n201 Others claim that desert is based on subjective intuitions about the wrongfulness of various types of offenses, and that ranking them is simply a matter of examining community norms. n202 Much of the philosophical writing is simply not very clear about how to determine the amount of punishment deserved, which has led some to conclude that the principle of desert sets only broad outer limits to a range of permissible punishments. n203

The *Supplementary Report* and the structure of the Guidelines themselves suggest that the philosophy of Andrew von Hirsch again provided the closest model for the rules determining offense levels. n204 Von Hirsch has given the problem of proportionality and offense seriousness rankings more attention than any other writer and has reached some firm conclusions; for example, "ordinal" but not "cardinal" rankings are possible. n205 He analyzes the seriousness of offenses [*64] along two dimensions: "how much *harm* the conduct does, and how *culpable* the actor is for the harm." n206 These words are echoed in the discussion of the just desert principle in Chapter One of the *Guidelines Manual*. n207

Both harm and culpability can themselves be analyzed in several qualitatively different dimensions. "Harms" certainly include the actual harmful *consequences* of an offender's conduct. Others view harms as also including various types of *inherent wrongs*, such as the moral iniquity associated with the conduct independent of any actual effects. n208 For example, the deceit involved in a fraud or the violation of trust and duty involved in treason are inherently wrong regardless of their consequences. n209 "Culpability" refers to an offender's responsibility or blameworthiness for the criminal conduct and its harms. This raises issues of *causation*: "Did the offender's conduct cause the harmful consequences to a degree for which he should be held accountable?" It also raises issues of mens rea: "What state of mind accompanied the conduct (malicious, premeditated, intentional, negligent, etc.)?" n210

Clearly, the literature can support different flavors of just desert, depending on how these different components of harm and culpability are mixed and the importance attached to each. The formula:

*harmfulness of the offense conduct* x *culpability of the offender = seriousness of the crime*

is too simplistic, and additional theoretical development is needed. n211 But for our present purposes the "harms times culpability" n212 framework explains much of what the Commission has done in Chapters Two and Three.

*2. Harm is Central*

The importance of harm in the Guidelines' model of just desert is demonstrated [*65] by the very "cornerstone" of the Guidelines, section 1B1.3, i.e., the "relevant conduct" rule, which specifies the scope of conduct for which the defendant is to be held accountable in setting the offense level. n213 This scope includes the defendant's own "acts and omissions" and also the reasonably foreseeable conduct of accomplices. n214 Most important for our purposes, the accountable harm is not limited to the specified acts and omissions, but also includes "all harm that resulted from the acts and omissions." n215 Harm is defined as including "bodily injury, monetary loss, property damage and any resulting harm." n216 In some cases, harms risked but not realized are used to determine the offense level. n217

The rules in Chapter Two demonstrate how harm is used to assign offense levels to different types of crimes. Offenses that involve greater harms to victims or society in general receive higher "*base* offense levels," the starting point from which calculation of the "*final* offense levels" begins. n218 In all likelihood, the Commission's use of

past practice data to establish base offense levels in effect ranked different crimes in terms of their typical harmfulness. n219 These rankings, based on average sentences imposed by judges in the past, mirror to a great extent seriousness rankings made by the general public. n220 One reason that just desert provides such a powerful theory for sentencing is the considerable consensus that exists concerning which crimes are most harmful, and thus most serious.

The "specific offense characteristics" that adjust the base offense level for each type of crime are also focused largely on different types or degrees of harm that may be present in different cases. For example, in cases of aggravated assault, the sentence is enhanced by two levels where minimal bodily injury results, but by four where serious bodily injury results, and by six where permanent or life-threatening bodily injury results. n221 For fraud, theft, and tax offenses, the sentence is increased as the amount of loss that resulted from the offense increases. n222 Thus, [*66] the base offense level corresponds to the general harmfulness of the offense, while specific offense characteristics "fine-tune" the assessment to the particular circumstances of the case. Several special rules in the Guidelines are designed to avoid "double counting" of a harm in order to prevent an offense level from being driven disproportionately high. n223

The content and structure of the rules in Chapter Two reflect a dominant focus on assessing the harm resulting from an offense. Several rules in Chapter Three, such as those concerning cases with multiple counts of conviction, n224 are similarly concerned with ensuring that the actual harms caused by the crime, and not the way the crime was charged, determine the offense level. In all cases the goal is to achieve proportionate punishment, where more harm means greater punishment.

*3. Culpability Is Considered*

If harm were the only factor affecting offense levels, we might conclude that deterrence was the sole purpose of Chapters Two and Three. After all, strict liability for the harms resulting from a crime might provide incentives to avoid reckless illegal behavior. But the Guidelines modify punishment to take account of the particular defendant's responsibility for the crime. The SRA explicitly directs the Commission to consider whether sentences should reflect defendants' "mental and emotional conditions to the extent that such conditions mitigate the defendant's culpability. . . ." n225 The original Commission found culpability important to sentencing in a variety of ways. Most important is the adjustment for "role in the offense." n226 Sentences can be increased or decreased by about fifty percent depending on whether the offender was an organizer, leader, or supervisor of a group who engaged in criminal activity, or was only a minor or minimal participant. n227 The notes to the mitigating adjustment explains that "it is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." n228

The Guidelines also track statutory distinctions that differentiate among offenders of different culpability. For example, separate offense levels are applied for first degree murder (killing with malice aforethought), second degree murder (intentional [*67] killing without premeditation), and voluntary and involuntary manslaughter (killing in the heat of passion versus merely reckless or negligent killing). n229 Other Guidelines differentiate among "intentional" and "reckless" endangerment. n230

A concern with culpability appears in the Guidelines' treatment of attempts, intention, and causation. If harm alone determined offense level, mere attempts resulting in no harm might receive little if any punishment. But the Guidelines treat attempts as the equivalent of completed crimes in some cases, n231 and as the near-equivalent in others. n232 The Guidelines sometimes punish *intended* harms regardless of whether the harm actually occurred. n233 On the other hand, the Guidelines include a causation requirement that can limit culpability for some harms resulting from the crime. n234 Clearly, an offender's state of mind and responsibility for any resulting harms are relevant to offense level determinations under the Guidelines.

Finally, the Guidelines' departure provisions demonstrate that the Commission recognized that culpability should bear on the severity of punishment. Two culpability-based affirmative defenses to criminal liability--coercion and duress n235 and "diminished capacity," which reflects mental impairment not rising to the level of a complete insanity defense n236 --are encouraged grounds for departure under the Guidelines. Thus, a downward departure from the Guidelines may be warranted in order to provide a sentence that more accurately reflects the offender's culpability where the offender's conduct was the result, at least in part, of some threat or diminished capacity.

*F. The Best Account of the Rules as a Whole*

We believe that the analysis above demonstrates that modified just deserts [*68] provides the best account of the Guidelines as a whole. n237 While isolated aspects of the Guidelines appear anomalous by this account, no other theory can better explain the content of the specific guideline rules, or explain why the Guidelines do not consider factors relevant to different philosophies of sentencing. Modified just desert is a hybrid theory that is consistent with the SRA, and that was specifically discussed by the original Commission in the *Supplementary Report* issued with the initial Guidelines. Nothing done by subsequent Commissions changes this basic structure.

## IV. WHAT IS A PHILOSOPHY GOOD FOR?

In Part IV, we further explore the particular flavor of desert theory represented by the Guidelines and how recognition of this as the philosophy of the Guidelines can help explain some common complaints about them. We then discuss how recognition of the Guidelines' goals can improve the experience and quality of judging under the Guidelines and clear up some confusion in the jurisprudence of departures.

### *A. Guideline Criticism*

One of our aims in articulating the Guidelines' philosophy is to sharpen debate over their merits. The Guidelines are the subject of a large critical literature. Many commentators so favor judicial discretion that they disagree with the very idea of binding sentencing guidelines. But other commentators support the idea of guidelines per se but not the policy choices represented by these particular Guidelines. Articulating these policy choices can help provide a vocabulary for future debate over the direction of federal sentencing policy.

[*69] Philosophical critics of the Guidelines can be divided into two camps. In the first are those who fundamentally disagree that modified just desert is an appropriate sentencing policy. People in this camp may prefer policies focused more on utilitarian goals, such as deterrence or offender rehabilitation. Some may feel that the balance between just punishment and incapacitation represented by the current Guidelines' version of modified just desert should be tipped more in one direction or the other.

In the second camp are those critics who accept that modified just desert is an appropriate sentencing philosophy, but who believe that the Guidelines' implementation of it is flawed. Some may attack the Guidelines on empirical grounds and argue that certain types of offenses are more or less harmful than the offense levels assigned to them. The Commission itself has taken this approach in criticizing the mandatory minimum penalties associated with crack cocaine. Other critics will identify anomalies, inconsistencies, and disproportionalities and argue that the Guidelines are not as coherent as they could and should be. They seek to perfect the Guidelines' implementation of modified just desert, not to change it.

#### *1. Culpability Receives Relatively Little Weight*

An example of this latter kind of internal critique concerns the role of culpability under the Guidelines. As noted above, culpability is central to just desert theory, which defends punishment on the ground that offenders are autonomous moral agents who deserve the punishment they receive. n238 If offenders' actions are not fully voluntary, or if their actions are not a significant cause of the harm resulting from by the crime, or if they did not have a requisite guilty state of mind, then the justification for punishment weakens or disappears altogether, as demonstrated by the existence of coercion, duress, necessity, and insanity defenses.

While the Guidelines do consider culpability in several ways, critics have noted that culpability gets greater consideration in the criminal law and in just desert theory than it gets under the Guidelines. n239 Harm-based adjustments can increase a sentence from offense level six to forty-three, with corresponding imprisonment ranges from probation to life. Culpability-based adjustments, on the other hand, rarely contribute more than two to four levels, resulting in only about a fifty percent increase or decrease in the sentence. A case can be made that the Guidelines underappreciate the importance of culpability as a mitigating factor.

Such a case was made by Judge Jack Weinstein and Fred Bernstein in a policy [*70] critique of the Guidelines' approach to *mens rea* in drug sentencing. n240 They noted that *knowledge* that one is engaging in a criminal act is a prerequisite for criminal liability in most circumstances; for example, one can be convicted of possession of a machine gun only if one knows that the gun can be fired automatically. But under the Guidelines, sentences can be increased regardless of whether the offender had knowledge that an aggravating factor was present. A drug defendant can be sentenced for the full amount of drugs she actually carried into the country, even if some of the drugs had been hidden in her luggage without her knowledge. The defendant's state of mind regarding the aggravating circumstance is irrelevant. n241

Other critics have complained that the Guidelines ignore important aspects of offenders' culpability. Minor members of a large-scale conspiracy can be held accountable for substantial amounts of drugs that they neither owned nor profited from. n242 Economic hardship, drug addiction, a history of physical or sexual abuse, or a lack of guidance as a youth--for many, highly relevant to assessing an offender's culpability--are ignored by the Guidelines and even actively discouraged as grounds for departure. n243

In their concern to design a workable system and to minimize disparity, the original Commission clearly preferred objective factors, such as drug weight or dollar amount, to subjective ones, such as the offender's role or state of mind, which might be applied inconsistently. The result, however, is that important moral questions of culpability are relatively neglected, while more easily quantifiable issues of harm are elevated to a significance and exactitude beyond their worth. n244 Even former Commissioners have noted that requiring judges to determine the exact amount of drugs or monetary loss involved in an offense gives the [*71] Guidelines a false precision. n245

*2. The Drug Trafficking Guideline's Internal Incoherence*

A great deal of the dissatisfaction with the Guideline system can be traced to one particular guideline: section 2D1.1 concerning drug trafficking. n246 Commentators have argued that this guideline's purpose is unclear, and that it frequently results in lengthy and disproportionate prison terms, particularly for low-level, non-violent drug offenders. n247 Considerable criticism is leveled at the guideline's emphasis on drug quantity, which along with drug type is the primary determinant of sentences under the guideline. n248 We agree that the role of quantity is problematic, but not because the purpose of the drug trafficking guideline is unclear. The purpose of this guideline is the same as other Chapter Two guidelines: proportionate punishment based on the harm of the offense and the culpability of the offender. The confusion arises because both Congress and the Commission have said contradictory things about how drug quantity is related to harm and culpability.

Quantity can be a measure of a drug trafficking crime's *harm*, just as the amount of toxic substance released into a river can be a measure of an environmental crime's harm. The seriousness of different drug crimes then depends on the harmfulness of the drugs that were distributed and the amount for which each offender was responsible. This interpretation is the only way to make sense of the Drug Quantity Table's seventeen different quantity levels and incremental punishment increases. But quantity can also be a rough measure of an offender's *culpability* to the extent it reflects the offender's position within the drug distribution network. In theory, leaders of drug distribution operations will be linked to large amounts, while underlings will be linked only to smaller amounts reflecting [*72] their position as wholesale distributer, street-level retail dealer, etc. n249 Congress appears to have understood the relation between quantity and offense seriousness in this way. The legislative history surrounding the Anti-Drug Abuse Act of 1986 describes the quantities tied to ten-year mandatory minimum penalties as typical of "kingpins," "masterminds," those "who are responsible for creating and delivering very large quantities." The quantities tied to five-year minimum penalties were thought to be typical of "managers of the retail traffic," "the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities." n250

Having two different ways that quantity might measure a drug crime's seriousness is not better than having one. With no consistent understanding of the reasoning behind the rule, judges are left just to weigh the drugs and mechanically compute the offense level. There is no way to evaluate the guideline or to recognize when it fails to produce the desired result. We explore some of the implications of the drug guideline's multiple rationales in a later article. n251 For now, we note only that, while the function of quantity in every guideline is unclear, both possibilities are consistent with a modified just desert interpretation of the Guidelines as a whole.

*3. Congressional Directives and Incoherence*

While some of the Commission's own actions are inconsistent with a modified just desert philosophy, we believe the majority of anomalies in the Guidelines can be traced to directives from Congress that the Commission was legally or politically bound to respect and incorporate into the Guidelines' structure. The example of "ecstasy" was discussed earlier, but many more could be offered. Because Congress is often motivated by an immediate public concern, it sometimes disregards the proportionality between penalties for the "crime of the day" and other crimes. n252 Harsh sanctions may be designed to deter a growing epidemic, but a reluctance to appear "soft on crime" makes it difficult to lower sentences even when the epidemic has passed or experience has proved the sanctions unfair or ineffective.

[*73] Aspects of the Chapter Four rules that are inconsistent with risk prediction can also be traced to congressional directives. Prominent among these are the special treatment of drug trafficking offenses under the Career Criminal Guideline § 4B1.1, which follows *28 U.S.C. § 994*(h) in requiring punishment "at or near the

maximum term authorized" for offenders with two prior adult convictions for either drug trafficking or violent offenses. Emphasis on prior violent convictions might reflect a special concern to incapacitate offenders with a high risk of future violence, but why are drug trafficking offenses also given this special treatment? There is no empirical evidence that prior drug trafficking convictions are better predictors of future offending than other types of convictions. n253 Nor is there reason to believe that incapacitation of drug traffickers is a sound crime control policy, since most incarcerated offenders are readily replaced by others willing to satisfy the unmet demand for drugs. n254 The best explanation, which is no justification, is that a "war on drugs" mentality led to the harsher treatment of drug trafficking offenses apart from any reason grounded in the incapacitation theory underlying the rest of Chapter Four.

Congressional directives like these put both the Commission and judges in an untenable position. On the one hand, the SRA was intended to establish a comprehensive and consistent sentencing philosophy for the federal courts. On the other hand, specific directives often cannot be reconciled with the Guidelines' overall philosophy and with Congress's own goals for sentencing reform. We do not have an answer to this dilemma apart from a wish that Congress would remain true to the SRA. While the Commission has no choice but to comply with the directives, judges can be cognizant of the genesis of some of the resulting anomalies and factor it into their understanding of what philosophy best fits the Guidelines as a whole.

*B. Guideline Interpretation and Application*

Identifying the Guidelines' philosophy can help judges interpret ambiguous provisions and apply the Guidelines properly. Interpretation becomes a matter of instrumental reasoning rather than a mechanical application of categorical rules. Given the unavoidable vagueness of language, phrases such as "the defendant had at least two prior felony convictions" n255 turn out to be debatable in particular situations. Understanding the reasons behind the rule helps show how to apply the rule in a given situation.

Interestingly, unlike the case law surrounding departures, which for reasons [*74] discussed below has failed to contribute to development of a shared philosophy of federal sentencing, cases involving application of vague guideline provisions have generated significant discussions of the purposes of the Guidelines. n256 An excellent example is *United States v. Leviner*, n257 in which Judge Nancy Gertner struggled with the ambiguous phrase concerning prior convictions cited above. Guideline § 2K2.1 follows *18 U.S.C. § 922*(g) in requiring heightened penalties for repeat felons who illegally possess a firearm. In *Leviner*, the question was whether a conviction received *after* the illegal firearm possession, but *before* the sentencing for that possession, should be counted as a "prior conviction."

Judge Gertner recognized that "while the Sentencing Guidelines were designed to eliminate unwarranted disparities in sentencing, and constrain a judge's discretion, they are not to be applied mechanistically, wholly ignoring fairness, logic, and the underlying statutory scheme." n258 This led her to inquire into the language and the structure of the Guidelines and the statutes from which they were derived. The distinctions drawn by the firearms guideline among offenders with different numbers and types of weapons, as well as different criminal records, all relate to the offender's *culpability at the time of the illegal firearm possession*. "These enhancements make sense . . . only insofar as they apply to the defendant's status at the time of the possession of the firearm." Judge Gertner concluded that:

> The structure of the Guidelines reinforces this conclusion: While Chapter 2, "Offense Conduct," focuses on the offense, Chapter 4, "Criminal History and Criminal Livelihood," focuses on the offender. Each chapter promotes a different sentencing purpose or mix of purposes specified in *18 U.S.C. § 3553*(a)(2). While Chapter 2 reflects the goals of retribution, and just deserts, Chapter 4 places a greater emphasis on rehabilitation and recidivism. n259

The best reading of the phrase "had at least two prior felony convictions" in section 2K2.1 was that the defendant must have had the convictions at the time of the illegal firearm possession. This would increase his culpability and require a proportionately higher sentence.

Purpose-oriented analysis has been used by other courts and by the Commission to resolve circuit conflicts over the interpretation of vague guideline phrases. n260 [*75] We believe purpose-oriented analysis could help clarify other provisions but we do not want to overstate our claim. Sometimes understanding a rule's purpose does not resolve whether applying the rule in a given situation would be effective. As a general matter, however, the more the

Commission says about the reasons for its rules, the better courts will be equipped to use those reasons to apply the rules intelligently. n261

*C. Guideline Departure*

The Guidelines are binding rules of law, but they are unusual in that a provision for departing from them is built into the rules themselves. Congress recognized that the Commission could not anticipate every circumstance bearing on appropriate sentences and directed courts to depart if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that *should* result in a sentence different from that described." n262 The Commission also highlighted this *presumptive* nature of the Guideline rules in its discussion of departures in Chapter One of the *Guidelines Manual*:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases *embodying the conduct that each guideline describes*. When a court finds an atypical case, one to which a particular guideline *linguistically applies* but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. n263

These famous passages have generated a thousand sentencing opinions. But the "jurisprudence of departures," such as it is, is widely recognized as unsatisfactory. n264

We have italicized different parts of the statute and the commentary because we [*76] believe departure jurisprudence needs to be refocused. Discussion of departures has been cast largely as a debate between those who think there are too few or too many; between those who favor more judicial "discretion" and those who are concerned to minimize it in the service of sentencing "uniformity." But the analysis of discretion in much of the case law and academic literature has been shallow and misleading, n265 and the conflict between Commission "hegemony" and judicial authority has been exaggerated. n266

The important question is not how many departures there should be, but under what conditions departure is appropriate. Specifying those conditions has proven difficult and has been hampered by a misplaced focus on aggravating or mitigating circumstances that were "not adequately taken into consideration" by the Sentencing Commission and by an uninformative deployment of the "heartland" concept in departure analysis. Without recognition that the Guidelines have purposes, we have lacked the basis for a principled jurisprudence of departure. We need to revisit the *functions* of departures as envisioned in the SRA and by the original Commission so that responsibility for the evolution of the Guidelines can be divided properly between the courts and the Commission. These functions include: (1) allowing correction of sentences if mechanical application of a guideline would fail to achieve its purpose; n267 and (2) providing feedback so that "the Commission, over time, will be able to refine the Guidelines." n268

*1. What Kind of Rules?*

The SRA and the Guidelines are binding. But the Guideline rules are *not* binding in the usual sense that judges must apply them whenever a case clearly falls within their linguistic categories. The departure power requires judges to look past dictionary definitions and to inquire whether there is something about the case that *should* result in a different sentence. We believe the most important reason for departure is that the Guidelines' own purposes would be defeated by imposing the sentence that the rules *presumptively* recommend.

Because the departure power is built into the system, the Guidelines are best understood as "rules of thumb" that direct judges' attention to considerations that the Commission has found commonly relevant to achieving the Guidelines' purposes for each type of case. The Guidelines are not foolproof and their lists of factors are not exhaustive. This "proxy" quality of the Guidelines is readily apparent in some provisions. For example, the loss table at U.S.S.G. § 2B1.1 provides for offense level increases in economic crimes based on the amount of [*77] pecuniary harm caused by the offense. But the commentary explicitly recognizes that there may be cases where monetary loss "understates" or "overstates the seriousness of the offense" and departure is thus appropriate. n269 Loss is a proxy for offense seriousness and when it mismeasures seriousness judges should depart.

The encouraged departures found throughout the *Guidelines Manual* demonstrate that the Commission recognized that the Guidelines can go wrong if applied too literally. n270 Studying these encouraged departures demonstrates two crucial points: (1) the underlying rationale for the Guidelines is modified just desert, and (2) the Commission encourages judges to depart from the literal Guidelines if necessary to implement modified just desert

more fairly. Almost all of the encouraged departures in Chapters Two and Three identify ways that the offense level might over- or under-measure either the harm caused by the offense, n271 or the offender's culpability for that harm, n272 the classic components of offense seriousness in just desert theory. In Chapter Four, departures are encouraged if the criminal history score fails to "adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." n273 Clearly, the Commission understands that departure is sometimes needed to ensure proportionate punishment and to incapacitate offenders according to their risk of recidivism.

[*78] The encouraged departures explicitly listed in some guidelines can be seen as specific examples of a broad category of encouraged departure applicable to all the guidelines: *departure in pursuit of the Guidelines' own purposes*. (We wish we could simply call these "purposeful departures," but this phrase has been adopted by those who advocate departure in pursuit of each judge's *personal* views of what purposes are important in a case, in the hope that a common law of departures might emerge. n274) No ground for departure is more important to the rational evolution of the Guideline system and the reduction of true sentencing disparity. The factors justifying departure on this general ground will sometimes be unusual aggravating or mitigating circumstances as they are commonly understood. But sometimes they will be circumstances that simply make application of the presumptive guideline unfair or ineffective, as when a proxy measure for harm or culpability fails to reliably track offense seriousness.

Despite the Commission's encouragement of departure in pursuit of the Guidelines' purposes, only three of the top ten reasons for departure in 2000 appear to be in this category. Several of the most common--"pursuant to a plea agreement," "fast track," or "deportation"--have no clear relation to the purposes of sentencing or the reduction of disparity. Several others, such as "general mitigating circumstances" or "not representative of the heartland" are so general as to be uninformative. n275

Particularly disturbing is rigid adherence to the literal Guidelines when it causes serious injustice and when departure in pursuit of the Guidelines' purposes would promote proportionality and reduce unwarranted disparity. The Drug Quantity Table is a leading culprit here, because experience has shown it results in lengthy incarceration for many low-level offenders n276 (and at times lenient treatment of serious traffickers). Yet judges appear reluctant to depart from it when the weight of the drugs is undisputed, as if drug amount were a foolproof measure of offense seriousness. The case law reveals few opinions in which courts have justified departure by reasoning that drug quantity over- or understates the seriousness of the offense. An exception is *United States v. Genao*, n277 in which Judge John S. Martin, Jr., a close observer of departure jurisprudence, reasoned that the aggregation of many small sales over many months resulted in a total amount that [*79] overstated the culpability of the defendant, who was merely a street-level dealer. Citing legislative history that the sentence the defendant would receive under literal application of the rules was intended for "stereotypical" drug dealers who profited greatly from their crimes, Judge Martin departed downward to impose a sentence that better reflected the defendant's culpability.

What accounts for the reluctance of most sentencing courts to depart in similar circumstances and for the appellate courts' failure to encourage it? Some reasons are specific to drug sentencing. Unlike the explicit encouragement to depart for economic crimes when loss over- or understates the seriousness of the offense, the Commission offers no similar encouragement for drug crimes. n278 This may reflect confusion about how drug quantity measures seriousness, as discussed above, which makes it harder to recognize when quantity goes wrong. n279 (Ironically, the more incoherent the reasons underlying a guideline, the more rigidly it may be applied, even though these are the guidelines most in need of rationalizing interpretation.) In addition, the Drug Quantity Table is linked to the mandatory minimum statutes, which may encourage rigidity even in those parts of the table extending above and between the five- and ten-year statutory thresholds. If these problems were solved by amending the commentary to section 2D1.1 to explain how quantity is intended to measure offense seriousness and to encourage departure when quantity misses its mark, sentencing under the guideline could be much less mechanical and the case law justifying and reviewing departures from the guideline could be much more illuminating. n280

Two other reasons may help explain why courts have largely failed to develop a more informative and purposeful departure jurisprudence. First, judges may find alternative ways to achieve just sentences, through acceptance of plea bargains that understate the true drug quantity or other facts, n281 through expansive use of [*80] departures for substantial assistance, n282 or other forms of "hidden departure" or guideline circumvention. n283 While these methods may result in greater fairness in the case at hand, they can also introduce disparity and impede development of a principled departure jurisprudence. n284

Finally, the Guidelines have been applied rigidly because departure law's analytical framework does a poor job of identifying when departure is warranted. Other commentators have noted the misplaced fixation on the standard of review, the "adequacy" of the Commission's consideration of "forbidden," "discouraged," or "unmentioned" factors, and above all, the incoherence of departure law's central concept: the guideline's "heartland."

*2. What Kind of "Heartland"?*

The first step in deciding whether to depart, according to the Supreme Court in *United States v. Koon*, is to decide whether the case falls outside the heartland of the applicable guideline. n285 But commentators are in wide agreement that the term raises so many unanswerable questions and has been used in so many different ways that it provides little guidance. n286 As a result, the circuits vary significantly in their rates of departure and in the circumstances they recognize as warranting departure. n287 There is little sense of an emerging common law of sentencing that will reconcile these differences.

At least two senses of "heartland"--which we might call "statistical" and "intentional"--were discernable in the *Koon* decision and have continued to dominate the case law and commentary. n288 To identify the statistical heartland, judges are told to ask if the case is "atypical," "unusual," or "outside the norm." Departure factors are supposed to be extreme or rare features of the case that the Commission did not anticipate or adequately consider. District judges are said to [*81] be in a special position to assess this heartland because they see more offenders and can develop a better sense of the typical case. Circuit judges review whether the departure grounds are legally permissible, although the circuits vary in how they do this and the amount of deference they show. n289

On close inspection this sense of heartland begins to look dubious. Do we really suppose that district judges see enough civil rights, environmental, or tax cases to develop a sense of what the "typical" case looks like? n290 What is the heartland of the Guidelines that are applied to, say, fewer than five cases a year nationwide? Do we think that different judges will develop a common perception of the typical case, even if they sit in different districts? Does the typical case sentenced under a guideline remain constant over time, or does it change as Department of Justice priorities change? Does the heartland concept apply only to features of the offense, or is there a heartland offender as well? Are all women offenders outside the heartland because most offenders are male? n291

Worst of all, it is quite possible for the statistically typical case sentenced under a guideline to be different *from the type of case for which the guideline was written*. For example, the Commission reported in 1997 that a substantial number of cases sentenced under § 2S1.1, Money Laundering, were not the type of case for which the guideline had been intended: "money laundering [activities] which are essential to the operation of organized crime." n292 Instead, they were run-of-the-mill fraud cases that involved no more "money laundering" than depositing the illicit proceeds of the crime in a bank. Similarly, the Commission has reported that, due to charge reductions and other forms of plea bargaining, most cases sentenced under the "statutory rape" guideline, § 2A3.2, Sexual Abuse of a Minor, are actually sexual assaults involving coercion, threats, and even violence. n293 The background commentary to the guideline, however, explains that the section was intended to apply "to consensual sexual acts . . . that would be lawful but for the age of the victim." n294 Should a judge apply the guideline, with its relatively low offense level, n295 to an aggravated sexual assault on the grounds that this is the typical case sentenced under the guideline?

Of course not. An aggravated sexual assault is outside the intended heartland of [*82] the statutory rape guideline. Thus, an upward departure is appropriate in "statutory rape" cases involving force, just as a downward departure is appropriate in "money laundering" cases where the offender's conduct involved nothing more serious than a simple fraud. Defining the heartland statistically instead of intentionally wrests control of the meaning of a guideline away from its drafters and subjects it to the potentially arbitrary flux of charging decisions, inter-district variations, shifting crime patterns, and changing law enforcement priorities.

The best understanding of a guideline's heartland are the cases to which it *should* apply to achieve *the guideline's* purpose. The leading examples of courts adopting this approach with which we are familiar come from money laundering cases sentenced prior to the recent amendment of that guideline. n296 In *United States v. Ferrouillet*, Judge Edith Brown Clement explained that: "In examining whether a case falls outside of the heartland, a court should ask what type of case a particular guideline is intended to cover," using legislative history, guideline commentary, and other material that can shed light on the purpose of the guideline. n297 The Second Circuit conducted a similar analysis to conclude that "although the appellants' conduct falls within the words of the Money Laundering Act, the terms of the relevant commentary shows that this conduct lies well beyond the 'heartland' or the

'norm.'" n298 Here are courts explicitly linking departure in pursuit of the Guidelines' purposes to an understanding of the heartland that embodies those purposes.

Would adoption of this understanding of the heartland be enough to refocus departure jurisprudence? The rough sketch outlined here hardly provides an answer. We need experience in a wide variety of cases with sentencing judges departing, appellate judges reviewing, and the Sentencing Commission and other commentators studying the results. But we know already that the present system has disappointed many observers who hoped that the Guidelines might foster a more collaborative and evolutionary common law of sentencing. They have proposed enhancing judicial involvement by either requiring n299 or encouraging n300 individual judges to determine which purposes they believe are important in each case; by subjecting the Commission to review under the Administrative Procedures Act, either by amending the SRA n301 or by interpreting the departure standard [*83] to support similar review; n302 or by replacing the Guidelines altogether with a common law system of wide sentencing discretion with appellate review. n303 Despite their authors' best intentions, and their intellectual merit, none of these proposals has been notably successful.

Perhaps a different place to begin is to encourage judges to understand the Guidelines as rules that have reasons and to use instrumental legal reasoning, written sentencing opinions interpreting the Guidelines and justifying departure when appropriate, and appellate and Commission review of those opinions, to gradually refine a single, shared philosophy of federal sentencing.

*3. Reducing True Disparity Through Departure*

One of the "mysteries" of the Guidelines experience is that many appellate courts have opted to enforce them more rigidly than anyone predicted or than the relevant statutes appear to require. n304 Part of the solution to the mystery may be found in what Stith and Cabranes have termed the "battle cry of disparity." n305 The overriding emphasis on reducing unwarranted variations among similarly situated offenders made both the Sentencing Commission and many appellate and district judges hyper-sensitive to the possibility that departure from the Guidelines could re-introduce the disparity the SRA was designed to eliminate.

The equation of departure with unbridled judicial discretion to pursue whatever purposes the judge thinks fit naturally raises the specter of disparity. But only a shallow conception of discretion takes it to be unbridled and only a shallow conception of disparity supports rigid application of the Guidelines without regard to their purposes. As the Commission n306 and others have observed, n307 applying a rule to offenders who are similar in terms of the rule's linguistic categories, but differ in important ways relevant to the rule's purpose, leads to "unwarranted uniformity," which is really just another type of unwarranted disparity. Far from creating disparity, departure in these circumstances *avoids* true disparity. n308 There [*84] is no justice in applying the Guidelines blindly in cases where the presumptive sentence is unfair and ineffective. Treating two offenders the same because the rules say so, even though they differ markedly in their culpability, in the harm caused by their crime, or in their risk of recidivism, is to elevate the rules above reason.

V. CONCLUSION

The advent of the Sentencing Guidelines over fifteen years ago raised difficult dilemmas for both judges and the Sentencing Commission. As the original Commission quickly discovered, reaching agreement on the purposes of punishment is difficult, because sentencing implicates one's deepest convictions about human nature, the causes of crime, and the proper role of criminal justice. Yet agreement on sentencing priorities, and establishment of a consistent sentencing philosophy for the entire federal courts, is precisely what the SRA requires in its quest to eliminate unwarranted disparity. To implement the SRA in good faith, we must search for common ground.

The sentencing system put in place by the SRA is a unique blend of centralized authority, presumptive rules, appellate review, and an open invitation to sentencing judges to examine the adequacy of those rules when interpreting them, applying them, and, when appropriate, departing from them. The idea was of an evolving system, a continuing dialogue among the Commission and the courts that would lead to refinement of the rules in pursuit of shared goals. Few commentators believe this ideal has been realized. A new jurisprudence has developed interpreting the Guidelines and describing the circumstances when departure is warranted, but that jurisprudence has been plagued by uncertainty and continuing disagreement as to the reasons behind the rules. We believe this uncertainty threatens sentencing reform.

The Commission's initial contention that the Guidelines are modeled after no particular philosophy certainly did not help matters. But neither has the reluctance of judges or commentators to accept that, if a common philosophy is

to be found, the best place to look is in the policies implicit in the Guideline rules themselves. We have argued that an interpretive tool is available for this project and that it clearly demonstrates that modified just desert is the best understanding of what the federal sentencing Guidelines are trying to do. Judges applying this understanding should seek to ensure that sentences are proportionate to the seriousness of the offense and that offenders are incapacitated for periods appropriate to their risk.

Recognition of the Guidelines' philosophy would in some ways *constrain* judges to interpret and apply the guidelines consistent with that philosophy. But in [*85] an important respect, we believe it would *liberate* judges from the worst of the Guideline rules: those that are poorly crafted for achieving the Guidelines' own purposes. Departure in these cases, and explanation of how the Guidelines miss their mark, would provide crucial feedback to the Commission for refinement of the rules. Departure in pursuit of the Guidelines' own purposes is a way for judges to participate in the evolution of sentencing law.

As courts recognize, "sentencing is probably the most difficult task faced by a federal district judge," n309 and imposing a sentence "probably the single most important duty." n310 We have offered an approach to this awesome responsibility that we believe would be more satisfying than mechanical application of the Guideline rules while remaining faithful to the new role of judges under the SRA. By coming to a shared understanding of the reason behind the rules, sentencing reform's worthy but deceptively simple goal--equal treatment under law--can be realized.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSentencingAppealsProportionality & Reasonableness ReviewCriminal Law & ProcedureSentencingGuidelinesGeneral OverviewCriminal Law & ProcedureSentencingProportionality

**FOOTNOTES:**

n1 S. REP. NO. 98-225, at 39 (1983).

n2 *See id.* For a particularly detailed discussion of the legislative history underlying the Guidelines and the creation of the United States Sentencing Commission (the "Commission"), 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, 224 (1993).*

n3 S. REP. NO. 98-225, at 59.

n4 The Commission was created by the SRA as an independent agency within the judicial branch of government. *28 U.S.C. § 991* (2002). The Commission consists of seven voting members, appointed by the President and confirmed by the Senate, and two ex-officio members. No more than four of the voting commissioners can be from the same political party and at least three must be federal judges. *Id.*

n5 The SRA directs the Commission to establish sentencing policies that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18 United States Code." *28 U.S.C. § 991*(b)(1)(A) (2002). These include the need for the sentence imposed

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Tensions among these purposes are discussed *infra* Part I.B.2.

n6 We use the phrases "philosophy of punishment" and "purposes of sentencing" interchangeably in this paper, although in some contexts they might be distinguished. Compared to purposes of sentencing, philosophy of punishment implies a more fully-rationalized theory of the moral justification of criminal sanctions. But the purposes, either alone or in combination, form part of every philosophy of punishment. *See infra* Part II.C.1 (discussing hybrid theories). The four purposes found in the federal statute above are simply cast at a lower level of abstraction than the theories of punishment found in the philosophical literature. *28 U.S.C. § 991*(b)(1)(A) (2002). The statutory purposes can be categorized into two general philosophies. The first is just punishment, sometimes called "just desert" or retribution, which is the criteria of justification for deontological theories. These trace their roots to the philosophy of Immanuel Kant (*see The Metaphysics of Morals, in* IMMANUEL KANT: POLITICAL WRITINGS 131, 156 (Hans Reiss ed. & H. B. Nisbet trans., 1991) or to the biblical *lex talionis* ("life for life . . . eye for eye, tooth for tooth . . ."). *Exodus* 21:23,24 (King James). The second general philosophy is utilitarianism. Deterrence, incapacitation, and rehabilitation are all utilitarian crime-control measures tracing their philosophical roots to Jeremy Bentham. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (discussing a variety of legal and moral arguments, e.g., principles of utility, as they apply to and influence lawmaking). In the workaday world of criminal sentencing, these subtleties can be largely avoided and the phrases "philosophy of punishment" and "purposes of sentencing" can safely be used interchangeably.

n7 *See, e.g., United States v. Walker, 202 F.3d 181, 182 n.1 (3d Cir. 2000)* (criticizing Guidelines for being "Internal Revenue Code-like" and noting "courts' (and others') frustrations with the Guidelines' overly mechanical characteristics."); Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1247, 1255 (1997)* (describing judges' roles in sentencing as offering "limited opportunity for judicial reasoning" and being "largely limited to factual determinations and rudimentary arithmetic operations").

n8 At least one federal judge has resigned the bench, saying that the Guidelines "dehumanized the sentencing process" and transformed it into a "numbers game." *See* Alan Abrahamson, *U.S. Judge To Quit; Cites Sentencing Guidelines*, L.A. TIMES, Sept. 27, 1990, at A3 (explaining Judge J. Lawrence Irving's decision to step down from bench in response to lack of judicial discretion within rigid Guidelines).

n9 *18 U.S.C. § 3553*(b) (2002).

n10 UNITED STATES SENTENCING COMMISSION (hereinafter U.S.S.C.), 2002 GUIDELINES MANUAL ch. 1, pt. A.3 (describing Guidelines as "but the first step in an evolutionary process").

n11 *Id.* at 6.

n12 *United States v. Blarek, 7 F. Supp. 2d 192, 204 (E.D.N.Y. 1998)* (enhancing punishment of money laundering defendants based on knowledge, evidence, funds gained by defendants, and supervisory role of defendants but allowing downward departure in light of fact that defendants were homosexual lovers vulnerable to prison abuse and because one defendant was HIV-positive); *see also United States v. K., 160 F. Supp. 2d 421, 431 (E.D.N.Y. 2001)* (discussing departure in light of prison overcrowding).

n13 *See generally* Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 ALB. L. REV. 1 (1987)* (encouraging departure and use of alternatives to imprisonment to avoid mechanical sentencing).

n14 *United States v. Frazier, 979 F.2d 1227, 1231 (7th Cir. 1992)* (internal citation omitted) (vacating sentence of defendant and remanding for resentence after judge departed downward in manner inconsistent with Guidelines).

n15 For a review of preguideline research, see Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity, 90 J. CRIM. L. & CRIMINOLOGY 239, 251-54 (1999)* (finding that studies demonstrated some judges to be more lenient than others based on philosophical principles).

n16 *Id.; see also* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines, 42 J.L. & ECON. 271, 303-04 (1999).*

n17 Some judges, sometimes with the acquiescence of prosecutors, have found mechanisms to ameliorate sentences they view as too harsh, particularly in the area of drug trafficking. But some of these mechanisms undermine the openness and legitimacy of the sentencing system. *See* HON. JOSEPH F. WEIS, JR. ET AL., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) (reporting evasion and manipulation of the Guidelines through hidden plea bargaining). Because these mechanisms are not used uniformly, they are very likely resulting in the re-emergence of disparity from region to region. Frank O. Bowman & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1050 (2001)* [hereinafter *Quiet Rebellion I*] (explaining that the many "discretionary choices [of prosecutors] represent evasions of the formal constraints of the Guidelines and federal sentencing statutes" and arguing that "such evasions might well impair one of the Guidelines' primary objectives, that of eliminating unjustified sentencing disparity"); Frank O. Bowman & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level, 87 IOWA L. REV. 477, 512-25 (2002)* [hereinafter *Quiet Rebellion II*] (cataloging various discretionary and quasi-discretionary mechanisms of sentence manipulation used to ameliorate sentences viewed as too harsh); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the* Post-Mistretta *Period, 91 NW. U. L. REV. 1284, 1289 (1997)* (describing empirical research undertaken "to investigate the interrelationship between charging and plea negotiation practices and the Guidelines system").

n18 *See* Richard Frase, *Sentencing Principles in Theory and Practice, 22 CRIME & JUST. 363, 430 (1997)* (describing Minnesota's guidelines as implementing a modification of just desert best captured by Norval Morris's theory of "limiting retributivism"); John Kramer, *Offender Characteristics and the Purposes of Sentencing, 9 FED. SENT. REP. 127, 130 (1996)* (characterizing Pennsylvania's guidelines as implementing a modified just desert philosophy). *See generally* Neal B. Kauder et al., *Sentencing Commission Profiles,* NAT'L CENTER FOR STATE COURTS (1997) (describing broad outline of individual state guideline systems).

n19 *See infra* Part IV (discussing problems with current departure jurisprudence). *See generally* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 BUFF. CRIM. L. REV. 723 (1999)* (demonstrating ambiguity of the "heartland" concept and arguing that departure jurisprudence is incoherent).

n20 A recent suggestion for improving departure jurisprudence can be found in Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines, 76 NOTRE DAME L. REV. 21 (2000)* [hereinafter Berman, *Balanced & Purposeful*] (arguing generally that judges should consider all four statutory purposes and make reasoned departures when appropriate); Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking, 11 STAN. L. & POL'Y REV. 93, 94 (1999)* [hereinafter Berman, *Common Law*] (arguing that common law of departures could eventually emerge from appellate review of reasoned departures).

n21 The penal theory of just deserts is based on the premise that the severity of punishment should be proportional to the seriousness of the crime it punishes. Unlike forward-looking utilitarian theories which emphasize crime control through incapacitation, deterrence, or offender rehabilitation, just deserts focuses on the offender's past conduct and seeks to do justice for victims and society by repaying or balancing the harm and wrong caused by the offender's crime. *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); RICHARD SINGER, JUST DESERTS (1979).

n22 Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?, 27 AM. CRIM. L. REV. 367, 371 (1989).* For a response to Professor von Hirsch from an original Commissioner, see Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 914 (1990)* (describing Commission consideration of sentencing philosophies and concluding that "theoretical orthodoxy to a pure or even hybrid model would not further the debate, but in fact would hinder the progress of discussion by virtue of its artificially induced constraints").

n23 Marc Miller, *Purposes at Sentencing, 66 S. CAL. L. REV. 413, 419 (1992).*

n24 *See, e.g.*, Albert W. Alschuler, *Departures and Plea Agreements under the Sentencing Guidelines, 117 F.R.D. 459, 467 (1988)* (criticizing "muddled methodology" of the Guidelines).

n25 *See, e.g., United States v. Blarek, 7 F. Supp. 2d 192, 203 (E.D.N.Y. 1998)* (asserting Commission's premise--that it need not choose a philosophy of sentencing as a practical matter--is flawed).

n26 *See Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18121-18132 (1987), reprinted in 41 CRIM. L. REP. 3174-86 (1987)* (stating that "of all the goals of the [SRA], it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines"); Paula Yost, *Sentencing Panel Member Resigns over Research*, WASH. POST, Aug. 23, 1989, at A25 (reporting that Commissioner Michael K. Block resigned on August 22, 1989, "over what he said is a lack of commitment by commissioners to base decisions on research and scientific data when amending sentencing guidelines").

n27 The Guidelines became effective November 1, 1987. Many courts ruled that the SRA was unconstitutional and delayed implementing the new regime. The Guidelines became effective nationwide after the U.S. Supreme Court ruled the SRA constitutional in January 1989 in *United States v. Mistretta, 488 U.S. 361 (1989).*

n28 *See* UNITED STATES SENTENCING GUIDELINES MANUAL app. C (Nov. 2000) [hereinafter U.S.S.G.].

n29 *See, e.g.*, Michael Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments, 1 FED. SENT. REP. 451 (1989)* (opining that some of the substantive amendments are unwarranted, and that, moreover, Commission's process is hindering rational policymaking).

n30 *See* Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M.* (Post-Mistretta): *Sunshine or Sunset?, 27 AM. CRIM. L. REV. 289, 318-23 (1989)* (discussing perceived problems of political expediency and disarray of research activities with respect to amendments); Jeffery S. Parker, *Rules Without . . .: Some Critical Reflections on the Federal Corporate Sentencing Guidelines, 71 WASH. U. L.Q. 397, 399, 401-26 (1993)* (critiquing perceived lack of rationality underlying sentencing guidelines for organizations). *See generally* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 CAL. L. REV. 1, 89 (1991)* (arguing that "courts should make more

aggressive use of their departure power to extract proper explanations from the Commission regarding controversial guidelines").

n31 KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 56 (1998) (providing an explanation of how federal sentencing works and arguing that judges should be freed from Guidelines' rigid constraints).

n32 Congress began enacting directives for the Commission in Pub. L. 102-141, Title VI, § 632, 105 Stat. 876 (1991). The long list of subsequent directives are collected following *28 U.S.C. § 994* (2002). The Commission expressed its preference for general directives in lieu of specific directives or mandatory minimum penalty statutes in U.S.S.C., MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter the MANDATORY MINIMUM REPORT].

n33 *See* Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106-310, Div. B, Title XXXVI, § 3663, Stat. 1241, 1242-43 (2000).

n34 *See* U.S.S.G. app. C, amend. 609 (increasing drug equivalency table for MDMA (a.k.a. ecstasy) from one gram of MDMA equaling thirty-five grams of marihuana, to one gram of MDMA equaling 500 grams of marihuana for purposes of sentencing under U.S.S.G. § 2D1.1); Press Release, U.S.S.C., *Sentencing Commission Increases Penalties for High-Dollar Fraud Offenders, Sexual Predators, and Ecstasy Traffickers, available at* http://www.ussc.gov/press/April2001release.htm (June 7, 2001) (stating that "new amendment will increase sentences for trafficking 800 pills of ecstasy by 300 percent, from fifteen months to five years. It increases the penalties for trafficking 8,000 pills by almost 200 percent, from forty-one months to ten years"). The amendment became effective on an emergency basis on May 1, 2001, and permanently on November 1, 2001.

n35 *See 18 U.S.C. § 841* (2002) (mandatory minimums for trafficking various quantities of drugs); *18 U.S.C. § 924*(c) (2002) (mandatory minimums for using, carrying, or possessing firearms in furtherance of a drug trafficking or violent crime). Statutory penalties are supreme over the Guidelines so if the two penalty structures conflict, the mandatory minimum penalties "trump" the Guidelines and control the sentence. Problems created by the interaction of the mandatory minimum penalty statutes and the sentencing Guidelines are discussed in the MANDATORY MINIMUM REPORT, *supra* note 32. These include disproportionality between the penalty required by statute and the penalties for other crimes that are more harmful. Mandatory minimums also increase the importance of one or two facts, such as the weight of the drugs involved in an offense, while neglecting other important considerations. *Id.*

n36 *See* Samuel J. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?, 4 FED. SENT. REP. 137, 139 (1991)* (arguing that "directives strike at the heart of the sentencing reform movement by permitting direct congressional intervention in highly politicized areas without concern for the overall integrity of the guideline process"). For a discussion of problems integrating the firearm mandatory minimums with the Guideline structure, see Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement, 37 AM. CRIM. L. REV. 41, 48-68 (2000).*

n37 *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681, 1741-43 (1992)* (arguing that original Commission misconstrued its obligations under the SRA); Aaron Rappaport, *The State of Severity, 12 FED. SENT. REP. 3 (1999)* (discussing generally the "methodology that the Commission used in developing its offense severity and guidelines ranges" and specifically (1) the role that sentencing purposes should play in sentencing length, (2) whether the Commission should defer to public opinion to decide the first question, and (3) "the relevance of prison capacity in setting guideline ranges").

n38 *28 U.S.C. § 991*(b)(1)(B) (2002) (stating that sentencing policies are to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

n39 For an extensive list of examples of conflicts among the purposes of sentencing, see Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions, 82 NW. U. L. REV. 19, 26-28 (1987)* (examining inherent conflict between deterrence, desert, incapacitation, and rehabilitation in sentencing). *But see* Parker & Block, *supra* note 30 (arguing that there is no tension among purposes and that SRA requires a utilitarian approach); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; Or, Confession of Two Reformed Reformers, 9 GEO. MASON L. REV. 1001, 1010 (2001)* (maintaining that "'just punishment' was intended to be consistent with the other three statutory purposes, and . . . all four purposes can be harmonized together . . .").

n40 *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 20-24 (1988)* (describing rationale for Commission's penalty increases for white collar offenders). Recent amendments enacted as part of an "economic crimes package" also increased penalties for many white collar offenses. *See* Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History, 35 IND. L. REV. 5, 7 (2001)* (describing amendments to Guidelines for economic crimes that increased penalties for many white collar crimes).

n41 *See* U.S.S.C., SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 18 (1987) [hereinafter SUPPLEMENTARY REPORT].

n42 Breyer, *supra* note 40, at 22 (describing Commission's choice to require some minimum confinement for all crimes of embezzlement, tax evasion and antitrust violations except the least serious cases). Later amendments to the theft and embezzlement guideline now require imprisonment for embezzlement of more than $ 70,000. U.S.S.G. § 2B1.1.

n43 Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing, 3 FED. SENT. REP. 326 (1991)* (describing congressional ambivalence over purposes of sentencing).

n44 For example, in addition to the exhaustive list of purposes found at *18 U.S.C. § 3553*(a)(2) (2002), the SRA singles out "the inappropriateness of imposing a sentence to a term of imprisonment for the purposes of rehabilitating the defendant." *28 U.S.C. § 994*(k) (2002). Congress directed the Commission to "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," *28 U.S.C. § 994*(j) (2002), but also directed that "in many cases, current sentences do not accurately reflect the seriousness of the offense." *28 U.S.C. § 994*(m) (2002).

n45 Nagel, *supra* note 22 (suggesting that "by mentioning several purposes" the SRA "would support [the] use of a hybrid rationale").

n46 For alternative views of the history of the SRA and the sentencing philosophy it entails, compare Stith & Koh, *supra* note 2 (arguing that legislation was transformed over course of its development and ultimately required rigid and harsh Guidelines), with Miller & Wright, *supra* note 19 (describing "Faustian" view that SRA is a hodgepodge of conflicts and compromises that Commission failed to resolve). *See also* STITH & CABRANES, *supra* note 31, at 51-59 (arguing that SRA simply fails to establish priorities among its conflicting aims).

n47 *See* S. REP. NO. 98-225, at 59-60 (1983) (recounting legislative history rejecting pure just deserts model).

n48 These efforts are recounted in Nagel, *supra* note 22.

n49 *See* Paul H. Robinson, *Dissent From the United States Sentencing Commission's Proposed Guidelines, 77 J. CRIM. L. & CRIMINOLOGY 1112, 1113 (1986)* [hereinafter Robinson, *Dissent*] (explaining his opposition to proposed sentencing guidelines of the United States Sentencing Commission); Paul H. Robinson, *A Sentencing System for the 21st Century?, 66 TEX. L. REV. 1, 6 n.20 (1987)* [hereinafter Robinson, *21st Century*] (explaining that one of the most important objectives of the criminal sentencing system is to further the goal of just punishment).

n50 *See* Michael K. Block, *Optimal Penalties, The Criminal Law and the Control of Corporate Behavior, 71 B.U. L. REV. 395, 396 (1991)* (explaining that optimal theory requires fines to be set at a level fully reflecting cost to society of the prohibited activity); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL'Y ECON. 169, 207-08 (1968) (arguing generally that "fines have several advantages over other punishments" such as conservation of resources, compensation to society, and punishment of offenders).

n51 Robinson, *Dissent*, *supra* note 49.

n52 Commissioner Michael Block resigned in 1989. *See* Yost, *supra* note 26.

n53 *Compare* Robinson, *Dissent*, *supra* note 49 (opposing rigid guidelines), *and* Robinson, *21st Century*, *supra* note 49, *with* Parker & Block, *supra* note 30 (arguing that a utilitarian approach is legally required by SRA and Supreme Court's decision in *United States v. Mistretta)*, *with* Nagel, *supra* note 22 (arguing that the SRA prohibited the Guidelines from adopting any "theoretical orthodoxy"), *with* Breyer, *supra* note 40 (describing Guidelines as a comprehensive system), *with* William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem, 2 CRIM. L.F. 355, 380 (1991)* (defending Guidelines as a "bold new approach to sentencing that is being followed today in federal courthouses throughout the United States[,]" arguing that the Guidelines "deserve[] an opportunity to succeed" because of their "lofty goals" and conceding that "ample work remains for the United States Sentencing Commission to monitor and improve the Guidelines," but also asserting that "indications at this still early date are that the experiment is succeeding"), *with* Helen G. Corrothers, *Rights in Conflict: Fairness Issues in the Federal Sentencing Guidelines, 26 CRIM. L. BULL. 38, 39 (1992)* (positing that purposes of sentencing reform were honesty, uniformity, and proportionality in sentencing).

n54 *See* von Hirsch, *supra* note 22, at 370-71 (analyzing potential for conflict that arises from different penal aims).

n55 Breyer, *supra* note 40, at 17.

n56 SUPPLEMENTARY REPORT, *supra* note 41, at 16. This report both describes the analytical process used by the Commission and reports the results. In Table 1A, the average past sentences are translated into corresponding offense levels and adjustments, which allows ready comparison between past practice and current Guideline sentences.

n57 *See* Nagel, *supra* note 22 (providing detailed description of this process).

n58 *See* Miller & Wright, *supra* note 19; *see also* STITH & CABRANES, *supra* note 31, at 59-66.

n59 *28 U.S.C. § 994*(i) (2002).

n60 *28 U.S.C. § 994*(m) (2002).

n61 U.S.S.C., 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 11 (Figure A) [hereinafter SOURCE-BOOK].

n62 *See, e.g., 21 U.S.C. § 841* (2002).

n63 *See* Ronnie M. Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses, 26 CRIM. L. BULL. 50, 52 (1990)* (noting that in the midst of the Commission's investigation regarding the most appropriate sentencing guidelines, Congress enacted the Anti-Drug Abuse Act of 1986, which effectively subsumed Commission's function because Act set its own minimum sentences).

n64 Justice Breyer devotes four pages to explaining the Commission's reasons for departing from past practice for white collar offenses, but merely alludes to the increases in drug trafficking sentences in a footnote. Breyer, *supra* note 40, at 20-24. In retrospect, the Commission's decisions regarding drug trafficking offenses--including a crucial decision to extend the drug quantity table well above the thresholds in the statutes, see GUIDELINES MANUAL app. C, amend. 125, had a greater impact on prison populations than any other decision made by the original Commission. Average prison time served by drug traffickers tripled between 1985 and 1992, with the Guidelines contributing significantly to this increase. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998, 12 FED. SENT. REP. 12 (1999).*

n65 MANDATORY MINIMUM REPORT, *supra* note 32.

n66 *See, e.g.*, BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (1994); Stephen J. Schulhofer, *Rethinking Mandatory Minimums, 28 WAKE FOREST L. REV. 199, 220-21 (1993)* (arguing that "the federal mandatories, precisely because they retain large measures of both discretion and 'mandatoriness,' produce many of the worst consequences of both models"); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 185 (1993)* (defending Guidelines as method through which Congress can play "a prominent and constructive role in federal sentencing").

n67 Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 40 FED. BAR NEWS & J. 158, 159 (1993) (claiming that "to retain mandatory minimums is to call into question the integrity and, ultimately, the viability of the Commission"). Perhaps the best example of Congress's split sentencing personality is found in the legislative history accompanying the SRA. "The [Judiciary] Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws." S. Comm. on the Judiciary, S. REP. NO. 98-225, at 89 n.194 (1983). Nonetheless, the 1984 crime package that included the SRA also included new mandatory minimum penalties.

n68 A short digression will demonstrate why this is so. Mandatory minimum statutes single out one feature of an offense, and require that *all* the cases that display that feature receive a sentence of at least a certain number of years. However, the SRA requires that the Commission fashion guidelines that contain many gradations of offense seriousness and that place offenders in relatively narrow categories, in order to take into account many aggravating and mitigating factors. Given these requirements of the SRA and the

simultaneous existence of mandatory minimums, how was the Commission to fashion guidelines to ensure proportionate punishment? Some commentators advocate that the Commission create the guidelines they believe are appropriate, and simply allow the statutes to "trump" them during an actual imposition of sentence. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 96-98 (1996). This approach could lead to greater coherence in the Guidelines, because they would reflect the Commission's considered judgment rather than accommodation to the statutes. But the Commission was persuaded that the disadvantages of this approach outweighed its advantages.

First, the flat sentences that result from the trumping would result in uniform treatment for very different offenders, the so-called "tariff" effect. MANDATORY MINIMUM REPORT, *supra* note 32, at 27. Second, trumping would create "cliffs" in the sentencing structure, where small differences in facts, say between four and six grams of crack cocaine, would result in dramatic differences in sentences. Third, incentives to accept responsibility and to plead guilty would be reduced, because no sentence reduction would result from a plea. Most important, failure to accommodate the statutory penalties might suggest to Congress that the Commission's approach to punishment cannot be trusted. This could lead to more mandatory minimums and further diminish the Commission's role.

n69 *See, e.g.*, S. REP. NO. 98-225 (1983) (legislative history accompanying Sentencing Reform Act of 1984 (Title II of Comprehensive Crime Control Act of 1984), Pub. L. No. 98-473, 98 Stat. 1837 (1984), providing comprehensive and consistent sentencing and establishing U.S. Sentencing Commission to promulgate sentencing guidelines and policy [hereinafter "Comprehensive Crime Control Act of 1984"]).

n70 *See* Peter Westin, *The Empty Idea of Equality, 95 HARV. L REV. 537, 542 (1982)* (demonstrating that: "(1) the proposition that 'people who are alike should be treated alike' is tautological; (2) the entitlements people mistakenly attribute to the idea of equality all derive from external substantive rights; and (3) the idea of equality is logically indistinguishable from the standard formula of distributive justice. . ."); Peter Westin, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply, 81 MICH. L. REV. 604, 661 (1983)* (asserting that both equality and substantive due process are empty derivative formulas "possessing no independent normative content apart from the anterior rights and rules they incorporate by reference").

n71 *See* Kevin Cole, *The Empty Idea of Sentencing Disparity, 91 NW. U. L. REV. 1336, 1336-37 (1997)* (arguing that disparity, like equality, is a popular but empty formalism); Michael Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?, 2 FED. SENT. REP. 122 (1989)* (claiming that compliance rates only demonstrate whether judges are sentencing within guideline ranges but not "whether judges are applying the guideline range that most appropriately applies").

n72 Robinson, *21st Century*, *supra* note 49.

n73 *See* Anthony Doob, *The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There, in* THE POLITICS OF SENTENCING REFORM 199 (Chris Clarkson & Rod Morgan eds., 1995) (discussing unique approach of Guidelines as potential lesson for state sentencing guidelines).

n74 *21 U.S.C. § 991*(b)(2) (2002).

n75 By weight, the penalties for ecstasy are higher than those for powder cocaine but lower than those for heroin. Given the radical differences among drugs in the weight required for intoxication, however, a dose-to-dose comparison seems the most rational. Depending on the purity of the drugs, the amended Guideline treats a typical dose of ecstasy the same as four-to-ten doses of heroin. *See* NATIONAL OFFICE OF DRUG CONTROL POLICY, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS, 1988-1998 (Dec. 2000) (providing consumption estimates for various drugs).

n76 Comment of the American Federation of Scientists on the proposed amendment to the drug trafficking guideline concerning MDMA, March 2000. On file at the Commission.

n77 *See generally* ROBERT NOZICK, THE NATURE OF RATIONALITY (1993) (describing benefits of rationality and how it disciplines decision makers).

n78 *See* Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice* System, *61 FED. PROBATION 58, 62 (1997):*

> The creation of the Sentencing Commission and its placement within the judicial branch of government was intended to insulate sentencing policy, to some extent, from the political passions of the day. As an independent, expert agency, the Commission's role is to develop sentencing policy on the basis of research and reason.

*See also* Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1 (1993):

> Although sentencing commissions are ultimately responsible to the legislature and to the people of a state, they do not face the immediate electoral pressures which confront legislators. Thus, they are less likely to be unduly swayed by the sort of public hysteria which periodically occurs following a series of particularly violent and highly publicized crimes.

*Id.* at 37; Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 934 (1991)* ("Non-elective commissions could serve as buffering agencies, making unpopular sentencing decisions that legislators would avoid.").

n79 *See, e.g.*, Rappaport, *supra* note 37.

n80 *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 105-08 (1990) (discussing the importance of "means-end" rationality in legal interpretation).

n81 Stith & Cabranes, *supra* note 7, at 1254-55 (explaining that judges have largely no discretion to determine relevant factors and weight of each factor for a defendant's sentencing, but can only calculate values assigned to pre-determined factors).

n82 *United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 442 (E.D.N.Y. 2002)* ("Requiring Federal Judges to apply the sentencing guidelines mechanically . . . threatens a devastating effect . . ..").

n83 *See, e.g.*, J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 YALE L.J. 105, 112 (1993)* (claiming that rational reconstruction is "an attempt to see the substantive reason that emanates from legal material").

n84 *See, e.g.*, POSNER, *supra* note 80, at 101-06, 273-76 (calling method "imaginative reconstruction").

n85 *See generally* H.L.A. HART, THE CONCEPT OF LAW 86 (1961).

n86 RONALD DWORKIN, LAW'S EMPIRE 87-90, 315-17 (1986) (arguing that the "pattern of agreement and disagreement" during a time with regard to legislative intent and community morals develops into the norm from which new paradigms arise as if to create an ongoing dialogue between judges and legislators that leads to a coherent theory based on legislative intent and judicial interpretation).

n87 A well-known description of this interpretive process can be found in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-23 (1978) (describing how an interpreting judge, "Hercules," reaching a principled decision in a hard case would impute a theory to the law from a close reading of legal materials).

n88 *See* Joseph Raz, *The Relevance of Coherence*, *72 B.U. L. REV. 273, 275 (1992)* (arguing that the case for coherence as primary criterion of legal validity has not been made and that other bases for adjudication have merit).

n89 Our claim that the Guidelines have a philosophy may seem preposterous given that several Commissioners who were present at the Guidelines' inception have argued that they do not. *See* Robinson, *Dissent*, *supra* note 49; Robinson, *21st Century*, *supra* note 49; Parker & Block, *supra* note 30. But these professors/Commissioners, with perches in both the ivory tower of academia and the "sausage factory" of the Commission, may have been locked into a strangely limiting perspective: both too familiar with guideline drafting and too clear about what a perfectly rational sentencing system should be. For us, the key is to realize that the Guidelines today are a living body of law, which should be approached from the perspective of a judge seeking to implement the SRA and apply the Guidelines in good faith.

n90 Balkin, *supra* note 83.

n91 Whether a guideline that does not fit within the overall theory should be considered an anomaly or a reasoned exception within a hybrid philosophy depends on the reasons given for the exception. Obviously, a guideline that departs from the Guidelines' overall approach arbitrarily or capriciously is an anomaly. But if sound reasons can be given for treating, for example, organizational defendants differently than individuals, then we can consider the exceptional treatment another modification of modified just desert. *See infra* note 107 (discussing reasons for modification of desert principle in Guidelines); *see also infra* Part III (discussing organizational guidelines).

n92 Balkin, *supra* note 83.

n93 Even Guidelines critics recognize that it may be possible to identify their implicit theory of punishment. Stith and Cabranes write:

> While it would perhaps be possible, as a logical exercise, to derive from the Guidelines some common standards and principles that animate them, the Guidelines themselves--which are simply directives for computing severity levels and criminal history scores--do not reveal any such reasoning. The sentencing judge is left to engage, not in judgment or moral reasoning, but in minute parsing of administrative regulations.

STITH & CABRANES, *supra* note 31, at 84.

n94 There are signs the Commission may be moving toward adoption of more explicit rationales for at least some Guideline provisions. As part of a package of amendments implemented in 2001 that fundamentally alters federal sentencing practice for economic crimes, the Commission published an extensive "Reason for Amendment," which articulates the rationale for these changes. *See* U.S.S.C., AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 32-35, 57-69, *at* http://www.ussc.gov/2001guid/congress.2001.PDF (last visited Mar. 11, 2003).

n95 *28 U.S.C. § 994* (2002).

n96 *488 U.S. 361, 390-92 (1989)* (holding that neither location of Commission in judicial branch, inclusion of federal judges on Commission, nor delegation of legislative power to establish federal sentencing policies violated separation of powers envisioned by Constitution).

n97 *Id. at 372.*

n98 In *United States v. LaBonte, 520 U.S. 751, 758-60 (1997),* the Supreme Court invalidated Guideline commentary that the Court held violated an unambiguous directive in the SRA: the requirement that the Guidelines specify a sentence "at or near the maximum term authorized" for career offenders. The Commission, and a minority of the Court, believed the directive was ambiguous, and that the interpretation preferred by the Department of Justice, and upheld by the Court, shifts sentencing discretion to prosecutors and leads to unwarranted disparity. *Id. at 763* (Breyer, J., dissenting) (explaining that "in light of the statutory ambiguity, we should defer to the Commission's views about what Guideline the statute permits it to write; and we should uphold the Guideline the Commission has written because it 'is based on a permissible construction of the statute'").

n99 *Mistretta, 488 U.S. at 379* (internal citations and quotations omitted); *see also* MICHAEL ASIMOW ET AL. EDS., STATE AND FEDERAL ADMINISTRATIVE LAW 534-35 (2d ed. 1998) ("[A] delegation of discretion to an agency suggests that the agency, not a court, has primary responsibility for resolution of matters falling within the zone of the discretionary authority. . . . Typically, the legislature delegates authority to the agency to *find the facts* and establish *policy*.") (emphasis in original).

n100 *LaBonte, 520 U.S. at 777-78.* The central role of the Commission in establishing federal sentencing philosophy was further highlighted in *United States v. Braxton, 500 U.S. 344, 348-49 (1991),* in which the Supreme Court characterized the guideline amendment process as the primary vehicle for resolving circuit conflicts, even compared with review by the Supreme Court itself.

n101 At least one circuit court has held that the Commission deserves "*Chevron* deference," which holds that courts must defer to an agency's interpretation of ambiguous provisions in its own organic statute. *See United States v. Smaw, 22 F.3d 330, 333 (D.C. Cir. 1994)* ("We owe the Sentencing Commission's commentary on its own Guidelines the same treatment as we afford 'an agency's interpretation of its own legislative rules.'") (citing *Stinson v. United States, 508 U.S. 36 (1993)); United States v. Doe, 934 F.2d 353, 359 (D.C. Cir. 1991)* ("The Commission's discharge of its delegated authority is entitled to deference. . . .").

n102 Philosophers disagree about whether it is possible to accommodate both deontological and utilitarian considerations within a rationally coherent moral theory. Some believe the two approaches are incommensurable, while others believe that a rational hybrid approach is possible. *See, e.g.*, Alan H. Goldman, *The Paradox of Punishment,* 9 PHIL. & PUB. AFFAIRS 42 (1979) (explaining that "the paradox of punishment is that a penal institution somewhat similar to that in use in our society seems from a moral point of view to be both required and unjustified"). In any event, it appears that the SRA commits the Commission to pursuit of a hybrid approach.

n103 S. REP. NO. 98-225, at 38 (1983):

> In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants. The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

*See also* SUPPLEMENTARY REPORT, *supra* note 41 ("A clear-cut Commission decision in favor of either of these approaches would have been inconsistent with the Sentencing Reform Act, which refused to accord primacy to any single purpose of sentencing.").

n104 *28 U.S.C. § 991*(b)(2) (2002).

n105 Robinson, *supra* note 39.

n106 Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, Paper presented at the Symposium on Federal Sentencing Guidelines, Yale Law School, Nov. 8, 2002 (arguing that guidelines accommodating incommensurable deontological principles and utilitarian goals would fail to be fully coherent).

n107 The Guidelines modify the principle of just desert in two main areas: (1) incapacitation of higher-risk offenders in Chapter 4 and (2) sentence-reduction incentives for offenders who cooperate with law enforcement by either pleading guilty, U.S.S.G. § 3E1.1 (Acceptance of Responsibility), or by providing assistance in the prosecution of other offenders, U.S.S.G. § 5K1.1 (Substantial Assistance to Authorities), required by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in *21 U.S.C. §§ 841*-848). We believe non-arbitrary reasons can be provided for these two modifications of a pure just desert approach. The empirical evidence concerning the increased risk of recidivism of offenders with more extensive criminal histories is quite strong compared, for example, with evidence of the deterrent effect of increased punishment. *See infra* Part III. Similarly, although not as amenable to empirical testing, testimony from law enforcement personnel and prosecutors have underscored the benefits of sentence-reduction incentives for defendants to cooperate. The Commission can reasonably conclude that the unfairness of some departure from desert principles in these two areas can be justified by the strong likelihood of significant benefits to crime control and criminal justice system efficiency.

n108 *Stinson v. United States, 508 U.S. 36, 38 (1993)* (holding that "the exclusion of the felon-in-possession offense from the definition of 'crime of violence' may not be compelled by the guideline text").

n109 *Id.*

n110 *Id. at 42.*

n111 133 CONG. REC. S16644-03 (1987) (Joint Explanation by Senators Biden, Thurmond, Kennedy, and Hatch on S.1822, the future Sentencing Act of 1987, Pub. L. No. 100-182 (1987)). According to Senator Thurmond,

> there was some concern that failure to specifically designate the materials that may be used in determining the appropriateness of departure could result in members of the Commission, or their notes and other internal work products, being subpoenaed. This was never intended by Congress, and section 3 clarifies that only those items listed may be used in a departure determination.

*Id.*; Senator Kennedy explained,

> I want to join the remarks made by my colleague from South Carolina with respect to the subpoena protection language in section 3. Clearly, Congress never intended that the sentencing courts would look to items other than the Guidelines, policy statements and the Commission's official commentary in determining what the Commission has adequately considered. Again, the bill clarifies this understanding.

*Id.*

n112 *See, e.g., United States v. Ferrouillet, 1997 U.S. Dist. LEXIS 7166,* at *17-18 (E.D. La. May 19, 1997) (holding that report by Commission's Money Laundering Working Group is relevant in deciding whether to depart from Guidelines even though Working Group's proposed amendment to Guidelines was ultimately rejected by Congress).

n113 *See generally* H.L.A. Hart, *Prolegomenon to the Principles of Punishment, in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1992). Here, as in the GUIDELINES MANUAL'S attempt in Chapter One to reconcile competing theories of sanctioning, Professor Hart writes that with respect to a general justifying aim of punishment,

> what is needed is not the simple admission that instead of a single value or aim (deterrence, retribution, reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a "justification") are relevant at different points in any morally acceptable account of punishment.

*Id.* at 3. Accordingly, Professor Hart later contends that

> much confusing shadow-fighting between utilitarians and their opponents[, i.e., retributivists,] may be avoided if it is recognized that it is perfectly consistent to assert both that the general justifying aim of the practice of punishment is its beneficial consequences and that the pursuit of this general aim should be qualified or restricted out of deference to principles of distribution which require that punishment should be only of an offender for an offence.

*Id.* at 9. Nevertheless, even assuming that the on-going debate between utilitarians and retributivists is mere shadow-fighting, these generalities, like those set forth in Chapter One of the Guidelines Manual, do not explain how the "plurality of different values and aims" should fit together, nor whether they should be weighted relative to each other, and if so to what degree. As we discuss in more detail below, see *infra* Part IV, a simple conjunction of justifying aims does not explain in any sufficient detail the structure of the Guidelines as a whole or in particular.

n114 U.S.S.G. ch. 4, pt. A (intro. comment.):

> The Comprehensive Crime Control Act sets forth four purposes of sentencing. . . . A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

n115 Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines, 44 ST. LOUIS U. L.J. 299, 316-17, 357 (2000)* (emphasis supplied).

n116 For a general overview of competing frameworks, see Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment, 33 RUTGERS L. REV. 799 (1981);* Robinson, *21st Century, supra* note 49 (discussing hybrid model);

ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993) (discussing retributive just deserts model); Block, *supra* note 50 (discussing utilitarian model).

n117 *Koon v. United States, 518 U.S. 81, 96 (1996)* (internal quotation omitted).

n118 *See* Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon's *Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines, 79 B.U. L. REV. 493, 495 (1999)* (arguing that Supreme Court failed to consider different varieties of discretion recognized in academic literature); Miller & Wright, *supra* note 19.

n119 For an earlier discussion of the varieties of heartlands, see Paul J. Hofer, *Discretion to Depart After* Koon v. United States, *9 FED. SENT REP. 8 (1996).*

n120 *Koon, 518 U.S. at 105* (holding that "for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission"). For critical discussion of this ruling, see Kate Stith, *The Hegemony of the Sentencing Commission, 9 FED. SENT. REP. 14 (1996).*

n121 *Koon, 518 U.S. at 86-88.*

n122 *Id.*

n123 *Koon v. United States, 518 U.S. 81, 86-88 (1996).*

n124 *Id.* (citing *United States v. Koon, 833 F. Supp. 769, 787-88 (C.D. Cal. 1993)).*

n125 *Id.* at 110 (citing U.S.S.G. § 4A1.3).

n126 *Id.* at 110 (citing U.S.S.G. § 4A1.3).

n127 *Id.* at 111 (quoting *Koon, 833 F. Supp. at 785-86).*

n128 *Id.* at 112 (quoting *Koon, 833 F. Supp. at 790).*

n129 *Koon v. United States, 518 U.S. 81, 110-11 (1996).*

n130 *See infra* Part IV.C.2 for an additional discussion of the heartland concept.

n131 The role that collateral consequences of conviction and imprisonment should have in determining the appropriate sentence is a difficult question that continues to trouble the courts. *Compare United States v. Restrepo, 999 F.2d 640, 647 (2d Cir. 1993)* (erroneous to view harshness of potential deportation as warranting a reduction in the period of confinement), *with United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997)* (district court is free to consider whether status as a deportable alien has resulted in exceptional hardship in conditions of confinement). Except in the most extreme cases, adjusting the period of incarceration to reflect the varying degrees of punishment experienced by different defendants could prove disastrously subjective. On the other hand, it seems odd that the principle of proportionate punishment would require detailed calibration of the seriousness of the offense, but would largely ignore the impact of collateral consequences on the severity of punishment.

n132 *Koon, 518 U.S. at 113* (J. Ginsburg and J. Souter, concurring in part and dissenting in part).

n133 *See supra* note 18 and accompanying text.

n134 For a sketch of the purposes of the Guidelines that closely parallels modified just desert, see Bowman, *supra* note 115, at 316-17.

n135 *See generally* John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103 (1982) (arguing that modifying strict desert to accommodate prediction of offenders' recidivism risk can be justified).

n136 SUPPLEMENTARY REPORT, *supra* note 41, at n.58. These include Norval Morris, *Punishment, Desert and Rehabilitation, in* SENTENCING 257 (Hyman Gross & Andrew von Hirsch eds., 1981), and Monahan, *supra* note 135.

n137 SUPPLEMENTARY REPORT, *supra* note 41, at 16.

n138 *See infra* Part III.B & III.D (discussing rehabilitation and deterrence, respectively).

n139 Guideline penalties must always operate within the range of penalties provided for by the criminal statutes defining the elements of each offense. In the federal system, the statutory ranges tend to be very broad, while the range of penalties provided by the Guidelines must be, under the terms of the SRA, relatively narrow.

n140 For a recent critique of these developments, see Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, *114 HARV. L REV. 1429, 1450 (2001)* (criticizing modifications of just desert sentencing schemes for crime prevention purposes).

n141 *See generally, e.g.*, Richard Frase, *Purposes of Punishment Under the Minnesota Sentencing Guidelines*, 13 CRIM. JUST. ETHICS 11 (1994) (demonstrating that Minnesota guidelines have moved away from pure just desert model toward incorporating elements of incapacitation).

n142 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 304-08 (1993) (describing how rehabilitative ideal and indeterminate sentencing reigned supreme from roughly early 1900s to 1960s).

n143 For discussions of the federal grid, see generally Marc Miller, *True Grid: Revealing Sentencing Policy, 25 U.C. DAVIS L. REV. 587 (1992);* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 WIS. L. REV. 679 (1996).*

n144 *See* U.S.S.G. ch. 4 (explaining procedures for determining criminal history score).

n145 *See generally* BRIAN OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA, NATIONAL CENTER FOR STATE COURTS (2002).

n146 *See* U.S.S.G. ch. 5, pt. A (setting forth sentencing table).

n147 *See id.*

n148 *See id.*; U.S.S.G. ch. 4.

n149 *See* U.S.S.G. ch. 5, pt. A; *see also* U.S.S.G. § 4A1.1.

n150 *18 U.S.C. § 3553*(a)(2)(D) (2002).

n151 *Compare* VON HIRSCH, *supra* note 21, *with* Alan M. Dershowitz, *Background Paper, in* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976); *see also* JOEL FEINBERG, DOING AND DESERVING JUSTICE (1970); SINGER, *supra* note 21.

n152 *See* Stith & Koh, *supra* note 2, at 239-41. For case law reaching a similar conclusion, see *United States v. Sklar, 920 F.2d 107, 115 (1st Cir. 1990)* ("We, and other circuits, have had scant difficulty in concluding that, consistent with the 'just deserts' philosophy, a penitent defendant's 'posture of rehabilitation' or sincere 'desire to change his life,' was accorded only small weight by the Commission. . . ."). *See also* Bowman, *supra* note 143, at 692; Weinstein, *supra* note 13.

n153 *See, e.g.*, Dale G. Parent, *What Did the United States Sentencing Commission Miss?, 101 YALE L.J. 1773, 1781 (1992)* (stating that "rehabilitation was in disfavor as a sentencing goal").

n154 *See 18 U.S.C. § 3553*(a)(2)(D) (2002).

n155 *See* U.S.S.G. § 5D1.3 (explaining mandatory and optional conditions of supervised release).

n156 Weinstein, *supra* note 13.

n157 U.S.S.G. ch. 5, pt. B, intro. comment. (emphasis supplied).

n158 U.S.S.G. § 5C1.1 (Imposition of a Term of Imprisonment).

n159 U.S.S.G. § 5C1.1(b).

n160 U.S.S.G. § 5C1.1(c).

n161 U.S.S.G. § 5C1.1(d). Note also that the "schedule of substitute punishments" found at U.S.S.G. § 5C1.1(e), which details how much home detention or community confinement is equal to a month in prison, is an abbreviated version of a "sanction unit" system. These are popular among just desert theorists as a means to ensure that offenders who do not receive prison time receive a roughly equivalent quanta of alternative punishment.

Curiously, the Guidelines do not give fines imposed on individuals, as opposed to corporations, any punishment weight. Many commentators have argued that fines, especially "day fines" that are adjusted to reflect an offender's income and wealth, can punish proportionately and should be added to the Guideline scheme. *See, e.g.*, NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 147-49 (1990).

Community service is another alternative that is not incorporated in the Guidelines schedule of substitute punishments, but arguably could and should be. *See generally* Malcolm M. Feeley et al., *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications for the U.S. Sentencing Guidelines, 66 S. CAL. L. REV. 155 (1992)* (suggesting as an alternative to imprisonment "the imposition of an obligation to work for the community, either in lieu of imprisonment or as an additional condition of probation").

n162 U.S.S.G. § 5F1.2, comment. (n.2). The Guidelines also acknowledge the secondary role of incapacitation in U.S.S.G. § 5C1.1, application n.7, which states that "the use of substitutes for imprisonment . . . is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives."

n163 In addition to the references at note 103 *supra*, see Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT. L. REP. 22 (1974); DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 523 (1975). *But see* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243, 252 (1979).*

n164 *18 U.S.C. § 3553*(a)(2)(C) (2002).

n165 *28 U.S.C. § 994*(d) (2002).

n166 *28 U.S.C. § 994*(h) (2002).

n167 *28 U.S.C. § 994*(i) (2002).

n168 SINGER, *supra* note 21.

n169 ANDREW VON HIRSCH, PAST AND FUTURE CRIMES 77-78, 131-32 (1986) (arguing that increased punishment for some repeat offenders compared to first offenders is justified even under just desert theory).

n170 *See* Mirko Bagoric & Kumar Amarasekara, *The Errors of Retributivism, 24 MELB. U. L. REV. 124, 131 (2000); see also* BENTHAM, *supra* note 6.

n171 There are isolated references to incapacitation considerations in Chapter Two of the GUIDELINES MANUAL, but we believe that Chapter Four and the criminal history score is the primary way the incapacitation of higher risk offenders is ensured.

n172 SUPPLEMENTARY REPORT, *supra* note 41.

n173 *Id.* at 41-44.

n174 The Commission increases sentence lengths in two areas for past conduct that may not have resulted in a conviction. U.S.S.G. § 4B1.3 increases sentences to at least offense level thirteen if the offender committed his current offense as part of "a pattern of criminal conduct engaged in as a livelihood." U.S.S.G. § 4B1.5 significantly increases offense levels if an offender engaged in a "pattern of activity involving prohibited sexual conduct" regardless of whether the conduct resulted in an arrest or conviction. Both

provisions free judges to examine all reliable evidence of the offenders' past conduct to identify those who "present a continuing danger to the public." U.S.S.G. § 4B1.5, comment. (backg'd.).

n175 SUPPLEMENTARY REPORT, *supra* note 41, at 42.

n176 *Id.*

n177 Recall that the situation is further confused by the Commission's attempt to justify the relevance of criminal history by citing all four purposes of sentencing in the Introduction to Chapter Four. *See* discussion at II.C.3 *infra.*

n178 U.S.S.G. § 4A1.3, p.s. (emphasis supplied).

n179 *See* U.S.S.G. § 5K2.19, p.s., prohibiting departure for *post-sentencing* drug rehabilitation (for example, at a re-sentencing hearing following a remand on appeal). The reason for amendment makes clear, however, that this policy statement is not intended to restrict departures based on extraordinary *post offense* rehabilitation efforts *prior to sentencing*, and such departures have been allowed by every circuit that has ruled on the matter since *Koon v. United States*. U.S.S.G. app. C, amend. 602.

n180 *See* Aaron J. Rappaport, *Editor's Observations: Criminal History and the Purposes of Sentencing, 9 FED. SENT. REP. 184 (1997)* (opining that "controversy over criminal history reflects a fundamental conflict over the basic goals and purposes of the sentencing system"); Barbara Meierhoefer Vincent, *So What's the Purpose?, 9 FED. SENT. REP. 189 (1997)* (discussing incapacitative rationale in order to set forth argument that "purpose of examining an offender's criminal history should be to determine whether the length or type of sentence prescribed under Chapters Two and Three (to meet 'just punishment') should be adjusted to reflect the need to protect the public from further crimes of the defendant").

n181 SUPPLEMENTARY REPORT, *supra* note 41, at 41.

n182 VON HIRSCH, *supra* note 169.

n183 There is a version of desert theory that takes the *number* of prior convictions into account. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (Law in Context 1992) (outlining a theory of "progressive loss of mitigation"). There is no evidence, however, that the Commission was aware of this theory at the time the Guidelines were promulgated. Nor is the theory compatible with the Guidelines' specific rules regarding recency or criminal justice supervision.

n184 *See, e.g.*, Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score, 9 FED. SENT. REP. 192 (1997)* (discussing origins of related cases rules and rules governing recency of convictions); Daniel P. Bach, *Reconsidering Related Conduct, 9 FED. SENT. REP. 198 (1997)* (criticizing rules governing related conduct). *See also infra* Part IV.A.3 (discussing extra weight given prior drug trafficking convictions under the career criminal guideline).

n185 SUPPLEMENTARY REPORT, *supra* note 41, at 43 ("In selecting elements for the criminal history score, the Commission examined a number of prediction instruments. . . ."). The report goes on to explain how details, such as the slope of the criminal history adjustment, were designed to maximize the incapacitation effects of the score. *Id.* at 44, n.77.

n186 *Id.* at 44.

n187 Hoffman & Beck, *supra* note 184.

n188 Rappaport, *supra* note 180.

n189 The predictive validity of the score has been confirmed by researchers at the Bureau of Prisons and the Commission. *See generally* MILES D. HARER, FEDERAL BUREAU OF PRISONS, OFFICE OF RESEARCH AND EVALUATION, RECIDIVISM AMONG FEDERAL PRISON RELEASEES IN 1987: A PRELIMINARY REPORT (1994). The Commission has recently committed to undertake a new recidivism study to reaffirm the validity of the score and to identify possible ways to improve it. Preliminary findings reconfirm the validity of the score. *See* Linda Maxfield & Miles Harer, *The Commission's Recidivism Study Project*, Presentation at the Federal Sentencing Guidelines Symposium, Yale Law School, Nov. 8, 2002.

n190 *E.g.*, U.S.S.G. § 2R1.1 (concerning anti-trust offenses). "The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this Guideline is general deterrence." *Id.*

n191 *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century, 23 CRIME & JUST. 1, 36 (1998)* (explaining that "while [the author is] . . . confident in asserting that our legal enforcement apparatus exerts a substantial deterrent effect, four major knowledge gaps limit our capacity to make confident predictions about what works in specific circumstances" and listing the four major knowledge gaps).

n192 A deterrence researcher advising the Commission concluded that the available data suggest that the certainty of punishment is more important to deterrence than is severity. Firm conclusions are difficult to draw from the extant research, however. GORDON WALDO, RESEARCH REPORT TO THE COMMISSION ch. 5, "Deterrence Research" (1986) (on file at the Commission).

n193 *See* U.S.S.G. ch. 1 pt. A, at 4.

n194 *See generally* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY 587 (1995) (conducting research using offenders sentenced prior to implementation of the Guidelines).

n195 The Guidelines make this kind of matched-group design more difficult because offenders who are similar now receive similar sentences.

n196 *18 U.S.C. § 3553*(a)(2)(A) (2002).

n197 *28 U.S.C. § 994*(c)(3) (2002).

n198 *28 U.S.C. § 994*(m) (2002).

n199 U.S.S.G. ch. 1, pt. A, intro. comment. 3.

n200 *See* Darryl K. Brown, *Third-Party Interests in Criminal Law, 80 TEX. L. REV. 1383, 1399 (2002)* (discussing various forms of retributivism); Jean Hampton, *Retribution and the Liberal State, 1994 J. CONTEMP. LEGAL ISSUES 117, 124* (noting that there are multiple conceptions of retribution).

n201 *See, e.g.*, James B. Brady, *A "Rights-Based" Theory of Punishment*, 97 ETHICS 792, 792-95 (1987).

n202 *See* Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales and Democracy, 28 HOFSTRA L. REV. 635, 637 (2000)* (claiming that "modern retributivist approaches that endorse giving the offender his "just deserts" appear to be distinctly inhospitable to community views about justice"). *But see generally* Deirdre Golash & James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy, 22 AM. J. CRIM. L. 703 (1995)* (criticizing view that community values shall determine punishment levels).

n203 *See, e.g.*, Lawrence Crocker, *The Upper Limit of Just Punishment, 41 EMORY L.J. 1059, 1110 (1992)* (arguing that broad question to be asked by a judge in attempting to identify the outer limits for a range of permissible punishments should be: "What is the least penalty that I can say with some confidence would be too severe, given the seriousness of the offense?") (internal quotations omitted).

n204 SUPPLEMENTARY REPORT, *supra* note 41, at 15-17. *See also* writings of early Commissioners, *supra* note 53. In an early review of the Guidelines, von Hirsch, *supra* note 22, complained that the original Commission "paid little attention to defining a sentencing rationale." We are aware of the irony: the philosopher who complained the loudest about the incoherence of the Guidelines actually provided its outline. We believe von Hirsch may have been so convinced of the ideal structure of just desert and so aware of the flaws in the Guidelines that he may have failed to see their shape. He may also have placed too much emphasis on the general and cursory statements of the original commission.

n205 Andrew von Hirsch, *Proportionality in the Philosophy of Punishment, in* 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 55-98 (Michael Tonry ed., 1992). Von Hirsch believes that sentencing policy makers can rank the seriousness of various crimes ordinally, that is, relative to each other, but that the cardinal or absolute severity of the scale of punishment required by just desert is indeterminable.

n206 *Id.* at 68.

n207 "Under this principle, punishment should be scaled to the offender's culpability and the resulting harms." U.S.S.G. ch. 4.

n208 *See* Hampton, *supra* note 200, at 124 (noting that there are multiple conceptions of retribution).

n209 The Guidelines recognize inherent wrongs. The Guidelines increase sentences when an offender "abused a position of trust" to commit a crime. U.S.S.G. § 3B1.3 (comment.) states that "such persons generally are viewed as more culpable."

n210 To confuse matters, some persons--and in some places the GUIDELINES MANUAL--use "blameworthiness" or "culpability" to stand for what we call the overall seriousness of the crime, involving both culpability and harm.

n211 Von Hirsch, *supra* note 205.

n212 We think multiplication rather than addition is the correct operator in the formula because, in the criminal law, culpability can reduce criminal liability to zero, even for conduct that causes substantial harm. A person who commits murder, but is found to be legally not responsible due to mental illness, is completely absolved of liability. Culpability may be viewed as ranging from zero to one or greater. U.S.S.G. § 3B1.1

(Role in the Offense) increases punishment for the leaders of criminal conspiracies by about fifty percent, so perhaps the upper limit under the Guidelines is about 1.5.

n213 *See* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. REV. 495, 503 (1990)* (explaining that "the 'acts and omissions' of the defendant and those of accomplices for which the defendant is held accountable comprise the most important elements of 'Relevant Conduct'").

n214 *See* U.S.S.G. § 1B1.3.

n215 U.S.S.G. § 1B1.3(a)(3).

n216 U.S.S.G. § 1B1.3 (comment. n.4).

n217 U.S.S.G. § 1B1.3 (comment. n.5).

n218 *See* U.S.S.G. § 1B1.1 (setting forth application instructions).

n219 *See* Paul H. Robinson & John M. Darley, *The Utility of Desert, 91 NW. U. L. REV. 453, 477-88 (1997)* (discussing how harm affects person's ranking of offense seriousness). For a contrary view of the meaning of offense levels, see Parker & Block, *supra* note 39, at 1014-15 (denying that offense levels should be understood as seriousness rankings).

n220 *See, e.g.*, PETER H. ROSSI ET AL., JUST PUNISHMENT: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997) (reviewing studies showing considerable consensus among the public regarding the relative seriousness of different crimes, and showing correlation between seriousness rankings and the severity of punishment imposed on hypothetical defendants).

n221 *See* U.S.S.G. §§ 2A2.2(b)(3), 2B3.1(b)(3).

n222 *See* U.S.S.G. §§ 2B1.1, 2F1.1, 2T4.1.

n223 *See* U.S.S.G. §§ 2A6.2 (comment. n.4, § 2K2.4.

n224 U.S.S.G. ch. 3, pt. D.

n225 *28 U.S.C. § 994*(d)(4) (2002).

n226 U.S.S.G. ch. 3, pt. B.

n227 *See* U.S.S.G. § 3B1.1.

n228 After explaining that the adjustment "is included primarily because of concerns about relative responsibility," the Commission confuses matters by including other general justifications for the aggravating role adjustment in the background commentary. "However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and represent a greater danger to the public and/or are more likely to recidivate." U.S.S.G. § 3B1.1 (comment. bkg'd.). Like the general justifications for the relevance of criminal history in the Introduction to Chapter

Four, we believe this language is best regarded as "dicta," which does not bear on a determination of which purpose of sentencing best explains the rule.

n229 U.S.S.G. §§ 2A1.1, 2A1.4.

n230 U.S.S.G. § 2A5.2.

n231 U.S.S.G. § 2A3.2.

n232 U.S.S.G. § 2X1.1.

n233 U.S.S.G. § 1B1.3(3) includes within relevant conduct "all harm that resulted from the acts and omissions specified . . . above, and all harm *that was the object of* such acts and omissions." (emphasis supplied).

n234 The "resulted from" requirement of U.S.S.G. § 1B1.3(3) has been interpreted as a causation standard that includes traditional limitations on accountability. A close reading of the Guidelines led Judge Edward Becker, writing the minority opinion, to conclude that "if the harm . . . was also caused by other factors beyond the defendant's control, the court should consider making a downward departure to better reflect the seriousness of the defendant's conduct." *United States v. Neadle, 72 F.3d 1104, 1117 (3d Cir. 1995).*

n235 U.S.S.G. § 5K2.12.

n236 In 1998, the Commission adopted a two-pronged definition of diminished capacity that is broader than the single-pronged definition of insanity adopted by Congress in the wake of the Reagan assassination attempt. Offenders may qualify for departure on this ground if they suffer from a significantly impaired ability to "(A) understand the wrongfulness of the behavior . . .; or (B) control behavior that the defendant knows is wrongful." U.S.S.G. § 5K2.13 (comment. n.1).

n237 Although we have not specifically mentioned the sentencing guidelines for organizations, which actually are contained in a separate chapter of the GUIDELINES MANUAL, these Guidelines also manifest a modified just deserts sentencing philosophy. Chapter Eight, entitled "Sentencing of Organizations," was "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." U.S.S.G. ch. 8 (intro. comment.). As incarceration is an unavailable sanction for organizations, only fines and terms of probation may be imposed. According to the introductory commentary, "the fine range for any . . . organization should be based on the seriousness of the offense and the culpability of the organization." *Id.* Consistent with a just deserts sentencing philosophy, the organizational guidelines provide that "the seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a Guideline offense level fine table." *Id.* Likewise, "culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed." *Id.* And just as with the sentencing guidelines that apply to individuals, the organizational guidelines also take criminal history into account. U.S.S.G. § 8C2.5(c). However, unlike the sentencing guidelines for individuals, the organizational guidelines' assessment of criminal history appears to be mainly, if not exclusively, for purposes of determining culpability (as opposed to recidivism). *See id.* For a history and overview of the organizational guidelines, as well as an analysis of their impact on organizational behavior, see Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 IOWA L. REV. 697, 698-713 (2002).*

n238 *See* TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (1984) (reviewing and critiquing justifications for punishment under just desert and other sentencing theories).

n239 Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 HARV. L. REV. 1938, 1957 (1988)* (claiming that Guidelines run risk of ignoring personal characteristics of each defendant that mitigate against culpability, "such as poverty, educational deprivation, and family instability").

n240 *See* Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing, 7 FED. SENT. REP. 121 (1994)* (claiming that "in the Guidelines era, mens rea has been all but eliminated from the sentencing of drug offenders").

n241 The neglect of a knowledge requirement has led some courts to conclude that the Guidelines' specific offense adjustments are generally made on a strict liability basis. *See, e.g., United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001).* This could suggest that deterrence, rather than just desert, is the better explanation of the Chapter Two and Three rules. But note that the criminal statutes themselves often limit the knowledge requirement to the core elements of an offense, permitting other factors to be proved without showing that the defendant knew of their presence. This seems likely to reflect Congress's and the Commission's concern with the practical difficulties of proving knowledge in many circumstances.

n242 *E.g.*, Steven B. Wasserman, *Sentencing Guidelines: Toward Sentencing Reform for Drug Couriers, 61 BROOK. L. REV. 643, 644 (1995)* (arguing drug offenders' level of involvement in trafficking, particularly a courier's responsibility for the amount of drugs he carried, should be a sentencing factor); Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines, 94 NW. U. L. REV. 1471, 1471 (2000)* (arguing that it is problematic that low-level offenders receive similar sentences regardless of their culpability).

n243 U.S.S.G. ch. 5, pt. H; *see* Freed, *supra* note 37, at 1715 (criticizing the Guidelines' restriction of judges' consideration of offender characteristics).

n244 Catharine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount is a Poor Indicator of Relative Culpability, 4 FED. SENT. REP. 226 (1990)* (explaining that drug amounts as a sentencing factor pose problems (1) for defendants with different culpabilities but carrying the same amount of drugs; (2) where foreseeability cannot be easily determined; and (3) where drug amounts are difficult to determine).

n245 *See* Stephen Breyer, *Federal Sentencing Guidelines Revisited, An Address Before the University of Nebraska College of Law* (Nov. 18, 1998), *in 11 FED. SENT. REP. 180 (1999).*

n246 *See* Bowman, *supra* note 143, at 740.

n247 GENERAL ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED (Aug. 1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); *see also* Miles Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?, 7 FED. SENT. REP. 22 (1994)* (claiming that alleged goals of Guidelines are "incapacitation, deterrence, just punishment and rehabilitation" and that while it is not clear that these goals have been furthered, it is clear that prison terms for drug traffickers has increased).

n248 *See* Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 AM. J. PUB. HEALTH 1059, 1062 (1995) (reporting

recommendations of a RAND corporation working group: "Federal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out. . . . The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug"); JUDICIAL CONFERENCE OF THE UNITED STATES, 1995 ANNUAL REPORT OF THE JCUS TO THE U.S. SENTENCING COMMISSION 2 (1995) ("The Judicial Conference . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved").

n249 Empirical research shows that the relation between quantity and the offender's position within the network is more complicated than this, and that many low-level offenders are held accountable for large amounts of drugs and receive very lengthy sentences under the Guidelines. *See* U.S.S.C., REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002) [hereinafter REPORT TO CONGRESS: COCAINE].

n250 H.R. REP. NO. 99-845, at 16-17 (1986).

n251 *See* Paul J. Hofer, *What Is the Federal Sentencing Guideline for Drug Trafficking Trying to Do, and How Well Is It Doing It?*, Paper delivered at the 2001 Annual Meeting of the American Society for Criminology, Atlanta (Nov. 2001) (on file at Commission).

n252 In addition to the ongoing debate about sentences for crack and powder cocaine, see Act of Oct. 28, 1991, Pub. L. No. 102-141, § 632, 105 Stat. 834 (1991), where Congress refused to accept a Sentencing Commission amendment that would have treated *receipt* of child pornography the same as *possession* rather than *distribution*. The Commission reasoned that all possessors must have been receivers at some point, and simple receipt is more similar to possession than to distribution.

n253 *See* Harer, *supra* note 247; *see also* HARER, *supra* note 189.

n254 *See generally* Alfred Blumstein, *Making Rationality Relevant: The American Society of Criminology Presidential Address*, 31 CRIMINOLOGY 1 (1993).

n255 U.S.S.G. § 2K2.1. The Guideline was amended in 2001 to clarify that "had at least two prior convictions" means "the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions." U.S.S.G. app. C, amend. 629.

n256 *See, e.g., United States v. Heffernan, 43 F.3d 1144, 1148 (7th Cir. 1994)* (explaining that "statute authorizing the guidelines . . . makes reasonably clear that deterrence, incapacitation, retribution, and rehabilitation are the principal considerations in sentencing under the Guidelines").

n257 *31 F. Supp. 2d 23 (D. Mass. 1998).*

n258 *Id. at 25.*

n259 *Id. at 28.*

n260 For example, Guideline amendments have sought to clarify which harms are reflected in the Base Offense Level (BOL), and which are reflected in specific offense adjustments in order to avoid "double counting." Amendment 614 clarified that the aggravated assault guideline's BOL of fifteen did *not* include the additional harm of use of a dangerous weapon, even if the weapon is what made the assault aggravated.

U.S.S.G. § 2A2.2(a). Thus the specific offense adjustment for use of a weapon could be applied in appropriate cases without constituting double counting.

n261 In recent years the Commission has made greater efforts to provide extensive explanations for its Guideline amendments. A good example is the "Economic Crimes Package," which was developed over the course of several years with the help of academic commentators and the Judicial Conference of the United States. *See* Amendment 617, "Reason for Amendment," *Supplement to Appendix C* (2001), at 180. Extensive background material on the problems motivating the amendment and the rationale underlying it is provided in Bowman, *supra* note 40.

n262 *18 U.S.C. § 3553*(b) (2002) (emphasis supplied).

n263 U.S.S.G. ch. 1, pt. A, intro. comment. 4.

n264 *See* Freed, *supra* note 37; Miller & Wright, *supra* note 19; Berman, *Balanced and Purposeful, supra* note 20; Berman, *Common Law, supra* note 20; Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines--An Empirical and Jurisprudential Analysis, 81 MINN. L. REV. 299, 300 (1996);* Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts, 30 CONN. L. REV. 569 (1998)* (comparing disparate departure practices in two contiguous districts); *see also* Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures, 69 GEO. WASH. L. REV. 57 (2000)* (citing problems with current understanding of "heartland" that are leading to disparity).

n265 Weinstein, *supra* note 118 (arguing that Supreme Court failed to consider different varieties of discretion recognized in academic literature).

n266 Stith, *supra* note 120.

n267 *See* GUIDELINES MANUAL ch. 1, pt. A.4(b) and various commentary encouraging departure in limited circumstances.

n268 *Id.; see also 28 U.S.C. § 994*(o) (2002).

n269 U.S.S.G. § 2B1.1 (comment. n.15).

n270 *See also* U.S.S.G. ch. 1, pt. A(b):

> It is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

n271 In addition to the commentary concerning loss, other examples concerned with the proper measurement of harm include: U.S.S.G. § 2A2.4 (Obstructing or Impeding Officers) ("The base offense level does not assume any significant disruption of government functions. In [such cases] an upward departure

may be warranted."); U.S.S.G. § 2 H2.1 (Obstructing an Election or Registration) ("If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be appropriate."); U.S.S.G. § 2M3.1 (Espionage and Related Offenses) ("The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security. . . . When revelation is likely to cause little or no harm, a downward departure may be warranted."); U.S.S.G. § 2T3.1 (Evading Import Duties) ("When items are harmful or protective quotas are in effect, the duties evaded . . . may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted.").

n272 Examples of commentary concerned with culpability include: U.S.S.G. § 2A1.1 (First Degree Murder) ("If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted"); U.S.S.G. § 2D1.5 (Continuing Criminal Enterprise) ("If . . . the defendant sanctioned the use of violence . . . an upward departure may be warranted"); U.S.S.G. § 2N2.1 (Food and Drug Regulatory Violations) ("This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted.").

n273 U.S.S.G. § 4B1.3 (p.s.).

n274 Berman, *Balanced and Purposeful*, *supra* note 20.

n275 SOURCEBOOK, *supra* note 61, at Tables 24-25. Departures due to inadequacy of the criminal history category are common, as are those based on the defendant's aberrant behavior, which is relevant to both culpability and likelihood of recidivism, and diminished capacity, which is a classic culpability consideration.

n276 In addition to the commentary *supra* note 193, see *The Disproportionate Imprisonment of Low-Level Drug Offenders, 7 FED. SENT REP. 1 (1994); see also* REPORT TO CONGRESS: COCAINE, *supra* note 249 (showing many street-level dealers are receiving sentences that Congress appears to have intended for "serious traffickers" or "kingpins").

n277 *831 F. Supp. 246, 248 (S.D.N.Y. 1993).* Judge Martin's theory of departures, which differs in emphasis from our own, can be found at John S. Martin, Jr., *The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity Under the Sentencing Guidelines, 66 BROOK. L. REV. 259, 260 (2000)* (discussed *infra* note 308).

n278 In fact, the commentary encourages rigid quantity measurement and a punitive approach to drug sentencing. For example, "mixtures of unusually high purity may warrant an upward departure . . . because it is probative of the defendant's role or position in the chain of distribution [and] may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs." App. n.8. But there is no mention of downward departure for unusually low purity, although the rationale would appear to apply in the inverse. Upward departure is also encouraged if the "mixture or substance counted in the Drug Quantity Table is combined with other, non-countable, material in an unusually sophisticated manner." App. n.1. The commentary does encourage downward departure in the limited case of reverse sting operations where the government seller sets an artificially low price for the drug, inducing the buyer to purchase substantially more than they otherwise would. App. n.14.

n279 Because there are two ways that quantity can reflect seriousness, see *supra* Part IV.A.2, a conservative approach would permit departure only when quantity overstates *both* (1) the harm of the offense and (2) the culpability of the offender. For example, aggregation of many small transactions of a highly-diluted drug could overstate both the harm caused by the drug and the offender's position in the distribution chain. A liberal approach might permit departure when *either* harm *or* culpability is overstated.

n280 *See* Bowman & Heise, *Quiet Rebellion II*, *supra* note 17.

n281 Francesca Bowman, *Probation Officer's Survey, 8 FED. SENT. REP. 305 (1996); see* Aaron Rappaport & Daniel J. Freed, *Reflections on Fact Bargaining, 8 FED. SENT. REP. 298 (1996)* (describing survey results suggesting fact bargaining commonly understates the offense conduct).

n282 *See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice, 11 FED. SENT. REP. 6 (1998)* (critically evaluating use of "substantial assistance" departures and suggesting they may undermine purposes of Guidelines).

n283 *See* Schulhofer & Nagel, *supra* note 17.

n284 Freed, *supra* note 37.

n285 *518 U.S. 81 (1996); id. at 95* (explaining that "if a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' . . . decide whether it is sufficient to take the case out of the Guideline's heartland") (internal citation omitted).

n286 *See* Stith & Cabranes, *supra* note 7, at 1277 (departure jurisprudence has been "speculative and trivial, addressing not whether a particular circumstance is relevant to just sentencing, but simply whether the Sentencing Commission can be said to have already considered the particular circumstance"); *see also* Berman, *Balanced and Purposeful*, *supra* note 20; Berman, *Common Law*, *supra* note 20; Miller & Wright, *supra* note 19; Goldsmith & Porter, *supra* note 264 (determining Guidelines' heartland seen as a question of law by some circuits and a question of fact by others).

n287 SOURCEBOOK, *supra* note 61, at tbl.26; Gelacak et al., *supra* note 264.

n288 Hofer, *supra* note 119 (describing "three potentially different 'heartlands': statistical, intentional, and normative").

n289 *See* 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, 11-18 (1997)* (explaining, for example, that "many colorful definitions of the phrase 'clearly erroneous' [under which questions of fact are reviewed] have been promulgated").

n290 Frank O. Bowman III, *Places in the Heartland: Departure Jurisprudence After* Koon, *9 FED. SENT REP. 19 (1996)* (demonstrating that claim district judges have better sense of statistical norm is dubious).

n291 *See* Miller & Wright, *supra* note 19 (offering more examples of incoherence of heartland concept).

n292 U.S.S.C., SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEP'T OF JUSTICE REPORT 4 (Sept. 18, 1997).

n293 U.S.S.C., REPORT TO CONGRESS: SEX OFFENSES AGAINST CHILDREN (1996).

n294 This commentary was extensively revised in 2001. *See* U.S.S.G. app. C, amend. 615.

n295 The guideline was substantially revised in 2001 to better accommodate the type of cases that were commonly sentenced under it. *Id.*

n296 U.S.S.G. app. C, amend. 634.

n297 *United States v. Ferrouillet, 1997 U.S. Dist. LEXIS 7166,* *11 (E.D. La. May 19, 1997) (claiming that in examining whether a case falls ouside of the heartland, a court should ask what type of case a particular guideline is intended to cover, an analysis one commentator has named "the intentional heartland"') (internal citation omitted); *see also United States v. Bart, 973 F. Supp. 691, 694 (W.D. Tex. 1997).*

n298 *United States v. Skinner, 946 F.2d 176, 179 (2d Cir. 1991)* (holding that district court judge had authority to grant a downward departure).

n299 Miller, *supra* note 23.

n300 Berman, *Balanced and Purposeful, supra* note 20; Berman, *Common Law, supra* note 20.

n301 *See* Miller & Wright, *supra* note 19; *see also* Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines, 77 WASH. U. L.Q. 1199, 1233-40 (1999)* (asserting that judges have abdicated their duty to review the Guidelines' constitutionality, and articulating at least five methods for courts to review the Guidelines' consistency with SRA).

n302 Wright, *supra* note 30; Goldsmith & Porter, *supra* note 264 (arguing that the adequacy of Commission consideration of a departure factor should be focus of departure analysis, and that wider range of Commission materials should be made available to support such review).

n303 STITH & CABRANES, *supra* note 31.

n304 *See, e.g.*, Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 NW. U. L. REV. 1441, 1500 (1997)* (describing mystery of rigid federal appellate review).

n305 STITH & CABRANES, *supra* note 31, at 104-42.

n306 MANDATORY MINIMUM REPORT, *supra* note 32.

n307 Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity, 29 AM. CRIM. L. REV. 833, 851-71 (1992)* (arguing that "excessive uniformity" in sentencing has been a result of Guidelines and is a serious problem); TONRY, *supra* note 68.

n308 *See, e.g.*, Martin, *supra* note 277, at 260 (arguing that "rigid adherence to guideline sentences has not and cannot end true disparity in sentencing and that the Second Circuit's recognition of the departure power's role in a just sentencing system properly balances the need to end unwarranted disparity while maintaining proportionality in sentencing and doing justice in individual cases").

n309 *Banks v. United States, 614 F.2d 95, 99 (6th Cir. 1980), quoted in United States v. Ruiz-Rodriguez, 277 F.3d 1281, 1292 (11th Cir. 2002).*

n310 *United States v. Curry, 767 F.2d 328, 331 (7th Cir. 1985), quoted in Ruiz-Rodriguez, 277 F.3d at*